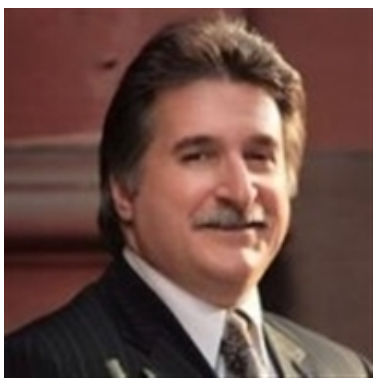
Estates & Wills & Trusts

Mediating estate disputes part 2: the process

By Kirsten McMahon, Associate Editor



In the second instalment of a three-part series, Toronto-area estates litigator and mediator Charles B. Ticker discusses how the mediation process works.

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.

Ticker, who practises estates litigation and mediation at Charles B. Ticker Law Office, says the biggest advantage to this negotiation process is that the parties are the ones controlling their own destiny and making the decision.

"They're not asking a judge — a total stranger who doesn't know and perhaps cares little about them or their family — to decide their future. With mediation, the parties are in control and, as a result, even though they may not be thrilled with the outcome, they are likely going to be more satisfied than they would after a trial," he says.

Joint session

Ticker says the mediation process traditionally begins with a joint session, which is where both parties, either through their lawyers or by themselves, make brief opening statements.

"The practice right now is to dispense with lengthy opening statements and I typically encourage the clients to say a few words about their position and their view of the case because mediation is really about them," he says. "I would prefer 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 suggest that they do not want to have a joint opening session at all.

"I think that is a mistake," Ticker says. "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 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, Ticker points out that if they don't settle, they will ultimately need to face each other in court.

"Their reluctance to face the opposing party at mediation may be interpreted as a willingness to go to trial, a message counsel does not want to send at the beginning of a negotiation," he says.

"This approach typically is successful in getting the parties to agree to at least a brief joint session."

Caucus

Following the joint session, parties will move into separate rooms where the balance of the day is typically spent with the mediator going back and forth, meeting with each party privately and relaying messages and offers to the other side

The mediator's role during a caucus is more than simply being a messenger, Ticker notes.

"They are 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," he says.

While emotions may run high, mediations still have to be conducted as a business meeting. If things are getting heated, Ticker says parties should take a break and go outside for a walk.

"I always make the rules of engagement very clear: no yelling or screaming, and no insults or name-calling," he adds.

Timing

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 them to go well into the evening hours if progress is being made. Sometimes the mediation is adjourned and continued on another day," Ticker says.

He adds that the pace of negotiations tends to quicken towards the end of the day.

"Much 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," Ticker says.

That said, parties and their counsel should not make any plans for the evening of the mediation in case it runs late.

If and when a settlement is reached, the lawyers — not the mediator — will draft minutes of settlement to be signed by the parties, which can be enforced in court like a contract.

Stay tuned for part 3 of the series, where Ticker will discuss common mediation mistakes.

For part 1, click here.

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