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Arbitration and Mediation: Role of Surrogates in Settlement Conferences

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In Surrogate's Court practice, as a result of the pandemic and resulting delays, and an unprecedented shortage of court staff, both the courts and the parties to Surrogate's Court proceedings are more inclined to attempt to have their disputes resolved by settlement. This can take place within the court structure through court-sponsored mediation, or outside the court by the parties agreeing to mediation or arbitration.

In contested proceedings, very often, the court may determine that a conference should be held in an attempt to resolve the issues. The proceeding may involve motions, discovery, or some other procedural matter but the courts are always open to the possibility that a matter can be settled. Accordingly, a law assistant or secretary, chief clerk, deputy chief clerk, all of whom may be designated as referees, will aim to see if the entire matter may be settled and negotiate with the attorneys and parties. Somewhere along the line, a decision may be made whether or not the Surrogate should participate in the settlement process. The Surrogate may hold the conference from the beginning, or the attorneys or the court personnel involved in the negotiations may subsequently ask for the Surrogate's participation in order to bring about a resolution.

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Many Surrogates are willing to participate in settlement conferences. They know that they may hear facts that may not be admissible if the matter is ultimately tried. However, they are convinced that if the matter is not settled, they will be able to block out from their minds what they may have heard during the settlement negotiations. They feel comfortable with this situation bearing in mind that they often hear facts that come about while deciding motions and even settlement allocutions. If the matter ultimately has to be tried, they must block out inadmissible facts. The same applies when a member of the court's staff is assigned as a referee to hear and report. Very often, settlement negotiations in this context are successful, because the parties are able to raise issues which, during trial, would be inadmissible, such as communications with the decedent that would be barred by the Dead Man's Statute under CPLR Section 4519.

Some Surrogates refuse to participate in settlement negotiations because they feel if they have to try the case, they do not want to learn facts or

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hear issues during negotiations that may be inadmissible. Accordingly, it may be advisable for counsel to determine what the position of a Surrogate is regarding participation in settlement negotiations.

In an effort to reduce their caseload, some Surrogates refer proceedings to out-of-court mediation, to either retired Surrogates or others who are qualified to be mediators. When a matter is referred out by the court, authority may be given to the mediator, if the mediator deems it appropriate and with court approval, to supervise any additional discovery that may be necessary. In some limited circumstances, if the matter is not settled, the court may designate the mediator to either hear and determine or hear and report on the issues.

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It may be that the attorneys and parties under the circumstances involved may decide to either mediate or to arbitrate. They may resort to organizations that participate in such endeavors or select their own mediator or arbitrator. Generally speaking, an arbitrator determines the issues involved and reaches a final, binding decision on the matter, whereas a mediator attempts to bring about a voluntary settlement of the issues without being assigned to make an ultimate determination of the issues.

For efficiency and economic purposes, the parties may wish to ask a mediator, if the matter is not settled, to arbitrate the issues. Some question the ethical considerations of this process. The concern is that during the course of mediation, the mediator will hear facts that would be inadmissible at trial or at an arbitration proceeding, and other issues of conflict may arise. This is similar to what the Surrogates must determine when deciding whether to participate in settlement conferences with litigants. As indicated, many Surrogates are comfortable participating in settlement negotiations, while some elect not to participate. Many professional arbitration organizations agree that the assignment to one individual to act as mediator and arbitrator is doable, as long as the parties agree, full disclosure is made, and precautions are taken.

It appears economical to have the same neutral individual act as mediator and, if the issue is not resolved, as arbitrator, as long as the individual selected can consciously disregard inadmissible facts, just like judges. If an individual is uncomfortable with fulfilling both roles, they should not accept the assignment, just like a judge would not participate in settlement negotiations if he felt uncomfortable.

At issue is the quality of the process and the ability to be impartial. If a neutral consciously accepts the fact that he or she must be impartial in both roles and is satisfied that they can accomplish that goal, there should be no conflict. However, if there is a doubt as to compromising one's ethical mandate, one ought not accept both roles.

There are some who dislike the words, "alternative dispute resolution" (ADR) and prefer other terminology such as dispute system design (DSD). Nearly all practitioners know what mediation and arbitration entail, and perhaps it would be better if we simply used that terminology for the process. Mediators and arbitrators design their processes to fit the specific matter assigned to them, and where they feel comfortable participating in the process. The resolution should be based on both conscious and unconscious possible conflict. If a neutral is satisfied that they can play both roles and overcome any ethical issues, then they should feel comfortable to serve.