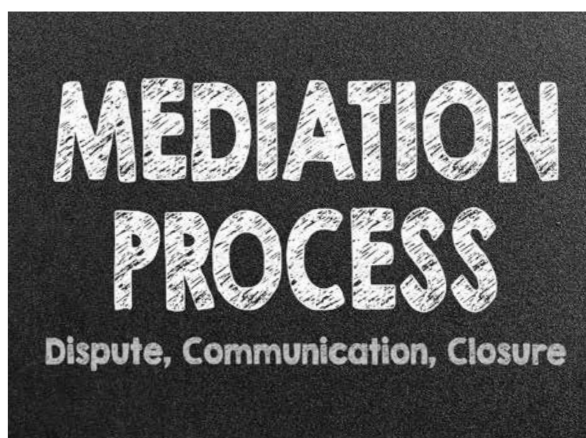

What Every Illinois Estate Planner Should Know About Elder Mediation

BY ROSELYN L. FRIEDMAN

The term "senior tsunami" refers to the large number of people now living past 65 and 70, even into their 80s, 90s and beyond. The result is that many more families are dealing with difficult issues in connection with an aging parent whose wishes are to be honored and respected, including those about health care, living arrangements, and finances. The family sometimes finds itself in significant conflict trying to make decisions about the appropriate course of action. To make matters worse, family decision-making may reflect not only the challenge of a parent's current health and financial needs, but also longstanding conflicts among the adult children going back to when they were young. It is not unusual for childlike feuds to arise over issues such as which sibling is doing the most to help the parent and who was/is the favorite child.

These developments, along with the magnitude of wealth transfers occurring and anticipated, have resulted in a groundswell of trust and estate litigation. It also has meant an increasing likelihood of malpractice actions and suits against estate planners who are caught up in difficult family dynamics in the process of wealth planning for older clients. These developments have caused a corresponding interest in mediating these cases.

Even when such disputes do not become the subject of a lawsuit, family dissension and dysfunction can interfere with a lawyer's effective representation and waste inordinate amounts of the advisor's time. Mediation, whether or not in the context of litigation, can be a helpful tool for managing family disputes while protecting the lawyer from unnecessary risk. The remainder of this article sets forth information about the mediation process; issues in elder mediation; when and how to use elder mediation in an estate planning/elder law practice; and Illinois mediation rules and law generally.

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SOME MEDIATION BASICS

MEDIATION ON THE ADR CONTROL SPECTRUM: PARTIES, NOT THE MEDIATOR, CONTROL THE OUTCOME OF A DISPUTE

There is a broad category of conflict resolution processes outside of a courtroom which are referred to as alternative dispute resolution or ADR. These can be either substitutes for litigation, or a means of settling pending litigation in a less costly and more efficient manner than a trial. The most common and well-known ADR processes are arbitration and mediation. In both processes, a third-party neutral is engaged to control the process, and some neutrals practice both arbitration and mediation. However, these two forms of ADR are very different in many ways, particularly in terms of who has control over the outcome of a dispute.

Arbitration is a substitute for litigation. The process may be simpler and faster, but the premise is the same as litigation—**the parties turn over control of the outcome of their dispute to a third-party neutral who rules on the case**. Although the process may differ from litigation as to court rules and motion practice, the arbitrator, like a judge, will look backwards at the facts of a dispute and determine a winner and loser under the law.

Mediation is a facilitated negotiation working towards settlement, and the decision-making process differs from either litigation or arbitration. **Self-determination and autonomy of the parties** is an essential factor in mediation. The mediator is not the decision-maker, and **the parties retain control of the outcome of a dispute and decide whether or not to agree upon a settlement.** An experienced mediator, trained in conflict resolution, is responsible for facilitating productive discussions and helping the parties come up with a durable forward-looking resolution which serves their mutual needs and interests. A mediated solution need not be limited by legal parameters; an important factor in reaching a family settlement may be a simple apology.

> The term "elder mediation" generally refers to a facilitative mediation process which addresses the health, financial, and other concerns of an aging party, whether in the context of a guardianship or other court proceeding.

MEDIATOR SELECTION

Illinois has no required statewide designation or certification for mediators. Each circuit court program may impose its own certification rules in compliance with Supreme Court Rule 99, and some circuit court programs require that mediators be attorneys.

Having the right mediator for a particular matter is the key to a successful process. Counsel should consider these factors in selecting a mediator:

- Review the candidates' training and experience. Look to certification if required by court rule or otherwise, as well as panels of approved neutrals.
- Consider whether the mediator needs to have subject-matter expertise for a particular case. An elder mediator will need extra training, an understanding of and sensitivity to ageism, and knowledge of available resources for caregiving, housing and other needs.
- Consider using co-mediators. For example, one mediator might have estate planning expertise while another might be an expert in family dynamics.
- Studies have shown that personality traits can be indicia of mediator success. Perhaps the most important trait is the mediator's ability to build trust and rapport with the parties.
- Identify the mediator's style, whether facilitative (or predominantly facilitative), evaluative, transformative or other. Some styles may be preferable to others depending upon the nature of the dispute. As discussed below, the facilitative model is generally preferable for elder mediation and other disputes involving family members.
- Discuss the candidate's approach to mediation before making a decision. Because the process used by individual mediators can vary greatly, this is the lawyer's opportunity to select the right mediator for each case.

FACILITATIVE MEDIATION

Generally facilitative mediation is a favored method for resolving family disputes involving trust and estate, elder law and guardianship matters. In the process, a neutral third-party mediator facilitates the negotiations and the parties' communication about the disputed issues. The neutral will assist the parties in trying to reach a mutually beneficial resolution that satisfies their respective needs and interests, but does not determine

a winner and a loser. While the mediator controls the process, the parties control the outcome of a dispute, and settlement is voluntary.

The facilitative mediation process is well-suited for settling these types of disputes, which often involve family members, because it provides the following:

- Consistency with the family settlement doctrine which courts have historically favored in trust and estate cases.
- A confidential forum, unlike litigation which is a matter of public record.
- The opportunity to preserve relationships through improved communication among family members.
- A forum for acknowledging and venting emotions, where highly-emotional parties will have an opportunity to be heard.
- The possibility of a creative and flexible solution that meets the parties' needs and interests, without being limited solely to legal issues.
- The potential for cost and time savings.

EVALUATIVE MEDIATION

Evaluative mediation is a somewhat different process. In this mediation model an expert in a field, after hearing both sides of the dispute, evaluates the respective parties' likelihood of success in litigation. This is intended to help the parties set more realistic expectations, which encourages settlement. Evaluative mediation may be particularly useful in some fact-specific disputes, such as those involving trustee fees or asset valuations where expert opinion can play an important role. It is not unusual for mediators to use a combination of techniques, such as both facilitative and evaluative mediation tools.

WHAT IS ELDER MEDIATION?

The term "elder mediation" generally refers to a facilitative mediation process which addresses the health, financial, and other concerns of an aging party, whether in the context of a guardianship or other court proceeding. Although elder mediation is the term commonly used, the process might be more accurately described as "adult family decision-making." Family crises and the attendant conflict may occur during a change in an aging parent's circumstances, such as the loss of a spouse or a decline in mental or physical capabilities, at a time when the parent still does not want to give up control. Elder mediation focuses on preserving the dignity, self-determination and autonomy of the "elder," while teaching a constructive model for adult family communication going forward.

Some of the disputed matters appropriate for elder mediation include:

- family caregiving responsibilities;
- housing arrangements, including intergenerational housing;
- health care, hospice, and end-of-life decisions; and
- estate planning and expectation of inheritance by younger generations.

This model presents additional challenges, such as being certain that the aging party is able to participate in the mediation to the extent feasible and is adequately accommodated, if necessary. This could mean additional assistance with seeing or hearing the process, or careful regard for scheduling. In mediating a court case including adult guardianship proceedings, legal and other representation of the elder may be required, such as a court-appointed special representative or guardian ad litem, depending on state law. In other cases, depending upon circumstances, representation may be advisable even if not required.

SPECIAL CONSIDERATIONS FOR ADULT GUARDIANSHIP MEDIATION

When a person is adjudicated a disabled person under Illinois law, it means the judge has determined by clear and convincing evidence that the party does not have capacity to make decisions for him or herself. The judge may appoint a guardian of the person to make personal and health care decisions for that party and/or a guardian of the estate to make property and financial decisions. Because the appointment of a guardian is a drastic procedure that deprives a person of important civil rights, it should be the last legal resort. Accordingly, elder mediation or other means may be considered prior to a guardianship proceeding, to determine whether any other health care and financial arrangement might meet the elder's needs.

Even at a late stage where a client's impairment is significant and a guardianship proceeding is already pending in court, there can be value in mediating the circumstances of the guardianship. For family members and professionals who know the alleged disabled person best, mediation can provide a forum for exploring the most effective care plan, help in deciding who should be guardian, and afford an opportunity to consider broader options such as a partial rather than plenary guardianship.

Some issues can be addressed in mediation prior to a court adjudication, such as whether co-guardianship could resolve a dispute over who should be appointed to act. To the extent a less restrictive arrangement with limited court intervention can be established and the family members have worked through other volatile issues during the mediation conferences, the parties are often more satisfied with the ultimate result in the guardianship court. Even though the family may not end up with a group hug, mediation may help them to determine a mutually acceptable care and financial plan for the disabled person, thereby dampening ongo-

ing family conflict and avoiding extra court appearances over these issues.

ELDER MEDIATION AS AN ESTATE PLANNER'S TOOL FOR MANAGING FAMILY CONFLICT

Ethical concerns may arise when attorneys find themselves in the middle of highly emotional family drama. These may become increasingly challenging if the lawyer reasonably believes that the client may be impaired and not mentally capable of handling his or her legal affairs.

The ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 96-404, responding to questions about the ethics of representing a client under disability, describes this issue clearly: "A normal client-lawyer relationship presumes that there can be effective communication between client and lawyer [Rule 1.4(a)], and that the client, after consultation with the lawyer, can make considered decisions about the objectives of the representation and the means of achieving those objectives [Rule1.2(a)]. When the client's ability to communicate, comprehend and assess information and to make reasoned decisions is partially or completely diminished, maintaining the ordinary relationship in all respects may be difficult."

Rule of Professional Conduct 1.14(a) addresses the representation of an impaired client, but how to implement it may not be entirely clear as a practical matter. The rule provides that a lawyer has a duty to maintain a normal relationship with an impaired client "as far as reasonably possible" as well as to abide by the other ethical rules. Only if the lawyer reasonably believes impairment is such that there could be serious physical, mental or other harm to a client with lack of decision-making capacity is the lawyer authorized to take protective action under Rule 1.14(b), and then only to the extent absolutely necessary. Such protective actions might include obtaining relevant information from family and medical professionals and/or seeking a guardianship.

Elder mediation can help the attorney represent a client who might be impaired without breaching the ethical rules. A mediation conference does not have the same ethical constraints as an attorney-client conference because the mediator has privilege and immunity similar to a judge, and also because mediation communications are privileged. In addition, the parties ordinarily sign a confidentiality agreement with respect to the process. Accordingly, the parties attending the mediation conference—including the attorney—can speak openly and with actual or implied consent to discuss confidential information in a way that will shield the information from discovery in subsequent litigation or otherwise. Below are examples of when and how elder mediation can be useful in managing family disputes which might otherwise interfere with normal estate planning / elder law representation.

CASE STUDY 1-- *A COMMON USE OF ELDER MEDIATION: RESOLVING CONFLICT BETWEEN ADULT CHILDREN OVER THEIR MOTHER'S POWER OF ATTORNEY*

Consider the common scenario where an attorney gets the call from a client's adult daughter, who is named to act as agent under her mother's power of attorney, and is a joint tenant on her mother's checking account for convenience. The client is in her late 80s, frail and sometimes forgetful, although not necessarily impaired.

The daughter thought she should take over handling the mother's checking and finances, and says her mother agreed. But when the daughter started reviewing the checking account statements, she found that her brother had not only been added on their mother's account as another joint tenant, but had also written a $200 check to his own daughter with the note "graduation gift." When the daughter asked about it, her mother had said that the son had insisted upon both of these, but that she wanted to let it go and would not even call her attorney. The daughter was concerned, particularly because the mother's care facility bills were in the vicinity of $100,000 a year, which could ultimately dissipate her estate, and because her brother was often in need of money. The daughter called the mother's attorney, asking him to handle the situation.

The attorney became very concerned. Under Rule 1.14, he was charged with maintaining a normal attorney-client relationship to the extent feasible, but also trying to investigate whether the mother was impaired and at risk of harm. He visited his client, who acknowledged that she had asked the banker to add the son as a joint tenant after he had insisted upon it, but she was vague about the check to the granddaughter. The attorney was aware of a potential dilemma, but at the same time he was not sure what to do next. He was hesitant about making contact with the son based upon the client's apparent desire to let things be.

By being knowledgeable about elder mediation, the attorney recognized that the process could be used to further investigate the situation. He suggested that the client engage an elder mediator to facilitate a discussion. The client agreed because the one thing she wanted more than anything else was for her children to get along, or at least stop fighting. The siblings agreed and an experienced elder mediator was engaged to convene a family meeting with the attorney, the client, the daughter, and the son as parties. All had of course signed mediation and confidentiality agreements acknowledging, among other terms, that the mediator was there to facilitate conflict resolution and was not practicing law.

The mediation conference proceeded along the following lines:

- The mediator started by using a variety of conflict resolution skills to get the siblings to stop scream-

ing and start talking. The client did not want to attend, but was encouraged to do so to the extent she was able, and the conference took place in her home to give her flexibility.

- The actual discussion began with the attorney explaining the meaning, purpose, and operation of the power of attorney and the rights and responsibilities of the daughter as agent. The client attended only this part of the conference, and then retired to her room as sparks were already flying between the siblings.
- The mediator facilitated a discussion of how this dispute needed to be resolved in order to avoid its escalation into a guardianship or other court proceeding during their mother's life or after her death. The mediator "reality tested" the parties to be sure they were aware of the cost, time and emotional burden of litigation.
- Neither sibling was thrilled with the possibility of eventual litigation or even court intervention, so the mediator helped them focus on how to avoid it. In particular, they discussed the advantages of the sister acting as agent without court intervention or additional attorney fees and costs. The brother was nervous that his sister would have "free rein" over his mother's assets and estate, so the attorney again explained that (i) the agent was subject to a fiduciary duty while acting under the power and thus did not have "free rein," and (ii) all the money was to be used for the mother's benefit, with his sister only being entitled to reasonable fees. On the other hand, the sister needed to be sure that her brother would not undermine her authority as agent under the power of attorney or try to use the joint account for his personal use.
- With the mediator's assistance, a plan for resolution was crafted to meet the parties' needs, especially the client's need for peace from her squabbling children. To induce her brother to enter into a mediated settlement agreement, the sister was willing to agree to certain actions not otherwise required of her as agent under the law. Specifically, the daughter agreed that (i) she would not charge compensation as long as her brother was cooperative, but would be keeping time records in order to charge if he continued his current behavior, and (ii) if the mother agreed, she would share with her brother account statements setting forth income and expenses on a quarterly basis.
- The parties ultimately signed a settlement agreement pursuant to the terms described above. Although the siblings never again had a personal relationship, they were able to avoid escalating conflict during their mother's final years as well as after her death through the elder mediation process. Further, the attorney was satisfied that he did not need to investigate the client's condition any further pursuant to Rule 1.14 in order to continue his representation or, if it became necessary, to defend his representation if it were to be questioned in an estate dispute after the death of the client.

CASE STUDY 2—*A CREATIVE USE OF ELDER MEDIATION: IDENTIFYING AND RESOLVING UNDERLYING CONFLICT WHICH WAS INTERFERING WITH AN ESTATE PLANNING REPRESENTATION*

An attorney spent two lengthy conferences with a client who was deciding whether to disinherit one adult child. The discussion ended with the client stating that she definitely wanted the new documents, which omitted all benefits to that son. Before drafting the documents, the attorney still wanted confirmation of what she understood to be the client's wishes. But, after receiving explanatory outlines of the proposed plan, the client called to change her mind on several occasions before finally advising the attorney that she wanted to proceed with the new plan, disinheriting her son.

The 90-year old client had appeared to be in good physical and mental health during the conferences, but under the circumstances the attorney's antennae went up regarding the client's decision-making capacity. Under Rule 1.14, did the attorney need to explore further what precipitated these events and whether the client was impaired, particularly because she had been unable to explain her reason for the disinheritance and unwilling to discuss it further? Specifically, was the client losing capacity, subject to undue influence, or something else? Was there impairment causing the representation to fall under Rule 1.14(b) requiring protective action?

The attorney saw an initial need to investigate under Rule 1.14 but was not sure what she could do to obtain information within the meaning of the rule. She was familiar with elder mediation from prior matters and knew that a facilitative mediator was trained in asking probative questions to uncover a client's needs and interests beyond just what the client says. At the attorney's suggestion, the client agreed to engage an elder mediator with the idea of finding help in resolving the conflict with her son. The mediator tried to set up the first meeting with the client alone, but the client requested that her second husband (who was not the father of the son in conflict) also be a party. Due to the husband's attendance, who was not a client, the attorney thought it would be better that he not be present for at least the first conference.

This is how the mediation conference evolved:

Protected by mediator privilege and a confidentiality agreement covering all the parties, the mediator was able to raise the question of the wife's estate planning with the couple openly, both in joint conferences and separate caucuses. For the first time, the client was willing to share information about her dilemma.

The mediator was able to help the parties identify the reason for the client's indecision about her plan. It came out in the discussion that her husband, in attempting to protect his wife, had been contributing to her indecision

and thereby influencing her estate planning. In joint conference, the husband emphatically stated that he was angry about the way his wife's son treated her, and every time the son did something hurtful the husband tried to persuade her to "take him out of the will" and leave the balance of her estate primarily to her other adult children and her grandchildren. With the mediator's support, the client was finally able to speak up to her husband and say: "I don't like my son very much either lately, but he is still my child and I do not want to disinherit him."

The result allowed the client to make a final decision, thereby including her son on a *per stirpes* basis in her estate plan. Just as important, this result allowed the attorney to be confident that the client was neither impaired nor unduly influenced in her decision-making capacity, and that she could proceed with the client representation without concern or further inquiry.

Beyond the legal issues regarding the estate plan, the mediation also provided a forum for the parties to discuss and brainstorm other options for helping the client deal with her son more effectively, thereby minimizing ongoing and future conflict.

CONCLUSION

In recent years, it has become increasingly common for estate planning attorneys to find themselves involved in family conflicts which present ethical issues. Some of these can be very complicated, such as when the dispute involves an aging client who is showing signs of possible impairment, and the ethical rules may not be easy to apply. Elder mediation, as discussed in this article, is a creative process which is well-suited for resolving such disputes arising in estate, trust or elder law matters, while minimizing ethical risks in the attorney-client relationship. Accordingly, it is advisable for estate planners to become familiar with the elder mediation process as well as how and when to use it most effectively.