MEDIATION OF FIDUCIARY LITIGATION CASES

SCOTT D. WEBER, *Dallas*
Norris & Weber

State Bar of Texas
16TH ANNUAL
FIDUCIARY LITIGATION
December 2-3, 2021
San Antonio

CHAPTER 15

Scott D. Weber
Norris & Weber, PLLC
3811 Turtle Creek Blvd, Suite 400
Dallas, Texas 75219
Direct Dial (214) 253-2177
scott@norris-weberlaw.com
www.norris-weberlaw.com

SCOTT D. WEBER is a trial lawyer, mediator, and member of Norris & Weber, PLLC, in Dallas, Texas. His practice involves contested probate, trust, and other fiduciary litigation. Scott is also frequently appointed by the Courts and selected by counsel to serve as a mediator for trust, estate, and fiduciary disputes. Scott grew up in Dallas, graduated from Woodrow Wilson High School, received a B.A. in history from Columbia University in 1986, and a J.D. from Southern Methodist University in 1989. He was admitted to the Texas Bar in 1989. Scott is also admitted to practice before all of the Federal Courts in Texas, the United States Court of Appeals for the Fifth Circuit, the United States Supreme Court, and the United States Tax Court. In 2006 he became Board Certified in Civil Trial Law by the Texas Board of Legal Specialization. In 2009 he became certified as a mediator. Scott has been named a "Texas Super Lawyer" by *Texas Monthly* Magazine since 2006, and has been listed in *Best Lawyers in America* since 2008. He has been a frequent speaker on topics involving trust and estate litigation, as well as mediation. Scott has been an adjunct professor of Trial Advocacy at Southern Methodist University's Dedman School of Law. Scott is active in the Dallas Bar Association and served as the Chair of the Probate Trust and Estate Section.

TABLE OF CONTENTS

MEDIATION OF FIDUCIARY LITIGATION CASES

I. INTRODUCTION

Forbes recently reported: "The U.S. is on the verge of the largest generational wealth transfer in history. Over the next two decades, millennials are set to inherit $30 trillion from "Baby Boomers," America's wealthiest generation.[1] This will, no doubt, result in increased litigation involving estates, trusts, and guardianships, which will lead to more mediation. And, of course, because of Covid-19, we are seeing an increase in overall mediation numbers because of difficulty accessing the courts to resolve disputes. Finally, due to pending (or perhaps enacted by the time of this talk) legislation impacting grantor trusts and other estate planning vehicles, there will be a flurry of estate planning that will be ripe for litigation in the very near future, thus leading to an increase in mediation.

Mediation of fiduciary disputes is dramatically different than almost any other type of litigation. Whether it be a lawsuit against Uncle Bob for breaching his fiduciary duties as trustee of the family trust, claims against the family's longstanding CPA who served as executor, or a business divorce between partners, it is emotionally charged. These examples of fiduciary litigation all involve disputes arising out of longstanding relationships between people who – at least at some point in time – liked, trusted, and even loved one another. Because of that emotional aspect of this kind of litigation, it is more important than ever to prepare your client, yourself, and your mediator to have the best chance of resolving the dispute.

While every lawsuit is different, there are common themes in every fiduciary case. For example, most families that end up in litigation had a strong patriarch or matriarch who grew, or at least was a steward of, the family fortune and held the family together. When he or she is gone, there is a vacuum the children and others try to fill by exercising power and control. Overlaid on top of this dynamic is the animosity and bitterness that typically exist in dysfunctional family systems. This same dysfunction can also manifest itself in closely held business divorces where changing circumstances and pressure are exerted on the principles and result in trips to the courthouse.

Another common element is the existence of blended families. Siblings in a nuclear family typically get along with each other after the death of their parents, but a blended family sometimes lacks the trust and strong relationships within the next generation that might exist otherwise.

II. PREPARE YOUR CLIENTS

Imagine all the extensive ways you prepare your client for trial, yet 90-95% of all cases settle before trial. Why not put that same emphasis on preparing for mediation? After all, this is your client's only – or at least his most important – lawsuit.

Explain to your client I am not the judge or the arbitrator. I will not decide anything. Explain how the process works, especially what to expect during the private caucuses. Make sure your client understands the protections afforded to and the confidentiality of mediation. Your client will also need to understand my role is to settle the case. I will be trying to create and keep momentum moving towards that goal. In order to do that, I will need to change people's perspectives about the case, cast doubts, determine what people really believe about their case and discover where the real bottom line is. I will also be exploring the various dynamics at work and finding out who is the most pliable. Whoever that is will get the most pressure.

Your clients will need to keep an open mind and be flexible with their approach and analysis. As I tell my clients: "Don't draw lines in the sand." They will need to avoid emotional reactions, make smart, business decisions, and try to understand the perspective of their opponent. They don't have to agree with the other side's perspective, but they need to at least try to understand it, because if they don't settle, how the jury perceives the facts will determine the outcome.

Your clients also need to understand mediation is a process. As tempting as it may be, you can't just come in with your best offer and expect the other side to take it. The parties need to adjust their expectations by being told "no."

Finally, you and your client must know what the various outcomes will look like if you have to try the case. What is your best-case scenario or your home run? What does it look like if you strike out? What is the current make-up of the estate? What is the most realistic value of the business? Who are the potential buyers in that market? What is it going to cost to go to trial, take it up on appeal, defend against an appeal, etc.? What is your damage model?

Remember the adage: "The perfect settlement is one where everyone goes away mad."

III. THE MEDIATION PAPER AND OTHER PRE-MEDIATION COMMUNICATION WITH ME

Don't just send pleadings to me. It's lazy. Think of the irrelevant things in your pleadings. Most mediators don't want to have to read all of that and I certainly don't.

Instead, give me a clear, concise, and informative

1 Nick Stonnington, *Why High-Net-Worth Boomers Should Consider Gifting Their Estates In 2020*, Forbes, August 6, 2020.

overview of the case. Introduce your clients. Explain how they're related to the other parties. Explain how the business started and who did what? Provide some of the backstory. Explain what the issues are. Tell me how much is at issue and what the assets consist of. Are they liquid or comprised of stock in a closely held business? Tell me, or better yet, show me what the operative language is in the will, trust, partnership agreement, or other key document(s).

If you prepare me, as your mediator, I will be much more prepared when I talk with the other side during the first substantive meeting. They're going to know I am prepared because of what you've given me. They know what they gave me, but if I'm not following their "script," they'll know you're prepared and you in turn prepared me.

People will often give me a power point or a presentation with deposition clips, exhibits, and other snippets about the case and then ask me if I think they should give them to the opponent. Most of the time I tell them to send it to the opposing party. It shows you're organized, prepared and ready to proceed. You want the other side to see what their testimony looks like, what the documents look like, and what other circumstances might look like. (For instance, the security camera footage of them "assisting" grandpa as he signs documents.) While you can't guaranty opposing counsel will share with their client what you send, they certainly can't share what you don't send them.

Don't think you'll show up at mediation, surprise your opponent with some key fact or piece of evidence and have them capitulate on the spot. Surprises at mediation never go over well and typically delay the resolution. You will ultimately have to produce whatever evidence you have that you think is so good, so why not get it to the other side in advance of the mediation so they have time to evaluate it?

Even if you don't have time to prepare a paper for me, at least call me and let's talk about the case. If we've never worked together, it gives us a chance to get to know each other and develop some rapport. You can also give me the backstory, tell me about your client, and let me know if there are any issues I need to be aware of that might help or hinder the process.

Let me know about all other prior settlement negotiations. Tell me who offered what, when, and what the response was. It is imperative I know in whose court the ball is so I don't spend extra time sorting out whose turn it is to make the next offer. There's nothing worse than spending several hours arguing over who must make the first move.

Consider preparing a mediation statement or position paper for me and the other side as well. Much like the power point presentation I mentioned above, a well-crafted position paper that you also send to your opponent conveys the message you have analyzed the case thoroughly, you take the process seriously, and you will be prepared for trial if not successful at mediation. While the communication is protected by Rule 408 T.R.E. and you don't have to worry about your words being used against you, a certain amount of discretion is still required if you do this.

IV. PUT DOWN THE SWORD

Don't get your client fired up about winning when we're there to try to resolve the dispute peacefully. Don't come in and tell me what a great case you have, how you're going to crush the other side, and how the court will grant you every item you're seeking in damages.

No lawyer in his right mind can predict what a judge or jury will do. We've all lost cases we thought we'd win, and we've all won cases we thought we would lose. If you start talking about how you'll win, I'll politely point out your inability to accurately predict the future, and you'll lose face in front of your client. Remember, mediation is a time for peace and there will be a time for battle if you don't succeed at mediation.

V. LET YOUR CLIENT TALK

Let your client talk directly to me, let him tell me how he got to this point, what he thinks caused it, and what he thinks is going to motivate the other side. I need to be able to develop a rapport with him and I can't do it when you do all the talking. On the other hand, if I ask you a softball question, like what your fees will be if you go to trial, tell me.

VI. LET YOUR CLIENT VENT

Because this litigation is so emotional, clients often get wound up, animated, and frankly angry. Lawyers often intervene and try to get their clients to calm down, want them to take a break, or in some way encourage clients to bottle up their emotions. That's not necessarily a good thing. Your client has been talking with you for quite some time before you get to mediation. Your clients need a new face to talk to. They need a new audience to vent their frustrations to. Let them do it with me. Oftentimes this venting is cathartic, and clients will calm down and focus on resolving the dispute in a more rational manner. If they can't seem to stop venting, then I'll step in when appropriate and help slow them down.

VII. WHEN YOU DO TALK, BE HONEST

I know a mediator whose checklist to prepare for mediation says: "Take with a 'grain of salt' what counsel says . . . ." However, it is imperative you be candid with me – and your client – about the weaknesses of your case, just like you will be strident about the strengths of it. Mediation is all about controlling cost and risk. If you can't adequately analyze the risk, how will you control it? And, if I'm asking about risks – and you know I will – when you haven't adequately prepared your client for that discussion it's not going to

look good.

VIII. DON'T ROUTINELY KICK ME OUT OF THE ROOM

Almost every time I convey an offer, we'll chat about it for a little while and the lawyer will say "give us a minute" and politely kick me out of the room. Why do that? The more you share with me the better able I am to guide the parties to a resolution. Consider letting me stay and observe the process you and your client undergo to formulate the response. I can join in the discussion or be the proverbial fly on the wall, if that makes you and your client feel more comfortable. As I will be the only person in all the breakout rooms, I can add a unique perspective to the process of formulating the proposal. Why not take advantage of that?

IX. DO NOT ALLOW YOUR CLIENTS TO POST ANYTHING ABOUT THE CASE ON SOCIAL MEDIA DURING MEDIATION

This is rather obvious and should go without saying, but I can assure you people do it. Don't let your clients do it.

X. DON'T RESIST A GENERAL SESSION

When I talk about a general session, I'm referring to one where everyone gathers in one room – or on one computer screen – so I can explain the process, make commitments to the parties, and get their commitments back. I'm not talking about the old general session where the lawyers would give a closing argument and annoy everyone so much it would take the mediator three hours to get everyone back on track. It's not that I have anything particularly brilliant to say, but rather having everyone hear what I have to say at the same time is extremely helpful. It allows me to develop rapport with everyone at the same time and, hopefully, to begin to build trust with your clients. It's also helpful for the parties to see each other and to understand the process is real. Sometimes mediation seems abstract and having the adversaries in the same room at the beginning grounds them in reality. It also helps from a psychological standpoint to have the parties hear the other side make the same commitments to me that I ask of them. And when I say I don't want the lawyers to make speeches, I am serious. There may be an occasional case – but they are few and far between – where it is appropriate, and some mediators will tell you it always is. I don't think it is a good idea.

When I tell people my plan for a general session they inevitably say; "I'm not going to sit in the same room with [fill in the blank]." My response is that you can certainly sit in the room with them for 10 minutes in order settle this case, otherwise you're going to be sitting in conference rooms and in a courtroom with them for a lot longer. Usually, they agree. Occasionally, the plaintiff or the will contestant will tell me he will get too upset or anxious if he must see the other side. Pointing out the obvious fact that plaintiffs are the ones who started the fight, and they shouldn't have done it if they're not willing to look someone in the eye usually gets them over the hurdle.

Don't tell your client he will not have to see the other side during mediation – especially without talking to me first. And when I suggest the general session, don't resist unless there is a good reason. If you have a really good reason for not wanting to, you should have brought it to my attention beforehand.

XI. KNOW WHERE YOU'RE GOING TO START

Know what your opening move is going to be. Whether it's the initial opening of the negotiations or your response to your opponent's opening move, you know you're going to be making an offer or demand at some point in the day. You can generally anticipate what the other side is going to do, even if it is to demand their best day in court. Be prepared, generally, for making your offer. This involves meeting with your clients ahead of time, reminding them of prior settlement discussions, setting goals and expectations, and mapping out a game plan to get into an acceptable settlement range. One of the primary reasons for delay in mediation is the lawyer who says; "Give me a minute to see what my client wants to do." This is code for: "I haven't talked with my client yet and we need to decide what our offer/demand is going to be." Sort that out before you walk into my office.

XII. BRING LOTS OF LISTS

The mediation of most fiduciary cases involves dividing up the estate, trust, or assets of the business. In order to divide it, everyone must know how big it is and what the assets are. Plan ahead and prepare various spreadsheets that will allow you to evaluate the proposed allocation of assets and their values. Get someone who is good at Excel to help you build the spreadsheet if you don't know how to do it yourself. It doesn't have to be fancy. It can be as complex as you wish, or it can be as simple as the following table created for a hypothetical estate. You can easily move assets into one column or the other, depending on who gets what and/or how it will be divided, so you can evaluate the settlement positions.

ASSET	VALUE	US	THEM
Homestead	$1,250,000		
Lakehouse	$750,000		
Minerals	$5,000,000		
Acme Company	$12,700,000		
Ranch	$4,000,000		
Antique Cars	$1,000,000		
Total	$24,700,000		

While this kind of spreadsheet is essential to understand and process the big picture, there are often other assets that are more voluminous and/or sentimental in nature. These assets can include firearms, artwork, antiques, pots and pans, furniture, and other collectibles. These are generally addressed after the big-ticket items and usually later in the evening or even the early morning. You absolutely must have lists of those ready to discuss. Having a list ready before makes it so much easier to address at mediation. If you have one with photos included or even an appraisal it makes the process go much more smoothly. We have even divided "pots and pans" by attaching a list and putting initials next to each item to memorialize who gets it. If you have that list of items ready to go it makes the process that much faster.

XIII. KNOW YOUR FEES AND EXPENSES

There are various ways to recover attorneys' fees in probate and fiduciary litigation and they are always a factor. You must come into mediation knowing what your total fees are thus far, how much your client has paid, what it is outstanding, and what you estimate your fees and expenses will be going forward – through trial and even on appeal. I will have that fee talk with you and your client at some point during the mediation and the better prepared you are for it the more effective the conversation will be.

XIV. ZOOM AND REMOTE MEDIATIONS

These days we are doing lots of mediations via Zoom. If you haven't done one yet, try it. You'll be pleasantly surprised. The mediator will have created breakout rooms, which are simply virtual conference rooms that work just as if you were at the mediator's office sitting in a conference room there. You and your client will be able to communicate freely and privately in the breakout room. And just like in a "real" mediation, the mediator will pop in and out and talk with you and your client. You can use the Share Screen feature to show the mediator whatever information you might want to use, and the parties can even edit the settlement agreement on the screen. Your client can print the signature page, sign, and return it as a PDF or even as a photograph from their phone.

Early in the pandemic people resisted Zoom mediations because they claimed they couldn't read the faces of other people involved and couldn't see their body language. However, most mediators, if they are even doing in-person mediations now, currently require the parties to wear masks. So, any complaints about the platform being a hinderance are generally offset by the face coverings mandated for in-person mediations.

Even after the pandemic subsides, we are still going to be doing virtual mediations. It has proven to be an effective way to resolve disputes. And, with parties scattered about the state, country, and even the world, being able to "attend" mediation without traveling is here to stay.

By now, everyone should be well-versed in how to use Zoom. If you're not, play with it. You can get a free account that's good for limited periods of time or an unlimited account for a nominal price. Use it to meet virtually with your family and friends and familiarize yourself with it. Obviously, you'll need a quiet place, good quality, reliable, internet and a webcam. Most of the cameras on laptops are certainly good enough for a mediation, but you can buy a quality camera that plugs into your computer for less than $100. Make sure you have good lighting from the front. Experiment and make sure you like the way the platform works.

For a more detailed discussion about using Zoom for mediations, attached as Appendix "A" is the "Zoom Mediation Resource and Reference Guide/Frequently Asked Questions" which Chris Nolland, John Shipp, and John DeGroote prepared and were kind enough to let me include in this paper.

XV. CONCLUSION

If you take the process seriously and prepare you and your client for it like you would a trial, you have automatically increased the odds you will reach a settlement. The most important thing you can do is communicate with me. Whether that's in writing, over the phone, or over a cup of coffee or lunch, it doesn't matter. I would much rather know what we're dealing with ahead of time than you simply show up at my office, tell me this is a will contest or partnership dispute, and explain that I can figure it out as we go. The second most important thing you can do is prepare your client for the process and have a realistic idea of where you want to end up. I look forward to helping you resolve your next fiduciary dispute.

Christopher Nolland
Attorney-Mediator
1717 Main Street, Suite 5550
Dallas, Texas 75201

Email: chris@nolland.com
OFFICE: (214) 653-4360
CELL: (214) 801-6110

Shipp Mediation

DEGROOTE PARTNERS
Mediation | Arbitration | Complex Situations

Zoom Mediation Resource and Reference Guide/ Frequently Asked Questions

How do I get on Zoom?

Zoom is easy to learn – just click on the meeting ID provided in the mediator's separate email and select "join by computer," although you may go to www.zoom.us and open an account and download the desktop app at https://zoom.us/client/latest/Zoom.pkg. Importantly:

- For our purposes a free account is all you'll need, although you don't have to open an account to participate.
- While you can log in through your browser using the Meeting ID and the Password provided in advance of the mediation, the desktop app provides the strongest encryption available.

How can I learn more?

- You can find Zoom tutorials at https://support.zoom.us/hc/en-us.

Why Zoom?

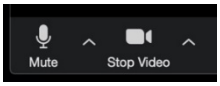
- It's encrypted.
- It has capabilities we need to make our mediation successful:
  - breakout rooms
  - screen sharing
  - whiteboards.

What kind of internet connection do I need to have?

- It must be fast, stable, and secure -- no coffee shop or public wifi.
- If you are experiencing problems with videos "catching," try closing other apps on your computer or others sharing your internet connection.
- If your connection continues to be unstable, mute your audio and then call in by phone so some of the data for the meeting isn't on your wifi network.

I can't hear, or you can't hear me. What do I do?

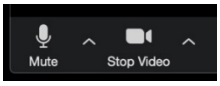
- If you're having audio issues, make sure audio is not set to "off" or "mute" (a red slash across the microphone icon at the bottom left corner of your zoom window) – scroll to the popup bar at the bottom left corner of your zoom window – it looks like this:



- Make sure the correct microphone and speakers are selected by clicking on the "carrot" to the right of the microphone icon. You may need to try each of the available microphones and speakers until you find the ones that work.
- If you are using a separate mic, the source should be yours and not "the system".

I can't see you. What do I do?

- If you're having video issues, make sure video is not set to "off" (a red slash across the camera icon at the bottom left corner of your zoom window) – it looks like this:



- Make sure the correct camera is selected by clicking on the "carrot" to the right of the camera icon. You may need to try each of the available cameras until you find the one that works.

How do I communicate with you privately?

- The Mediator will provide you with their cell number at the beginning of the mediation so you can contact him/her directly and privately.
- If you need to speak with the Mediator privately during the mediation, or if you need to suggest a restroom break or for some other reason, please text him/her.

What are your tips for success?

- Appearance
    - Backlit participants are difficult to see – please face the light
    - Be sure confidential information can't be seen in the background.
        - Turn off all notifications that reveal personal information.
        - You may choose to share your screen during the mediation, so you may want to clean up your computer's desktop.
    - Find a quiet area and be sure family members, pets, and others are aware you shouldn't be interrupted.
- Don't talk over each other – Zoom only allows audio from one person at a time.
- Turn off all reminder buzzers, dings, etc. – but allow your phone to receive text messages so you can communicate with the Mediator and with others in your group.
- Stay near your computer even when the Mediator has gone in the other room so you will know when the Mediator returns to your breakout room.

Can I use my smartphone or my tablet?

- There are options to use Zoom smartphone and tablet apps and you may wish to download those apps as a backup in case of technical difficulties.
- Participating on a desktop or laptop with a strong, secure internet connection will make your experience much better.

How do breakout rooms work?

- A quick video at https://www.youtube.com/embed/jbPpdyn16sY?rel=0&autoplay=1 shows what breakout rooms look like.
- Soon after the beginning of mediation, the Mediator will usually put each client/counsel group into a breakout room separate and apart from the opposing parties and counsel. This breakout room is the equivalent of a private conference room – while you are in your breakout room no one outside the room can hear any communications between the parties and their counsel (including the Mediator unless he/she joins the meeting and you see them on your screen). This room is where you most likely will spend the majority of your mediation. The Mediator will shuttle between breakout rooms over the course of the day.
- Note that for security reasons the Mediator may have disabled the chat feature. If you need to communicate privately with anyone in your room, we suggest texting one another on your cell phone. You can also communicate with the Mediator when he/she is not in your room by sending him/her a text to their cell.

Can I share a document or a presentation?

- Yes – the host (the Mediator) and with Mediator's permission during the mediation (for security reasons) any attendee can screen share by clicking the "Share Screen" icon. The Mediator can help you with this feature during the mediation.
- A video at https://support.zoom.us/hc/en-us/articles/201362153-Sharing-your-screen demonstrates how to use this feature.
- When enabled by the Mediator the screen share function allows participants to show documents, PowerPoints, or other content on their computers to all participants in the mediation or just their group in their breakout room.

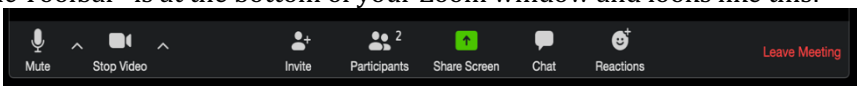
Will you record our mediation?

- No. Under our Mediation Agreement no one may record the mediation.

Can you participate by phone?

- It's better if everyone attends by video conference, but sometimes that isn't possible.
  - You can join the meeting as an audio participant only by dialing one of the phone numbers listed on your invitation and then entering the Meeting ID and password.
  - Note that, if you participate by phone, it's just like a conference call.
- Calling in can also serve as a "workaround" when internet connections become unstable – simply mute your computer and call in while remaining on video.

How do I control my video and audio?

- The "Magic Toolbar" is at the bottom of your Zoom window and looks like this:
  - 

- If you pull your cursor to the bottom of the screen the Magic Toolbar will pop up. You can lock the Magic Toolbar in place by clicking:
  - The carrot to the right of *Stop Video*
  - *Video Settings*
  - *Accessibility* (on the bottom)
  - *Always show meeting controls*
- You can mute your microphone by clicking on the microphone icon and can stop your video from streaming by clicking on the camera icon. When the microphone is muted or the video stopped you will see a red slash through the mic or camera icon. To unmute or to re-start video streaming just click on the appropriate icon.
- You can change your view – see the upper right-hand corner of your screen
  - Your Zoom screen features a choice to toggle between "speaker" and "gallery" view. "Speaker view" shows the speaker, and "gallery view" shows all meeting participants.

Important Phone Numbers and Notes: