THE ESSENTIAL GUIDE TO ESTATE DISPUTE MEDIATIONS: UNIQUE CHALLENGES AND CREATIVE SOLUTIONS FOR LAWYERS

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1. Introduction

Estate litigation involves some of the most emotionally fraught disputes. Litigating parties, or even individuals 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. These disputing parties are often individuals who 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 complicated by emotion and lack of objectivity in the decision-making process. Long (often lifetime-

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held) family resentments, feelings of inequality, inadequacy and competition among siblings, prove to be a recipe for intractable disputes. The "real" cause or root of the disagreement may never be clear, or even related to what is pleaded in court documents.

Notably, the person at the heart of the dispute, the testator, is no longer available for consultation, 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 and is mandatory in some jurisdictions.

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

2. Overview of Alternative Dispute Resolution, Arbitration and Mediation in General

Alternative Dispute Resolution ("ADR", or Appropriate Dispute Resolution)[1] involves a range of techniques outside of (or used at the same time as) the traditional litigation process. ADR procedures are either mandated or chosen by parties in conflict to resolve their dispute in a less adversarial or confrontational way. These procedures are usually voluntary and are confidential.

ADR is an umbrella term for many ways to resolve a dispute. The most common and well-known procedures are mediation and arbitration; however, there are several other processes 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 opinion but supports and helps group members engage in constructive dialogue to help problem solve, manage conflict and make decisions. Group facilitation is often used in private and public-sector workplaces and for corporate boards.[2]

1. See ADR Institute of Canada's website for more information: www.adric.ca.
2. See ADR Institute of Canada's website's FAQs for more information: www.adric.ca/frequently-asked-questions.

- *Collaborative law*: Is a voluntary process in which each party retains a specially trained lawyer to collaborate 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, it may be used in other contexts. Notably, 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 the matter heads to trial. Sometimes contracts or agreements require the parties to make good-faith attempts to negotiate a settlement before litigating.

2.1 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, after a dispute has arisen.

Unless otherwise agreed, the terms of the applicable arbitration legislation will govern (for example, the federal *Commercial Arbitration Act*[5] or the applicable provincial legislation, such as Ontario's *Arbitration Act, 1991*[6]). Arbitration is often chosen as a litigation alternative in commercial or corporate disputes.

2.2 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 any decisions and the parties may terminate the process at any time. If a voluntary settlement is reached it only

3. *Ibid.*
4. *Ibid.*
5. R.S.C. 1985, c. 17 (2nd Supp.).
6. S.O. 1991, c. 17.

becomes binding on the parties upon signing a formal settlement agreement, often in the form of Minutes of Settlement.

Mediation is a highly effective, successful and often less costly (though in itself not inexpensive), alternative or addition to an adversarial dispute. Estate mediation is more generally "interest based" as it explores solutions that meet the needs and interests of the parties, rather than "rights-based" litigation that focuses more on the parties' rights or rules and the law.

There are also many benefits to conducting a mediation even before the adversarial process begins. Its appeal lies in the private nature of the resolution process (as opposed to the public court system); the parties may be able to preserve 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.

2.3 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 issues remain unresolved, the parties may move on to arbitration. If the mediator is also qualified as an arbitrator, the same facilitator can fulfill both roles and make a binding decision quickly since there will be familiarity with the facts of the dispute.

2.4 ADR Designations

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

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

3. To Mediate or Not to Mediate?

3.1 Mandatory Mediation

The question of whether or not to mediate an estate dispute in Ontario is easy to answer if the dispute arises in Toronto, Ottawa or Essex County (the Windsor area). Pursuant to rule 75.1.02(1)(a) of the *Rules of Civil Procedure*,[7] estate 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, including details of the mediation attendance, confidentiality and remedies for non-compliance. Rule 75.1.02(1)(b) provides that mandatory mediation applies to the following disputes:

- contested passing of accounts 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 *Succession Law Reform Act*;[8]
- proceedings under the *Substitute Decisions Act, 1992*;[9]
- proceedings under the *Absentees Act*,[10] the *Charities Accounting Act*,[11]
  the *Estates Act*,[12] the *Trustee Act*[13] or the *Variation of Trusts Act*;[14]
- applications under rule 14.05(3) whether the matters at issue relate to an estate or trust; and,
- proceedings under s. 5(2) of the *Family Law Act*.[15]

Ontario courts will dispense with mandatory mediation only where there is a clear reason. In the Toronto decision, *Sheard Estate*,[16] the court dismissed a motion for an order dispensing with mandatory mediation in a contested passing of accounts dispute.

7. R.R.O. 1990, Reg. 194, R. 75.1.
8. R.S.O. 1990, c. S.26.
9. S.O. 1992, c. 30.
10. R.S.O. 1990, c. A.3.
11. R.S.O. 1990, c. C.10.
12. R.S.O. 1990, c. E.21.
13. R.S.O. 1990, c. T.23.
14. R.S.O. 1990, c. V.1.
15. R.S.O. 1990, c. F.3.
16. 2013 ONSC 7729, 94 E.T.R. (3d) 130, 236 A.C.W.S. (3d) 273 (Ont. S.C.J.),

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". The beneficiaries also argued that mediation should be dispensed with as the amount in dispute was "small". Justice Mesbur, however, 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] as a "small" amount.[17]

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.[18]

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 January 1, 2016, rule 75.06(3.1) provides 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*,[19] where a court ordered mediation pursuant to rule 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 session". The decision does not mention whether

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additional reasons 2014 ONSC 807, 94 E.T.R. (3d) 141, 236 A.C.W.S. (3d) 1069.

17. *Sheard Estate*, at paras. 40-41.
18. *Sheard Estate*, at para. 43.
19. 2017 ONSC 6666, 39 E.T.R. (4th) 91, 285 A.C.W.S. (3d) 448 (Ont. S.C.J.), at para. 13.

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 the parties may 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 merits in considering mediation of an estate dispute include:

- mediation is strictly a confidential process and subject to settlement privilege;
- privacy (in a digital era where court decisions are more public than ever and accessibility of cases is prevalent through online databases such as CanLII[20] and postings on the internet and social media);
- since there is no winner/loser, everyone involved can control the mediation process and take ownership of the outcome;
- 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;
- a mediation will occur in a neutral space with less pressure than a formal courtroom;
- mediation is less expensive than trial;
- mediation may help preserve relationships;
- the process is relatively informal and straightforward; and
- mediation can facilitate dialogue.

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, especially given the participants are often bereaving the loss of a loved one.

3.2 When Mediation May Not Be Appropriate

While most estate disputes will benefit from a mediation, 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

20. www.canlii.org.

harassment, violence and other forms of abuse and power imbalances, mediation may not be a suitable alternative to litigation.

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

To deviate from the requirement for mandatory mediation, lawyers will need to seek a court order excusing the parties under rule 75.1.04.

4. Mediation Confidentiality and Settlement Privilege

Confidentiality and settlement privilege remain the most common reasons for choosing mediation. The application of settlement privilege applies as a rule of evidence that protects communications exchanged by the parties as attempts are made to settle a dispute.[21] The Supreme Court of Canada observed: "The 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."[22]

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.[23] Settlement privilege applies even in the absence of contractual provisions providing for confidentiality.

Notably, there is an exception to the common law settlement privilege, which permits parties to produce evidence of confidential communications in order to prove the existence or the scope of a settlement agreement.

The *Rules of Civil Procedure* stipulate: "All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions."[24] While

21. *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, 373 D.L.R. (4th) 626 (S.C.C.) ("*Union Carbide*"), at para. 31.
22. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, 359 D.L.R. (4th) 381 (S.C.C.) ("*Sable*") at para. 2.
23. *Sable*, at para. 17.
24. Rule 75.1.11.

mediation is intrinsically confidential, care should be taken to specify the confidentiality of the process by considering the inclusion of a confidentiality clause in the agreement to mediate. Often these clauses require the parties to keep anything that transpires at the mediation confidential. A confidentiality clause in an agreement to mediate differs from settlement privilege since the former is not a rule of evidence, but rather a matter of contract. If such a clause is placed in a settlement agreement, take care to consider whether it is appropriate to the circumstances, for example, court approval is required under rule 7 for settlements concerning persons under disability, and as such a confidentiality clause may not be appropriate.

In 2014, the Supreme Court of Canada weighed in on the interaction between settlement privilege and confidentiality clauses in mediation in the case of *Union Carbide Canada Inc. v. Bombardier Inc.*[25] The court considered 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.[26] 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 in 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.

5. Timing of the Mediation

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

For example, will challenges tend to be document and fact driven. As such, after obtaining disclosure of the drafting lawyer's 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-examinations.

25. 2014 SCC 35, [2014] 1 S.C.R. 800, 373 D.L.R. (4th) 626 (S.C.C.).
26. *Union Carbide*, at para. 51.

Seeking an Order Giving Directions stating specifically that the mediation be conducted prior to examinations-for-discovery or cross-examinations may be preferable in some instances. Insisting that examinations be conducted prior to attending a mediation session is in many circumstances cost prohibitive, unnecessary and often more appropriate to other civil litigation matters.

6. 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.[27]

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 a mediator is not chosen within 30 days after the order directing the mediation, the court shall, on a motion, assign a mediator (with the mediator's prior consent).

It is important to choose a mediator with experience in the area of the issues in dispute and having regard to the personalities' involved. While some believe that any experienced mediator can mediate an estate dispute, regardless of training and experience, it is important to consider the complexity of the estate litigation matter and the type of assets and interests involved. Estate litigation is a unique area of law with unique considerations. 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, attorneys, guardians, trustees and estate trustees; power of attorney litigation; trust rectification/variation/interpretation applications; guardianships for property or for personal care; elder law issues including elder abuse; capacity proceedings; end-of-life disputes; fiduciary litigation; and tax considerations and consequences arising in estates and trusts. Complex estate disputes often involve family businesses, corporate structures, estate freezes, shareholder agreements, property and corporate valuations and co-ownership, to list but a few. Often the estate dispute will touch on more than one of these 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 which also reflects the dollar value attributed to the matter.

27. See rule 75.1.06(1)(a)-(c).

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

Lawyers should also consider the "style" of the mediation that the proposed mediator will conduct. The two more common styles of mediation are *facilitative* and *evaluative*, or a combination of both.

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 manage the process and guide the parties to a mutually agreeable resolution by facilitating discussion, 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/parties tend to have the influence on decisions made, rather than the parties' lawyers.

One of the benefits of a facilitative mediation is that it empowers parties to take responsibility for the outcome of the dispute. Occasionally, however, such an approach may not work – more so where there is a clear power imbalance between the parties. Facilitative mediations may be more time consuming as there is often considerable time spent on non-legal issues.

An *evaluative* mediator will give an evaluation of the strengths of the parties' cases. Generally, this type of mediation will be concerned more with the legal rights of the parties, rather than their underlying interests. The mediator will evaluate the parties' legal rights and positions, may push parties towards 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. Careful management of the parties, such that there is no appearance of a winner and a loser, is important to the process, especially where the mediator concludes that one party has the stronger case. This approach demands that 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 and progress towards evaluative, or when the parties request, provide an opinion on or evaluate the legal rights of the parties and the process.

Choice of the mediator may include lawyers, retired judges, social workers, elder law experts or other professionals.

6.1 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 by which that lawyer must abide:

> 5.7-1 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 to the parties during the mediation process. This does not preclude the mediator from giving legal 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.

7. 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 to use the mediation brief as a tool to assist in settlement. The mediation brief is an opportunity to tell the client's story in a compelling and persuasive manner to convince the opposing parties of the merits of settlement.

Lawyers should spend time on the mediation brief. The goal, in part, is to educate the mediator on the relevant information necessary to assist in settling the matter. There is no need for the mediation brief to be a lengthy document. Briefs can, and should be, clear and concise.

Rule 75.1.08 provides that a mediation brief is required for all mandatory mediations and must be provided to all parties and the mediator at least seven days before the mediation. Form 75.1C outlines what should be included in a mediation brief (statement of issues), however, it can be modified. Form 75.1C has three sections: (1) factual and legal issues in dispute; (2) party's position and

interests (what the party hopes to achieve); and (3) attached documents.

A well-written and documented brief will assist in achieving a successful mediation. Lawyers may consider adding a short "Overview" that talks about the theory of the case, highlights the main issue(s), 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 the mediator will have appropriate insight into the family dynamics.

Be careful in the approach since the goal is settlement, not to engage in scorched earth warfare. Demonstrate that your client has a good, strong case but do not include inflammatory language or accusations that will only serve to heighten already emotive parties.

For the "Facts" section, consider including a chronology or chart of notable events. It is important to include key documents relevant to the issues.

8. Obtain Required Documents and Expert Reports

Lawyers should have all the documents their clients 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:

- testamentary documents (wills, codicils, deeds);
- 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 (s. 72 assets); include account opening documents for joint accounts, and insurance designations and policies;
- relevant marriage or domestic contracts, separation agreements;
- in a will challenge scenario, consider including the drafting lawyer's notes;
- if capacity is an issue, include relevant medical records;
- consider the value of an expert's 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 passing of accounts application dispute, obtain and understand the vouchers;
- obtain real estate valuations/opinions of value;

- if it is a dependant's support claim, provide life style analysis; and
- consider tax issues and outcomes.

These are just some of the relevant preparation considerations. 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.

9. Prepare Your Client

Mediation can work when all parties are prepared and understand the goal of mediation. In so far as is possible, settlement should be reached with the benefit of information and transparency to ensure the best forum for understanding the issues involved, rather than having one party left in the dark and unable to make an informed decision.

Lawyers should prepare their clients for the process, underscore the importance of confidentiality, explain that this is a chance to step away from or avoid an adversarial court 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 opposing lawyers will meet your clients. A properly prepared and presented client may cause opposing lawyers and clients to re-evaluate their case and sometimes re-evaluate what their clients have been saying about your client.

The client should be familiar with the process of a mediation: What will happen? When? Where? How long will the process last? What are the realistic expectations? What are the various potential outcomes? What if settlement is achieved; what are the next steps? What if settlement is not achieved; what are the next steps?

Explain the confidential nature of the mediation and remind clients of rules 75.1.11 and 75.2.08 (for court-ordered mediations) which state that: "All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions."

Clients need to be assured that anything that is said or admitted cannot be used against the client at a later stage. The fact that there is no public record of the proceeding may provide some clients with the comfort to say things that might otherwise not be said. In addition, clients can be advised that any information a client provides to the mediator to help the mediator understand their position better can

remain confidential and that the mediator will not disclose any information unless expressly authorized by the clients.

Having the opportunity to participate in open and frank discussions may be the key to resolving outstanding issues that might otherwise be addressed in the litigation process.

Estate mediations will often take a full day or several days. The client should be prepared to spend significant time at the mediation.

Explain 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.

9.1 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. Rarely will a party leave with everything that is wanted and be completely satisfied.

Sometimes in estate mediation there are non-parties who may have influence over whether a settlement will happen or not (other family members, relatives, spouses, friends, etc.). Consider having these individuals attend the mediation with your client. At the very least, consider having that individual available by phone.

Explain the negotiation process. Prepare your client for the likelihood that an opening offer from the other side will not be close to what your client is expecting. Manage client expectations. Be direct in advising clients on realistic expectations of the day (even if your client may not want to hear your views).

Sometimes estate mediations fall apart over what seems to be inexpensive or insignificant items. Often it is the emotional connection to such items that prevents parties from reaching resolution. Consider preparing a list in advance of the items the client really wants and have a conversation with the client about the expectations of receiving those items and whether an accurate valuation of the items should be obtained in advance. Steering your clients away from the emotional aspects and towards the financial implications of continued litigation assists the clients in moving past those types of difficulties.

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

Also, lawyers must remember their duty to encourage settlement as set out in Rule 3.2-4 of the Rules of Professional Conduct, which 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."

Lawyers must also communicate to their clients that a mediation may be a "fishing expedition" for the opposing party, and in that event, will not likely result in a settlement.

10. Prepare Draft Minutes and Releases

Before the day of mediation, you should have a discussion with your client about the first offer your client is 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 draft set of Minutes of Settlement and Releases. Having the title of proceeding, court file number, correct parties, recitals, etc., will save a substantial amount of time on the date of mediation. Since these mediations tend to go into the evening, advance preparation will assist in making sure necessary protections are set out in the settlement agreement.

11. Prepare for the Day of Mediation

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, if any, 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 lawyers and perhaps in consultation in advance with the mediator. A few considerations:

- Should there be a plenary session?
- Should the mediator meet any of the parties in advance?
- Should any of the non-parties be present in plenary, or not?
- Will lawyers be expected to give opening statements?

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

Contact experts or accountants and ensure availability and access via phone on the day of mediation in case questions arise. Structuring a settlement may require tax advice. The settlement may have tax consequences and clients may need to understand more precise valuations to understand what they are receiving or paying on settlement. 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 is needed and ensure plenty of food and water are available.

11.1 The Lawyer's Role at Mediation and the Rules of Professional Conduct

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 the duties owed to a court are similarly owed to a mediator.

For example, Rule 2.1-1 "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."

These are just two of the many Rules that govern lawyers' duties. Lawyers must remember that these duties also apply to mediators and their conduct at mediations.

12. Documenting the Settlement

You will have prepared your draft Minutes of Settlement and Releases as recommended above. Have them available on your laptop, ready to edit and finalize. 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. Include tax consequences, legal fees and expert fees that need to be paid. As lawyers, be prepared to advise on the risks of having or not having such information.

Consider in finalising Minutes of Settlement whether:

- all parties with a financial interest have been given notice;
- independent legal advice is required;
- a certificate of independent legal advice or none is required;
- spouses/former spouses are signatories or have been given notice of the proceedings;
- all parties named in all testamentary documents are signatories or have been given notice of the proceedings;
- all defendants are signatories or have been given notice of the proceedings;
- the estate trustee should be a signatory; and
- the estate trustee has knowledge of the estate administration and for example, whether the estate trustee has advertised for creditors.[28]

Settlement agreements must be prepared by the parties and their lawyers and should not be prepared, 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 s. 6 or s. 45 of the *Substitute Decisions Act, 1992*). All claims involving persons under disability require judicial approval of any settlement.

13. 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 and the parties will be bound by its terms.

Rule 75.1.12(4) of the Rules of Civil Procedure provides:

> 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,
>
> (a) in the case of an unconditional agreement, within 10 days after the agreement is signed;

28. See Ian Hull and Suzana Popovic-Montag, "Alternative/Creative Resolution in the Context of Incapacity", at p. 26.

(b) in the case of a conditional agreement, within 10 days after the condition is satisfied.

In practice, such notice is rarely ever filed.

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

14. Conclusion

There is no guarantee that an estate dispute will be settled at a mediation. However, estate mediation has proven to be a highly successful alternative to the expensive, emotive and lengthy court processes involved in these types of disputes. If lawyers and clients put in the effort and necessary preparation before and during a mediation session, the chances of a successfully mediated outcome increases substantially.