WADE ASH
WADE ♦ ASH ♦ WOODS ♦ HILL & FARLEY, P.C.

CHERRY CREEK CENTRE
4500 CHERRY CREEK DRIVE SOUTH, SUITE 600
DENVER, CO 80246-1500
303.322.8943
WWW.WADEASH.COM

MEDIATION MEMORANDUM

The use of mediation, sometimes referred to as alternative dispute resolution, is on the rise in Colorado courts generally and in the Denver Probate Court. In many contested cases, the Colorado District Courts and the Denver Probate Court order the parties to mediation prior to giving the parties trial dates. Ninety-five percent of all probate and trust disputes are resolved in mediation. I suspect that the high percentage of will and trust cases that settle is attributable to the fact that these disputes typically involve the decedent's assets rather than money actually earned by the litigants. Mediation is defined by Colorado statute C.R.S. § 13-22-302(2.4) as "an intervention in dispute negotiations by a trained neutral third party with a purpose of assisting the parties to reach their own solution."

Timing of Mediation

Mediation is an important part of the litigation process in that it affords the parties a one time opportunity to resolve the dispute short of incurring the time and expense of trial. The timing of mediation is a conversation every client should have with their lawyer early in the case. Prior to mediation, your lawyer needs to have a good understanding of the strengths and weaknesses of your case, as well as the opposing party's case. If you mediate your case too early without adequate opportunity for discovery of critical evidence, your lawyer will not be able to properly evaluate the strengths and weaknesses of your case and the opposing party's case. At mediation, if you cannot demonstrate to opposing counsel that trial is a risky proposition for his or her client, you will have little or no leverage to convince the opposing party to make concessions. If you mediate too late, after exhaustive discovery, including depositions of experts, the parties may have invested so much money in the case that a settlement may be impossible.

You will need to discuss with your lawyer whether you should hold back disclosure of critical evidence favorable to your case. It is my opinion, since you typically only get one opportunity to mediate your case, holding back for trial "smoking gun" evidence is not always a wise decision.

Confidential Settlement Statement

Your mediator will require the lawyers to prepare a detailed confidential settlement memorandum prior to mediation which includes the following: important facts, the law on each side of the disputed issues, candid discussion of the strengths and weaknesses of your case and opposing counsel's case.

The confidential settlement memorandum should also discuss various settlement scenarios contemplating that there may be more than one way to skin a cat. Coming to mediation with several creative settlement proposals will foster meaningful negotiations between the parties. For example, tax efficiencies may be critical to settling the case. If a party is claiming status as common law spouse, an agreement recognizing spousal status may afford the tax exempt marital deduction whereby money that might otherwise be paid to the IRS can be used to settle with the purported common law spouse. A good settlement should attempt to untangle the parties to avoid the prospect of future litigation. For example, a settlement between a second wife, as lifetime beneficiary of a trust, and the decedent's children from the first marriage, as remainder beneficiaries, may include early termination of the trust and the remainder beneficiaries receiving a present value calculation of their remainder interest based upon the surviving spouse's life expectancy.

Your lawyer should prepare a trial budget prior to mediation so that you have a good understanding of what kind of money you will spend on legal fees and costs if the matter were to proceed to trial and possibly, appeal. Your lawyer should explain to you carefully what a win and loss might look like to you monetarily so that you can weigh the risks and benefit of reaching a targeted settlement amount.

Preparation for mediation is critical. Nothing is more frustrating for the mediator than not having a complete inventory of estate assets, including personal property and its value. If the dispute involves real estate, you and your lawyer should obtain real estate appraisals, comparables or commercial market analysis prior to mediation so that there is no dispute regarding the value of the real property which is to be divided. When a family owned-and-operated business entity is to be dissolved or if a buyout of a partner is contemplated, it may be necessary prior to mediation for the parties to stipulate to a CPA as a neutral expert to appraise the business assets.

Selection of a Mediator

Your selection of a mediator is as important as your selection of an expert witness. Your lawyer should be familiar with the reputation of each candidate you are considering to mediate your case. Ask your lawyer how many mediations a particular mediator has done regarding will and trust contests. A mediator is only as good as his or her last mediation. Mediators who do not have high success rates usually do not get a lot of repeat business. The best mediators, whether retired judges or lawyers, settle approximately ninety-five percent of their mediations. Mediators charge by the hour in the range of $280 - $500. Typically, the mediation fees are split by the parties equally.

Your lawyer should be familiar with each of the proposed mediator's styles. Some mediators like to spend hours getting to know the parties, while others like to get to the negotiation process (i.e. offer/counteroffer) quickly. Some mediators employ a "facilitation style" mediation, which focuses on improving communications between opposing parties. As a facilitator, the mediator may suggest a more collaborative effort at negotiation where the parties meet together. It is my opinion, in probate and trust disputes, that joint meetings between the parties and their counsel may only further polarize the parties. Other mediators tend to evaluate the relative strengths and weaknesses of the case offering their opinion to each of the parties as to their risk at trial. Mediators who are asked to evaluate each party's case are typically retired judges who, based upon their past experience on the bench, can objectively analyze the evidence and offer their perspective as to your chances of prevailing at trial.

Contact Your Mediator Prior to Mediation

While lawyers are prohibited from contacting a judge without opposing counsel being present, ex parte communications with a mediator are encouraged. Your lawyer should, at the very least, pick up the phone and call the mediator and discuss with him the confidential settlement memorandum answering any questions the mediator may have regarding the case. There may also be sensitive information not contained in your confidential settlement memorandum that you want the mediator to know. Any information that you give to the mediator is confidential unless you and your lawyer instruct the mediator to reveal that information for settlement negotiations. Similarly, your lawyer may want to alert the mediator as to potential problems which may occur at mediation. For example, a spouse of the party who wishes to attend mediation may have unrealistic expectations about the case which may be an impediment to the process. Since you have the best understanding of the family dynamics, there may be certain topics which should be avoided as "hot buttons" for the opposing party.

Preparing for Mediation

The mediation process is often a grueling all-day event which may go into the late evening, leaving the parties and their attorneys exhausted. Most cases settle in the evening. If you are contemplating mediation, you should make appropriate arrangements to attend the mediation for the entire day. Flight arrangements should not interfere with the mediation. There is nothing worse than a party leaving early in the mediation process to catch a departing flight at DIA. Your all-day attendance may make it necessary to schedule your travel plans to include an overnight stay.

Your lawyer should explain to you the negotiation process which will take place throughout mediation. For example, some mediators require an initial group meeting where the mediator will explain the process and want to hear briefly from each of the parties, as well as their attorneys. Typically after the group meeting, the parties are segregated into separate rooms. It may be more appropriate, if emotions are running high, to separate the parties from the beginning of the mediation. If you or your lawyer believe that a collaborative meeting with the opposing party and their counsel is counter-productive or even harmful to the process, you should advise the mediator up front. If you are the plaintiff and have the initial burden of proof at trial, you will probably be required to prepare and make the opening settlement offer. Your lawyer should prepare you for the initial offer or counteroffer from the opposing side, which will be substantially lower than the targeted settlement range. Your lawyer should advise you to avoid overreacting with derogatory comments about the opposing party and/or his or her lawyer.

You should be advised that during the actual mediation, there may be long periods of time where the mediator is with the opposing party. You should not assume that just because the

mediator is spending more time with the other side that it is indicative that he likes their case better than yours. Your lawyer should advise you that mediators will attempt to lower the parties' expectations. At certain periods during the mediation, the mediator may express to you that your case is lousy and that your expectations are too high. Take comfort in knowing the mediator is probably telling the opposing party the same thing. A good mediator should not allow himself or herself to become emotionally invested in either side of the case. Mediators should always advise the parties that a settlement is a business decision, not an emotional one based upon a risk/benefit analysis.

The offer/counteroffer dance may go back and forth four or five times throughout the day. During the process, you should let the mediator help you close the gap in settlement range. Pay close attention to each incremental move by the opposing party to your offer or counteroffer, because those moves will give you and your attorney a good idea where the parties are likely to end up. Feel free to ask the mediator for advice regarding your next move. Don't be afraid to ask the mediator whether your offer may be so insulting to the other side that the opposing party and his or her attorney will walk out of mediation.

Your lawyer should advise you that, at any time in the mediation, you can request that the mediator leave the room to allow you and your attorney to consider and discuss openly settlement offers and counteroffers. You may be asked by the mediator to meet with him privately. You should discuss with your lawyer the parameters of such a meeting if requested by the mediator. At times, the mediator may want to meet with just the lawyers in a separate room. Often these meetings help reach a consensus on disputed facts and issues of law. The mediator's meeting with the attorneys (without their clients present) often reduces posturing between the lawyers who are simply trying to impress their respective clients as to their knowledge of the case and prowess in the courtroom. As a party to the mediation, you can anticipate speaking directly to the mediator. When speaking to the mediator, you should always be respectful. Your lawyer should warn you that most experienced mediators are judges that have mediated hundreds if not thousands of cases. They have all heard "It is not about the money. It is about moral principle." Most mediators will respond "It is always about the money." In fact, I had one mediator that responded when my client suggested that it was not about the money: "Then give your share of your father's estate to your favorite charity". My client backtracked quickly.

Your Rights at Mediation

Participation at mediation does not in any way constitute a waiver of your right to go to trial. All mediation discussions are confidential and cannot be admitted as evidence at trial.

Mediation is generally not binding unless the parties execute a settlement agreement. In addition, the Colorado Probate Code requires all persons having a beneficial interest or claims which will or may be affected by the settlement agreement execute the agreement.

Parents of minors can sign on behalf of their children so long as they do not have a conflict of interest. If all interested persons are unable to attend mediation, arrangements should be made ahead of time to obtain their signatures. This may require interested persons to stand by a fax machine or scan signature pages back to the mediation office. Your lawyer should advise you that absentee parties can give an attending party (who they are aligned with) a Special Power of Attorney granting them, as agent, authority to settle on their behalf.

Memorandum of Understanding v. Formal Settlement Agreement

A memorandum of understanding ("MOU") signed by the parties is sufficient to create a binding settlement agreement. MOUs are generally short summaries of the material terms of the settlement as agreed upon by the parties. The parties typically agree to reduce MOUs after the mediation to a more formal settlement agreement, which is then approved by the court. I prefer a formal settlement agreement be signed by all parties at mediation rather than a MOU because it affords the parties more protection if either party needs to later enforce the terms and conditions of the settlement agreement. Like a MOU, a formal settlement agreement, once approved by the court, is a binding court order punishable by contempt.

Ideally, your lawyer should prepare a draft formal settlement agreement prior to the mediation that includes all of the necessary factual recitation, mutual releases and waivers of claims, as well as boilerplate provisions which include a provision for binding arbitration if a dispute arises regarding the enforcement of the terms of the settlement agreement. The arbitration clause should include a fee shifting provision which requires the losing party to pay the winner's fees and costs. By preparing a draft formal settlement agreement prior to mediation, you avoid, after a long day of settlement negotiations, standing around while lawyers wordsmith the settlement agreement from scratch.

Let the Process Work Itself Out

Don't get discouraged if the case does not settle on the day of your mediation. Chances are you have learned valuable information about your case and more importantly the strengths and weaknesses of the other side's case. Good mediators are relentless and will pursue negotiations even after a failed mediation. In the event of a failed mediation, you should discuss with your lawyer, whether you want the mediator to make his or her own proposal for settlement. A mediator's proposal for settlement will offer the mediator's recommendations as to terms and conditions of the settlement and invite the parties to either accept or reject that settlement proposal. If the parties accept the mediator's proposal and execute it, there is a binding settlement.

Conclusion

Mediation is a form of intervention designed to reach a compromise. As with any compromise, you will leave the mediation feeling as if you gave up too much or left too much on the table. In my experience, most parties after a successful mediation go through a period of buyer's remorse, but eventually reach the conclusion that the mediated settlement is far less expensive and risky than the proposition of going to trial. You should not underestimate the emotional toll that trial has on you and your family, both physically and mentally. Getting rid of the emotional baggage of litigation can be as rewarding as the monetary benefit provided by the settlement.