Best Practices for Mediation of Estate Disputes

By Charles Ticker[1]

Estate disputes due to their very nature and the relationships (or lack thereof) of the litigants are well suited to mediation. In estate disputes, clients are dealing with a lot of emotional baggage that goes way back. A mediator is trained to listen to each side and empathize with them. A trial judge is not going to care too much about the client's feelings or motivations. The judge is just interested in finding the facts and applying the law to those facts. The job of mediators, Bernard Mayer has written, "is to help people deal with the most important conflicts in their lives productively, wisely, effectively and ethically."[2] The mediator is part lawyer, part psychologist, part social worker. The mediator also acts a guide accompanying the parties on their quest to craft a resolution of their dispute.

This paper will review the procedural framework for mediation of estates disputes in Ontario, the mediation process and provide suggestions for increasing the odds of a successful mediation.

Mandatory Mediation of Estate Disputes in Ontario

Rule 75.1 of the Rules of Civil Procedure provides for mandatory mediation for specified Toronto, Ottawa and County of Essex estates, trusts and substitute decisions proceedings. The types of proceedings that require mandatory mediation in these jurisdictions are set out in Rule 75.1.02 (1) as follows:

1. Contested Application to Pass Accounts;
2. Formal Proof of Testamentary Instruments;

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[2] Bernard Mayer, *The Future of Mediation: Be Less Certain-and More Flexible*, MEDIATE.COM, htpp://www.mediate.com/articles/MayerFutures.cfm Quoted in Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution* [2017] Cardozo Journal of Conflict Resolution Vol. 18 :513 at p. 518

3. Objections to Issuing Certificate of Appointments;
4. Return of Certificate;
5. Claims against an estate under Sections 44 and 45 of the *Estates Act*;
6. Dependant's Relief Applications under Part V of the *Succession Law Reform Act*;
7. Any disputes under the *Substitute Decisions Act, 1992*;
8. Matters pertaining to the *Absentees Act, the Charities Accounting Act, the Estates Act, the Trustee Act or the Variation of Trusts Act*;
9. Applications pursuant to Rule 14.05 if the matters at issue relate to an estate or trust;
10. Equalization claims against an estate pursuant to Subsection 5(2) of the *Family Law Act*.

Rule 75.1 was originally introduced in 1999 on a pilot basis for estate litigation. Based on reports from 2003 – 2004, in Ottawa for mandatory mediations and estate matters, 61% of cases fully settled, 29% partially settled and 9% did not settle. In Toronto, 68% of cases fully settled, 15% partially settled and 17% did not settle. The Rule became permanent with respect to Toronto, Ottawa and the County of Essex.[3]

Even in jurisdictions that do not provide for mandatory mediation in estate disputes, it is not uncommon for counsel to agree to seek an order for directions referring the dispute to mediation.

Effective January 1, 2016, Rule 75.2 provides procedures for court ordered mediation that are similar to the mandatory mediation procedures under Rule 75.1. A Court may order that an estates matter proceed to mediation under Rule 75.2 in two circumstances: (a) on an application or a motion for Directions in any estates matter pursuant to new subrule 75.06 (3.1)(b); or (b) in respect of a contested passing of accounts where the court has ordered that the matter proceed to trial (see subrule 74.18(13.2(b)). [4]

[3] *Watson & McGowan's Ontario Civil Practice 2018* (Toronto: Ontario: Thomson Reuters).

[4] Ibid.

The Court may make an Order pursuant to Rule 75.1.05(4) directing:

1. The issues to be mediated;
2. Who has carriage of the mediation and who shall respond;
3. Within what times the mediation session shall take place;
4. Which parties are required to attend the mediation sessions in person, and how they are to be served;
5. Whether notice is to be given to parties submitting their rights to the court under Rule 75.07.1;
6. How the cost of the mediation is to be apportioned amongst the parties;
7. Any other matter that may be desirable to facilitate the mediation.

Rule 75.1.05(1) provides that the applicant shall make a motion in the same way as under Rule 75.06 seeking directions respecting the conduct of the mediation to which this rule applies. The notice of motion is to be served within thirty days after the last day for serving a notice of appearance. The motion may be combined with a motion for directions under Rule 75.06.

Accordingly, the Rules provide for rather short time frames for seeking directions with respect to mediation. It is not unusual to see these timelines not complied with.

At What Stage Should Parties Consider Mediation?

In my opinion, the parties should consider mediation at the earliest opportunity, even before commencing proceedings. Indeed, a number of studies in the ADR field have shown that when disputes are mediated in their early stages, the rate of settlement is significantly improved. [5] However, the parties typically need time to develop a fairly good sense of the facts and gather background documents such as medical records, notes and records of the drafting solicitor, etc.,

[5] Brian L. Cutler, ed., *The Encyclopedia of Psychology and Law* (Thousand Oaks,CA: Sage Publications Inc.,2008) at p.17 as quoted in Justice Todd Archibald and Christian Vernon, *Annual Review of Civil Litigation 2015: Incorporating Insights from Experimental Psychology and Behavioural Economics into ADR Practices: The Art and Science of Persuasion -Chapter V* at page 21; (Thomson Reuters Canada Limited)

in order to come up with a better understanding of the issues and the challenges and the merits of their case.

Nonetheless, I believe that it is better to proceed to mediation sooner than later as the more time, legal fees and emotion the parties have invested in the case, the more entrenched they will become in their position. This makes it more difficult to reach a resolution.

Who Should be the Mediator?

Rule 75.1.06 provides that the mediation is to be conducted by:

(a) A person chosen from the list for the county by the agreement of the designated parties;
(b) A person assigned from the list by the mediation co-ordinator for the county at the request of a designated party; or
(c) A person who is not named on the list, if the designated parties consent.

One of the most important decisions to be made is the choice of mediator. While the province has a roster of mediators that deal with mandatory mediation matters at reduced rates,[6] most experienced counsel use mediators that are not part of the roster and that are in private mediation practice.

There is a debate as to whether the mediator should be a specialist in estates law or whether a generalist can be as effective. In my view, both specialists and generalists can be successful. However, the trend in ADR as in the practice of law is leaning towards specialized or niche practices. Therefore, a common practice has developed of counsel typically seeking specialists as

[6] The fees of roster mediators pursuant to Rule 75.1 are set out in O.Reg 43/05 under the Administration of Justice Act ,R.S.O. 1990, c.A.6. Maximum of $ 600 for 2 parties; $ 675 for 3 parties; $ 750 for 4 parties and $ 825 for 5 or more parties. All fees are subject to applicable HST and cover one-half hour of preparation and up to three hours of actual mediation. After the first three hours of actual mediation, the mediation may be continued if the parties and the mediator agree to do so and agree on the mediator's fees or hourly rate for the additional time.

mediators. In addition, many retired judges are opening up mediation practices upon leaving the bench.

What Style of Mediator – Facilitative vs. Evaluative vs. Transformative?

When choosing a mediator, counsel need to carefully consider the style of the proposed mediator. Some mediators use a facilitative approach. They encourage the parties to discuss the issues and their interests and motivations. They act as facilitators in the negotiations but do not weigh in with their opinions or evaluations of the case.

On the other hand, evaluative mediators take a much more active role in pointing out the strengths and weaknesses of each side's case and will not hesitate to provide their opinion (regardless of whether they are asked for one or not). Most retired judges are evaluative mediators.

In a transformative approach to mediation, the mediator consciously tries to avoid shaping issues, proposals or terms of settlement, or even pushing for the achievement of settlement at all. Instead, the transformative mediator encourages the parties to define problems and find solutions for themselves and endorses and supports the parties' own efforts to do so. [7]

Most mediators use a combination of the above approaches. The facilitative approach is very useful at the beginning of the process in helping the parties to express their interests and discuss the history of the family dispute. Clients need an opportunity to vent.

In order for the mediation to have success, the mediator must gain the trust of the parties. The facilitative approach also helps the mediator to gain the trust of the parties.

This takes time. When I am mediating cases, I spend a couple of hours not even talking about numbers. I don't even want the parties to start presenting settlement offers. I want to get a feel for where they're at, what their motivations and interests are and build trust in private with both

[7] Bush, Robert A. Baruch and Joseph P. Folger (2005) *The Promise of Mediation* (2d Ed.) San Francisco: Jossey-Bass

sides. Once that relationship of trust is established, you can start talking about offers and actual numbers.

While the facilitative approach can be very effective, it does take longer and at some point, in order to speed up negotiations and hopefully conclude a settlement, many mediators will shift gears and adopt a more evaluative approach.

Judicial Mediation

Although not formally mandated by the *Rules of Civil Procedure*, we are seeing increased use of judicial mediations as part of the litigation process typically at a pre-trial or settlement conference. As sitting judges gain more experience and training as mediators, the prospects for more successful judicially mediated disputes will increase, resulting in a savings of court time and expense. Unfortunately, judicial mediation is usually held at a rather late stage in the proceedings. It would be beneficial to have judicial intervention by way of mediation at an earlier stage. Our court system still has limited resources to provide judicial mediation. In my view, we need more judges and more resources to make better use of judicial mediation.

How to Prepare for the Mediation

Counsel will typically file mediation briefs, or statements of issues, with the mediator in which they will set out the facts in the dispute, their identification of the issues and their client's position on the issues together with copies of relevant court orders, pleadings and copies of the applicable legal authorities. It is important for counsel to remember that they are drafting a mediation brief and not a brief for argument at trial. Inflammatory statements that are inserted simply to take shots at the other side (and which are often client driven) are not helpful. Emotions should be left out of the briefs. The purpose of the brief it to educate the mediator as to what the case is about and the party's position on the issues and highlight what evidence and law they may have to support their position. The key word is "brief". Volumes of material are not in my view necessary or helpful.

The Role of Counsel

In order to increase the chances of success in mediation, counsel must play a very different role than they do as advocates. The clients need to be fully prepared prior to the mediation as to what to expect. Counsel have to critically review with their clients the relative strengths and weaknesses of the case and encourage the clients to do their best to settle the case (as lawyers are required to do by the *Rules of Civil Procedure)* . Clients need to be encouraged to be candid at the mediation and to be assured that whatever they say to the mediator in a private meeting is strictly confidential. Most importantly, the parties need to be encouraged and advised to be prepared to make real concessions and compromises if they want the process to be successful.

What is the Procedure at Mediations?

Traditionally, there have been joint sessions held at the beginning of a mediation where both parties, either through their lawyers or by themselves, will make opening statements. I remember one case where the counsel's opening statement went on for an hour and a half. The practice right now is to dispense with lengthy opening statements by counsel. I typically encourage the clients to say a few words about their position and their view of the case, because mediation is really about the clients. I like to see the lawyers take a back seat, because I am of the view that the mediation is the clients' day to try and put the dispute behind them.

Sometimes counsel will come to me and suggest that they do not want to have a joint opening session at all. I think that is a mistake. It is important for the mediator to explain the process to both sides together to try and set the tone for the day by explaining to the parties the benefits of mediation and the downside if they do not settle their case in terms of the further costs they will incur, both emotional and financial.

At times, the animosity is so great that the parties will not sit in the same room together. Where there is resistance to the joint session, I point out that if the parties do not settle, they will ultimately need to face each other in court and that their reluctance to face the opposing party at mediation may be interpreted as an unwillingness to go to trial, a message counsel do not

want to send at the beginning of a negotiation. This approach typically is successful in getting the parties to agree to at least a brief joint session.

Following the joint session, the parties will move into separate rooms (caucus). The balance of the day is typically spent with the mediator going back and forth between the caucus rooms meeting with each party privately and relaying messages and offers to the other side. However, it is more than simply being a messenger. The mediator is there to ensure that the dialogue continues and the parties do not present positions or offers in a manner that will be detrimental to the process.

While mediations can be emotional, they still have to be conducted as a business meeting.

If emotions and temperatures are getting too high, the parties should take a break and go outside for a walk. I always make the rules of engagement very clear: no yelling or screaming, insults or name calling.

At the end of the day, if a settlement is reached, the lawyers (not the mediator) will draft minutes of settlement to be signed by the parties. Those minutes of settlement can be enforced in court like a contract.

What are the Prospects of Success?

As cited above, mediation of estate disputes has a high rate of success. Even when the mediation does not result in a final agreement, it is not unusual for parties who have attended a mediation to start thinking about settlement and to settle shortly after an unsuccessful mediation.

What are the Advantages of Mediation?

There are several advantages to mediating an estate dispute. One of the main advantages is that it has the potential to save the parties thousands of dollars in legal costs. In addition, mediation is a private, off the record meeting. Unlike court decisions, the party's personal details and dirty laundry are not going to find their way into a court decision that will become a matter of public record available for all to read over the internet.

Another advantage is parties can be creative and craft a resolution to a dispute that goes beyond the four corners of the pleadings and beyond what a judge could order at the end of a case. I once had a case where there was a mother who was in a dispute with her daughter over the estate of the mother's brother. Because she was involved in this dispute with her daughter over the estate, the daughter wouldn't let her visit her granddaughter. As part of the settlement, the grandmother was granted visitation rights to her granddaughter. This was something that a judge could not order within the context of the case.

A mediated settlement provides certainty. There is not way to predict how a judge might decide at trial.

In my opinion, the biggest advantage to mediation is that the parties are the ones controlling their own destiny and making the decision. They're not asking a judge who is a total stranger who knows or perhaps cares little about them or their family to decide their future. The parties are in control and as a result, even though they may not be thrilled with the outcome, they are going to likely be more satisfied then they would after trial.

How Long Do Mediations Take?

Some counsel call me seeking to book a half day of mediation instead of a full day. Unless the issues are very simple, for example, a dispute over the amount of executor's compensation in a contested passing of accounts application, a half-day of mediation is not going to be adequate to deal with a significant estate dispute. In my experience, most mediations are scheduled for at least one day and sometimes go beyond. It is not unusual for mediations to go well into the evening hours if progress is being made. Sometimes the mediation is adjourned and continued on another day.

At mediations, the pace of negotiations tend to quicken towards the end of the day. A lot of time is spent during the day with each side feeling the other side out and apparently not making much progress. But the pace can pick up very quickly and the deal can get done in the latter part of the day.

What are Common Mistakes in Mediation?

One of the biggest mistakes is that the persons with authority to settle are not present at the mediation. Sometimes they are only available by phone, so they are not really involved in the process. In order for a mediation to be successful, everyone who has the authority to make a decision should be present.

Another mistake is that the clients are not being properly prepared for the mediation. They come to mediation expecting to get everything they are claiming because their lawyer has failed to manage their expectations by pointing out the potential weaknesses of their case and the uncertainty of the results of a trial. The client has to understand that a mediation is not a trial, it is a settlement meeting to be held in good faith. Counsel need to prepare their clients for mediation and encourage them to approach the mediation with a desire for settlement by making serious compromise. This is not trial preparation.

Sometimes counsel are the problem. You may have a lawyer whose mindset is just not towards settlement. Traditionally, many lawyers have thought that the way to build their reputation is to take all their cases to trial. But we know that 95% or more of all cases never go to trial. In my view, counsel have to explain to the clients that the odds are the case is going to settle and it is better to settle sooner than later. Settlement is not a sign of weakness, it's a smart decision, because the client is saving a lot of aggravation and expense.

Another mistake can be choosing the wrong mediator or the wrong style of mediator. As explained above, some mediators jump into the fray and start voicing their opinion as to what should happen much too early in the day.

Another mistake is not setting aside enough time for the mediation, as I indicated above. Parties and their counsel should be told that they should not have any plans made for the evening of the mediation in case the mediation runs late.

Another problem is not dealing with tax issues. Sometimes counsel and the clients are not aware of tax issues that may arise out of the dealing of an issue in a particular fashion. If they have not addressed tax issues prior to the mediation, there could be an inability to conclude the settlement until a tax opinion is obtained. Accordingly, it is helpful to have a tax opinion in advance or to have a tax expert available during the day in case questions arise. [8]

It is a mistake to choose a mediator based on price. While the marketplace offers a range of fees, the choice of mediator should not be based on his or her fees alone. Counsel should ask other lawyers for their opinions on proposed mediators and they should consider a mediator's experience and rate of success.

Conclusion

Mediation has a high rate of success in settling estate disputes. The chances for success are maximized by preparing the client as to how to approach the mediation and stressing the positive outcomes of settling disputes in providing certainty and savings of both financial and emotional costs. The choice of mediator also needs to be carefully considered.

[8] For examples: See Charles B. Wagner and David Posner: Mediation and the Deemed Disposition October 30, 2017 https://www.wagnersidlofsky.com/mediation-deemed-disposition/

Charles B. Wagner and David Posner: A tax trap in mediation- the foreign joint tenant September 3, 2017 https://www.wagnersidlofsky.com/foreign-joint-tenant/