

# “TOP Mediation” in Trust & Estate Planning

By Joe Epstein, Esq. & Scott Baroway, Esq.

## Introduction

In the emotionally charged world of estate planning, industry professionals (lawyers, financial planners, and tax specialists) should consider TOP Mediation, which facilitates a dialogue between the testators and their intended beneficiaries. Top Mediation is a transparent, open, and positive approach to mediation. This approach allows testators to discuss their underlying interests and motivations they wish to address in their estate plan.

In significant asset cases, those involving transfer of a family business, and other special circumstances, the failure to involve the beneficiaries in, at least, discussions of the plan prior to death may result in unintended probate litigation. Most testators desire to leave a legacy that will advance the family unit, not divide them and dissipate the assets in the process. Practitioners know this is often the effect of probate litigation and despite the testator's best intentions of caring for others, conflict often arises between those who have on-going personal relationships involving both good and bad strong emotional components. TOP Mediation, discussed below helps to address these very real concerns in an effort to avoid future litigation.

A highly successful but underutilized method of handling this delicate stage of the estate planning process is the use of a mediator, using the TOP approach, who works with the planning professional

and the family to assist them in reaching an understanding of the testator's desires and, in the process, avoid future litigation. This, we think, is a better approach than the “Ethical Will” approach where testators leave a note or a DVD with their wills explaining their wishes.

Based upon our experiences in mediation and litigation, we have noticed that probate litigation often occurs due to testator's avoidance of having an emotionally charged up front discussion with their heirs. This article, which draws on our experience, addresses the opportunity for testators' desires to be met without destruction of family relationships and dissipation of assets on expensive, and often needless, litigation.

## I. Trust and Estate Planning - Need for Mediation

Generally, estate planning professionals and their clients have been reluctant to engage in mediation. After all, the attorneys represent “testators” who have the power to pass on their estates as they wish. However, these testators are also husbands and wives, fathers and mothers, brothers and sisters, and uncles and aunts. With the prevalence of divorce and remarriages, the addition of new spouses, step-children, half-siblings, and non-traditional same-sex relationships, the emotional component in probate matters has become more complicated.

In this more complex environment, the Chinese Wall between testators and

heirs may need to come down partially. Surprises at the reading of the will frequently catch people unprepared and unleash a flood of emotion whose only outlet is through litigation. This unfortunate but often inevitable event can be avoided.

Instead of the “testator” speaking solely from the grave, there are many instances where facilitated lifetime dialogue is helpful to both the testators and their beneficiaries and minimizes the likelihood or extent of probate litigation. With the assistance of a skilled mediator, the testator can convey their actual intent without the shock of unanticipated distributions.

There are a number of instances where a mediator skillful in promoting dialogue and understanding can prove particularly helpful. These situations include:

- 1) Testators with multiple marriages,<sup>1</sup>
- 2) Blended families arrangements,<sup>2</sup>
- 3) Special needs children with unique support needs,<sup>3</sup>
- 4) Children with disparate educational backgrounds and financial means,<sup>4</sup>
- 5) Grandchildren the testator wants to consider,
- 6) A child or children who will take care of another child,<sup>5</sup>
- 7) A child who is estranged or distant from a parent,<sup>6</sup>

8) Existence of a family retreat, ranch or farm<sup>7</sup> and

9) The transfer, restructuring or sale of a family business.<sup>8</sup>

Many of these circumstances are ripe for a mediation focusing on the needs, wishes, interests, motivations and expectations of both the “testators” and the beneficiaries.

A skillful mediator can address assumptions, expectations, interests and motivations of testators and heirs. In most circumstances, this dialogue, as hard as it may be to face, is better had during the “testator’s” lifetime than when he or she is merely a voice from the grave. In many instances what is fair, appropriate, or necessary can be best understood and accepted, even if reluctantly, by a lifetime mediation.

For example, family business dialogues may reveal children do not want to continue the business the testators have spent a lifetime building, but have been reluctant to let their elders down. Learning of this, the testator will certainly affect the estate planning process. What if a “testator” has a grandchild with special needs whose parent(s) are of modest means, while the testator also has a wealthy child with children? Is the difference in treatment best discussed during the testator’s lifetime? In wealthy families, tax consequences may come into play as well as sibling competition.

The point is simple; if problems and issues can be anticipated, can an open facilitated dialogue in the hands of a skillful mediator limit the emotional toll and financial cost of probate litigation? We think so.

## II. Utilization of TOP Mediation in Estate Planning

### A. Typical Mediation Approach

Mediation in Estate Planning requires a unique approach and set of skills from the mediator. The typical Settlement Conference model is not appropriate for

estate planning<sup>9</sup>. In this approach, the mediator intentionally separates the parties and focuses on legal rights while being evaluative much in the same manner as a judge. The mediator acquires power and control by being the only one with “all” the information. In a Settlement Conference little is done to address the emotions of the parties, to encourage compassion, graciousness, understanding, and empathy. The goal of TOP mediation is for the promotion of relationships during and after the testator’s life; rather than the thrust for quick resolution used in the Settlement Conference approach.

Likewise, an Evaluative Mediation model<sup>10</sup> also fails to address all the needs of the parties. This approach is similar to the settlement conference method as it, too, focuses on legal rights, power, and likely outcomes – with power being a controlling force. The Evaluative Mediation model focuses on the fact that “testators” have the power to distribute their property as they wish and fails to consider the emotional elements, undisclosed needs, and desires of the beneficiaries. Like settlement conferences, this model is not designed to engage in an open dialogue with the intended beneficiaries or to consider the input of their family with the intent to promote family harmony and understanding.

In addition to methodology, the mediator’s style is an important element in how the mediation model is executed. The pure facilitative mediator may use the standard general session and caucus approach while guiding the dialogue.<sup>11</sup> In contrast, the pure transformative mediator might take more of a hands-off approach and let the parties frame the discussion.<sup>12</sup> Some well-respected mediators favor an “understanding approach,” which insists that all work be done in common or together.<sup>13</sup> Finally, mediators using the “understanding approach” utilize an “all together – all the time” model to provide people in conflict a way to work together to resolve their dispute. Their core principals are:

1) Relying on the power of understanding rather than the power of coercion,

2) According primary responsibility for dispute resolution with the parties,

3) Having the parties work together to resolve their dispute and

4) Uncovering the underlying issues.<sup>14</sup>

### B. TOP Mediation

TOP Mediation combines various forms of caucuses, guided discussions and evaluative intervention to provide the best opportunity for success in an estate planning environment. TOP Mediation, focuses on creating open dialogue, a transparent process, and a positive communication format which allows family members to air their needs, interests, motivations, goals, and expectations in a safe and respectful atmosphere.

A “TOP” Mediation usually begins with a number of pre-mediation private caucuses with testators and then beneficiaries separately. This allows the mediator to understand the underlying issues and emotional dynamics, and to frame the best dialogue process for the joint sessions. Various sub-grouping caucuses may become necessary at various stages of the mediation process to meet the newly raised or uncovered needs of the parties in the process while working toward the desired objective of the testator. This approach offers transparency, encourages airing of underlying emotional concerns, and provides the opportunity for parties to maintain, reestablish, and/or enhance their relationships. It is an approach that empowers parties while encouraging understanding, empathy, and respect. It is an approach that provides an environment where matters may be viewed from the combined perspective of objective judgment and compassion.

The mediation format has to be extremely flexible in order to fit the family dynamics. In some instances, we may suggest an informal setting rather than an office environment. “Cooling off” time, as well as visiting informally in spontaneous groupings, may well be necessary for a productive dialogue.

The process must fit the family's needs and address the unique circumstances the testator is tackling with the estate plan. The TOP Mediation approach allows the parties to achieve a setting that promotes transparency, open dialogue and a positive environment with a goal of achieving collaborative decision-making to approach to address sensitive and emotional issues.

### C. Reducing Probate Litigation with an ADR Agreement

We suggest that a mediation clause be inserted in trusts and in wills at the conclusion of a TOP Mediation. Such a clause may provide that any probate dispute be mediated before commencement of any litigation with the estate paying the mediation cost. The extent of the mediation may be defined as anything from a one day session to a mandated multi-caucus approach to force confrontation and repeated attempts at pre-litigation resolution. The purpose of such clauses is to preserve family relationships in an atmosphere that promotes understanding and dialogue while limiting the emotional and financial cost of litigation.

### D. Avoiding Litigation with Settlement Agreement

Even more effective in reducing potential litigation is a written settlement agreement entered into by all of the beneficiaries, consenting to the terms of the estate plan. Additionally, such agreements will allow assets of the estate to be quickly transferred without dissipation due to litigation costs. Even though Probate courts and the Uniform Probate Code (UPC) have been reluctant to expand the ADR requirements of most civil courts into the Probate arena, the UPC does contain provisions regarding the enforceability of written agreements among beneficiaries.<sup>15</sup>

### Conclusion

With the high transactional costs associated with litigation, along with the

often-resulting fractured relationships, parties and counsel have been drawn to mediation. Mediation is particularly helpful where parties have ongoing relationships with strong emotional components. We have specifically designed TOP Mediation to fit such circumstances. In this article, we have addressed its application to special circumstances involving Trust and Estate Planning. Our TOP approach to mediation may be combined with an ADR Agreement or an "Ethical Will". Whether used independently or in combination with an ADR Agreement or "Ethical Will", the purpose of TOP mediation is to minimize the risk or extent of potential probate litigation with the hope of enhancing and/or maintaining family relationships.

Without a TOP mediation, and despite the testator's best efforts at making everyone happy, disputes are still bound to arise when its time to administer the will. At the conclusion of a TOP mediation, if a settlement agreement can be reached between the beneficiaries regarding both consent to the terms of the estate plan and an ADR clause should a dispute nevertheless occur, then costly and emotionally charged issues like undue influence and lack of testamentary capacity can be removed from the future mix, reducing the potentially irreparable emotional damage between family members – the last thing a parent/testator ever wants to occur.

To achieve these objectives TOP mediators work with trust and estate planners, their clients, and their clients' families, using facilitative skills that promote understanding by utilizing transparency, open dialogue, and positive framing to make the ultimate execution of the estate plan as painless as possible.

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**Joe Epstein is a mediator with Conflict Resolution Services, Inc. (CRS). Mr. Epstein has mediated over 3500 cases throughout the United States. His focus is on business, employment, insurance, medical**

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Scott Baroway is a CRS mediator who focuses his mediation practice in the areas of domestic relations, probate, personal injury, professional liability, business and construction defect litigation. He may be reached at the CRS numbers or [scott@crs-adr.com](mailto:scott@crs-adr.com).

### Endnotes

- <sup>1</sup> Melissa Street, *A Holistic Approach to Estate Planning: Paramount In Protecting Your Family, Your Wealth, and Your Legacy*, 7 PEPP. DISP. RESOL. L.J., 141, 152-153 (2007).
- <sup>2</sup> David Gage & John Gromala, *Mediation in Estate Planning: A Strategy for Everyone's Benefit*, ELDER'S ADVISOR (Fall 2002); [http://www.bmcassociates.com/articles/news\\_ea200210.html](http://www.bmcassociates.com/articles/news_ea200210.html).
- <sup>3</sup> See generally, Street at 152.
- <sup>4</sup> *Id.* at 152; see Gage & Gromala at 6.
- <sup>5</sup> See Street at 152; Gage & Gromala at 6.
- <sup>6</sup> See generally, Street at 152.
- <sup>7</sup> See *id.* at 154-156.
- <sup>8</sup> *Id.*
- <sup>9</sup> See e.g., LAWRENCE J. BOULLE, ET AL., *MEDIATION SKILL AND TECHNIQUES* 13 (2008).
- <sup>10</sup> See generally, *id.*
- <sup>11</sup> *Id.* at 12.
- <sup>12</sup> See generally, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *PROMISE OF MEDIATION*, (New and Rev'd Ed. 2005), see also Boulle at 13.
- <sup>13</sup> GARY GRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2008).
- <sup>14</sup> *Id.* at xxix.
- <sup>15</sup> Unif. Probate Code § 3-912 (amended 1998). The agreement is also subject to the rights of creditors and taxing authorities.

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killed by a delivery truck.

(A case referred to us.)



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POZNER LLP  
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Dan Reilly - [dreilly@rplaw.com](mailto:dreilly@rplaw.com)  
Joe Zonies - [jzonies@rplaw.com](mailto:jzonies@rplaw.com)  
303-893-6100

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