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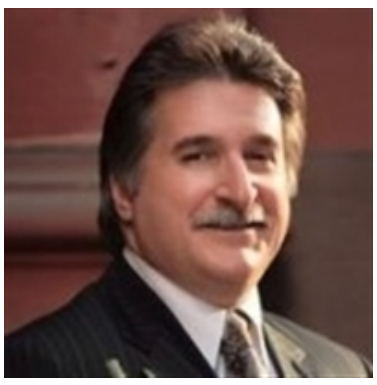
Mediating estate disputes part 1: preparation

By Kirsten McMahon, Associate Editor



In the first instalment of a three-part series, Toronto-area estates litigator and mediator Charles B. Ticker discusses how to prepare for mediation.

Due to the relationships — or lack thereof — of the litigants involved, estate disputes are well suited to mediation, Toronto-area estates litigator and mediator Charles B. Ticker tells AdvocateDaily.com.

"Clients are dealing with emotional baggage that can go back decades," he says.

Mediation has a high rate of success in settling estate disputes, says Ticker, who practises estates litigation and mediation at Charles B. Ticker Law Office. However, 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, such as the certainty and savings of both financial and emotional costs.

While the *Rules of Civil Procedure* provide for mandatory mediation of estates matters in Toronto, Ottawa and County of Essex, it is not uncommon for counsel in other jurisdictions to request it.

Ticker says parties should consider mediation at the earliest opportunity, even before commencing proceedings.

"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," he says.

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

Choosing a mediator

Once parties have agreed to take part, one of the most important decisions to be made is who will mediate the dispute.

"When choosing the person to lead the process, counsel need to carefully consider the style of the proposed mediator. Some use a facilitative approach and 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," Ticker says.

"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."

Most mediators use a combination of the above approaches, he says. For example, 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. 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.

“Clients need an opportunity to vent,” Ticker says. “In order for it 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 and this takes time.”

When he mediates cases, Ticker says he spends a good amount of time getting a feel for what the parties’ motivations and interests are and building trust before talking about offers and numbers.

Preparing for the mediation

Counsel will typically file mediation briefs with the mediator in which they will set out the facts in the dispute, their identification of the issues and their client’s position together with copies of relevant court orders, pleadings and copies of the applicable legal authorities, he says.

“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,” he says.

“Emotions should be left out of the briefs,” he adds.

The purpose of the brief is to educate the mediator as to what the case is about and the party’s position on the issues as well as highlight what evidence and law they may have to support their position.

“The key word is ‘brief.’ In my view, volumes of material are not necessary nor helpful,” he says.

In order to increase the chances of success in mediation, counsel must play a very different role than they do as advocates. Clients need to be fully prepared beforehand as to what to expect, Ticker says.

Counsel have to critically review with their clients the relative strengths and weaknesses of the case and encourage them to do their best to settle.

“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,” Ticker says. “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.”

Stay tuned for part two where Ticker will explain the procedure at mediations as well as common mistakes.

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