

MEDIATING TRUST & ESTATE DISPUTES MEDIATION SESSION

October 2, 2024

Presented by:

Hon. Barbara Johnson (Ret.)

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Hon. Marshall Whitley (Ret.)



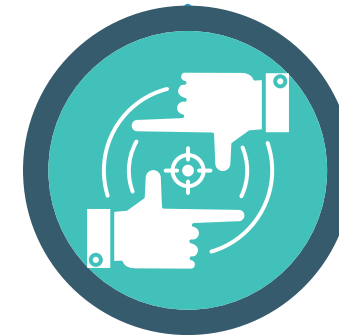
EXCHANGE OF PRE-MEDIATION BRIEFS



Facilitates
Communication



Keeps Information
Flowing



Focuses
Issues



Emphasizes honesty
during mediator calls

AVAILABILITY OF CRUCIAL DOCUMENTS DURING MEDIATION



Property valuation reports

Updated bank statements and
newly found assets

Pending motions

Expenses paid to date

HANDLING PRO PERS IN MEDIATION

- Presence due to Breslin case
- Should attorneys clarify or mediators explain?
- Alignment with represented parties?
- Risks of prolonging proceedings

COMPLEX CASES: MEDIATION WITHIN A MEDIATION



Can we agree on at least one issue?

What can we settle today to move toward resolution?

Negotiating while mediating: Zoom or in-person sessions?

Is a second mediation after the initial session viable?

THE ART OF NEGOTIATING TRUST & ESTATE DISPUTES

a/k/a: Making decisions in the face of uncertain,
conflicting and missing information.

Preparation

The Negotiation

The Mediator



PREPARATION - MANAGING EXPECTATIONS

- Pleadings and Litigation Uncertainties
- Petitioner - Respondent : Seller - Buyer
- “Halo Effect”
- Glass Half Full and Half Empty
- “Reservation Point” (party’s pre-mediation bottom line or goals discounting for risks avoided)
- “Red Zone” (zone within which resolution can occur)
- Emotional / Blame – Objectivity / Taking Responsibility for Resolution
- Mediator – Heads Up!

THE NEGOTIATION – THE DANCE

- Opening Offer: Who, What, When? / Neutral's Offer - Reactive Devaluation
- Expect several rounds – Flexibility is key - Two Mediations in One
- Think Ahead: Credible (\leftrightarrow) Credible
- Credible (\leftrightarrow) Competitive : then (\rightarrow) Competitive
- Bracket offer – Linked Move
- Exploit Relative Preferences
- Reservation Point and “in game” adjustments
- **Red Zone** - “Will I Regret...”
- Settle = Midpoint of first two reasonable offers
- Impasse Breakers



THE MEDIATOR



USE MEDIATOR TO YOUR RESOLUTION ADVANTAGE
("the process creates its own settlement reality")

Confidante
Guidance
Reader of Rooms

CLOSING THE DEAL

The Mediator's Proposal

Basics:

- What is it?
- How and when is the subject broached?
 - Before the mediation?
 - During the mediation?
 - After “Impasse”?
 - Ever?

Considerations for the Mediator:

- Are you “evaluating” the case?
- Are you trying to “facilitate” a deal?

DEALING WITH “IMPASSE”

Ways to approach (Courtesy of the Hon. Reva Goetz, Retired (CLA, “Trusts & Estates Quarterly, Vol. 29, Issue 3, pp. 56-61)



“Neither party willing to blink first”

“Fear of settling based on incomplete information”

“Rejecting offers just because they come from the other side”

“Parties relying on alternative facts”

“When the attorney is the barrier to settlement”

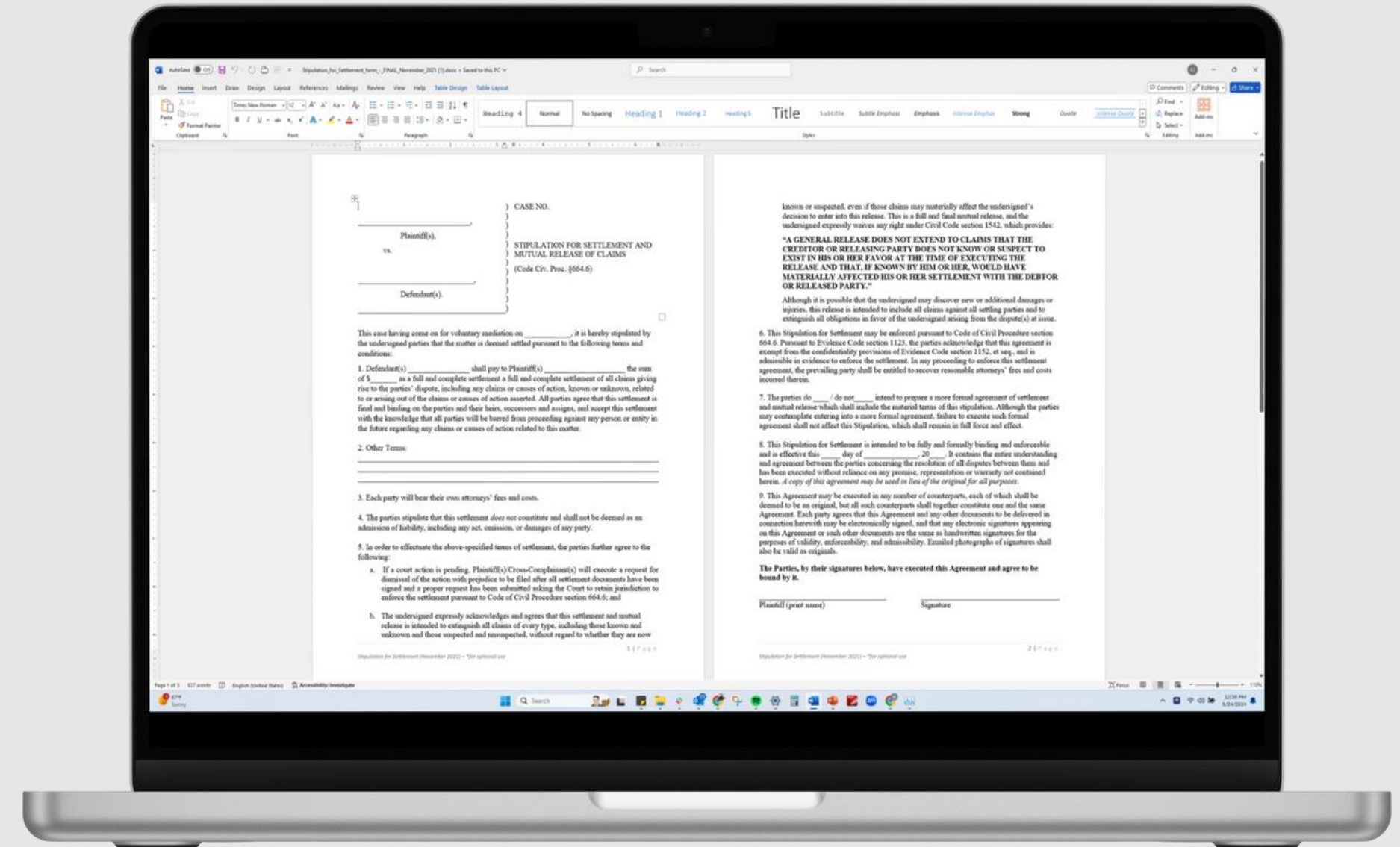
“Structural barriers to settlement”

“Heightened psychological or emotional sensitivity of one or both of the parties”

“ ‘Mom loved you more!’ (Dysfunctional family dynamics)”

SEALING THE DEAL

- A **written** settlement agreement
 - Evidence Code considerations
 - *Fair v. Bachtiaria* 40 Cal.4th 189 (2006)
 - *Rael v. Davis* 166 Cal.App.4th 1608
- “Memorandum of Understanding”?
- Oral agreement reduced to writing within three days?!
- Alternatives to close mediation if no settlement reached
 - “Continue” the mediation?
 - Mediator remains “available”?
 - Termination?
- Conclusion: “Good luck to all!”



[Form Stipulation for Settlement Available Here](#)

THANK YOU

Feel free to contact our speakers with any questions



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MEDIATOR'S QUESTIONNAIRE TO ATTORNEY

Dear Attorney _____,

I am pleased to serve as your mediator on _____ starting at _____ a.m. on Zoom Video/in-person and look forward to working with you to a resolution. You may submit and share a traditional Mediation Brief, or alternatively, you may provide brief **CONFIDENTIAL** responses to the following 10 questions. Either, or both, will be fine but I have found that responses to these questions provide me with better insight into the case and help me facilitate the mediation.

1. If the mediated matters are the subject of one or more pending court, administrative, or State Bar proceedings please provide the following:

- What do the pleadings set forth as the issues pending for decision; and
- What is the procedural posture of each pending matter; and
- Are there any issues not included in the pleadings that may be relevant to the mediation?

2. Describe any pivotal issues that if resolved would have the effect of rendering moot or non-controversial other issues AND are there any unique or particular circumstances that might help the mediator better understand the parties and the dispute?

3. Please identify your client and briefly describe your client's interest(s) in this mediation matter. Also, are there any other persons (including insurance carriers) who have a financial or other "legal interest" in the outcome of the issues who are not parties to the pending pleadings or who may not be involved in the mediation?

- If your answer is YES, please name them, describe their interests, and state whether you believe these persons are necessary for an effective mediation and an enforceable agreement?

4. Provide the full names of each person in your group who will be present at the mediation.

5. Have any settlement offers and responses been communicated and if so, please describe?

6. Is there any problem with me discussing with your client, during the mediation, the expense and unpredictability of litigating the issue(s)?

7. Is there a time by which if no agreement has been reached that you or your client must terminate _____ the _____ mediation?

8. What do you believe is/are the biggest obstacles in reaching a complete agreement and how do you believe these can be overcome?

9. As a "bottom line" and confidentially, what do you believe your client is willing to concede or not pursue in order to reach a settlement?

10. Do you believe that an evaluation of any legal or factual issue or a mediator's proposal will be necessary or helpful? If so, what are the issues? Also, let me know whether you believe a joint session with all the interested parties would be productive.

If you choose to respond to these questions, I would like to receive your responses (or your brief) by _____. My general approach to mediations is to adapt to whatever works best. In that regard, it is often helpful to have a telephone conference before the mediation. If you agree, let me know what days and times are best for you.

It would be helpful if you have an electronic settlement agreement template for a computer-generated final agreement and **please make sure that your/client(s)' video and audio equipment are up and running.** I look forward to seeing you at the mediation.

Hon. Marshall Whitley

Hon. Marshall Whitley (Ret.)

Mediating Trust & Estate Disputes

Enforcing Mediation Settlement Agreements

Hon. Marshall Whitley (ret.)

Written Settlement Agreements are Confidential

- * EC§ 1119(b) – NO writings prepared during mediation are discoverable or admissible as evidence. Among other things, includes:
 - * Settlement Agreements;
 - * Mediator's/party's/counsel's notes

Settlement Agreement Exception to Confidentiality

- * Comes up if one or more parties seeks to enforce the terms of the agreement
- * For a written agreement to be enforceable, it must first be admissible.
- * For it to be admissible, confidentiality must be waived.
- * For confidentiality to be waived, all parties to the agreement must effectively waive

Settlement Agreement Exception to Confidentiality

- * EC§ 1123 says that written mediation agreement is admissible if:
 - * The parties expressly agree to its disclosure;
 - and
 - * Is signed by the settling parties

“Expressly Agree to its Disclosure” - EC§ 1123

- * *Fair v Bakhtiari*, 40 Cal. 4th 189 (2006) says that agreement must state directly that it is:
 - * Admissible; or
 - * Enforceable; or
 - * Binding; or
 - * Words to that effect
- * Writing does not have to be in finished form and no formulaic phrase is necessary BUT MUST CONTAIN ABOVE ENFORCEABILITY LANGUAGE TO BE ADMISSIBLE

“Expressly Agree to its Disclosure” - EC§ 1123

* NOTE:

- * Signed initial confidentiality agreement may make any subsequent settlement agreement admissible if it directly states that and all settling parties sign

Sample Enforceability Provision

- * “In the event that it becomes necessary to introduce this agreement in any court proceeding to enforce its terms the parties waive the Mediation Confidentiality provisions of the Evidence Code for that purpose only”

“Signed by the settling parties” - EC§ 1123

- * For the confidentiality waiver in an agreement to be effective the parties who the agreement is intended to bind must all sign. See *Rael v. Davis*, 166 Cal.App.4th 1608 (2008)
- * If all do not sign then confidentiality has not been waived and the agreement is not admissible and therefore not enforceable

Rael v. Davis, 166 Cal.App.4th 1608 (2008)

- * Says to be admissible Agreement must be signed by all settling parties
- * Facts:
 - * Agreement named 5 parties to the settlement and waived mediation confidentiality as to the agreement. All parties signed but one. One of the signing parties sought to enforce the Agreement against another signing party.
- * The court stated that before an agreement can be enforced it must first be admissible and that without all parties signatures waiving confidentiality the agreement remains confidential and therefore not admissible/enforceable.

Loose Ends

(can't conclude on day of mediation)

- * Prep a Memorandum of Settlement (MOS)
 - * Include all terms but make conditional upon resolution of loose end by a date and time certain.
- * What if some issues too complex for MOS?
 - * Language can say these will be a part of a later formal agreement of settlement and release
 - * What if a later disagreement as to these matters?
 - * MOS could say mediator will decide

Loose Ends

(can't conclude on day of mediation)

- * Not everyone who needs to sign is physically present at signing. Language could say:
 - * FAX signatures acceptable; or
 - * Signatures will be obtained by certain date and time
- * What if a question whether a certain party/attorney has the authority to sign or bind a party?
 - * Agreement should recite that party has that authority and the basis for that authority

Settlement “Release”

- * Parties want to know that the settlement will end all issues between them and therefore will seek to include a “release” in the agreement.
 - * A release is where a party agrees to abandon, or give up rights, or claims, that otherwise could be pursued.
- * Scope of release is negotiable
 - * Whether it will be general or specific regarding the subject matter;
 - * Its contents; and
 - * Whether it will be unilateral or mutual

General Release Clause & CC§ 1542

- * Typically applies to all known and unknown claims
- * However, pursuant to CC§ 1542 a general release does not extend to claims which a party:
 - * Does not know or suspect to exist in his or her favor at the time of executing the release; and
 - * Which if known would have materially affected the settlement
- * The intent is to prevent an inadvertent waiver of unknown claims merely by signing a general release. [*Casey v. Proctor* (1963) 59 Cal.2d 97.]

Waiving CC§ 1542

- * Merely reciting that Civil Code section 1542 is waived, or that the releasing party intends to waive unknown claims, may not be sufficient.
- * There must be independent evidence that the releasing party intended to release unknown claims. [*McCray v. Casual Comer, Inc.* (C.D. Cal. 1992) 812 F.Supp. 1046.]

Waiving CC§ 1542

- * In practice, the Agreement should include separate lines for initials or signatures by the parties to the waiver, indicating:
 - * Their acknowledgment of the CC§ 1542 waiver; and
 - * A statement that the releasing party is:
 - * Aware of the meaning of the CC§ 1542; and
 - * Intends, by signing the release, to assume the risk of then-existing but as yet unknown claims (i.e., give them up)

CCP § 664.6

- * A Judgment pursuant to the terms of an agreement will be entered by the Court if parties to the pending litigation;
 - * Outside the presence of the court sign a written agreement; or
 - * Orally agree before the court
- * Parties must sign-Agents may sign. *Elnekave v Via Dolce Homeowners Assoc*, 142 Cal.App.4th 1193 (2006)

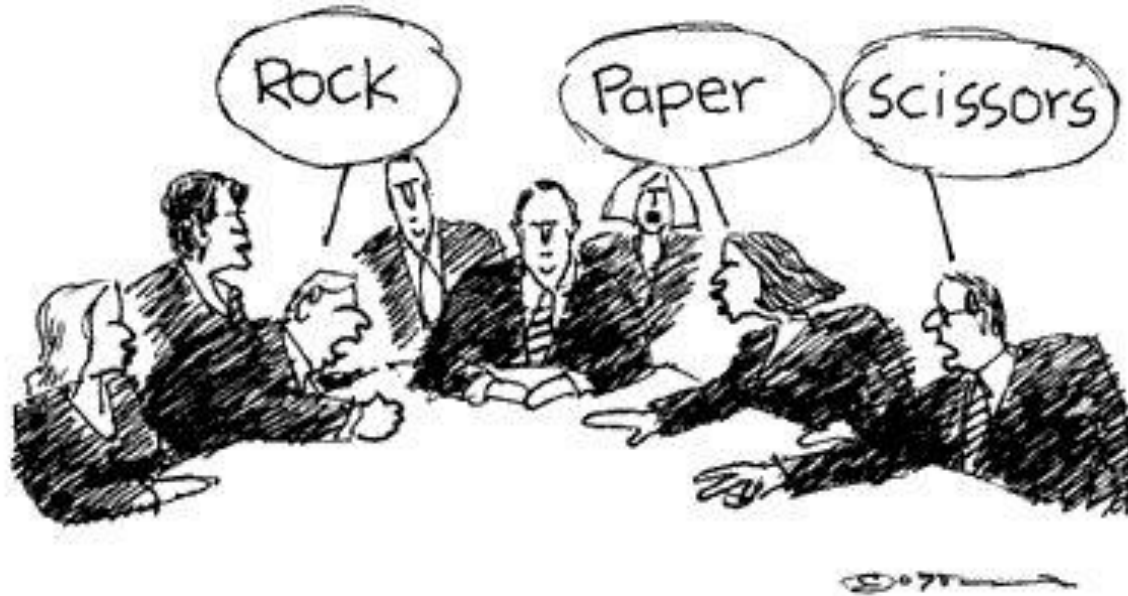
CCP § 664.6

- * Allows the Court to issue an order that it shall retain jurisdiction to enforce the settlement.
- * Must be requested before case is dismissed.
Hagan Engineering, Inc. v. Mills, 115 Cal.App.4th 1004 (2003) [court no longer had subject matter jurisdiction]

Enforceable Agreement Contents

- * Recites that settlement reached immediately after mediation
- * Lists the Settling Parties
- * Describes subject matter and any underlying pending action
- * Details the settlement terms
- * Provides that parties intend the Agreement to be enforceable and waives the mediation confidentiality provisions of the Evidence Code only for purposes of enforcing the Agreement
- * Assures that signatories have authority to bind
- * Release (general or specific)
- * If general release consider CC § 1542 waiver or not
- * CCP § 664.6 court retains enforcement jurisdiction
- * Signed by all parties (counsel)

If all else fails...



Jameson, the mediator, uses his last remaining negotiating tool in an effort to break the stalemate.

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