# TAB 18

# The Unworthy Litigant at Mediation – Payment of "Ransom" Money?

18

**Howard S. Black**
*Minden Gross LLP*

# The Six-Minute Estates Lawyer 2009


The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING LEGAL EDUCATION

# THE UNWORTHY LITIGANT AT MEDIATION – PAYMENT OF "RANSOM" MONEY?

The Six-Minute Estates Lawyer 2009
April 6, 2009

Howard S. Black, B.A., LL.B, LL.M

Minden Gross LLP
Barristers & Solicitors
145 King Street West, Suite 2200
Toronto, Ontario, M5H 4G2
Telephone: (416) 369-4332
Fax: (416) 864-9223
E-Mail: hblack@mindengross.com

# THE UNWORTHY LITIGANT AT MEDIATION – PAYMENT OF "RANSOM" MONEY?

Mandatory mediation has now been a part of our procedural framework in Ontario in the trusts and estates area of practice for a number of years. While most would likely argue that this has been a worthwhile development, there are also drawbacks in introducing a scheme of mandatory alternative dispute resolution. One of those drawbacks is the fact that litigants with unmeritorious or weak legal positions often end up with a financial benefit as a result of the mediation process that they otherwise would not have received if the matter had proceeded to Court. At the end of the day, however, the ultimate question is whether we are now better off with mediation than we were prior to its introduction to our rules of civil procedure.

Rule 75.1 of the *Rules of Civil Procedure*[1] (please see Appendix 1) is the rule that deals with the application of mandatory mediation to estates, trusts, and substitute decision issues. Originally introduced as a pilot project, the "sunset clause" was subsequently revoked, resulting in the rule's formal inclusion as part of our procedural model. According to the annotation to the rule[2], the revocation of the rule's "experimental" status was due, in part, to some of the statistics that were reported in 2003-2004 from matters that had been mediated in both Ottawa and Toronto. In Ottawa, 61% of cases fully settled, 29% partially settled, and 9% did not settle; in Toronto, the respective numbers were 68%, 15%, and 17%.

Although a "purist" mediator would not exclusively regard the settlement of a proceeding as indicative of a "successful" mediation, most litigants and counsel for

---

[1] Watson and McGowan, *Ontario Civil Practice*, 2009, Thomson Carswell.
[2] *Ibid.*, *"Highlights"* to Rule 75.1.

litigants look to mediation as a process by which the litigation may potentially be resolved. Accordingly, from their perspective, the resolution of the dispute is symbolic of mediation having been a success.

By way of side comment, if mediation has been seen as one of the best things since sliced bread, why has mandatory mediation not been embraced across the entire province? Currently, the mandatory mediation rules apply only to proceedings that have been commenced in the City of Toronto, the City of Ottawa, and the County of Essex.[3]

In proceedings commenced in any of the jurisdictions noted above, the mandatory mediation rules apply to a variety of estate, trusts, and substitute decisions matters. They are the following:

(a) contested applications to pass accounts;

(b) formal proof of testamentary instrument; objection to issuing a certificate of appointment; return of a certificate of appointment; claims made against an estate under sections 44 or 45 of the *Estates Act*;

(c) dependants' support applications under the *Succession Law Reform Act*;

(d) proceedings under the *Substitute Decisions Act, 1992,* the *Absentees Act*, the *Charities Accounting Act*, the *Estates Act,* the *Trustee Act*, or the *Variation of Trusts Act*;

(e) applications brought under subrule 14.05(3) where the matter relates to an estate or trust; or

(f) applications for equalization of *net family property* commenced under subsection 5(2) of the *Family Law Act*.[4]

---

[3] Supra note 1, paragraph 75.1.02(1)(a).
[4] *Supra note* 1, paragraph 75.1.02(1)(b)

It is clearly self-evident that almost every type of judicial proceeding involving an estate, a trust, or an incapable person will come within the ambit of Rule 75.1.

When a lawyer is consulted by a potential client with an inquiry concerning the possibility of a pursuing a claim involving an estate, most reputable practitioners will assess the merits of the legal issues that are at stake and will assess, admittedly only on a very preliminary basis at this early stage, the relative strengths and weaknesses of the claim. The responsible lawyer will then advise the potential client as to the possible risks and rewards involved with proceeding further in advancing the claim.

As professionals working within the legal system, we have a duty and responsibility to ensure that frivolous cases are not pursued in the courts. Our obligation includes ensuring that the administration of justice operates efficiently and properly. "The lawyer should advise and encourage the client to compromise or settle a dispute whenever possible on a reasonable basis and *should discourage the client from commencing or continuing useless legal proceedings*."[5] (italics added)

In days which are now hopefully history, there was often very little disincentive, from a financial perspective, for a potential litigant to give serious consideration to the merits of a potential law suit prior to initiating the claim. Particularly in estates matters, it was routine for the courts to order that the legal costs of all parties be paid out of the estate of the deceased individual, regardless of whether a particular party litigant was the "winner" or "loser" in the litigation.

---

[5] The Canadian Bar Association, *Rules of Professional Conduct*, Chapter III, commentary 6. (Canadian Bar Association – adopted by Council August 2004 and February 2006).

Fortunately, the trend of our courts, over the last number of years, has been to address the issue of costs in estates matters in a similar manner to that used in other civil litigation proceedings. In other words, the "losing" party is much more likely to bear personal responsibility for his or her own costs and, possibly, for the costs of the victorious litigant.

From a costs perspective, therefore, we have witnessed a positive evolution in that the Courts have begun penalizing parties with costs consequences where they have pursued or prolonged unmeritorious proceedings. While some might argue that Courts should continue to be even more aggressive in the area of costs awards, we have at least progressed from the day when a potential party litigant held the view that there were no personal financial consequences to pursuing litigation.

While the judiciary has been doing its best to adopt measures that would minimize the pursuit of unworthy or unmeritorious litigation in the form of costs penalties, the introduction of mandatory mediation in estates matters may be having opposite consequences. While there is now a greater risk of potential costs consequences in pursuing a frivolous matter, the *amount* of such financial risk is really the specific consideration. In other words, the real question involving any party litigant to an estates dispute, but particularly one whose legal argument has very little substance, involves a balancing of competing risk factors. What is the likelihood of my being able to settle this dispute in a way that will *at least* ensure that I am not out-of-pocket at the end of the day? Secondly, if I feel somewhat confident that there will be a settlement of the dispute upon terms that will result

in my being indemnified as to costs, then any *additional* monies that I might be able to extract in the settlement process will be a bonus to me.

Given the "success" statistics outlined earlier relating to the resolution of estates disputes at mediation, there is much reduced risk that a party whose legal position is weak is going to have the case proceed all the way to trial with the potential for significant adverse costs consequences. Given my experience as a mediator of estates disputes,[6] I have found that the vast majority of mediations that result in a successful resolution of the dispute involve the costs of all parties to the mediation being paid out of the estate assets.

Have we, therefore, replaced a system that once virtually guaranteed parties full reimbursement of their legal costs with a system that now does the same through the mandatory mediation process?

The consequences outlined above are probably true. The more relevant, practical question, however, is: Are we better off now that mandatory mediation has become a part of our procedural framework? Acting as a mediator of estate disputes and being a strong advocate of mediation, I will answer the question in the affirmative. The answer to the question, however, needs to be qualified in a few respects as outlined below.

While mediation is mandatory, the settlement of the dispute at mediation is not. A resolution of the litigation will only result upon the consent of all parties. (In fact and, once again based upon my experience, I am of the strong opinion that the successful resolution of disputes at mediation depend upon three different groups of individuals, being the parties themselves, their legal counsel, and the

[6] The author has been a mediator of estates disputes for the past ten years as at the date of this paper.

mediator.) There is, therefore, nothing preventing a party from refusing to accede to the request of the "unworthy litigant" to be reimbursed in full for legal costs incurred. This is all part of the negotiation process and depends upon a number of factors, including how risk averse the parties are, what are the parties' financial resources, the significance of the emotional issues that may be driving the litigation, etc.

While one of the most dominant reasons to settle a dispute at mediation is financial, given the very significant costs involved in litigating a matter all the way to trial, individual litigants nevertheless have the option of travelling down that road should they choose to do so.

It is also those very significant costs involved in litigating a matter all the way to trial that practically prevent many litigants from pursuing or defending a proceeding to a judicial determination, resulting in "ransom" money often having to be paid in order to resolve the matter at an earlier stage and to stop the financial bleeding. In this way, from a practical perspective, unworthy litigants are still benefiting in many cases from a system that promotes mandatory mediation in that they will still often have their legal costs reimbursed to them if the matter settles at mediation.

The consequence of a "reward" being given to those who perhaps ought not to have been granted the privilege of advancing a frivolous claim in the first place has to be balanced against a society which promotes freedom of expression and democratic principles. A transparent judicial system that is open to all is a value that is well worth maintaining and supporting. That does not mean that it is

devoid of deficiencies and that there are always areas of reform that are worthwhile.

On the whole, however, the introduction of mediation to our procedural framework has been a positive development. While the individual with the unmeritorious legal position may not be sufficiently discouraged from proceeding with the claim, all of the advantages of mediation still exist, including overall reduction of costs, greater satisfaction with the result, more individual involvement in the process, rehabilitation of the parties, etc.

Our obligation, as the stewards of the legal profession, is to constantly seek ways to improve our administration of justice system in a way that will promote democratic principles and a judicial process that will operate efficiently and which will be perceived as fair and equitable.

## APPENDIX 1

## RULE 75.1 MANDATORY MEDIATION — ESTATES, TRUSTS AND SUBSTITUTE DECISIONS

**75.1.01** Revoked: O. Reg. 132/04, s. 13.

**SCOPE**

**75.1.02** (1) This Rule applies to proceedings,

(a) that are commenced in,

(i) the City of Toronto on or after September 1, 1999,

(ii) The Regional Municipality of Ottawa-Carleton on or after September 1, 1999 but before January 1, 2001,

(iii) the City of Ottawa on or after January 1, 2001, or

(iv) the County of Essex on or after January 1, 2005; and

(b) to which any of the following applies,

(i) rule 74.18 (application to pass accounts), if the application is contested,

(ii) rule 75.01 (formal proof of testamentary instrument), 75.03 (objection to issuing certificate of appointment), 75.05 (return of certificate) or 75.08 (claims against an estate),

(iii) Part V of the *Succession Law Reform Act*,

(iv) the *Substitute Decisions Act, 1992*,

(v) the *Absentees Act*, the *Charities Accounting Act*, the *Estates Act*, the *Trustee Act* or the *Variation of Trusts Act*,

(vi) subrule 14.05 (3), if the matters at issue relate to an estate or trust, or

(vii) subsection 5 (2) of the *Family Law Act*. O. Reg. 290/99, s. 2; O. Reg. 132/04, s. 14.

(2) The fact that an estate or trust is a party to a proceeding, by virtue of an order to continue under rule 11 or otherwise, is not sufficient to bring the proceeding under this Rule. O. Reg. 290/99, s. 2.

**DEFINITIONS**

**75.1.03** In this rule,

"designated party" means a party whom an order under rule 75.1.05 requires to attend a mediation session in person; ("partie désignée")

"list", when used in reference to a county, means the list maintained for the county under subrule 24.1.08 (1); ("liste")

"mediation co-ordinator", when used in reference to a county, means the person designated as mediation co-ordinator for the county under rule 24.1.06. ("coordonnateur de la médiation") O. Reg. 290/99, s. 2.

**EXEMPTION FROM MEDIATION**

**75.1.04** The court may make an order, on a party's motion or of its own motion, exempting the proceeding from this rule. O. Reg. 290/99, s. 2.

**DIRECTIONS FOR CONDUCT OF MEDIATION**

***Motion for Directions***

**75.1.05** (1) In a proceeding described in subrule 75.1.02 (1), except a contested passing of accounts under rule 74.18, the applicant shall make a motion, in the same way as under rule 75.06, seeking directions for the conduct of the mediation. O. Reg. 290/99, s. 2.

(2) The notice of motion shall be served within 30 days after the last day for serving a notice of appearance. O. Reg. 290/99, s. 2.

(3) The motion may be combined with a motion under rule 75.06. O. Reg. 290/99, s. 2.

***Directions***

(4) On the hearing of the motion under this rule, the court may direct,

(a) the issues to be mediated;

(b) who has carriage of the mediation and who shall respond;

(c) within what times the mediation session shall take place;

(d) which parties are required to attend the mediation session in person, and how they are to be served;

(e) whether notice is to be given to parties submitting their rights to the court under rule 75.07.1;

(f) how the cost of the mediation is to be apportioned among the designated parties; and

(g) any other matter that may be desirable to facilitate the mediation. O. Reg. 290/99, s. 2.

(5) In a contested passing of accounts the court shall, on the hearing date specified in the notice of application, deal with the matter as if subrule (4) applied. O. Reg. 290/99, s. 2.

***Non-Compliance***

(6) If there is non-compliance with a direction given under subrule (4) or (5), the matter shall be referred,

(a) in the City of Toronto, to a judge; and

(b) in the City of Ottawa and in the County of Essex, to a judge or a case management master. O. Reg. 132/04, s. 15.

**Note: On January 1, 2010, the French version clause (b) is amended. See: O. Reg. 438/08, ss. 66, 68 (1).**

**MEDIATORS**

**75.1.06** (1) A mediation under this rule shall 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. O. Reg. 290/99, s. 2.

(2) Every person who conducts a mediation under subrule (1), whether named on the list or not, is required to comply with this rule. O. Reg. 290/99, s. 2.

## CHOICE OF MEDIATOR

**75.1.07** (1) Within 30 days after an order giving directions is made under rule 75.1.05, the designated parties shall choose a mediator under subrule 75.1.06 (1). O. Reg. 290/99, s. 2.

(2) When a mediator has been chosen, the party with carriage of the mediation shall give the mediator a copy of the order giving directions. O. Reg. 290/99, s. 2.

(3) If the designated parties have not chosen a mediator by the end of the 30-day period, the party with carriage of the mediation shall immediately file with the mediation co-ordinator for the county a request for the assignment of a mediator (Form 75.1A). O. Reg. 290/99, s. 2.

(4) A copy of the order giving directions shall be attached to the request. O. Reg. 290/99, s. 2.

(5) On receiving the request, the mediation co-ordinator shall immediately assign a mediator from the list and give the mediator a copy of the order giving directions. O. Reg. 290/99, s. 2.

(6) If the party with carriage of the mediation fails to file a request, any designated party may file the request. O. Reg. 290/99, s. 2.

(7) The mediator shall, immediately on being chosen or assigned, fix a date for the mediation session and shall, at least 20 days before that date, serve on every designated party a notice (Form 75.1B) stating the place, date and time of the session and advising that attendance is obligatory. O. Reg. 290/99, s. 2.

## PROCEDURE BEFORE MEDIATION SESSION

### *Statement of Issues*

**75.1.08** (1) At least seven days before the mediation session, every designated party shall prepare a statement in Form 75.1C and provide a copy to every other designated party and to the mediator. O. Reg. 290/99, s. 2.

(2) The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement. O. Reg. 290/99, s. 2.

(3) The party making the statement shall attach to it any documents that the party considers of central importance in the proceeding. O. Reg. 290/99, s. 2.

***Non-Compliance***

(4) If it is not practical to conduct a mediation session because a designated party fails to comply with subrule (1), the mediator shall cancel the session and immediately file with the court a certificate of non-compliance (Form 75.1D). O. Reg. 290/99, s. 2.

**ATTENDANCE AT MEDIATION SESSION**

***Who is Required to Attend***

**75.1.09** (1) The designated parties, and their lawyers if the designated parties are represented, are required to attend the mediation session. O. Reg. 290/99, s. 2.

***Authority to Settle***

(2) A designated party who requires another person's approval before agreeing to a settlement shall, before the mediation session, arrange to have ready telephone access to the other person throughout the session, whether it takes place during or after regular business hours. O. Reg. 290/99, s. 2.

***Failure to Attend***

(3) If it is not practical to conduct a scheduled mediation session because a designated party fails to attend within the first 30 minutes of the time appointed for the commencement of the session, the mediator shall cancel the session and immediately file with the court a certificate of non-compliance (Form 75.1D). O. Reg. 290/99, s. 2.

**REMEDY FOR NON-COMPLIANCE**

**75.1.10** (1) When a certificate of non-compliance is filed, the party with carriage of the mediation shall, within 15 days after the date fixed for the mediation session that was cancelled, bring a motion for further directions before,

(a) the judge who made the order under rule 75.1.05;

(b) any other judge who is available; or

(c) in the City of Ottawa or in the County of Essex, a case management master. O. Reg. 132/04, s. 16.

**Note: On January 1, 2010, the French version of clause (c) is amended. See: O. Reg. 438/08, ss. 66, 68 (1).**

(2) The judge or case management master may require the designated parties to appear before him or her and may,

**Note: On January 1, 2010, the French version of subrule (2) is amended in the portion before clause (a). See: O. Reg. 438/08, ss. 66, 68 (1).**

(a) establish a timetable for the proceeding;

(b) strike out any document filed by a designated party;

(c) order a designated party to pay costs; or

(d) make any other order that is just. O. Reg. 290/99, s. 2.

## CONFIDENTIALITY

**75.1.11** All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions. O. Reg. 290/99, s. 2.

## OUTCOME OF MEDIATION

### *Mediator's Report*

**75.1.12** (1) Within 10 days after the mediation is concluded, the mediator shall give the mediation co-ordinator for the county and the designated parties a report on the mediation. O. Reg. 290/99, s. 2.

(2) The mediation co-ordinator may remove from the list the name of a mediator who does not comply with subrule (1). O. Reg. 290/99, s. 2.

### *Agreement*

(3) If there is an agreement resolving some or all of the issues in dispute, it shall be signed by the designated parties or their lawyers. O. Reg. 290/99, s. 2.

(4) If the 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;

(b) in the case of a conditional agreement, within 10 days after the condition is satisfied. O. Reg. 290/99, s. 2.

(5) Despite subrule (4), if rule 7.08 (person under disability, approval of settlement) also applies to the agreement, the notice shall be filed within 10 days after the event mentioned in clause (4) (a) or (b), or within 10 days after the agreement is approved, whichever is later. O. Reg. 290/99, s. 2.

***Failure to Comply with Signed Agreement***

(6) If a party to a signed agreement fails to comply with its terms, any other party to the agreement may,

(a) make a motion to a judge for judgment in the terms of the agreement, and the judge may grant judgment accordingly; or

(b) continue the proceeding as if there had been no agreement. O. Reg. 290/99, s. 2.

***No Agreement***

(7) If no agreement is reached that resolves all the issues in dispute, the matter shall proceed in accordance with any directions given under rule 75.06, or a motion for directions shall be made as soon as possible under that rule. O. Reg. 290/99, s. 2.

**CONSENT ORDER FOR ADDITIONAL MEDIATION SESSION**

**75.1.13** (1) With the consent of the designated parties, the court may, at any stage in the proceeding, make an order requiring them to participate in an additional mediation session. O. Reg. 290/99, s. 2.

(2) The court may include any necessary directions in the order. O. Reg. 290/99, s. 2.

(3) Rules 75.1.07 to 75.1.12 apply in respect of the additional session, with necessary modifications. O. Reg. 290/99, s. 2.

**75.1.14** Revoked: O. Reg. 132/04, s. 17.