

Chicago Daily Law Bulletin®

Volume 160, No. 6

Client involvement is key in estate mediation

Encouraging a client to participate in mediation and communicate directly with the other participants can be extremely effective in mediations involving estate disputes.

Of course, not everything should be communicated with the other side and counsel must exercise judgment in determining whether a particular client can be prepared to share information without doing damage to the case. In many instances, however, allowing the clients to exchange information directly can be beneficial.

A case I mediated several years ago involving a lawsuit challenging the will of an elderly uncle provides a good example of how facilitating the exchange of information can help the parties get out from under the assumptions that often drive a dispute.

In that case (certain facts have been changed to protect confidentiality), a family member from another state alleged that the relatives who lived near the uncle while he was dying of cancer had exercised undue influence on the uncle, which caused him to change the terms of his will shortly before his death.

The relatives living near the uncle, on the other hand, were offended and angry, as they had provided care and comfort to the uncle in his last days. They were convinced the relative had purely selfish motives in challenging the will.

After a lengthy discussion with relatives, it was disclosed that the out-of-town relative believed that the uncle could not possibly have been lucid so late in his fight against cancer. She described how she had nursed her first husband through a terrible battle with cancer and was familiar with the mental limitations of someone who was receiving strong pain medication. Because of a previous experience with that patient, she had formed an opinion about cancer

patients and their inability to understand something as complex as changing a will.

During joint session, the parties were also able to exchange significant information about the details of the uncle's last days. This was information never before shared with the out-of-town relative. As she heard the details of the uncle's social interactions in the days before his death, and as she learned more details about the uncle's relationship with the nearby family members, her position began to change.

Similarly, as the nearby family members listened to the out-of-town relative's description of her experiences with her first husband's cancer and her concerns about the uncle's abilities based on her husband's final weeks, they were able to let go of their assumption that her only motive was to make trouble.

The nearby relatives learned that the claimant was not just pouring gasoline on a family dispute, but had a deeply held belief based upon a life-changing experience of her own. She, in turn, learned that people can have different experiences as cancer patients.

The information exchanged between the parties was critical to resolving the case. Some of

“This communication can go a long way in increasing understanding and the chances for a peaceful resolution that all family members can live with.”



**BY TERESA
F. FRISBIE**

Teresa F. Frisbie is the director of the Loyola University Chicago School of Law Dispute Resolution Program; a mediator and arbitrator at ADR Systems of America; a member of the National Academy of Distinguished Neutrals; and of counsel to DeGrand & Wolfe PC.

the information, such as the details of various conversations with the uncle shortly before his death, would likely have been disclosed in pre-trial discovery. The other information exchanged that day would almost certainly never have been part of the usual information sought or disclosed in discovery, yet it too was key to reaching a settlement.

By actively participating in the mediation, not only did the parties gain a better understanding of each other's motives, they also got a better handle on the weaknesses of their own legal cases.

There was little risk in allowing this information exchange because even if the case had not settled and a court found for some reason that the mediation communications were not protected by mediation privilege, none of the information exchanged would have materially undermined the legal case of either party.

Having the clients themselves meet in joint session and speak directly to one another in estate mediations also seems in my experience to increase the likelihood of an agreed resolution. Perhaps this is related in part to the unconscious human need to cooperate when in the presence of other humans. Studies have shown that human beings are more cooperative and likely to act for the common good when in the presence of another human being.

One of the most interesting

studies was by scientists Terence Burnham and Brian Hare and involved a picture of a robot with large eyes “watching” Harvard Business School students engage in decision-making.

The results showed that the instinct to cooperate could be triggered without a real person, or even a real robot being present. Just a picture was enough. (This is not to suggest that the presence of a live lawyer and mediator is worth less than a picture of a robot in prompting cooperative behavior, but perhaps the presence of another family member increases this unconscious instinct.)

Another advantage to allowing clients to participate actively in joint session is that it gives them the ability to observe the other participants. While the lawyers can convey the same information on behalf of their clients in caucus through the mediator, by having a conversation in joint session, the parties are able to ask each other questions and evaluate the sincerity of each other's words as they are spoken.

Moreover, with their lawyers present and ready to intervene to prevent the answering of any problematic questions, and the mediator prepared to acknowledge emotion and facilitate constructive communication, parties are able to discuss matters in joint session without a high risk of making damaging admissions or communicating in a way that makes the situation worse.

In estate mediations, the parties also typically have the common ground of the shared loss of a loved one. If they are prevented from participating actively in the mediation, the opportunity to communicate their own grief and recognize the grief of others is lost.

This communication can go a long way in increasing understanding and the chances for a peaceful resolution that all family members can live with.