EDITOR'S INTRODUCTION

From Preemptive Litigation to Mediation

JUL 04, 2019

BY ROBERT ROSBOROUGH

In the trusts and estates world, stories of children suing their parents are, sadly, unsurprising. Stories of parents suing their children are rare. Andrew Verriere is not advocating the latter but he makes a good case that some estate plans could be well-served by settlors going to court to have a trust's provisions declared valid while the settlors are still around to speak. As a family-conflict mediator, I can attest that many, most or even all of the arguments beneficiaries use could be swiftly preempted by a ruling on an inter vivos trust petition. While it may sound extreme, such an action could be a tremendous service to your heirs, not to mention ensuring your estate plan is actually carried out how you designed it. I would view the growth of this type of action not as the rise of yet another type of outrageous litigation (parents suing children!) but as a one more tool to reduce litigation that is bound to be even more acrimonious and protracted. Imagine a murder trial where the victim could testify! (Is that analogy too mean a commentary on trust conflicts?)

Continuing in the vein of reducing litigation, this month we bring you three articles about mediation. Many thanks to our guest editor, mediator Scott Buell, who, in addition to his service on MCBA's board, co-chairs our ADR section. In the first article, Randy Wallace distills many years of experience as an advocate and a mediator into five pithy principles of successful mediation that together create, "The Magic of Mediation." While aimed more at mediators, Randy's article provides useful insight for attorneys in mediation as well. Patricia Prince's article on invisible threats and rewards is aimed at attorneys as much as mediators. While grounded in the wisdom of Sun Tzu, it outlines a fascinating neuroscience-based model for identifying the invisible threats and rewards inherent in all conflict and explains how to use this knowledge to improve results in mediation and negotiation. And in our third mediation article, Mary McLain updates us on the lack of diversity in alternative dispute

resolution and the work of the ABA and other organizations to address it. The problem is not only who becomes—or doesn't become—a mediator or arbitrator but how attorneys choose them. Mary calls upon all of us to do something about this, including for the development of an MCBA diversity pledge.

I encourage you to read this month's member profile of Daniel Rossi. He has agreed to reinvigorate MCBA's Barristers section by accepting the position of section co-chair. Daniel talks about the experience of founding a personal injury firm with his wife and how welcoming he has found MCBA. And if you missed the always informative and entertaining Rory Little discussing the current Supreme Court term, read Scott Buell's recap of the event, which includes Professor Little's handout of major cases this term.

PRESIDENT'S MESSAGE

An Invitation to Lead

JUL 03, 2019

BY CHARLES DRESOW

The Marin County Bar Association is thriving. Our Association's membership is full of a diverse group of amazing lawyers who care about their clients and their communities. We are providing our membership with fun and interesting social and educational events that are also wonderful networking opportunities. We regularly communicate with our bench to continue our pursuit of innovative ways to ease court congestion and increase efficient access to justice. We provide rewarding pro bono opportunities to help our community. We bring you the Marin Lawyer every month. The list goes on. One of the ingredients for this success is leadership. In order to remain a vibrant group of innovative lawyers we need to cultivate those leaders—a pipeline of leadership. This pipeline starts at the section and committee level, moves to board membership and ultimately ascends to the executive committee of our Association.

Our Association wants and needs to build a leadership pipeline with diverse viewpoints and new ideas to help the Association and our members thrive. We are one of the smaller bar associations and so your participation matters tremendously not only to MCBA but to the community. We have many avenues for involvement and leadership development.

The American Bar Association recognizes the important role a lawyer must play both in the legal community and society at large:<blockquote>As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the

administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.</blockquote>(From the American Bar Association's Model Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities.)

Please take this opportunity to join our leadership pipeline. It will add to your enjoyment of the practice of law, contribute to your community and you will become a better leader. We have many different ways for you to become more involved and contribute to the continued success of our Association and to your own success as well. Please contact me directly if you would like to help our Association raise the bar. (cdresow@rflawllp.com) cdresow@rflawllp.com; 415.453.9433.

Understanding Invisible Threats and Rewards to Improve Mediation Results

JUL 02, 2019

BY PATRICIA PRINCE

“To subdue the enemy without fighting is the acme of skill.”ⁱ Although addressing The Art of War, Sun Tzu’s axiom applies equally to litigated cases and speaks to the promise of mediation. One of the best offensive strategies for succeeding in mediation, as in war according to Sun Tzu, is to “[k]now the enemy and know yourself; in a hundred battles you will never be in peril.”ⁱⁱ

Litigators Who Have the Edge in Mediation

In my experience as a mediator, the best attorneys arrive at my mediations with the confidence to go to trial, but they operate from the foundation of Sun Tzu’s principles, having completed and discussed with their clients a case analysis, an exploration of the client’s needs and interests, an examination of options and potential costs, and a negotiation strategy.

Obtaining an optimal resolution, however, requires more. As a long-time mediator, I have observed a seeming paradox: both sides to a dispute will obtain better mediation results if they can shift from the war footing of litigation to the problem-solving collaboration of mediation. This is not inconsistent with Sun Tzu’s guidance, as it is in furtherance of knowledge. In fact, the cornerstone of this work is fully understanding the opposing party’s point of view (to appreciate differences in case analysis) and motivations (to appreciate interests and priorities).

A useful tool attorneys can use to boost their mediation results is the SCARF neuroscience model for

collaborating and influencing others, which was developed by David Rock.ⁱⁱⁱ I have used its key principles to make sense of human behavior and as a powerful complement to case and interest analysis and negotiation.

Attorneys can also use it to their benefit during mediated negotiations on behalf of their clients, particularly to anticipate and alleviate perceived threats (as opposed to actual threats) and, importantly, to anticipate and amplify perceived rewards during the negotiations.

SCARF User Guide for Attorneys

The SCARF acronym represents five elements that relate to human neurological responses to threats and rewards.^{iv} Mediation is designed to exchange information and expand perspectives, but without understanding our most basic neurological reaction to threats and rewards, the goal of mediation can be entirely thwarted.

On the flip side, understanding innate threats and rewards that are part of the (often subconscious) human experience can help us craft more skillful and therefore more successful negotiation results. In short, these elements can automatically impact our feelings about others. If we are aware of the elements, we can avoid or enhance the perceived threats and rewards perceived by the brain. This can bring incremental gains that add up in a settlement negotiation.

SCARF stands for:

S: Status

C: Certainty

A: Autonomy

R: Relatedness

F: Fairness

Status: Corresponds to perceived importance in relation to another. For litigation parties, as they meet their opponent in a mediation, this can be viewed through several prisms, including social class, education, wealth or employment status, to name a few, and often is viewed in terms of having power or lacking power. Attorneys representing the parties can often even out a power imbalance, although there is also a status element for parties' attorneys, as each comes into the case implicitly or explicitly displaying his or her reputation, firm size, funds available to take case to trial, trial experience and record, and measures of professional competence.

Status can play a role in the power dynamics at play in a negotiation. Recognizing, understanding and managing this dynamic is important, whether power is explicitly or implicitly asserted, because the human brain is always seeking status. If one side feels disrespected (i.e., that their status has been diminished), they will often act out in a way that is counter-productive to the negotiations. This can take place on either side of the power imbalance.

In the employment context I frequently hear aggrieved employees demanding respect, but I also have observed more powerful (in terms of the status element) employers expecting greater deference because of their perceived power. If a status issue is detected, one of the best ways to address it is showing respect to the other side. Your mediator can also remind the parties of process issues that eliminate any perceived imbalance through the equal application of the law, representation by counsel, participation in a voluntary mediation, and other factors that will fill a status deficit. Once any status issues are addressed, the wheels of negotiation are free to move again.

Certainty: For parties in litigation, this typically expresses itself in the negative: lack of control of future costs, time, emotional energy, and, ultimately, the outcome of the case. For attorneys, certainty is usually a risk assessment based on good/bad facts, applicable law, the client's probable presentation at trial, comparative trial experience, and a dash of luck.

In the mediation context, considering risk meaningfully and realistically is typically painful for parties because it is an uncertain threat most people would prefer to avoid. Understanding that this is a normal, neurological response is helpful. Parties sometimes become overwhelmed with the uncertainty and cannot continue meaningfully with the negotiations. Antidotes to this state of "overwhelm" can be

as simple as taking a break for a brief walk or a cup of coffee, just to re-ground the person. Attorneys can provide extra support, as well, by merely listening to concerns, simplifying choices and reminding the client of negotiation plans.

Uncertainty is something the brain eschews. In this sense, a certain settlement can be a balm that soothes the pain of litigation's lack of certainty. This can be helpful when your client has achieved a good settlement number, but it can also be dangerous if the other side is playing hardball.

Autonomy: For parties mired in the litigation process, it is difficult to exercise autonomy, since most decisions are out of the control of the parties—with the notable exception of mediation. It is also helpful to consider the parties' autonomy in the circumstances leading to the litigation (e.g., the worker trapped in his job, the employer who had to implement a reduction in force). It is easy for both sides to feel a lack of autonomy as they consider what led to their dispute. The litigation process rarely makes things better.

Self-determination is a key principle of mediation, yet parties often feel unheard and frustrated. Attorneys may also experience issues relating to autonomy that impact the mediation, including a client's willful exercise of autonomy that seems counter to the client's best interests (e.g., a corporate defendant not taking counsel's settlement advice or a plaintiff rejecting advice to focus on her wage and hour claim instead of a legally weaker discrimination claim). Resistance to reasonable advice, norms or interests, can signal a need for autonomy.

The most effective remedy is typically listening carefully and verifying your client's needs and goals before moving forward. Since parties always choose their attorneys, they typically want the advice of their attorneys. If the client is still resisting important advice, another option is to generate more options and allow space for the party to utilize counsel as an advisor. The brain can then welcome the advice received as helpful, as opposed to fighting against the advice because it is perceived as someone telling them what to do, which takes away their autonomy and is therefore a threat.

Another important note: The brain interprets threats more strongly than rewards, so telling someone they must change their opinion is resisted more fiercely than offering incentives to change their point of view. My best indicator of a need for autonomy is when I find myself arguing with a party (or counsel) in

mediation caucus over an issue of case analysis. As soon as I notice this, I realize I probably have missed something of importance and the party's (or attorney's) sense of autonomy is pushing back. Becoming curious and listening completely is a great antidote for encroaching on someone's autonomy. The interesting and important thing about this approach is that once autonomy is restored, the person is better able to receive difficult information.

Relatedness: This has to do with the brain's constant evaluation of people as "friend" or "foe." The brain is always trying to ascertain the level of desired relatedness—from highly trusted friend to threatening foe. In litigation, the parties have largely determined that their opponent is an untrustworthy and threatening foe. It is not surprising that this protective neurological function would be a stumbling block in mediation, as each side tries to help the other understand its perspective and/or case analysis.

I think of "relatedness" as "trust." When there is a lack of trust, it is even more important to listen with greater discernment to the information being transmitted. Be sure to ask, "Am I discounting the information because I dislike the person giving me the information?" (Sometimes it is equally important to ask, "Am I being overly trusting of the information being transmitted by the person for whom I feel an affinity?") Sometimes our trust or distrust is warranted, but it is always worth making a closer examination of the scrutiny under which we put all information.

Mediators fill the trust gap between parties to a mediation by their very presence. Keep this in mind as you formulate offers—sometimes it is helpful for your mediator to suggest an approach to moving the negotiation forward simply to avoid the negative attribution the other side would attach to a proposal from an opponent. Information is "sanitized" by the mediator for unbiased consideration by the other side. Mediators may engage in case analysis, discuss strengths and weaknesses of the case or explore interests, and these activities may also build trust, but it is always prudent to keep your brain's automatic tendencies in mind as you listen to information.

Fairness: The fact that fairness is a neurological drive is worthy of consideration during a mediation. (I keep this deep-seated drive in mind by remembering the Tedx Talk by Dr. Frans de Waal with a pair of monkeys, available on (https://www.youtube.com/watch?v=meiU6TxysCg) YouTube. One monkey protests after receiving different food—a cucumber versus a grape—in exchange for the same task

performed by the other monkey. Humans are more covert in their frustration when not treated fairly, but the monkey shows what it feels like to be treated unfairly.^v You will love the visual, so check it out if you have not seen it!)

The principle of fairness is vital to the success of any mediation. Since mediation is voluntary, there must be a basic sense of fairness under the circumstances for the parties to agree to settle instead of going to trial. The opportunity the concept of fairness brings about can be seen in making reciprocal offers. Interestingly, offers of differing monetary value can still be experienced as fair exchanges, particularly when presented with tradeoffs tailored to each side's values and when presented utilizing the lens of general fairness. Fairness, after all, is in the eye of the beholder.

For example, in a discrimination case I mediated, the parties could not bridge a $70,000 gap between offer and demand with money alone; however, the case settled after plaintiff agreed to reduce her settlement demand in exchange for a two-hour meeting with defendant's HR Department (including a clear understanding that no action would be required as a result of the meeting, but that the HR Department would listen in good faith to plaintiff's recommendations for improvement of defendant's policies). Because plaintiff valued changing defendant's work environment for future workers and because she came to believe that defendant's representatives were genuinely open to improving the defendant's policies, a lower number from defendant, coupled with the meeting, was seen by both sides as a fair settlement.

In a New Yorker article, Maria Konnikova explored research on innate and learned fairness, including the differences between advantageous inequities and disadvantageous inequities, concluding that "Our ideas about fairness are relativistic, rather than absolute."^{vi} She goes on to note that "[i]n many ways, we approach fairness as a form of social signaling. People…use fairness to negotiate their place in a social hierarchy."^{vii} This is something I have observed in mediation, as well, and is just another element that sometimes can be tapped to find a mediated agreement both sides consider to be fair, when combined with their risk analyses and other interests.

In an intellectual property case I mediated, I commented in caucus to a defendant manufacturer that I was surprised he (the owner) was defending the trademark infringement case we were mediating with such vigor, since the product at issue was such a small part of his overall business, in contrast to the

plaintiff, whose entire business was based on the product. The owner paused and then agreed with me that the product was unimportant to his business. This shift in his perspective helped bring the case to resolution and is an example of the use of fairness discussed by Konnikova to negotiate one's place in a social hierarchy.

Both sides must come to an agreement that they consider fair in consideration of the different valuations of case strength and the different importance they place on other interests. However, contemplating our deep-seated drive for fairness provides many additional opportunities for advantage during the negotiations. Identifying these issues and helping both sides find the equilibrium that represents fairness creates an optimal case value for both sides.

Attorneys Who Remember SCARF in Mediation Can Optimize Results

The SCARF model does not eliminate the need for full case analysis and other principles of negotiation, such as making sure decision-makers are at the table, a well-considered first offer and demand, management of client expectations, a negotiating plan, etc. However, listening for SCARF themes to reduce perceived threats and enhance perceived rewards can add significant value to one side or the other, and it usually will add value for both sides.

As a model, SCARF describes basic human drives that can be understood and anticipated, particularly when considered in the context of the mediation of a litigated case. Each side desires status, which may include the ability to exercise power or importance socially, economically, through litigation or altruistically. The desire for certainty can be a powerful driver of behavior because we all want a secure and certain future. The need for autonomy often can be felt as an impediment to progress until self-determination is restored. Trust is at the heart of the "friend" or "foe" calculation of relatedness.

Even when trust is at a minimum between the parties, attorneys can help their clients immensely by screening information more critically and using a mediator to neutralize negotiation moves. Fairness in mediation is a tremendously powerful concept because it is relative in nature, allowing tradeoffs that hold different value for each side.

Looking for and understanding the SCARF drives within your opponent, your client and yourself would be consistent with Sun Tzu's thoughtful approach to battle. It also produces great settlement results.

<hr>ⁱ Griffith, Samuel B., translator. The Art of War, Sun Tzu. Oxford University Press, 77 (1963).

ⁱⁱ Id. at 84.

ⁱⁱⁱ David Rock developed the SCARF model in 2008 and has used its principles largely in the workplace to help people work more effectively together.

^{iv} Rock, David, "Managing with the Brain in Mind," pwc Strategy&Business (originally published by Booz & Company), Issue 56, Autumn 2009. See also, Rock, David, "SCARF: A brain-based model for collaborating with and influencing others," a paper originally published in 2008 in Issue #1 of the NeuroLeadership Journal (co-founded by Rock).

^v Brosnan, Sarah F. and de Waal, Frans. Monkeys Reject Unequal Pay. Nature, 425, 297-299 (2003). Demonstration of the experiment with capuchin monkeys: (https://www.youtube.com/watch?v=meiU6TxysCg) https://www.youtube.com/watch?v=meiU6TxysCg.

^{vi} Konnikova, Maria, "How We Learn Fairness." The New Yorker, 7 Jan 2016.

^{vii} Ibid.

The Magic of Mediation

JUL 02, 2019

BY RANDY WALLACE

Introduction

I cannot count how many times I have heard these four words uttered about mediation. No matter how hard, complex, emotionally charged, anxiety producing, or chaotic, the magic of mediation seems to find a way for intelligent people to make sensible decisions to solve their problems.

In other words, mediation resolves cases that people think will never settle. For years I wondered what produces this magic or perhaps what factors increase the likelihood of producing it. I discovered five guiding principles, each linked to the others. I made this discovery while hiking the Pacific Crest Trail in 2017 and reflecting over the hundreds of mediations I participated in as a lawyer and a mediator. I offer my observations for your consideration.

1. Mindset of the Mediator

A mediator must believe down to the marrow of his or her bones that all cases can and will resolve. He or she must have an unwavering commitment to this belief. Unless the parties tell the mediator not to do any more work towards settlement, "the" mindset is "it ain't over till it's over."

2. Objective of the Lawyer and Client

Mediation participants must want settlement and have no doubts that settlement is their objective. What is in doubt are the terms and conditions of that settlement. That's the job of the mediator to find those terms and conditions and put them on the piece of paper at the end of the day with signatures attached. How a mediator does this is part of the magic, which segues to preparation.

3. Preparation

In the legal profession, the mantra is preparation…preparation…preparation. A mediator must be the most prepared person in the rooms as to every aspect of the case that affects resolution. How does this happen? The parties and the lawyers can make it so if the mediator asks the right questions about the issues and poses those questions in an appropriate way. The answers to those questions will tell the mediator the necessary information that leads to the intersection points for resolution. But it will not happen without Principles 1 and 2.

4. Impasse: Opportunity v. Obstacle - Double O

Every mediation reaches impasse. The parties are firmly committed to their positions. Each has what he or she believes are appropriate, necessary, and correct reasons for not negotiating any further. Each believes his or her position is the most righteous one. Unless the other side gives in and makes a move, they are done. These situations often create the most conflict, anxiety, and emotional turmoil. The level of discomfort can be palpable. Good mediators use this zone of discomfort to change an obstacle to an opportunity.

5. Listen-Observe-Learn-LOL

A mediator does not learn when his or her mouth is open. He or she cannot hear and assimilate the content and context of the words or observe body language if the mediator does most of the talking. Learning does not take place without listening and observing and the more learning that occurs, the better the mediator can listen and observe. This process is a circle with no beginning or ending. Each time the circle is circumnavigated, the terms and conditions for resolution become clearer.

Conclusion

These principles are what I learned in the past 40 years in the legal business and my reflections while hiking alone over many miles on the PCT. I offer readers the following suggestion: In your next mediation, keep a watchful eye open to these five principles, and perhaps, shazaam, the curtain hiding the magic will open.

This article is reprinted with minor changes with the kind permission of Plaintiff magazine.

Leveraging Inter Vivos Trust Petitions to Avoid Post-Death Trust Contests

JUL 02, 2019

BY ANDREW R. VERRIERE

Clients frequently demand "bulletproof" trusts from their estate planning attorneys. Concerns about contests based on lack of capacity, undue influence, or even claims that a family member procured the trust through financial elder abuse weigh on our clients' minds. Unequal distributions or family members' feelings of entitlement to certain property amplify these concerns.

The revisions to Probate Code section 21311 limit the effectiveness of no contest clauses, leaving estate planning attorneys with few tools to assure protection of a trust or amendment. There remains, however, an infrequently used avenue within the Probate Code to leverage res judicata and collateral estoppel to preclude contests: inter vivos petitions to confirm the validity of a trust.

Probate Code Section 17200

Among its many provisions, Probate Code section 17200 permits a trustee or beneficiary to petition the court "to determine the existence of the trust." (Prob. Code, § 17200, subd. (a).) Similarly, they may petition to determine "the existence or nonexistence of any immunity, power, privilege, duty, or right," "the validity of a trust provision," and to "ascertain[ ] beneficiaries and determin[e] to whom property shall pass … upon final or partial termination of the trust." (Prob. Code, § 17200, subd. (b)(2)-(4).)

Upon executing a trust or amendment, the settlor may petition the court to determine the existence of the trust and confirm its validity under Probate Code section 17200. Assuming the settlor is the initial

trustee or beneficiary, he or she has standing to bring the petition. In the event the settlor is not a trustee or beneficiary, the settlor may still bring the petition if the settlor holds the power to revoke the trust. (Prob. Code, § 15800.) In so doing, the settlor would provide notice not only to all trustees and beneficiaries, but also to any persons the settlor wishes to preclude from later challenging the validity of the trust.

While uncommon, case law supports the use of such petitions. In Conservatorship of Irvine (1995) 40 Cal.App.4th 1334, the court held that Probate Code section 17200 "'specifically authorizes' the use of petitions for instructions regarding the validity of trust amendments." (Id. at p. 1342.) The court considered the terms of various trust amendments during the lifetime of the settlor, and passed upon them. It rejected the settlors' children's argument that it "had no authority under section 17200 to invalidate a trust agreement or amendment while the trustor is still alive." (Id. at p. 1341.)

Similarly, in the much-maligned Drake v. Pinkham (2013) 217 Cal.App.4th 400, the Court of Appeal held not only that parties may bring petitions regarding the validity of trusts during the settlor's lifetime, but that under certain circumstances they must do so or be barred by the doctrine of laches. (Id. at p. 407.)

Res Judicata and Collateral Estoppel Bar Post-Death Litigation

The goal of these pre-death petitions is to protect a trust instrument from subsequent challenge. The doctrines of res judicata and collateral estoppel provide this protection.

"The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction." (Bernhard v. Bank of America (1942) 19 Cal.2d 807, 810-11.) "The doctrine [of res judicata] is applicable in probate proceedings." (Lazzarone v. Bank of Am. (1986) 181 Cal.App.3d 581, 591, citing Estate of Charters (1956) 46 Cal.2d 227, 234.) "In its primary aspect the doctrine of res judicata [or 'claim preclusion'] operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. … The secondary aspect is 'collateral estoppel' or 'issue preclusion,' which does not bar a second action but 'precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding.'" (Murphy v. Murphy (2008) 164 Cal.App.4th 376,

398.)

"Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." (Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 897.) "Collateral estoppel is an equitable concept based on fundamental principles of fairness. Issue preclusion prevents relitigation of issues argued and decided in prior proceedings. The threshold requirements for issue preclusion are: (1) the issue is identical to that decided in the former proceeding, (2) the issue was actually litigated in the former proceeding, (3) the issue was necessarily decided in the former proceeding, (4) the decision in the former proceeding is final and on the merits, and (5) preclusion is sought against a person who was a party or in privity with a party to the former proceeding." (Murphy v. Murphy, supra, 164 Cal.App.4th at pp. 398-99.)

Importantly, such an order would not constitute res judicata or collateral estoppel as to the validity of any subsequent amendment.

Practical Considerations

An inter vivos petition to confirm a trust's validity does not come without some significant practical considerations. Most notably, by filing the petition and providing notice to beneficiaries, it potentially exposes the client to protracted, unpleasant and potentially wasteful litigation over an instrument that they may later choose to amend. Even if the client chooses to later dismiss the petition, it may prompt family members to pursue a conservatorship or a trust contest of their own under Drake v. Pinkham, supra, 217 Cal.App.4th 400.

On the other hand, by involving the settlor in the petition, it may dissuade parties who might otherwise contest the trust from getting involved. Their involvement could provide a settlor persuasive rationale for further reduction of their gift and raises the difficult prospect of arguing against the wishes of a settlor who is able to appear in court. Moreover, allowing the settlor to explain his or her rationale for the terms of the trust eliminates the largest question looming over most post-death trust contests: what the decedent wanted and why.

While these petitions can potentially serve as powerful tools to protect the integrity of a trust instrument, they should only be used after fully counseling the client on all of the ramifications.

Diversity in Mediation

JUL 02, 2019

BY MARY MCLAIN, LLM, JD

Mediation plays a critical role in our justice system and faces a difficult, yet glaring, challenge with respect to a lack of diversity. Organizations, including but not limited to the American Bar Association and the United Nations, strongly believe that enhancing diversity in dispute resolution is integral to increasing the sustainability and relevance of mediation and arbitration.
Last year, in an effort to increase diversity in dispute resolution, the American Bar Association adopted Resolution 105, which states:<blockquote>RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution services to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities ("diverse neutrals") and to encourage the selection of diverse neutrals; and

RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.</blockquote>

Resolution 105 strongly encourages providers and clients of ADR professionals to consider diversity in their selection process. It identifies the problem as two-fold:

1) A "roster issue" of underrepresentation on ADR providers' panels; and
2) A "selection issue" where diverse neutrals actually on such panels are not selected.

As of December 2016, minorities represented 16% of law firm associates and partners and women 35%. Research shows that diversity within ADR significantly lags the legal profession as a whole, leading ADR to be described "as the least diverse corner of the profession."¹

The Report to the ABA delegates on Resolution 105 enumerates various factors that contribute to this bias, from the network-based and confidential nature of the profession, to the lack of transparency of the selection process and lack of public awareness of diversity issues in the field. Please

(https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf) read the full report.

Women's involvement in mediation was a theme that reverberated throughout an open debate of the UN Security Council in August, 2018. Over 70 delegates called upon the United Nations to ensure that women are involved meaningfully and equally as mediators, leaders and decision-makers, from national to local levels.

The United Nations noted that women comprised just two percent of mediators in major peace processes between 1990 and 2017. Yet women's involvement before, during and after negotiations demonstrate successful contributions to lasting agreements. One of several examples mentioned was the critical work of the Northern Ireland Women's Coalition in achieving the Good Friday Agreement, which celebrates its twentieth anniversary this year.

The number of diverse neutrals utilized, nationally and internationally, is astonishingly low. And yet, over the last ten years, there has been a steady increase in awareness of mediation as well as a rise in alternative dispute resolution programs and certifications. As a result, a new generation of mediators, many with ADR-related undergraduate degrees, is emerging on the scene. These mediators bring unique experience, diversity and tremendous untapped potential to the profession.

Many ADR organizations recognize the benefits of diversity and inclusivity and promote inclusion riders in contracts. Others have created pledges for action to encourage equal opportunity for women in arbitration. See, for example, the group Equal Representation in Arbitration's (http://www.arbitrationpledge.com/) 10 Pledge Resolutions for 2019.

I ask MCBA to create a committee to establish a diversity pledge for our membership. This would be a solid initial action to acknowledge the underrepresentation of minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities ("diverse neutrals") in alternative dispute resolution and would align with ABA Resolution 105. I recall about twenty years ago being part of the committee that drafted the Code of Civility adopted by MCBA. Let's demonstrate our support for best practices of our legal profession by promoting opportunities for all.

<hr>^{¹Ben Hancock, ADR Business Wakes Up to Glaring Deficit in Diversity, Law 360 (October 5, 2016) at p. 4}

MEMBER PROFILE

Daniel Rossi

JUL 01, 2019

BY SCOTT BUELL

The Marin Lawyer recently sat down with Dan Rossi, the new co-chair of MCBA's Barristers section, at his office in San Rafael. Also present was Dan's friendly black Lab, Zita.

What is your practice area?

I'm a plaintiff's personal injury attorney exclusively. That's pretty much what I do, day in and day out, here at Martino & Rossi Law Firm along with my wife, Kelly Martino. We opened the firm in 2017.

Why did you decide to become a lawyer?

It came down to the fact that I always felt compelled, even as a young kid, to defend the little guy, the person who was being pushed around. A legal education helped me become a plaintiff's attorney, which was a natural fit to help the little guy. Almost everything we do at Martino & Rossi is geared toward helping to even the playing field for these individuals who find themselves going up against powerful insurance companies. I think that's the primary reason I ended up in law school rather than some other graduate program.

Why did you choose to live in Marin?

I had a job interview at a P.I. firm here in San Rafael and after the interview I went for a hike and ended up near Muir Woods and I just fell in love with the whole amazing, preserved, open-space here and I thought, "Why not live here?" If I'm going to work up here, I don't want to commute to a beautiful place and then go home to somewhere that is congested and over-populated, so it was an easy decision to make.

Tell us about your family.

Our family continues to grow. My wife, Kelly, and I have twin boys, Enzo and Luca, who are almost two years old; and we are now expecting our third child, our first daughter, in December. I suppose, of course, our original daughter is Zita, our black Lab, who has been around since we graduated from law school.

What do you love to do when you're not busy practicing law?

When I'm not busy practicing law, which seems to be all-consuming these days since when you have your own practice you never seem to really get much time off, it's my routine almost every morning to go to the gym at 5:30 a.m. before I start my workday. I used to run a lot more, and I try to get out on the trails occasionally, but it is kind of hard with the kids. One of the things I've started doing more of is playing soccer again. I used to really enjoy playing in high school and Marin has this great thing called the Marin Co-Ed Soccer League. It's not hyper-competitive and there are age-restrictions (women of all ages and men thirty and over) so the games are more friendly and collegial. There are no standings and we don't officially keep score, although it seems everybody still knows who the better teams are. It's been fun and entertaining, and I can play on the weekends without compromising quality time with the family.

If you could pursue any career other than law what would it be and why?

I think I would become a pilot. I've recently started reading up about what is required to take the pilot's exam. I don't know when I would get the time to log in all the required flight hours. That would likely be the biggest challenge for me, but I just really enjoy flying or being up in the air. I find it to be a very freeing and liberating experience, especially when you're in one of those small prop planes and you're literally moving away from everything and you're just up there by yourself, although obviously with a pilot at this point, but it's something that is very relaxing for me.

Why did you join the Marin County Bar Association?

I was convinced by colleagues, most of whom I know from my involvement in ALMA (Association of

Latino Marin Attorneys) and they were all pushing for it. I was led to believe early in my career by some attorneys that the Bar Association of San Francisco (BASF) was the be-all and end-all for Bay Area practitioners, but I've found the Marin County Bar Association has a lot more to offer, especially if you're living in Marin. I feel like joining has been a good experience. When you work here in Marin, you really get to know your colleagues, who are the attorneys you're mostly dealing with day in and day out. I found I didn't have the same close relationships in the BASF that I do here. I spend time with more colleagues from the MCBA than any other professional association. That's also led to me getting involved now in the leadership in the Barristers section. A lot of attorneys I respect as peers in the community are in some way active in the MCBA and I wanted to be more active and helpful to keep this organization moving forward.

If you could pick a single highlight of your career what would it be?

Starting my own practice was a watershed moment. I had enjoyed many feel-good moments working at several P.I. firms—small victories and overcoming legal obstacles. But no one really tells you when you're learning to practice law what it takes to run a law firm. There's a lot involved. Everyone says, almost passé, that sometimes you must put on your attorney hat or other times you have to put on your business-owner hat. But it's so much more than simply putting on a hat. Sometimes it seems like it's a full-time job just managing the business and on top of that you need to find the time to do the legal work. It's been a gratifying learning experience. I think for a lot of attorneys it can be very comfortable staying in certain practices but once you make the decision to do it and you overcome the fear factor of "Oh my goodness, is this going to work?" and then it actually starts working, it is so satisfying. Opening our practice is one of the biggest feats we've accomplished. It was surely a great decision for Kelly and me.

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Professor Rory Little on the U.S. Supreme Court's Recent Term

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BY SCOTT BUELL

Yet another capacity crowd at the June 26th MCBA general membership meeting heard Professor Rory Little offer a captivating summary of the U.S Supreme Court's 2018-2019 term. The Court heard 69 cases, ten more than last term, but still well below the 150 or more typical of the 1980s.

Justice Kavanaugh's first term since his controversial nomination hearing (which caused him to miss the first few days of oral argument) distinguished the year, which also meant the term was the first that both of President Trump's appointees to the Court sat together. Professor Little pointed out that Justice Kavanaugh and Justice Gorsuch did not always vote the same way. For example, in criminal cases Kavanaugh voted in a "conservative, mainstream way…almost a lockstep vote for the institutional criminal justice system as we have it today." On the other hand, in four cases Gorsuch ruled for a criminal defendant (notably none of them death penalty cases), which "may be based on some sort of channeling the views of Scalia, whose seat he took, who had a very individualistic, libertarian viewpoint in certain criminal contexts, wherein the rights of the individual should take precedence over the rights of the state."

In the "Blandensburg Cross" civil case (a First Amendment establishment case), Kavanaugh expressed sympathy with a plaintiff offended by a cross on public land, whereas Gorsuch opined that offended people should not have standing to challenge the cross in the first place, although both voted with the majority that the cross could stay. Time, Professor Little stressed, will determine whether these differences in voting will develop into a pattern in future sessions.

Professor Little offered a speculative "seating position" theory that since the two new justices sit

next to Justices Kagan and Sotomayor, having to actually interact with justices with differing views may have some softening effect on them, although the deep friendship between Justices Scalia and Ginsburg didn't appear to change Justice Scalia's votes. Professor Little put forward the possibility that Justice Kagan is "playing a long game" to build coalitions by occasionally siding with the more conservative justices in cases where her vote would not change the outcome of the case.

Also noteworthy to Professor Little was the fact that in the Court's nineteen 5-4 decisions, nine different combinations of justices made up the majority. Those majorities and minorities were only rarely split along so-called conservative/liberal ideological lines. Perhaps also surprising was that the majority in nine of the nineteen decisions could be said to adopt a liberal ideological viewpoint.

Professor Little noted there was speculation that one or more of the Court's three oldest justices (Justice Ginsburg at age 86, Justice Breyer at age 80, and Justice Thomas at age 71) would retire. While Professor Little felt strongly that Justice Breyer and Justice Ginsburg would not retire, he predicted Justice Thomas may, based upon some bitterness in his opinions this session. Professor Little humorously noted that in light of his prediction in last year's outline that Justice Kennedy would definitely not retire—but by noon of the day of last year's membership luncheon, Kennedy had indeed announced his retirement—that Justice Thomas would almost certainly be back for next year's session. Should any justice retire before the 2020 election, it would give President Trump the likelihood of adding a third justice, making the Court, according to Professor Little, into the Trump Supreme Court.

One of the biggest issues this term was the role of stare decisis and the criteria for when a precedent should be overruled. Of six cases in which the Court had to decide whether to overrule existing precedent, the Court explicitly overruled two, declined to overrule two others, and almost overruled the remaining two. In her dissent in one of those cases (Knick v. Township of Scott, Pennsylvania), Justice Kagan directly called out the majority for voting to overturn existing precedent where they, "smashe[d] a hundred-plus years of legal rulings to smithereens," and she commented that, "we may as well not have principles about precedent at all." Professor Little noted that stare decisis is a doctrine in flux and this debate is a preamble to the expected debate in upcoming terms whether Roe v. Wade should be overturned.

At the time of Professor Little's presentation, the Court had announced decisions in all but three of the cases it had heard, and those remaining decisions were due to be released the following day. Of the three, two were major cases, one involving gerrymandering and the other whether a citizenship question could be added to the 2020 census. The census case was such a mess, Professor Little predicted, that the Court would likely remand it, which would probably prevent the citizenship question from being added to the 2020 census. As to the gerrymandering case, Professor Little declined to predict what the Court would do, but if the Court voted along so-called conservative/liberal ideological lines, it would likely issue a 5-4 decision to allow the gerrymandering to continue. Professor Little turned out to be prophetic as to both decisions. The Court remanded the census case, likely preventing the citizenship question from being included on the 2020 census. Although a tweet from President Trump reversed the Justice Department's earlier capitulation in the case, the Department is struggling to advance legitimate arguments for including the question. Even whether the legal team remains the same has become a source of contention. Meanwhile, printing of forms without the question has already begun. The Court decided the gerrymandering case along apparently partisan lines, holding that it was a political question to be handled by the legislative branch, thereby unleashing potentially extreme partisan gerrymandering in any state where one party controls the entire mapping process.

In an email exchange with Professor Little the day after these last two decisions were announced, he made the following comments:<blockquote>The census and gerrymandering are obviously two hugely impactful decisions.

The gerrymandering case thankfully does not affect California, because we have had a non-partisan redistricting Commission for twenty years now. But with the federal courts now unable to patrol this topic in the states, we can expect to see even more polarized political gamesmanship in the many states that have no similar process.

If the citizenship question is ultimately placed on the census form, it will undoubtedly hurt California, both financially and in allocation of members of Congress. This is because such issues are supposed to be based on the number of "persons" residing in a state, and the citizenship question is predicted to cause significant undercounting and those with questionable citizenship status or such family members will predictably just decline to fill out the census forms.

But thankfully, the Chief Justice remanded the case for further proceedings, due to the "pretext[ual] nature of the government's explanations." We will see whether, and how, the two or three district courts handling the issues will now proceed, with the deadline for printing the forms looming in July.

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If you were unable to attend Professor Little's presentation, you can learn more about the Supreme Court's 2018-2019 term (and some cases granted for the upcoming term as well) from the outline Professor Little prepared and, like last year, has kindly allowed us to post as a pdf for you to download (https://marinbar.org/docs/mcle/mcba-professor-little-scotus-update-2019-1-105-4550.pdf) here. Even better, there are hyperlinks in this year's outline that will take you to each listed decision.