Marc P. Grismer
GRISMER LAW

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2025

Effective probate mediations

A PROBATE COURT'S ORDER TO PRIVATE MEDIATION CAN INCLUDE NONPARTIES TO THE LITIGATION

Losing a loved one or facing a loved one's disability, illness, or injury that renders them incapable of managing and providing for their own basic needs can be exacerbated by contentious litigation in probate courts. Mediation can prove beneficial in resolving these matters, not only by facilitating the settlement of underlying claims but also by allowing the parties to focus on their grief and essential responsibilities.

For attorneys, mediating cases involving long-standing family conflicts can be emotionally challenging. In probate litigation, attorneys often assume a therapeutic role, addressing their clients' underlying issues. Emotions can be intense, whether a new spouse's conflict with biological children, or sibling rivalry. Effective mediation helps parties set aside their emotions and concentrate on finding a resolution. For the court system, mediation has proven to be a highly effective tool in resolving cases and reducing caseloads.

What is probate mediation?

Generally, probate mediation is a voluntary and confidential process. It involves enlisting an impartial and neutral third party, such as a judge or experienced attorney, as a mediator to assist the parties in resolving the matter or particular issues.

The mediation process typically commences with an initial session where the mediator establishes ground rules and guarantees the confidentiality of the proceedings. Subsequently, the parties may be separated into individual rooms (virtually or physically) where they express their position, concerns, and thoughts on resolution to the mediator during "caucus" sessions.

Typically, the mediator functions as an intermediary, facilitating communication and negotiation between the parties and their counsel. Unlike a judge in a courtroom, the mediator is not there to make decisions or offer solutions to the issues. They facilitate the parties' communications and guide the discussion toward a mutually satisfactory resolution.

The mediator actively facilitates communication between the parties, ensuring each party can present their position. Subsequently, the mediator identifies common ground and searches for resolvable issues. Probate mediators, specifically, employ a diverse range of techniques and styles during the mediation process to assist the parties in reaching an informed and voluntary agreement.

Types of cases suitable for probate mediation

The Probate Court exercises jurisdiction concerning a decedent's estate, including administering wills, adjudicating contested wills, and allocating assets for individuals who died intestate. The court also assumes jurisdiction over conservatorships and guardianships, which may occasionally involve disputes regarding the appointment of representatives or objections to their annual accountings and reports. Additionally, the Probate Court handles diverse litigation involving contested trusts, such as conflicts among beneficiaries, accusations of breaches of fiduciary duties, and cases of financial elder abuse.

Mediation has been proven particularly effective for probate matters, especially when emotions hinder resolution. To resolve these matters, mediators and attorneys need to find a way to redirect the parties' emotions into a positive resolution during mediation.

Although mediation can be a viable option in numerous cases, it is crucial to ascertain its appropriateness for a particular client's situation. An experienced mediator can facilitate communication between the parties and encourage constructive dialogue; however, mediation may not be suitable if one of the parties is unwilling to cooperate or compromise.

Where probate mediation is court-ordered

In civil matters, *Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536, held that trial courts do not have the power to order parties to private mediation. The decision was based on the general premise that mediations are supposed to be voluntary.

For probate matters, *Breslin v. Breslin* (2021) 62 Cal.App.5th 801, upheld a probate court order for the parties to mediate their case. The *Breslin* court affirmed the trial court's order refusing to allow parties who did not appear at a court-ordered private mediation to challenge the outcome of that mediation, even though the mediation result excluded the non-appearing parties as beneficiaries of the involved trust. *Breslin*, together with the interpretation of Probate Code section 17206 ("[t]he court in its discretion may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition") allows a *probate* court to order and require the parties to engage in mediation. Considered a "*Breslin* Notice" or "*Breslin* Order" the probate court can order all parties involved in the matter *and all others who may have an interest* in the outcome of the case to mediation.

In summary, if a probate matter is ordered to mediation, attendance is mandatory for *all* interested parties, regardless of whether they are parties to the litigation. While attendance is mandatory, the mediation remains non-binding and confidential. Failure to attend may result in the forfeiture of the right to object to any settlement agreement, including an agreement that excludes the interested party from any decision-making power or even the ultimate distribution of the estate.

Inclusion of mediation clauses in an estate plan

In most probate cases, mediation is an appropriate alternative to litigation as it offers a more cost-effective and expedient method for resolving the underlying dispute. Litigation can be contentious, and it can be challenging for the parties to overcome their emotions and posturing to resolve disputes informally. Mediation is a valuable tool that assists the parties in focusing on the issues and facilitates their efforts to find common ground.

Although estate planning attorneys have not extensively utilized mediation in the past, the increasing number of

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probate disputes and the court's consistent mandatory referral of these matters to mediation have prompted estate planning attorneys to become proactive by incorporating mediation clauses into their estate planning documents. This proactive approach anticipates potential disputes and channels them toward early resolution rather than litigation.

These mediation clauses can be a valuable addition to an estate plan, mandating that resolution of disputes arising from the estate plan must initially be attempted through mediation. Customarily, a beneficiary who disregards this mediation provision would not be subject to a no-contest provision – a provision providing for removing the contestant from the estate plan, effectively treating the contesting party as deceased. Under current law, a no-contest clause will only be enforced against specified contests, including a direct contest brought without probable cause. (Prob. Code, § 21311.) Ignoring a mediation provision is not considered a direct contest.

Timing of a probate mediation

In probate mediation, the parties may choose to mediate before or during the litigation process. In certain instances, early mediation can be a highly effective means of resolving disputes, thereby avoiding substantial attorney fees and costs. This approach involves mediation before litigation or at the initial stages of a case before significant discovery.

Early-resolution cases are typically most suitable for mediation when the facts of the case are relatively undisputed, such as cases involving the appointment of individuals with equal priority or cases where parties seek to interpret estate planning documents. In some cases, early mediation may be necessary due to time-sensitive matters, such as conservatorships, or when property is at risk of being lost during litigation.

Conversely, attempting early resolution in matters with critical facts in dispute without adequate discovery is typically unsuccessful. For example, early mediation is challenging to resolve in cases involving the capacity of the testator of a will or the settlor of a trust, where medical records have not been obtained and analyzed, witnesses have not been interviewed or deposed, and so on.

Without adequate discovery and, ultimately, evidence to support allegations, attempting to mediate disputed cases undermines a fundamental aspect of mediation, i.e., to effectively communicate the strengths and weaknesses of each party's case as a means of negotiation. Allegations without evidentiary support, where obtainable, typically lead to the entrenchment of positions with hypothetical support.

Most probate cases are appropriate for mediation, which can provide the parties with a more affordable and expedient way to resolve the underlying dispute. Litigation can be contentious, and it can be difficult for the parties to put aside their feelings and posturing to attempt to resolve disputes informally. Mediation can be a valuable tool to assist the parties in focusing on the issues and help move the parties to find common ground. Ultimately, each case is unique, and the facts will determine when a case is suitable for mediation.

Selecting the right probate mediator

Selecting the appropriate probate-knowledgeable mediator is arguably one of the most critical decisions. As part of this decision, consulting with opposing counsel regarding the selection of the mediator is not only a necessary aspect that is often overlooked but can also be a valuable tool in enhancing the likelihood of success during mediation.

Occasionally, opposing counsel's input can reveal their specific needs for a mediator. For instance, counsel may believe that obtaining an evaluation from a retired judge is essential to facilitate the negotiation toward resolution. This is particularly relevant in probate mediations, as most probate cases will be subject to a bench trial. In such cases, mediation by a retired probate judge can provide valuable insight into how specific issues, particularly well-developed issues, will likely be handled.

When selecting a probate-knowledgeable mediator, it is essential to consider their experience, reputation, and personality. While these factors apply to all litigation, evaluating a mediator with these factors is particularly important because probate cases are not common litigation matters.

One of the most significant factors to consider when choosing a mediator is probate experience, as a practicing attorney or bench experience. Probate knowledge and experience provide a unique ability and practical insights into specific evidence, potential outcomes, and admissibility. When probate judges render decisions, probate decisions tend to be more consistent than verdicts from jury trials.

Each mediator has their own approach to mediation, and their demeanor and personality can greatly assist or be a detriment to the process. Some clients may appreciate a mediator's no-nonsense mediation style, which can appear adversarial and straight to the point. On the other hand, some clients need a more tender approach, as their feelings need to be heard and understood before being ready to partake in the process.

It is crucial to recognize that probate mediations are triggered by the death, disability, illness, or incapacity of a loved one. Although financial or power considerations may influence mediation in this domain, it is inherently emotionally charged.

Preparing a client for probate mediation

As part of the preparation, well-prepared and well-informed parties are essential for a successful mediation. Well-informed parties entering the mediation who comprehend the nature and issues involved are more likely to participate in good faith with realistic expectations regarding the potential resolution.

In probate mediation, the parties must comprehend the proceeding's scope and the mediation's purpose. During

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periods of heightened emotions, parties may become excessively hostile or argumentative, which can impede the mediation process. While persuasion is essential, maintaining civility and respect is equally important. This also discourages the parties from becoming unnecessarily entrenched, which impedes progress toward resolution.

It is particularly beneficial to prepare parties with relevant information regarding both the best-case and worst-case scenarios of the case. This can be extremely helpful in moderating expectations and establishing a zone of settlement before even initiating mediation.

The scope of the proceedings and mediation is also crucial. For instance, if the matter involves competing petitions for the appointment of an administrator, a client's insistence on arguing the conduct of the other party, such as estrangement, inadequate caregiving services, or lack of assistance with funeral arrangements, will not be productive if those arguments are not relevant to the issue. In such cases, confronting those arguments with the client before mediation to focus on the scope of the issues is essential for preparation and promoting resolution.

Preparing the mediation brief

Probate mediation proceedings are susceptible to failure without adequate mediation-brief preparation. Pre-mediation briefs present an opportunity to highlight case strengths to the mediator while simultaneously addressing case weaknesses in the most favorable light. Briefing enables counsel to provide the mediator with a comprehensive analysis of the dispute, financial abilities, needs, emotional factors, and the parties' respective positions.

An effective probate-sensitive mediation brief assists the mediator in comprehending the pertinent issues, facts, and legal principles. Regrettably, not having an effective written brief often presents a missed opportunity to advocate the client's position compellingly and persuasively. The lack of an effective explanatory probate brief fails to show that the client and counsel are committed to engaging in collaborative settlement discussions, even when emotions run high.

The effectiveness of mediation briefs can be significantly enhanced when shared with the opposing party. Brief-sharing provides an opportunity to advocate persuasively, fosters the exchange of information, and promotes good faith toward resolution. Sharing the brief demonstrates that there has been a thorough assessment of both the strengths and weaknesses of a client's case. Case assessment is particularly important in probate mediation, where there is greater flexibility in creating a mutually beneficial solution.

Proposing potential solutions in a shared mediation brief can trigger more thoughtful responses during the negotiation process. Furthermore, it can serve as a valuable instrument in highlighting pertinent concessions, given that the opposing party is well-acquainted with the situation. Confidential information can be provided to the mediator during pre-mediation conferences or in a separate confidential mediation brief.

Intangible aspects in probate

In many legal cases, monetary damages are a central issue, encompassing breaches of contracts, personal injuries, and other forms of compensation. Probate litigation is no different, as it typically involves the distribution of an estate, which often entails financial considerations. However, probate litigation mediation can offer greater flexibility and control to the parties and present a broader range of concessions based on the multifaceted and personal nature of each case.

In a typical probate of an estate, for instance, an administrator must be appointed to oversee its administration. There is also a liquidation of assets, which may include real and personal property, and ultimately a distribution of the estate. As part of a mediated resolution, one party may be more interested in assuming the position of administrator, while another party may be interested in receiving an in-kind distribution of property to avoid its liquidation.

Control and sentimentality, especially in family dynamics, are often the core of probate disputes and litigation involving family members. An adversarial probate action may aggravate pre-existing and long-lasting tensions and can exacerbate stress and anxiety. Conversely, mediation offers a platform for open and meaningful communication, fostering rebuilding and strengthening trust and long-term relationships among family members. Mediation fosters a collaborative and supportive environment where parties can freely express and process their emotions. This facilitative approach leads to more comprehensive resolutions that address the probate dispute's underlying concerns and emotional aspects while still considering the legal aspects.

Conclusion

"Nothing is certain except death and taxes" – Benjamin Franklin, 1789. Expanded further into the context of California probate courts, in the presence of death, litigation is becoming more certain. The rise of probate litigation underscores the necessity of alternative dispute resolution mechanisms such as mediation and effective techniques and strategies to make the most of contentious situations.

Marc P. Grismer received his B.S. from the University of La Verne and earned his J.D. from Western State University, College of Law. Marc established his law firm, Grismer Law, *in 2014 with Orange and Los Angeles County offices. Marc and his team focus on estate planning/litigation, personal injury, and wrongful death matters. Marc is also a volunteer mediator for Resolve Law and the Los Angeles Superior Court's Mediation Volunteer Panel. He can be reached at Marc@Grismerlaw.com. www.grismerlaw.com.*