Bill: Welcome to the Executorium Podcast. I'm your host, Bill Gross, at Bill Gross Probate, where we interview services and vendors that can help executives be more effective as they handle the task of managing an estate – a trustee estate, probate estate, whatever it might be.

One of the common themes that people find when they get involved, particularly when there's a lot of money involved or a lot of assets involved, is conflict. And you really have two ways.

One is you go to court, which is kind of like shooting nuclear weapons at each other until somebody dies and you destroy the land they're on. The other option or alternative is mediation.

I'm really excited to have today a practicing attorney who also is a mediator, a practicing mediator, Bracha Etengoff. Thank you so much for joining us again, Bracha.

Bracha: Thank you for having me, Bill. And I am happy at any time to talk about mediation, so I'm real excited to be here.

Bill: So as I sit back as a real estate broker in the probate space and trust litigation space, I just see oftentimes it feels like a World War I battle, where there's trenches and they're just shooting each other and there's all kinds of bodies and blood everywhere, when they go to court. And mediation is an opportunity to avoid it.

Talk about the alternative or the possibilities that mediation presents to an estate that's in some sort of a conflict.

Bracha: Ideally, we can get there before people dig into the trenches. Once they've dug into those trenches, it gets harder, but we can still settle conflicts even after they've gone to court.

But let's talk about the ideal situation where we see there's this dispute brewing. And people are at the courthouse steps. But people don't want to sue family members usually.

And they don't want their privacy invaded by those court proceedings.

And it's really hard to sit across from anyone at a Christmas dinner or a Hanukkah dinner while you are suing them.

Not to mention the expense – like you said, it just drains away the estate assets.

So mediation is a really great alternative. Mediation involves a neutral facilitator who comes in and tries to help the parties reach agreement. Unlike a judge or even an arbitrator, we don't impose our decisions on the parties.

So they have a lot of agency to craft solutions that are really the best for them, and that they can say, “This is really what we decided on.”

Which then have a better chance of actually working, right? Because if you and I are fighting and we decide together with someone's help, this is how we're going to resolve it, often that will prevent further disputes.

If some other third party came in and said, “Here's what you're going to do” – maybe we'll keep fighting, right?

Bill: You know, as a real estate broker, I often come in, in the middle of a conflict that hasn't set the trenches yet. And I'll call one party or the other – somebody’s in charge, they want to sell the house – or the other party, for whatever reason, I'm talking to them.

And the attorney – sometimes I find from the beginning, is already attacking me where I have no dog in the hunt. Just somebody called me who wants to sell a house – you know, I'm glad to help them.

Now I think I'm good at walking through that. But what I find is that oftentimes attorneys, once they're hired by a client, feel like they're already fighting for them – as opposed to maybe just listening and assessing what the best solution is. Maybe the best solution is *not* fighting.

It's kind of like – do you want to hire a bodyguard who's armed?

Or maybe you should hire somebody who in those circumstances can help you assess: if you need a bodyguard, hire one, if you don't though – here’s a way out.

And you must make those same phone calls – those same attorneys that I talked to who are just guns are blazing from phone call one. How do you get them to just stop for a second and say, “Let's assess this before we assume that somebody's right or wrong, or there's only one solution.”

Bracha: You've probably found that in some of the cases it's bluster, and attorneys feel like if they don't come in with the guns blazing, the other party is going to think they're weak. But when it comes down to it, they're actually on the settlement train and they want to do what's best for their clients.

There are unfortunately the other types.

*Sometimes I see requests for an attorney, “Oh, I need a pit bull.” Whenever I see animals involved, I say “Let's take a step back and be human beings. To each other and for our clients.”*

And you've really hit on a point because we have a duty to be zealous advocates for our clients. But what does that mean? Do we zealously advocate into the dust for only our clients who get the best share of the pie?

Or maybe we have a client who says, “I want a fair solution for everyone. I want this wrapped up quickly. What can you do for me?” Then we're supposed to be advocating for those interests.

And as somebody who's a probate professional, you can raise this. I have encountered many attorneys who are not aware that mediation can be used in the estate space. So if you brought it up, I'd be curious to see what reactions you get.

Bill: In Los Angeles there is a free program where attorneys and retired judges volunteer time – a certain amount, obviously limited in what they're going to do. And like everything else in life, I want to say you get what you pay for because you're getting an attorney's time and not paying much for it, but you also aren't going to get much, right?

And the question I always ask is – is there a track record of success? Are you going to a mediator who historically has been able to bring people together, or are you going to a mediator who just grinds through the cases, and it's just another step in the litigation process?

And so how do you share your success and your skills without bragging? I want to hire you to solve the problem. So how do you get across to prospective attorneys who come to you or executors that you have a track record, or you have the skills to help them get the job done that they want?

Bracha: I suppose that without too many identifying details, I can talk about a case that I have been able to settle previously, and let people kind of draw the comparisons and analogies to themselves, for themselves.

I think also when you speak to someone and they're knowledgeable and effective – it could be bluster, but sometimes the truth of it does come across. As attorneys, we have become very good at sussing out, “Is this person just kind of selling this or, or do they really have something may be a track record of success?”

I can't put names of cases I've settled on my website. Confidentiality (and the way I want to treat my clients anyway) preclude me from doing that. But I can certainly talk about cases with some identifying details changed, and people get the sense that she's not just making up this very detailed story.

Bill: Right, I'm kind of the same way. I've had people ask me sometimes, “Can I get references of some clients you sold houses for?”

And I said, “To be honest I’d rather not bother them. If you don't get that I'm good for you by now, that's okay, I have other phone calls to make about the business.” I'm not disrespectful – I would like to help you – but what I don't want to do is bother my past clients with phone calls about my business. Nobody signed up for that.

And again, I think it comes across, if you talk about their case and the problem and you do it effectively, they're gonna be interested.

And so I think the first step is just to talk to the parties and get a sense. So let's say that an executor's interested in mediation. Of course they're on one side – there’s another side.

Or they have an attorney and their sense is the attorneys are just battling and running up the fee, and they want to find out about the opportunity for mediation.

Do you do consults with executives or attorneys before you take on a case?

Bracha: I do. The first person who calls me, I'll usually speak with for about half an hour because people need to be briefed. What is this mediation business?

It's different than what my lawyer is doing for me – really getting the point across that I don't represent any party as a mediator. So it's very different than an attorney, actually.

And we have a challenge. We have a natural bias towards, “Let's advocate for someone.” And we have to get out of that headspace as mediators.

So when somebody comes to me, I explain basically what mediation is and what the process looks like. People generally ask for some sense of what it might cost, and I talk to them about the factors.

And at that point, they really need to call whoever it is that needs to get on board with this idea on the other side, and find out if they'd consider mediation.

And occasionally somebody comes to me and they've done that step already. And I can just straight off meet with both parties, and have a very productive and substantial first session.

More often I get a call like, “I heard about this” or “I saw it on your website – and what exactly does that even mean?”

And you've identified some of the challenges right there. I also practice prenup mediation, and like estate mediation a lot of people don't know that that's an option. What you've identified as being in the adversarial mindset and getting all the best for their clients – sometimes people walk into prenups with that same mindset.

But really, this is a time when people love each other. And sometimes the spouse with more means wants to make sure the other person is taken care of – not give them as little as possible to still get that person to marry them. So it's actually a prime candidate for mediation.

And then we have what's called review attorneys. Each party gets an attorney to review the ultimate prenup draft.

But besides that, I do spend a lot of time in the estate and elder mediation space. Estate mediation has its challenges all of its own – because siblings, right? Often we've got siblings inheriting, and siblings kind of do not have to resolve their problems.

So it's true that some people stay married and don't resolve anything, but often things are pushed to a head. Because maybe they're raising kids together, or they're just spending so much time with each other.

And siblings may have these deep-seated issues – and believe me, I see them come out in mediation. But you're able to just maybe spend some holidays all at mom's house, and then everyone goes home, and maybe you do it again next year.

Or you saw each other at the funeral, but now what?

I think that because it doesn't have to be such a close relationship, that creates challenges all of its own, when you need to do something so personal and reach agreement on splitting up assets.

Bill: Yeah, I think generally speaking, people feel the need to maintain a relationship with parents. And I do myself – I have two siblings, one of each. I feel the need to continue the relationship with them at all costs, and work through whatever it is.

But many people don't. It's like – that’s just my brother. And we didn't get along when we were kids.

 Well, that's a choice. That's not my choice – I think that's a mistake. And obviously in any mediation when you go into it with “this relationship is not of value to me,” you're going to be a lot harder to work with than if you appreciate the relationship. Then then you have to make some sacrifice to keep the relationship, and there's value there that you have to work towards, and so let's talk.

What do you think is the biggest mistake that leads to conflict that you as a mediator help unwind? Like what is it that you bring?

Bracha: In a recent estate mediation, I had two siblings, a brother and a sister. And the sister brought up an issue in a session and said, “I feel safe bringing this up because Bracha is here.”

And I know everyone wants to know settlement stats – but to me, that's actually as meaningful, that's very high praise.

That's quite as important to me as: Did the case actually get settled? Because in order to even get there, people have to be somewhat free to open up.

Bill: In my experience, when I'll have somebody like yelling at me or very upset, I say “Do you mind if either we take this conversation to text or email, so we have a record? Or can I record this?

Because what I don't want is a lack of accountability. I find that when people are arguing with each other, they can say whatever they want, because it kind of disappears in the ether. But when the third person's in the room, they know now they're accountable for what they say to some degree. You're paying attention.

And I think sometimes, rather than record the conversation, bring a third party in. Bring some accountability to one's positions, and one's logic, and one's decisions. And I think that's why I think one of the biggest things a mediator does is to add some accountability to the process.

Bracha: Oh, a hundred percent! I started off my mediation career in foreclosure mediation during the housing crisis, way back in ‘08. Really half of the purpose was – let’s set a schedule.

So I was mediating for the New Jersey courts. And as I'm sure you know, being in this space, people were sending documents that banks requested, and banks didn't get it and or banks didn't process it in time. And by the time the bank processed it, they said, oh, no, no, no. We need your most *recent* paycheck. That paycheck is too old. But when you sent the paycheck again to the bank, it's again too old.

So a large portion of it is, yes, by the next mediation session you will have explored, for example, creative mortgage alternatives. I give you someone that you can call who works with people.

Let's say you don't have a lot of income showing on the books. Let's say you've got bad credit history. Well, there are still loans that you can get, not like loan sharks, but real loans. They will be at higher interest rates.

But at the end of the day, the person who I'm speaking with does have to make that call. So with mediation, there is an element of – I can hold you accountable. But again, because I'm not the judge, I can't sanction you if you didn't make that call.

But ultimately, if both parties aren't fully participating in the process, then that tells us what we need to know – that one or both are not really willing to resolve this. And the other person may have no choice but to bring a partition action, because they would like some portion of their inheritance while they can still enjoy it.

Maybe they haven't been able to buy a home of their own. A lot of people, when they inherit half of their parents' home, for example, that's when they can finally become homeowners themselves. So I sympathize with that completely. People can't wait forever.

So both parties really have to be committed to finding a solution.

Bill: Yeah, I find often as a real estate agent, when people have inherited with multiple siblings, there's the one sibling who's holding up the sale. Sometimes the other sibling, the “good guy” or “good gal,” just doesn't believe that the brother is willing to be dishonest and continue holding up the sale for no reason.

And I think getting it to a conclusion – say, he's not willing to meet any reasonable standard of solution here – it gives them clarity, at least to now move forward with the difficult choices. But at least with the conviction of knowing you've done everything you can.

Bracha: I had a case exactly like that. And from the beginning, the other sibling said, “If I didn't love you, if I didn't care, I would have been in court a few years back. I would have brought a partition action. That's what all the lawyers tell me to do. But this is my last shot with you.”

And that was actually the client who wouldn't make the call. He wouldn't call about the creative mortgage solutions that he needed. I called ahead to that professional. But ultimately, *you* have to make the call.

And ultimately his sister had to realize he is not on board. And she had to get to a place where she felt, “I did all I could I want to be a good sibling, but you can't wait forever.”

So I love that you brought that up because everyone wants to settle, of course, and that's our ideal solution as well. But sometimes that reality testing, and that feeling like “I've gotten to the end of the road, I've done everything I could,” is a success in itself.

Bill: And I also think for the “bad sibling” (meaning living there forever, not being responsible, not paying for anything, really stealing from their siblings without their choice)…the sibling didn't say, “We're gonna agree to pay you a thousand dollars a month of value living here free.” We didn't have that discussion. We didn't have that agreement. I just don't think it's healthy spiritually for that bad sibling.

They have a chance. If they sell their share, they can move to a cheaper area, find a roommate, live on the money – there’s a lot of options there. But the option of “I'm just going to steal from my siblings” is, I think, inherently bad. And I think getting the siblings who want to resolve things at least the clarity – even if you don't resolve the matter with the brother, resolving it can be he *doesn't* want to resolve it. He wants to live for free, he wants to live on your good graces forever.

And that's not really a good option for you, and for your kids, and your family. That clarity at the end of the mediation, even if it fails to resolve the matter, is a resolution that helps people.

Bracha: Absolutely. I do guardianships as well when an elder needs protection. And I do elder mediation: Can we form a caregiving plan for this person with different people in the family contributing that's going to be sufficient, so that we don't need that removal of independence that guardianship implies?

And I had really excellent trainers for that, and they said, “There is a reason that guardianships exist. There is a reason we have courts.” And there is.

So not every case, unfortunately, can be resolved through mediation. We do tell people that. That said, I have been able to resolve quite a few, and I'm happy about that.

Bill: And you're right that there are other options. You could find a roommate, you can downgrade.

Bracha: I don't usually see the person who's living in that house that they inherited only a share of wanting to do that. I hear, “I want to stay here,” and not a recognition of, “Okay, I'm single. I have only one income and this house is in a pricey area. And if I were starting to look for something tomorrow, I know I couldn't afford that.”

Or this feeling of, “But I have to live in this expensive area of the city! What else could I do? And of course, I need three bedrooms.”

So people have gotten used to a certain standard. And what I see is that a lot of people have a lot of difficulty with that shift in mindset, and just facing that reality of, “I can't have the life that I've been used to having anymore.”

Bill: Well, they were never launched a responsible adults. And so now either this changes them, or if they don't change, they're not responsible. They don't have the ability to see life as, “I need to take care of myself.” They're just used to mom and dad letting them stay for free and that's never ending.

For those who are interested in following up on mediation alternatives, and/or estate questions in general, guardianships/conservatorships, the Law and Mediation Office of Bracha Etengoff phone number is (347) 640-0993.

And the website is [www.brachalaw.com](http://www.brachalaw.com). And if you go there, you'll see a nice picture of her as well as a description of her legal services. And then also the top right corner is a click phone call, and you can get in touch with her as well.

And then Bracha, thank you so much for your time today.

Bracha: I really appreciate being on. I hope I didn't overstay my welcome, because I could talk about this forever! But thank you so much for raising awareness.

Bill: It's me. I enjoy this topic a lot. And I'm in this space a lot where there's a conflict and I wish more people turned to mediation. So I think my goal here is to try to advocate, hey, explore this alternative.

If you're an executor, if you're an attorney, why don't you see if you can't bring another third party in that can help avoid litigation?

Because litigation is a no-win. As a realtor, my house doesn't sell. But more than that, my customer doesn't get the money. The person living in the house who's living there for free, it's not really good for them spiritually. I can say that on a personal level. It's just not good.

And so if we can resolve these matters more often, great. And, Bracha, you're a resource to do that.

So thank you so much for being on with us today. Alright, you have a great day there.

And for everybody else, this is the Executorium Podcast. We get together every week and interview vendors and providers of services from the program: [www.executorium.com](http://www.executorium.com) is the website.

If you go there, you have a directory of services, government resources, articles, and learning. If you go to the Browse button and put in your county, you get a list of various vendors: probate attorneys, and people who dispose of items, people who help you, grief support, legacy management, all kinds.

And then here we have, under probate attorneys, Bracha, who also is under mediation, the only person listed under mediation in New York County.

It’s just a great resource – these other tabs as well: government resources for free forms and such, and then the articles and learning on the subject.

So again, I'm Bill Gross at Bill Gross Probate, your host on Executorium. We do have a new episode every week.

Thank you so much for joining us – as always, make today your best day ever. Thanks so much.