LESSONS FROM PROBATE COURT

by William D. Dowling

Dowling Mediation has passed the one-year mark. In that time, I was appointed as a mediator by the Summit County Probate Court and I became a member of the American Arbitration Association's commercial arbitration and mediation panels.

My experience with probate cases has been consistently interesting and challenging. More than many other types of litigation, probate disputes often involve long-term relationships and complex emotions. They are often freighted with complexity related to both the past and the future.

My litigation practice typically involved disputes over one-time economic transactions. The deeply personal feelings and issues that come before the probate court add an entirely new dimension. The lessons learned from probate court underscore the basic principles of mediation.

Lesson #1: The real interests of the parties are often different than their legal positions

> **The Case:** The parents of middle-aged children have died, leaving an estate with significant assets, mostly financial. The terms of the will of the parents are ambiguous, with each of the children asserting a claim based on his or her interpretation of the document. The will also provides that the personal possessions of the parents are to be divided equally among the children. The case file contains motions and briefs regarding the financial assets, but, when the mediation session begins, it becomes clear that the children can easily resolve this aspect of the case. The real dispute is over family pictures and possessions, along with a belief that one of the children had taken advantage of the parents' generosity before they died. The lion's share of the mediation was consumed with negotiation on these issues.

Clients seek out lawyers when they have a problem that need to get resolved. They rarely present a neatly packaged legal issue. Instead, their disputes are an amalgam of facts and it is the lawyer's job to apply the law and discern the appropriate legal claims. While those claims may be appropriate under the law, they may not adequately address the often-messy real interests of the clients. If the dispute is ultimately resolved by the court, the legal interests will be addressed

but the real problems may persist. **The mediation process provides an opportunity to explore and resolve the real interests of the parties in a manner that goes beyond their legal positions.**

The implication is that lawyers must take steps to explore and understand the real interests of their clients and they must be prepared to address those interests in mediation. In a case seeking money damages, the real interests of the parties may not involve the payment of a settlement amount. Instead, they may be truly interested in restructuring their business or family relationship in a manner that is mutually beneficial. Or the parties may have an interest in the manner in which a settlement amount is paid (e.g. a structured settlement) that will not be addressed if the case proceeds to final judgment in court. Sometimes, an apology may be as important as the receipt of settlement funds. Mediation gives the parties an opportunity to address interests that are not adequately considered in litigation.

Lesson #2: Sooner is better than later

> **The Case:** Siblings are involved in a dispute over the guardianship for their mother. One of them insists that a guardian is needed and has retained a psychologist to evaluate the mother. The other disagrees and has his own expert witness. If a guardian is appropriate, this sibling wants the job. Both siblings have excellent lawyers and a hearing is scheduled to decide the issue in the near future. At the mediation conference, the lawyers argue their cases zealously. The siblings agree that they each want what is best for their mother and that their dispute has been very hard on the family. However, they have each invested money and emotion in the dispute. It cannot be settled.

Mediation is often perceived as part of the litigation process. A lawsuit is filed, discovery is performed, dispositive motions are filed and finally a trial is set. Shortly before the trial, the parties agree to mediation in the hope that it will facilitate their negotiations. Mediation at this late stage in the process can indeed be useful but often it is too late. By the time the case is ready for trial, the positions of the parties are set in stone and the expenses, both financial and emotional, have been paid.

Mediation should be considered by the parties early in the dispute resolution process, before their positions have hardened and before the expenditures of time, emotion and money that litigation entails. If the siblings had mediated their dispute earlier, it is likely that they could have fashioned a resolution that addressed the central issue on which they both agreed, the best interests of their mother. A creative resolution might have involved the use of powers of attorney, a third party guardian or an agreement that one sibling would serve as guardian but would share essential information with the other. By waiting too long, the promise of mediation was lost.

Lesson #3: Even if you can't resolve all of the dispute, resolve some of it

> **The Case:** Two siblings have filed motions to be appointed guardian of their mother. While they both claim to love their mother, they have significant differences on appropriate care for the mother and they clearly dislike each other. There have been a couple of ugly confrontations at the nursing home where the mother now resides and it is clear that they can't visit at the same time. During the mediation session, it becomes apparent that the siblings cannot agree on any type of middle ground in regard to appropriate care for their mother. However, they were able to reach agreement on a schedule for visitation and other ground rules to govern the situation until the court resolved the guardianship issues.

Both parties and mediators are inclined to gauge the success of a mediation by whether or not the case is settled. Often, however, the question is more nuanced. **Resolution of a portion of the dispute is helpful, even when issues remain for resolution by the court.** In this case, the agreement of the parties on ground rules for care of their mother was indeed helpful and it allowed the angry siblings to cool off while they awaited a hearing in court.

Partial resolutions in mediation can involve substantive or procedural issues. Where a dispute involves multiple claims (e.g. the division of business assets in a business break-up), the parties may agree to the division of some of the assets while requiring third party adjudication of other issues. In a personal injury case, the parties may agree that liability will be admitted and

that some of the claimed damages will be paid while others remain at issue. Or, parties may decide at mediation that while they cannot agree to resolve their dispute, they can agree to an expedited and efficient mechanism for resolution, such as arbitration or a third party appraisal of real estate. When partial resolution is achieved, the mediation usually has been a success.

Lesson #4: Don't give up

> **The Case:** The deaths of an elderly couple have resulted in a monumental dispute among their eight children (two from the first marriage of one spouse and six from the first marriage of the other) and 26 grandchildren. The dispute involves questions about the validity and interpretation of two trusts and competing wills of the couple. Substantial assets are at issue. Approximately ten attorneys are involved in the case. Faced with a long and difficult trial, the probate judge sends the case to mediation, despite healthy skepticism from the parties. Arrangements were made to find a site for that would accommodate all of the parties. After two day of mediation, the parties agreed to a complicated but effective settlement.

Attorneys and their clients may be skeptical about whether mediation will work, whether because the issues are too complicated, the positions of the parties are too far apart, or the emotions are too great. Yet, they are often wrong. With the help of a good mediator, they can sort through the issues, move their positions closer together, and diffuse the emotions. **Every experienced mediator has had cases in which the parties thought settlement was impossible but the case was eventually resolved.** They know that the process must play out to determine whether or not settlement can be achieved.

Mediations tend to follow a pattern. At the beginning, each side has a need to explain to the mediator the righteousness of its cause and provide justification for its opening position. On its face, the dispute may seem unsettleable at this point. However, then the parties begin the process of evaluating risk, i.e., acknowledging that there are two sides to the story and that the result of the legal process may not be everything they desire. With the guidance of the mediator, they also evaluate the financial and emotional costs of continued litigation. Gradually, the

positions of the parties soften and they move closer together in their negotiations. They may also discover shared interests that can be addressed in a manner they hadn't anticipated. As the process continues, either or both sides may state, sometimes on more than one occasion, that they've reached the end of the line and are ready to go home. But in the end, most cases get resolved through hard work, clear thought and good will.