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## **FAQs: Navigating Conflict and Probate Peacemaking**

### *What Is Probate Peacemaking?*

Before you hire an attorney to explore legal remedies in a family dispute, or to prepare a demand letter or an initial pleading in court – you might want to ask the attorney about the range of alternatives to court proceedings, and consider the costs and benefits to the range of alternatives. You might start with a question to an attorney about what kind of role he or she could play to resolve a dispute and what alternatives to litigation she would be comfortable exploring. Dispute resolution involves a broad array of techniques, and it is good for people to know that litigation is only one type of dispute resolution among a broad array of alternatives. For example, if you are much more concerned about preserving your relationship with family members, it might be a good idea to avoid court proceedings if you can. On the other hand, if starting a proceeding and getting resolution of the dispute is your biggest concern, perhaps your best option is litigation. Attorneys must get “informed consent” from their clients to pursue a particular course of action. This is much like the informed consent with a health care provider. Essentially it means that you have been offered information as to the range of options, and that you knowingly choose from among those options.

### *Tell Me More About Some of these Peacemaking Options ...*

A preliminary “snapshot” of the conflict would be a conflict assessment. This is the “who,” “what,” “where,” etc. of the conflict, along with an identification of some options to resolve or manage the conflict. A second option is a conflict consultation. The conflict consultation builds on the foundation of the conflict assessment, and would explore a variety of techniques or services that can be offered in a strategic application or limited to the provision of “a la carte” services. A third option would be a party-to-party engagement in a discussion (which may be supported by or held with the assistance of a peacemaker) with a stated goal of the disputants’ being able to resolve the dispute on their own. Another alternative would be a facilitated discussion among the other attorneys (where the parties are represented by counsel) in which they might discuss negotiating a settlement of the dispute. A fifth and final option would involve mediation.

As a process, mediation is suited to encompass a spectrum of processes, which start at one end with an outcome-oriented process like a settlement

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conference (where a mediator conducts “shuttle diplomacy” between the parties). At the other more relationship-oriented end, lies the facilitative, interest-based mediation model in which parties can explore their own and each others’ interests in order to find common ground to resolve their dispute. Mediators have their own unique styles, so it is important to ask a mediator about their processes, style and goals of mediation.

### *How Might an Attorney Acting as a Probate Peacemaker Behave?*

The conduct of a probate peacemaker would of course vary with the situation and depend on the unique circumstances of the case or conflict. With that said, there are some behaviors that would distinguish the peacemaking mindset, and which would be designed to obtain win-win outcomes. These include a willingness to (1) agree to stipulations as to facts and the admission of evidence along with other requests to hasten the proceeding; (2) accommodate requests from opposing party or counsel for schedule changes due to illness, family, or work responsibilities; and (3) avoid the “gotcha” strategy when a mistake is made by an opposing party or counsel; and (4) abstain from negative personal or otherwise disparaging comments. This list is not meant to be exclusive or exhaustive – the bottom line for all these “indicia” of the peacemaking mindset is that the peacemaker is an erstwhile advocate for family or intergenerational healing and that this restorative approach can be consistent with the interests of the client.

### *How Is a Probate Peacemaker or Elder/Probate/Intergenerational Mediator Different from Other Mediators?*

Many elder law attorneys spend a large part of their practice engaged in preventive law. Preventive law is a law practice that seeks to anticipate and prevent legal problems and litigation. It is an approach found in several other areas of law besides elder law and estate planning. Many of us who practice elder law already use counseling techniques and many of the documents we prepare with the goal of avoiding litigation (such as an expensive trip to probate court or other legal or financial harm that might have been avoided with appropriate planning). When elder law attorneys act as probate peacemakers or as elder/probate mediators, they bring their substantive knowledge of and familiarity with these preventive steps and techniques. This combination of

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substantive experience and the preventive approach to a problem or set of problems combine in a way that can help predict how a client and members of a family or another interested group might behave in the future. That can mean that an attorney serving as a peacemaker or as counsel to a disputing party can help ensure that the client has the benefit of strategic advice before future problems or troubles appear on the horizon. To the extent that a dispute is not definitively resolved by some process, or if related issues crop up, a peacemaker can be enlisted to draft an agreement that can guide the parties toward productive management of anticipated future disputes.

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