



ESTATE PLANNING COUNCIL OF CANADA

PREPARING FOR AN ESTATE MEDIATION

SEPTEMBER 29, 2022

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ESTATE MEDIATION CHECKLIST

Mandatory, Court Ordered, or Voluntary Mediation	
	✓
<p>Is this a mandatory mediation under Rule 24.1? Mandatory mediation under Rule 24.1 is applied to civil matters in dispute in the following jurisdictions:</p> <ul style="list-style-type: none"> ❖ The City of Toronto; ❖ The City of Ottawa; and, ❖ The County of Essex (Windsor area). <p>See <i>Canfield v. Brockville Ontario Speedway</i>, 2018 ONSC 3288 (Re: cost penalties for non-compliance with mandatory mediation)</p>	<input type="checkbox"/>
<p>Is this a mandatory mediation under Rule 75.1? Mandatory mediation is applied to Estates, Trusts, and related matters in respect of the following disputes in Toronto, Ottawa, and Essex County:</p> <ul style="list-style-type: none"> ❖ Contested passing of account applications; ❖ Formal proof of testamentary instruments; ❖ Objections to issuing a Certificate of Appointment of Estate Trustee; ❖ Claims against an estate; ❖ Proceedings under Part V of the <i>Succession Law Reform Act</i>; ❖ Proceedings under the <i>Absentees Act</i>, the <i>Charities Accounting Act</i>, and the <i>Estates Act</i>; ❖ Applications under Rule 14.05 (3) whether the matters at issue relate to an estate or trust; and, ❖ Proceedings under section 5 (2) of the <i>Family Law Act</i>. 	<input type="checkbox"/>
Is this a mediation that has been ordered by the court (Rules 75.2, 1 or otherwise)?	<input type="checkbox"/>
If this is a mandatory mediation under Rule 75.1, have you chosen a mediator within 30 days of the court providing directions?	<input type="checkbox"/>
Is this a voluntary mediation, consented to by the parties whether by agreement serving as the mandatory mediation or otherwise?	<input type="checkbox"/>
<p>Have you followed the Law Society of Ontario Rules of Professional Conduct, Chapter 3, Sections 2-4, encouraging compromise or settlement? (Contained here) Professional Conduct rules oblige lawyers to make reasonable efforts to settle – arguably - a duty to mediate.</p>	<input type="checkbox"/>
<p>If this is a commercial mediation, have you considered and reviewed the relevant legislation? For example, commercial mediations are conducted pursuant to the <i>Commercial Mediation Act</i>, S.O. 2010, Ch. 16, Sch. 3.</p>	<input type="checkbox"/>

Preparing the Mediation Brief

Have you drafted a short yet concise overview addressing the theory of the case, highlights the main issue(s), the status of the litigation, and any outstanding offers to settle?	<input type="checkbox"/>
Have you included a family tree which identifies the relationships, including estrangements, or other that might be relevant?	<input type="checkbox"/>
Does the facts section include a chronology or chart of notable events?	<input type="checkbox"/>
Have you evaluated the tone of your brief? Is it free of inflammatory language? Does it demonstrate that your client has a good, strong, case?	<input type="checkbox"/>
Have you appended the relevant documents to the participating parties to facilitate their ability to settle on an informed and knowledgeable basis?	<input type="checkbox"/>
If this is a mandatory mediation, have you provided your mediation brief to all parties and the mediator at least seven days prior to the mediation?	<input type="checkbox"/>
If this is a mandatory mediation, is your brief in compliance with Form 75.1C: (1) Factual and legal issues in dispute; (2) Party's position and interests (what the party hopes to achieve); and (3) Attached documents	<input type="checkbox"/>
Is your brief clear and concise ?	<input type="checkbox"/>
Have you included: offers exchanged? Costs incurred? Pictures, if appropriate or of assistance?	<input type="checkbox"/>

Preparing Your Client	
Has a Mediation Agreement/Retainer been signed by all participating parties, and their lawyers if any?	<input type="checkbox"/>
Does your client understand the importance of confidentiality? Pursuant to Rules 75.1.11 and 75.2.08 and for court ordered mediations: All communications at a mediation session including the mediator's notes and records shall be deemed to be without prejudice settlement discussions	<input type="checkbox"/>
Have you advised your client that any information provided to the mediator to assist in the understanding of positions can remain confidential if stated to be treated as confidential?	<input type="checkbox"/>
Has your client been assured that anything that is said or admitted cannot be used against them at a later stage?	<input type="checkbox"/>
Does your client understand that mediation is an opportunity to step away from or avoid an adversarial court process?	<input type="checkbox"/>

Have you advised your client to approach mediation with an open mind , advising that this is a chance for all parties to step away from the uncertain outcome of the court process and come to a mutual resolution?	<input type="checkbox"/>
Does your client understand the process of mediation: do they know what to expect, where it will take place, how long it will take, the role of the mediator, the parties and counsel?	<input type="checkbox"/>
Is your client prepared to spend significant time at the mediation?	<input type="checkbox"/>
Have you provided your client with realistic expectations as well as the various potential outcomes?	<input type="checkbox"/>
Have you explained the mediation retainer to your client, the costs of the mediator, the costs of lawyers and how and by whom, the mediator will be paid?	<input type="checkbox"/>
Have you advised your client to attire appropriately and respectfully?	<input type="checkbox"/>

Preparing for the Day of Mediation	
Have you identified and ensured all of the parties who will/should be in attendance by confirming with all parties in advance of the mediation?	<input type="checkbox"/>
Have you considered what non-parties , if any, should attend?	<input type="checkbox"/>
If possible, agree to the format of the mediation ahead of time with lawyers, self-representatives, perhaps if deemed necessary, in consultation with the mediator in advance.	<input type="checkbox"/>
Have you contacted experts or accountants and ensured their availability on the date?	<input type="checkbox"/>
Have you identified accessibly and accommodation requirements, if any? I.e. Interpreters, etc.?	<input type="checkbox"/>
Have you ensured food and water availability?	<input type="checkbox"/>

Preparing Emotional Clients	
Have you explained the mediation processes, including the potential styles employable by the mediator?	<input type="checkbox"/>
Have you advised your client to be prepared to contribute positively by being respectful of the process, disengaging from anger and entrenched views, and to depart from using blaming language and adopting neutral language with a view to compromise?	<input type="checkbox"/>
Consider preparing a list of client expectations, goals, and objectives in advance. Discuss with the client their expectations.	<input type="checkbox"/>

Exchange of Documents and Expert Reports	
Consider including key documents. As an example, consider including the following:	
Testamentary documents (wills, codicils, relevant documents to the issues in question)	<input type="checkbox"/>
Medical, solicitor, financial documents, as are deemed relevant	<input type="checkbox"/>
A list of the nature and extent of the estate assets and liabilities and assets passing outside of the estate	<input type="checkbox"/>
Domestic agreements if any	<input type="checkbox"/>
If there is a family business involved, an organizational chart including the business structure and constating documents	<input type="checkbox"/>
Valuations of estate assets	<input type="checkbox"/>
Tax status	<input type="checkbox"/>

Preparing Draft Minutes and Releases	
Before the day of mediation, have a discussion with your client about the conduct of the negotiations -the first offer and ensuing process.	<input type="checkbox"/>
Provide the client an assessment of their case, its strengths, weaknesses, and risks.	<input type="checkbox"/>
Lawyer and client should both carefully review all mediation briefs.	<input type="checkbox"/>
Prepare ahead of time a draft of Minutes of Settlement and Releases in anticipation of reaching settlement.	<input type="checkbox"/>
Have included in the Minutes of Settlement, the title of proceedings, court file numbers, correct parties, non-parties, recitals/preambles and other relevant information which will save time on the date of mediation.	<input type="checkbox"/>

Considerations in Planning for an Online mediation	
Do you have a location with good lighting and minimal background noise?	<input type="checkbox"/>
Do you have a working camera ? Is the camera at eye level with you? Having your video on can be helpful for identification purposes and to facilitate conversation between the meeting members	<input type="checkbox"/>
Do you have a working microphone? Ensure you are muted when not speaking, this prevents distracting echo and background noise from pervading into the call.	<input type="checkbox"/> <input type="checkbox"/>
Do you have a reliable and strong internet connection? Ensure that you are close to the Wi-Fi router or plugged in through an ethernet cable.	<input type="checkbox"/>

Does your laptop or device have enough battery? Is it plugged in?	<input type="checkbox"/>
Do you have a headset or external microphone? Using a headset or external microphone can enhance the sound of your voice if it is not well-captured by the laptop or other device's built-in microphone.	<input type="checkbox"/>
Have you tested your audio and video prior to the mediation?	<input type="checkbox"/>
Ensure there an agreement not to post any information on social media. Parties should adhere to the confidentiality of the process and avoid this kind of conduct.	<input type="checkbox"/>

This checklist is intended for the purposes of providing information and guidance only and is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.
Kimberly A. Whaley, Whaley Estate Litigation Partners, September 2022