LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com

ONLINE — SEPTEMBER 15, 2022

THOUGHT LEADERSHIP ADVERTISEMENT

In the (Virtual) Rooms Where It Happens: How ADR Has Kept Probate, Estate and Trust Dispute Resolution Going Throughout the Pandemic

Three distinguished JAMS neutrals share their insights

Featuring:
Hon. Kevin R. Culhane (Ret.)
Hon. Risë Jones Pichon (Ret.)
Hon. Glen M. Reiser (Ret.)

Virtually every part of society has been affected by the pandemic. In particular, probate, estate and trust cases were adversely impacted as most courts shut down their civil divisions out of an abundance of caution to prevent parties from exposure to the virus.

In order to address the growing backlog of cases, alternative dispute resolution (ADR) has rapidly become an attractive option. Given the complex family dynamics of these types of cases, it is not surprising that ADR has taken on greater currency, as mediation presents an opportunity to talk through differences and explore options for settlement.

"Litigation is notoriously poor at sorting out many of the problems that are associated with family disputes," explained Hon. Kevin R. Culhane (Ret.), JAMS mediator, arbitrator and special master/referee. "Cases involving deeply held emotions can often benefit from ADR because the parties have an opportunity to talk through issues that may predate the current dispute. Rather than simply having a winner and a loser, mediation offers a chance at a more durable outcome. ADR is uniquely suited to these challenging family disputes."

Virtual ADR Has Become the Norm

Over the past few years, probate, estate and trust disputes that have been mediated have largely been handled virtually—for obvious reasons. But virtual ADR has proven to be advantageous for a number of additional reasons.

"In those instances where parties are deeply at odds with each other, they might avoid appearing in court altogether, instead relying on their attorneys to handle the dispute," stated Hon. Risë Jones Pichon (Ret.), JAMS mediator, arbitrator and special master. "But in a virtual mediation, clients may feel more inclined to participate because they won't be compelled to be in the same physical space. Sometimes the feelings are so intense they don't even want to see each other on camera, which we can easily accommodate with separate virtual breakout rooms. In this way, virtual ADR offers some real advantages."

Judge Pichon was quick to point out that virtual ADR and in-person mediation are equally effective in resolving disputes.

How Participants Should Approach Mediation

It's important for attorneys to set expectations with clients as they approach mediation. At the same time, attorneys should be candid with the mediator, which will allow the neutral to be more effective in doing their job and helping to achieve a resolution.

"Because everything is confidential between the neutral and litigants, it is better for the parties to be completely straightforward," offered Hon. Glen M. Reiser (Ret.), JAMS mediator, arbitrator and special master. "The more information the mediator has—good, bad or indifferent—the better resolution it's going to be, because this way the risks and the rewards are much more apparent. Obviously, everyone comes into these mediations with expectations, which are almost immediately undercut. The more straightforward everyone is at the outset, the more quickly the litigants can begin to recalibrate their thinking about the case and come to some mutual understanding. This takes time and an awful lot of discussion."

Judge Pichon added that in her experience, probate lawyers are highly skilled and very professional. They tend to be extremely effective advocates for their clients. Her only advice is to remember to consider both sides of the issues and to acknowledge those areas where there is, or can be, agreement.

"With regard to the discovery phase, I would recommend considering how you as an attorney or as a client would respond to your own discovery request. Are all the requests necessary? Would you find them overwhelming? Is it worth shutting down positive communications with opposing counsel by asking for as much as you have during the discovery phase?" shared Judge Pichon.

The Impact of *Breslin* on Mediation

One recent court ruling in particular has had a significant impact on the mediation landscape. In April 2021, the California Court of Appeal expanded the authority of California probate courts to compel beneficiaries to mediate or risk forfeiting their interests in a disputed trust. As a result of *Breslin v. Breslin*, when mediation is mandated, parties have a greater incentive to be active participants in trust proceedings.

"*Breslin* does make the job of the mediator more difficult, because more concerns and more positions must be taken into consideration," explained Judge Culhane. "For instance, the interests of contingent beneficiaries will have to be discussed and satisfied in a negotiated resolution. Increasing the number of participants certainly complicates matters, but because a *Breslin*-oriented mediation compels everyone to come to the table, it becomes possible to achieve a greater understanding of all parties' positions and, as a result, achieve a more durable agreement."

How Neutrals Deal With Impasses and High Emotions

Leading parties to settlement is something of an art form for mediators. Every mediator

brings their own unique skills and experience to the table in seeking to resolve disputes.

"As a mediator, I feel it's important for me to remain positive and regularly acknowledge the progress being made and the areas where there is agreement," said Judge Pichon. "It's incumbent on me to let the parties know that I understand what's driving their position and acknowledge their feelings and emotions. Oftentimes, the parties have villainized each other, so I try to remind them that the opposing side is just as concerned about resolving the case and that settlement is equally important to them. When emotions run high, I encourage them to try to put aside those feelings in order find a mutually agreeable settlement."

Judge Pichon went on to point out that developing trust is crucial for mediators. Mediators must be viewed as truly neutral. She begins by working to develop a rapport with the parties and show them that she understands their positions. Further, she will, under all circumstances, accurately convey those positions to the opposing parties.

Judge Culhane focuses on anticipating where impasses may potentially surface during pre-mediation work. He likes to remind the parties that unlike litigation, where there is a clear winner and loser, mediation is about building an agreement. It behooves all parties to be open to some degree of change in their positions. "There is no recipe for settling an impasse," explained Judge Culhane. "A mediator will attempt to identify the stumbling blocks and then look for ways to collectively work to resolve them. You can't have a mediated resolution if both sides don't eventually reach an agreement. In most cases, this is better than the alternative, where one party wins and the other loses."

Experience Matters in Cases of Undue Influence and Capacity

In cases involving wills and trusts, there is frequently a petition to declare a will or trust invalid because it was procured through undue influence. Judge Reiser believes that approximately one-third of all probate, estate and trust litigation that comes to a neutral involves the efficacy of an instrument and, almost invariably, such challenges are a result of undue influence or capacity.

"When contested conservatorships are involved, judges tend to be very protective, taking on a far more active role in such cases," stated Judge Reiser. "In these cases, it's helpful to have a strong former judge to serve as a neutral who can educate the parties on what's likely to happen."

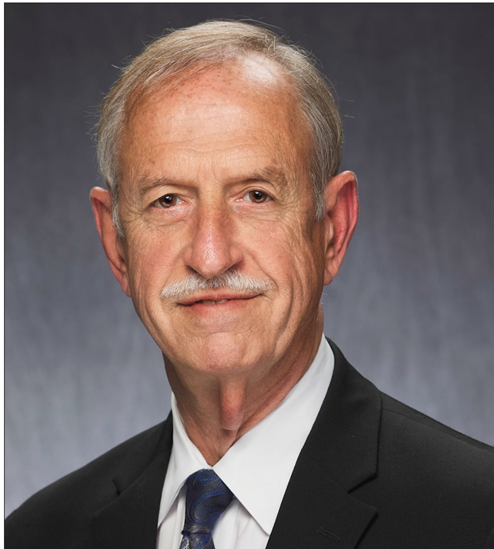
Judge Pichon sees mediation as a viable alternative in disputes involving conservatorships. "This is a situation where the parties can fight it out in court or instead choose mediation, which will afford an opportunity to sit and talk without all the procedures that come with a court proceeding," added Judge Pichon. "Mediation allows differences to be discussed in a less adversarial setting. Perhaps there's something in the middle where some of the restrictions can be relaxed a little bit for the conservatee. This might present an agreeable arrangement for all involved parties."

A provision in the probate code called "substituted judgment," where an estate plan can be created for a person who has no capacity or limited capacity, is another viable option, according to Judge Reiser. "This is a pretty effective tool that creates a conservatorship simply for the purpose of creating an estate plan, and then the conservatorship is ended," he explained.

The Role of Mediation in Probate/Estate/Trust and Family Law Crossover

Judge Pichon pointed out that it is not unusual to have a probate case that has family law issues mixed in. "Family court and probate can be completely intertwined because probate has so many issues regarding community property," concluded Judge Pichon. "These types of cases can be resolved through mediation rather than litigated. It's often easier to simply talk these issues through rather than trying to resolve them through court proceedings."

Disclaimer: The content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.



Hon. Kevin R. Culhane (Ret.) serves as an arbitrator, mediator and special master/referee, handling family law, real property/real estate, probate/estate/trust, professional liability, employment, health law/elder care, insurance, personal injury and torts, class action/mass torts, government and discovery/civil procedure disputes. He joined JAMS following a distinguished legal career spanning over four decades.

Hon. Risë Jones Pichon (Ret.) serves as a mediator, arbitrator and special master for a wide array of disputes, including probate/estate/trust matters, personal injury/torts and business/commercial matters. She joined JAMS after a distinguished judicial career spanning more than 35 years.

Hon. Glen M. Reiser (Ret.) is an arbitrator, mediator and special master at JAMS. He has vast experience adjudicating and resolving thousands of complex commercial, real property/environmental, trust and family law disputes as a respected trial judge and litigator.

Reprinted with permission from the *Daily Journal*. ©2022 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros.