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Resolution of estate and trust disputes: mediation and Alternative Dispute Resolution in Canada

Kimberly A. Whaley*

Abstract

This article will start with a brief overview of Alternative Dispute Resolution in Canada and then focus on a Canadian perspective on mediating estate disputes with some tips and steps that lawyers can consider in improving the chances of a successful mediation. This article is written with a focus on estate mediation rules and procedures in the province of Ontario; however, all provinces and territories in Canada have their own corresponding mediation rules and procedures.

Introduction

Estate litigation in Canada, and around the world, involves some of the most emotionally fraught disputes. Litigating parties, or persons who find themselves in a dispute at the pre-litigation stage, are often grieving the loss of a loved one, or perhaps trying to remedy an abuse by a fiduciary, and opposing parties are often people that are closely related, either through blood or marriage. Unlike corporate/commercial disputes, where there is more likely to be little or no personal connection, estate disputes are often impacted by emotion and, hence, lack of objectivity in decision-making ability. Long, often life-time-held, family resentments, feelings of inequality, inadequacy, competition among siblings, prove to be a certain recipe for intractable disputes. The ''real'' cause or root of the disagreement may not be clear on the surface, or even related to what is plead in the court documents.

Most notably, the person at the heart of the dispute, the testator, is no longer available for clarification or guidance or perhaps may be incapable of meaningful participation. Many times, the disputing parties are only connected through the deceased person and would not otherwise wish to have anything to do with the other.

For these reasons, estate disputes often benefit from mediation, a form of alternative dispute resolution. The use of mediation to resolve estate disputes has grown considerably in Canada and is mandatory in some jurisdictions.

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Overview of Alternative Dispute Resolution, arbitration and mediation in Canada

Canadians have embraced Alternative Dispute Resolution (or sometimes called Appropriate Dispute Resolution, ADR)[1] to help settle their disputes.

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1. See ADR Institute of Canada's website for more information: https://adric.ca/

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ADR is an umbrella term for many ways to resolve a dispute. In Canada the most common and well-known procedures are mediation and arbitration (discussed below); however, there are several other techniques that are used successfully:

Group facilitation: Where an impartial facilitator leads and manages discussions with a group of people on issues that impact them. The group facilitator does not express opinions but supports and helps group members engage in constructive dialogue to help problem-solve, manage conflict, and make decisions. Often used in private and public sector workplaces and for corporate boards.[2]

Collaborative law: Is a voluntary process in which each party retains a specially-trained lawyer to collaborate together in joint meetings to negotiate resolution of the issues in dispute without threat of litigation. This is often used in family law disputes in Canada, however, may be used in other contexts. Although it has not made much ground in estate disputes.[3]

Restorative justice: This is a reparative approach to dispute resolution that focuses on the needs of victims and the offenders, often used in criminal law. Instead of relying on legal principles or punishing the offender, this process contemplates the needs of any aggrieved party and others who have been affected.[4]

Negotiation: As part of the ADR process or not, negotiation settles the majority of disputes before they head to trial. Sometimes, contracts or agreements require the parties to make good-faith attempts to negotiate a settlement before litigating.

Arbitration

This form of ADR involves adjudication by a neutral third party. Most arbitration proceedings are designed to be binding. Arbitration will, in most instances, take place due to an agreement between the parties, either under a pre-existing contract or based on specific terms of an arbitration agreement entered into after a dispute has arisen.

Unless otherwise agreed, the terms of the applicable arbitration legislation will govern (for example, the federal *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp) or the applicable provincial act, i.e., *Ontario's Arbitration Act*, SO 1991 c 17).

Arbitration is often chosen as a litigation alternative in commercial or corporate disputes in Canada.

Mediation

Mediation is a process in which the parties agree to an impartial facilitator (a neutral third party) to assist them to reach a voluntary settlement of the issues in dispute. Unlike arbitration, the mediator does not render a decision, and the parties may terminate the process at any time. If a voluntary settlement is reached it only becomes binding on the parties when they sign a formal settlement agreement, often in the form of Minutes of Settlement.

2. See ADR Institute of Canada's website's FAQs for more information: http://adric.ca/frequently-asked-questions/
3. *Ibid.*
4. *Ibid.*

In Canada, mediation is a highly effective, successful, and often less costly (though in itself not inexpensive), alternative or addition to the adversarial litigation process. Estate mediation is ''Interest-based'' as it explores solutions that meet the needs and interests of the parties, rather than ''rights-based'' litigation which focuses solely on the parties' rights, or, rules and the law.

There are also many benefits to conducting a mediation *before* the adversarial process begins, including that it is private (as opposed to the public court system), the parties may be able to preserve the relationships, there is a better chance of success in finding a mediated solution, and mediation is less costly. It is easily apparent that a mediated settlement is a better solution in most situations.

Med-Arb

Med-Arb is a hybrid approach that combines the benefits of both mediation and arbitration. The parties first attempt to reach an agreement with the help of a mediator. If that does not produce results or if the issues remain unsolved, the parties may move on to arbitration. If the mediator is also qualified as an arbitrator, the same person can fulfill both roles and make a binding decision quickly as they are already familiar with the facts of the dispute.

ADR designations in Canada

The ADR Institute of Canada (''ADRIC'') is a professional organization for ADR professionals in Canada. There are several designations one can apply for through ADRIC including Chartered Mediator (C. Med.), Chartered Arbitrator (C.Arb.), Qualified Mediator (Q. Med), and Qualified Arbitrator (Q. Arb) designations.

Each province also has its own chapter (i.e., the ADR Institute of Ontario) which provides continuing professional development courses and other membership benefits.

The ADRIC also provides Arbitration Rules, Code of Conduct for Mediators, and a National Code of Ethics.

To mediate or not to mediate? Mandatory?

Mandatory mediation

Whether or not to mediate in Ontario is an easy question to answer if the dispute arises in Toronto, Ottawa, or Essex County (Windsor area). Pursuant to Rule 75.1.02(1)(a) of the *Rules of Civil Procedure*,[5] estates disputes are subject to *mandatory mediation* in those areas unless such requirement is waived by the Court.

Mandatory mediations are governed by Rule 75.1 which sets out the procedure, attendance, confidentiality, remedy for non-compliance, etc. Rule 75.1.02 (1)(b) provides that mandatory mediation applies to the following disputes:

- contested applications of passing of accounts;
- formal proof of testamentary instruments;
- objections to issuing a certificate of appointment;
- claims against an estate;
- proceedings under Part V of the *Succession Law Reform Act*;[6]
- proceedings under the *Substitute Decisions Act*;[7]
- proceedings under the *Absentees Act*,[8] the *Charities Accounting Act*,[9]
- the *Estates Act*,[10] the *Trustee Act*[11] or the *Variation of Trusts Act*;[12]
- applications under Rule 14.05(3) whether the matters at issue relate to an estate or trust; and

5. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 75.1.
6. *Succession Law Reform Act*, RSO 1990, c S 26.
7. *Substitute Decisions Act, 1992*, SO 1992, c 30.
8. *Absentees Act*, RSO 1990, c A 3.
9. *Charities Accounting Act*, RSO 1990, c C 10.
10. *Estates Act*, RSO 1990, c E 21.
11. *Trustee Act*, RSO 1990, c T 23.
12. *Variation of Trusts Act*, RSO 1990, c V 1.

- proceedings under section 5(2) of the *Family Law Act*.[13]

Ontario's courts will only dispense with mandatory mediation where there is a clear reason. In the Toronto decision, *Sheard Estate* 2013 ONSC 7729, the court dismissed a motion for an order dispensing with mandatory mediation in a contested passing of accounts dispute. The beneficiaries of the estate (the grandchildren of the deceased) argued that as their primary complaint was over estate trustee compensation, the ''quarrel was not really among family members, and thus is less amenable to mediation''. They also argued that mediation should be dispensed with as the amount in dispute was ''small''. Justice Mesbur disagreed, noting that:

> Mediation is helpful in narrowing issues, focusing cases, and, where possible settling them. Mediation is useful in every kind of litigation before our courts. Its efficacy is not limited to ''family relationship'' disputes ... I hardly view [$100, 000.00] as a ''small'' amount.[14]

The grandchildren also argued that settlement had already been explored and failed. Justice Mesbur also rejected this argument:

> Often, parties need an independent, third party to help them see past their respective positions and arrive at a resolution that is in the interests of all, without expending further resources. The parties have not had the benefit of this kind of third party intervention. It is extremely beneficial. It could resolve this case.[15]

Justice Mesbur concluded that there was no reason for her to exercise her discretion to dispense with mediation.

Importantly, it should be noted that as of 1 January 2016, Rule 75.06(3.1) provides the Ontario courts with the power to *order* parties to a mediation, on their own initiative, and without the consent of the parties, even in jurisdictions where the mandatory mediation rules do not apply. Court-ordered mediations are governed under Rule 75.2.

At the time of writing, there was only one reported decision, *Horbaczyyk v Horbacczyk* 2017 ONSC 6666, where a Court ordered mediation pursuant to **section 75.06**(3.1). In that case the challenger of a Will sought relief directing the parties to participate in mediation; however, he failed to request that relief in his motion for directions. Justice Emery made the following comment: ''Fortunately, Rule 75.06(3.1) provides that the Court may order that a mediation session take place under Rule 75.2, with power to give the necessary directions. Therefore, this Court makes an order that the parties attend a mediation''. The decision does not mention whether the propounder of the Will consented or objected to participating in a mediation.

When not subject to the mandatory mediation rules, or a mediation order, there are several reasons why Canadian counsel would choose to mediate. As with most litigation, but ever more so in estate litigation, the ''real'' dispute may have nothing to do with the legal issues involved.

Some of the benefits of mediating an estate dispute are:

- mediation is strictly confidential and subject to settlement privilege (discussed in detail below);
- privacy in a digital era where court decisions are more public than ever, given the accessibility of cases through an online case database CanLII[16] and information that be posted on the internet and social media;
- as there is no clear winner and loser, everyone involved in a mediated settlement can control the

13. *Family Law Act*, RSO 1990, c F 3.
14. *Sheard Estate*, 2013 ONSC 7729 at paras 40–41.
15. *Sheard Estate*, 2013 ONSC 7729 at para 43.
16. www.canlii.org.

mediation process and take ownership of the outcome, and therefore there is a greater likelihood of compliance;
- both sides can tell their story and hear the details of the opposing view, which may be therapeutic for all involved;
- a mediation is time limited, as opposed to litigation which can be time consuming and can take years to determine given the intents of the parties adverse in interest and the court scheduling and back-log;
- a mediation will occur in a neutral space with less pressure than a formal courtroom;
- mediation is less expensive and faster than going to court;
- mediation may help preserve relationships;
- the process is relatively informal and straightforward; and
- mediation can facilitate communication, listening, and understanding.

There is little downside to mediation if you approach it with the right attitude and preparedness. Mediation gives parties a chance to ''hit the pause button'' and step outside of the litigation which can be traumatic for individuals who may still be bereaving the loss of a loved one.

When not to mediate

While most estate disputes will benefit from a mediation, a mediation may not be appropriate in some situations. For example, where there is a history of documented physical violence between the parties, having the parties attend a mediation in person may not be appropriate. For cases where there has been sexual harassment, violence, and other forms of abuse and power imbalances, mediation would not be a suitable alternative to litigation.

Other situations where mediation may not be suitable for an estate dispute is where the parties wish to set a legal precedent, the parties want a formal judicial ruling on an existing point of law, or where extraordinary court relief is sought, such as a declaratory judgement.

If this situation arises in a mandatory mediation jurisdiction, counsel will need to seek a court order excusing the parties from mediation under Rule 75.1.04.

Mediation confidentiality and settlement privilege in Canada

As noted above, confidentiality and settlement privilege are often the most important reasons for choosing mediation.

Settlement privilege: A rule of evidence that protects communications exchanged by the parties as they try to settle a dispute.[17] As the Supreme Court of Canada (SCC) observed, ''[t]he privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.''[18]

The purpose of settlement privilege is to encourage and promote settlement by allowing full and frank discussions between the parties. There is a *prima facie* presumption that any communication made in furtherance of settlement is inadmissible. However, this presumption of course can be displaced. The trigger for settlement privilege is the intent to settle (not simply adding the words ''without prejudice''). Settlement privilege applies regardless of whether a settlement is ultimately reached.[19] Settlement privilege applies even in the absence of contractual provisions providing for confidentiality.

It is important to note however that an exception to the common law settlement privilege enables parties to produce evidence of confidential communications in order to prove the existence or the scope of a settlement agreement.

17. *Union Carbide Canada Inc v Bombardier Inc.*, 2014 SCC 35 (''*Union Carbide*'') at para 31.
18. *Sable Offshore Energy v Ameron International Corp*, 2013 SCC 37 (''Sable'') at para 2.
19. *Sable* at para 17.

Confidentiality: The *Rules of Civil Procedure* in Ontario stipulate that "all communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions."[20] While mediation is intrinsically confidential, care should be taken to specify the confidentiality of the process by including a confidentiality clause in the mediation agreement. Often these clauses require the parties to keep anything that transpires at the mediation confidential. A confidentiality clause in a mediation agreement differs from settlement privilege as the former is not a rule of evidence but a matter of contract.

In 2014 the SCC weighed in on the interaction between settlement privilege and confidentiality clauses in mediation in the case of *Union Carbide Canada Inc v Bombardier Inc* 2014 SCC 35. The SCC was asked to consider whether an absolute confidentiality clause in a mediation contract trumped the exception to settlement privilege allowing disclosure of confidential communications to prove the existence or scope of an agreement. The Court held that it is open to parties to contract for greater confidentiality than that provided by settlement privilege, but that doing so requires a clear and unequivocal statement of the parties' intention to oust the common law.[21] A standard mediation confidentiality clause would not have this effect. A contract purporting to oust the law of settlement privilege must be clear and unequivocal. If parties desire absolute confidentiality of the mediation process, they can contract to override the common law in an express provision to this effect. Whether or not to do so will be a strategic decision based on the specific facts of your case.

Timing of the mediation

The timing of a mediation can be strategic. It is often not worthwhile to conduct a mediation unless and until all of the relevant documents are exchanged, reviewed, or otherwise ordered (by way of a court order for disclosure), and the documents circulated amongst the parties.

For example, Will challenges are heavily document and fact-driven. After obtaining the relevant drafting solicitor records, financial records, and medical records, a mediation session can be, and most often is, conducted without having to conduct expensive examinations-for-discovery or cross-examination.

If it is your intention to proceed in this manner, it might be wise to seek an Order Giving Directions stating specifically that the mediation be conducted prior to examinations-for-discovery or cross-examinations. Insisting that examinations be conducted prior to attending a mediation session is in many circumstances cost-prohibitive, and unnecessary, and often more appropriate to other civil litigation matters. Avoid the fight if possible and seek and clarify your Orders so expectations are set from the outset.

Choosing the "right" mediator

For mandatory mediations in Ontario, Rule 75.1.07(1) provides that a mediator must be chosen within 30 days of the court providing directions for the mandatory mediation session. The mediator may be chosen or assigned from the list for the county or chosen by consent if not listed (see Rule 75.1.06(1)(a-c)).

Court-ordered mediations are governed by Rule 75.2. Rule 75.2.04 requires a court-ordered mediation to be conducted by a "person agreed to by the designated parties". If they have not chosen a mediator within 30 days after the order directing the mediation, the Court shall on motion assign a mediator (with the mediator's prior consent).

It is important to choose the right mediator for the job depending on the issues and personalities. While some believe that anyone can mediate an estate dispute regardless of whether they have mediation training, it is important to consider the complexity of the

20. Rule 75.1.11, *Rules of Civil Procedure*, RRO 1990. O Reg 194.
21. *Union Carbide* at para 51.

estate litigation matter and the type of assets and interests involved.Estate litigation is a unique area of the law with unique concerns. The types of issues mediated in the area of estates include: Will, estate, and trust challenges; dependant support claims; family law act elections, passing of account applications by fiduciaries including attorney, guardian, trustee and estate trustee; power of attorney litigation; trust variations/interpretations, rectification/variation/interpretation applications, guardianships for property or for personal care; elder law issues and elder abuse; capacity proceedings; end-of-life disputes, trustee and fiduciary litigation; and the tax considerations and consequences arising in the estate. Complex estate disputes often involve family businesses, corporate documents, shareholder agreements, complicated valuations, etc. Often the estate dispute will touch on more than one of the above issues. Therefore, it is important to choose a mediator who understands and is knowledgeable about the area of law which predominates the subject matter of the proceeding and reflects the dollar value attributed to the matter.

It is important to choose the right mediator for the job depending on the issues and personalities.While some believe that anyone can mediate an estate dispute regardless of whether they have mediation training, it is important to consider the complexity of the estate litigation matter and the type of assets and interests involved

Choosing a mediator who is a specialist in estates and trust litigation will aid in getting the parties to a mutually agreeable resolution of all of the issues.

Counsel should also consider the ''style'' of the mediation that the proposed mediator will conduct. The two main styles of mediation are *facilitative* and *evaluative.*

A *facilitative* mediator is a neutral person who assists the parties in taking ownership of the issues and solving the dispute amongst themselves. The role of the facilitative mediator is to be in charge of and manage the process and guide the parties to a mutually agreeable resolution by facilitating discussions, asking open questions, communicating settlement offers, and digging into the real issues below the surface. Both parties are involved in the mediation's outcome, unlike a judicial outcome where the decision is ultimately in the hands of a third-party decision maker. In mediation, the clients should have a major influence on the decisions made, rather than the parties' lawyers.

One of the benefits of a facilitative mediation is that it empowers parties and helps parties to take responsibility for their own disputes and resolution. Occasionally, however, such an approach may not work and more so, where there is a clear power imbalance between the parties. Facilitative mediations may be more time consuming as they are dedicated to getting to the underlying issues.

An *evaluative* mediator will give an evaluation of the strengths of the parties' cases. This type of mediation, however, will be concerned more with the legal rights of the parties rather than their underlying interests and may not solve the real issues. The mediator will evaluate the parties' legal rights and positions, may push and/or urge the sides to a settlement, develop and/or propose the basis for settlement, predict an outcome in court and educate each party on their strengths and weaknesses. For an evaluative mediation to work, the mediator should have substantive expertise in the subject matter. It is in this way that consideration of a mediator with particular experience will benefit disputing parties in this area. In evaluative mediations, careful managing such that there is not an appearance of winner and a loser is important to the process, especially where the mediator concludes that one party has the stronger case. This approach demands clients be prepared for possible negative feedback on their legal position.

In many situations there is room for both approaches. For example, parties could have the mediator start out as facilitative but at the end of the day, or when the parties request, provide an opinion on, or evaluate, the legal rights of the parties and the process.

Some examples of types of mediators include, lawyers, retired judges, social workers, elder law experts, etc.

Lawyers as mediators and the Rules of Professional Conduct

If a lawyer acts as a mediator in Ontario, Rule 5.7 of the *Rules of Professional Conduct* sets outs specific obligations that lawyer must abide by. Rule 5.7-1 states:

> A lawyer who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that
>
> (a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and
>
> (b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by the solicitor-client privilege.

The commentary to this Rule reminds lawyers that in acting as a mediator, generally a lawyer should not give legal advice as opposed to legal information to the parties during the mediation process. This does not preclude the mediator from giving information on the consequences if the mediation fails. Further, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of the rules in section 3.4 of the *Rules of Professional Conduct* that deal with ''Conflicts'' and its commentaries and the common law authorities.

The mediation brief

In Ontario, the parties are required to exchange mediation briefs which include a statement of the issues to be mediated. It is wise for counsel to use the mediation brief as a tool to assist in settling the matter. It is not helpful to use a precedent for the mediation brief without customizing it for the dispute and facts at hand. The mediation brief is counsel's chance to tell the client's story in a compelling and persuasive way and to convince the other side why they should settle.

Counsel should spend time on the mediation brief and not just cut and paste the pleadings or notice of application. The goal is to get the mediator up to speed as much as possible and give them the information that they need to assist in settling the matter. However, there is no need for the mediation brief to be a lengthy document. Briefs can, and should, be clear and concise.

Rule 75.01.08 provides that a mediation brief (statement of issues) is required for all mandatory mediations and must be provided to all parties and the mediator at least seven days before the mediation. Form 75.1 C outlines what should be included in a mediation brief (statement of issues); however, it can be modified. Form 75.1 C sets out three sections: (1) Factual and Legal Issues in Dispute, (2) Party's Positions and Interests (what the party hopes to achieve), and (3) Attached Documents.

A well-written and fulsome brief will assist in achieving a successful mediation. Lawyers may consider adding a short ''Overview'' that talks about the theory of the case that highlights the main issue(s) that need to be settled, why your client has the better case, the status of the litigation, and any outstanding offers to settle.

Consider also including a family tree, explaining the relationships and any estrangements or difficulties that might exist so that the mediator will have an insight into the family dynamics.

Try to be careful of your tone. You are trying to settle this matter and not ignite the emotions of the parties even more. You must show that your client has a good, strong case but there is no need for inflammatory language.

For the ''Facts'' section, consider including a chronology chart if several events have occurred and are important to the narrative.

It is important to include all of the relevant and key documents to the issues that need to be settled. See the section, ''Obtain required documents and expert reports'' below for more information.

Obtain required documents and expert reports

Lawyers should have all the documents they need to make informed decisions about the legal issues in dispute and that are required to reach a possible settlement. Consider including the following documents:

- The testamentary documents (wills, codicils)
- A chart or list of the estate assets and liabilities, including a list of jointly held assets and any assets that passed outside of the estate (section 72 assets). Include any account opening documents for joint accounts. Include insurance designations for any insurance policies.
- Relevant marriage contracts or separation agreements.
- In a will challenge scenario, consider including the drafting solicitor's notes.
- If capacity is an issue, include any medical records, and/or consider obtaining an expert report.
- If there is a family business involved, it may help to have an organizational chart including the business structure, shareholder interests, etc.
- If it is a dispute over a passing of accounts application, obtain and understand the vouchers.
- Obtain real estate valuations in advance if real property at issue.
- If it is a dependant's support claim, seek an expert report on lifestyle analysis.

These are just some of the relevant documents you should consider including. The documents you choose will depend on the specific legal issues in dispute. Consider including only the ''key'' documents, there is no need to include the entire file.

Prepare your client

Mediation will work when all parties are prepared and understand the goal of mediation. A settlement should be reached on full knowledge and transparency ensuring the best forum for understanding the issues involved, rather than having one party left in the dark about an aspect of the dispute.

Mediation will work when all parties are prepared and understand the goal of mediation

Lawyers should prepare their clients for the process, underscore the importance of confidentiality, explaining that this is a chance to step away from the adversarial process.

Your client should be as prepared for the day of mediation, as for a day of discovery. The day of mediation may be the first time that opposing counsel will meet your clients. A properly prepared and presented client may cause opposing counsel to re-evaluate their case, and sometimes re-evaluate what their clients have been saying about your client.

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The client should be familiar with the process of mediation: What will happen? Why will that happen? When will that happen? etc.

Explain the confidential nature of the mediation and remind them of Rule 75.1.11 and Rule 75.2.08 (for court-ordered mediations) which state that ''[a]ll communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions.''

Often estate mediations will take a full day. The client should be prepared to spend significant time at the mediation.

Explain the mediation retainer to your client, the costs of the mediator, and how the mediator will be paid.

Preparing the "emotional" client

Clients should be prepared to be respectful of the process, to disengage the anger and entrenched views, depart from using blaming language and adopt neutral language, all with a view to compromise and brokering a deal that can be managed.

No person will leave with everything they want, nor will any party be completely satisfied with the process.

Sometimes in estate mediation there are non-parties who may have influence over whether a settlement will happen or not (other family members, spouses, etc.). Consider having them attend the mediation with your client. If they cannot attend and your client won't settle without conferring with them first, have them ready by phone, at least.

Explain the negotiation process. Prepare your client for the likelihood that an opening offer from the other side will not be close to what they are expecting. Manage client expectations and advise them up front on what they may realistically expect to achieve (even if they may not want to hear the answer).

Sometimes estate mediations fall apart over what seems to be inexpensive or insignificant items. Often it is the emotional connection to those items that stops the parties from letting go. Consider preparing a list, ahead of time, of the items the client really wants and have a conversation with the client about the realistic expectations of them receiving those items and an accurate value for those items (not what the client *thinks* they must be worth).

Counsel should also prepare themselves for mediation as though they were preparing for trial or for discovery. Since mediation usually occurs early in the litigation, sometimes counsel have not fully researched the nature and extent of the client's case, in the same way that they would have done by discovery or trial.

Also, Ontario lawyers must remember their duty to encourage settlement as set out in Rule 3.2-4 of the Rules of Professional Conduct. Rule 3.2-4 "Encouraging Compromise or Settlement" states: "A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings."

On the other hand, counsel should be aware of the risk that a mediation may be a 'fishing expedition' for the opposing party, and in that event, will likely not result in a settlement.

Prepare draft minutes and releases

Before the day of mediation, you should have a discussion with your client about the first offer they are prepared to make. Give your client a frank assessment of their case and its strengths and weaknesses. If possible, you should meet with your client in advance of the mediation to have this discussion and to review the mediation briefs.

Prepare ahead of time a shell or skeleton set of Minutes of Settlement and Releases. Having the style of cause, court file number, correct parties, recitals, etc. will save a substantial amount of time for the day of mediation. Since these mediations tend to go into the evening, a shell or skeleton of these documents will assist in making sure all protections are set out in your settlement agreement. However, as with the mediation brief, don't just cut and paste clauses from past settlement agreements that may not be applicable to a present settlement of the issues. Make sure there is a reason for each clause to be there and be prepared to think outside the box to come up with creative solutions to settle the dispute.

Prepare for the day of mediation

First and foremost, ensure all parties will be in attendance. A mediation will be less likely to succeed if the parties who can consent to settlement are not present.

Consider what non-parties should attend as well, either as support for the parties, or to "approve"

the settlement if the actual party will be relying on the non-party's input, opinion, and advice.

Consider the utility of a social worker if it will help with any non-legal issues that need to be mediated as well.

If possible, agree to the format of the mediation ahead of time with other counsel and perhaps in consultation in advance with the mediator. Considerations:

- Should there be a plenary session?
- Should any of the non-parties be present in plenary or not?
- Will counsel be expected to give opening statements? etc.

The format will often depend on the relationships between the parties, number of parties, and counsel or mediator preferences.

Contact any experts or accountants so they are available via phone if any questions may come up. Structuring a settlement may require tax advice. Do not forget that settlement may have tax consequences and clients need to understand the actual value they are receiving or paying. Having an accountant available to explain this to your clients is helpful. In other words, consider all the tools you need in advance to increase the likelihood of a successful mediation: real estate valuations, business valuations, etc.

If older adults are involved in the mediation and need accessible accommodation, make sure the venue provides what they need and ensure plenty of food and water are available.

The lawyer's role at mediation

Ontario lawyers should be mindful of their obligations under the *Rules of Professional Conduct*. Under the rules a ''tribunal'' is defined as including ''courts, boards, arbitrators, *mediators*, administrative agencies, and bodies that resolve disputes, regardless of their function or the informality of their procedures.''

This means all of the duties owed to a court are also owed to a mediator. For example, Rule 2.1 ''Integrity'' states that: ''A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, *tribunals*, the public and other members of the profession *honourably and with integrity*.''

Further Rule 5.1-1, ''Advocacy'', states: ''When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating *the tribunal with candour, fairness, courtesy, and respect*.''

Lawyers should remember that these duties also apply to mediations.

Settlement considerations

You will have prepared your draft or skeleton Minutes of Settlement and Releases. Have them available on your laptop, ready to edit and finalize. As noted above, be prepared to accommodate the unexpected in the settlement and think outside the box on possible solutions to the dispute at hand.

When coming to a settlement, try to calculate the ''real'' value the client will be receiving or paying. This will include any tax consequences and should also consider any legal fees and expert fees that need to be paid. As counsel, you should be prepared with that information, including up to date dockets and any disbursements owing.

Settlement agreements must be prepared by the parties or their counsel and should not be prepared by, or witnessed by, the mediator. The mediator will remain neutral, is not an advisor and cannot become a witness.

Make note if any of the parties are ''under disability'' pursuant to Rule 7.01(1) of the *Rules of Civil Procedure* (includes a minor or an individual who is mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992*). All claims involving persons under a disability require judicial approval of any settlement.

Potential outcome of settlement and next steps

If the parties are successful in attaining a mediated settlement with Minutes of Settlement drafted and executed, the agreement is a legally binding contract.

Rule 75.1.12 (4) of the *Rules of Civil Procedure*, provides that if the settlement agreement resolves all the issues in dispute, the party with carriage of the mediation shall file a notice to that effect with the court, (1) in the case of an unconditional agreement, within 10 days after the agreement is signed; (2) in the case of a conditional agreement, within 10 days after the condition is satisfied, though in Estate Mediation practically speaking, oftentimes no notice is ever filed.

The benefits of a legally binding contract include the ability to enforce the agreement before a court.

Conclusion

Obviously, there is no guarantee that an estate dispute will be settled at a mediation. In Canada, estate mediation has proven to be a very successful alternative to the expensive and lengthy court procedures. If counsel and clients put in the effort and necessary preparation before and during a mediation session, the chances of a successfully mediated outcome increases substantially.

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