TAB 21

Part 7: Putting It All Into Practice

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Mediation and Other Strategies to Negotiate a Resolution

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MEDIATION AND OTHER STRATEGIES TO NEGOTIATE A RESOLUTION

1. Introduction

While any form of estate and trust dispute can be very complex and provoke extreme emotion on the part of the litigants, none matches the difficulties and emotional wear and tear of disputes involving allegations of lack of testamentary capacity and undue influence. Predominantly, these types of disputes relate to questions of the validity of gifts made by an individual during his lifetime, or the validity of Powers of Attorney or Wills. The matters are made more difficult to resolve due to the number of parties who become involved with the issues, including family members as well as public authorities such as the Public Guardian and Trustee and Office of the Children's Lawyer which are required to represent charities, minor children, etc. Of course, the complexity of the issues, depth of emotion and potentially large number of litigants translates into extremely expensive litigation if the matter is taken through the Court system. This paper is a discussion of other options available to attempt to resolve the issues without the necessity of pursuing the expensive and cumbersome litigation process.

2. Early Intervention

The most important element in efforts to resolve an estate dispute without the necessity of proceeding along the litigation track is early intervention. The longer the dispute festers, the more letters are exchanged among lawyers (with copies always going to clients), the greater is the opportunity for the individuals to consider and raise old wounds, real or imagined, and the less likely is the

probability that the matter will be resolved without engaging in confrontational and wearing litigation for many years.

The initial attitude and approach of the lawyer or lawyers retained by the parties is usually determinative of the direction that the dispute will take. In addition to providing legal advice and empathy in response to the client's needs, the lawyer should sensitively introduce perspective and context. She should initiate a discussion with the client as to why it is to everyone's benefit to make a concerted effort to keep emotional matters in check as much as possible in an attempt to deal with the dispute in a practical and cost efficient manner. The lawyer who immediately sends a very intemperate, overly aggressive letter to the other parties or counsel for the other parties is inflaming the situation at a time when instead every effort should be made to create an atmosphere that will stimulate discussion and negotiation. The initial approach of the lawyer should be to encourage an atmosphere of "problem solving" or "dispute resolution", not confrontation.

It is recognized that not all disputes can be resolved through negotiation, mediation, etc. In an estate context, some matters require an eventual Court adjudication despite the costs – financial and emotional – that it involves. However, anecdotal evidence has been consistent that well over 90% of estate disputes do eventually resolve without an ultimate trial or hearing. The unfortunate aspect is that so many of the disputes only settle after years of expense and emotional anguish, when in retrospect all of the facts and legal issues were known to the parties and lawyers within a couple of months of the initiation of the dispute.

Some elements of early intervention that must be considered by the lawyer or lawyers involved at the outset of the case are:

1. As referred to above, there is very often a tendency on the part of the lawyer to immediately take a very aggressive position both in discussions with the client and communication with the lawyers for the other parties. Such an approach flows from the lawyer's role as "protector" of the client. It gives the client reassurance to feel that the lawyer feels as strongly about the injustice that the client feels he is suffering. However, by assuming an overly aggressive posture in the initial communication with the other parties, the lawyer is unintentionally doing the client a great disservice.

   Instead, the lawyer can be both sympathetic and sensitive to the client's sense of outrage and injustice while also explaining to the client the benefits of attempting to approach the dispute in a non-confrontational manner. In order to set the matter on a trajectory of discussion and negotiation, the lawyer must begin with the nature and tone of the discussions with his client and by managing the expectations of his client. It is not being proposed that the lawyer attempt to play the role of social worker. The most important skills which experienced counsel can provide include listening, ascertaining the client's needs, explaining legal options in a concise and understandable manner and advising as to options and approaches which in the long run will be of greatest benefit to the client.

2. Technology such as voicemail and email has introduced significant efficiencies into the practice of law. It has also added to the increasing trend toward "depersonalization" in addressing legal disputes. As a mediator, I am struck by how often I will conduct a mediation, perhaps a year and a half or two years after the dispute began, and at the outset of the mediation the lawyers are introducing themselves to one another. That is, they have not met face to face in the course of a one

and a half year dispute. Face to face meetings remain the most productive means of stimulating meaningful negotiations.

3. Correspondence and emails of lawyers in a dispute very frequently are one-sided and hard edged. They are this way because a copy of the letter is going to the client and there is an element of reassurance being communicated to the client that the lawyer is forcefully advocating the client's position. Usually, this provokes a similarly confrontational response from lawyers representing other clients in the case. To avoid dispute escalation of this nature, the first thing the lawyer should pursue with the client is the possibility of the affected family members sitting down together without lawyers to discuss the issues - hopefully in a very cool-headed manner – with a view to determining whether there is any path toward resolution which they could directly adopt. If so, they can then go back to their respective lawyers so that the details can be discussed and a proper settlement agreement can be drafted and concluded. This model is increasingly being used by spouses in matrimonial disputes which frequently share the high emotional component that accompanies estate disputes.

4. Another variation is to encourage a meeting of affected family members at a very early stage in the presence of another family member who is respected by all, but not directly involved in the dispute. It is surprising how often there can be an uncle, aunt, brother-in-law, who has the respect of all the disputants and can be an effective unofficial mediator. This possibility should be thoroughly canvassed. While the litigants may vehemently disagree on every issue, they usually have one strong bond: they would all prefer that a significant amount of the estate not be spent on legal fees.

3. Early meetings involving lawyers and clients

One of the requirements, but great challenges, in being an effective lawyer is to advocate the client's interest without losing objectivity. The lawyer must always focus on the primary goal which is to resolve the dispute as early as possible in a manner which is beneficial to the lawyer's client and to the other litigants as well. To do this it is vital that every effort be made to have a meeting about the case at the earliest possible opportunity.

If there are numerous complex legal and factual issues, it may be sensible to first have a meeting involving only the lawyers. In any case, a meeting involving the lawyers and the litigants should be convened at the earliest possible opportunity. Very high emotions on the part of the litigants is not a reason to forego such a meeting. It can easily be organized with the litigants in their own separate rooms so that actual contact among them can be minimized or entirely eliminated. However, the result is that all of the parties are physically together to discuss the issues and attempt to work their way towards resolution, rather than have one imposed upon them by a Court.

4. Mediation

As a result of a pilot project in Toronto and Ottawa which began in 1999, mandatory mediation of all estate disputes applies in Toronto, Ottawa and Windsor. Mandatory mediation has become an integral part of the litigation process. Recent amendments to Rule 24.1 of the Rules of Civil Procedure dealing with mandatory mediation in non-estate matters have extended the types of actions which are subject to mandatory mediation.

While there may be many individual factors that must be taken into account when deciding at what point the parties should go to mediation, it is generally the rule that "the sooner the better". It is seldom necessary or desirable that

examinations for discovery be conducted in estate disputes before the parties attempt to resolve matters in mediation. Rather, the longer the matter is on the "litigation track", the more entrenched the parties become and the more extreme the emotions. As will be discussed later, if more information is required, a mediation can always be adjourned for this purpose.

5. The Process of Mediation

Voluntary Mediation

Although mediation is only mandatory in the three jurisdictions of Ontario noted above, increasingly, counsel and litigants are voluntarily proceeding to mediation, recognizing that it is a very effective alternative to expensive confrontational litigation. There is no evidence to suggest that the percentage of cases that resolve at mediation is reduced when litigants are forced to mediate; i.e., through the mandatory mediation regime.

The time to mediate

As stated earlier, it is almost always preferable for the matter to proceed to mediation as quickly as possible. Increasingly, parties and lawyers are proceeding to mediation before any formal legal proceedings have been commenced. Earlier mediation means that there has been less confrontation within the adversarial litigation process. This tends to enhance the effectiveness of the mediation.

While the examination for discoveries or cross-examinations are not necessary or desirable prior to mediation, for the mediation to be productive, it is necessary that there be a consensus as to the approximate value of the assets and liabilities of the estate. Meaningful negotiation and mediation cannot occur if

there are significant differences among the parties as to the value of estate assets or the amount of unquantified potential tax liability.

When one considers the risk of proceeding to mediation prematurely versus getting unnecessarily deep within the adversarial process before taking a "time-out" and proceeding to mediation, it is preferable to err on the side of going to mediation early. It is not unusual that significant progress is made at a mediation, but a factor which would have great impact upon the outcome must be investigated further before the matter can be completely resolved in a binding settlement. Even a premature mediation is not a waste of time as it has removed the parties from the adversarial process and substituted a context of attempting to creatively and cooperatively resolve their differences.

A mediation can always be adjourned while the parties and counsel obtain further information that is required, before the mediation is resumed. As stated, even in those jurisdictions where mediation is not mandatory, it is growing increasingly infrequent that a case will come to trial before mediation has been attempted either at the initiation of the lawyers or the Court. Therefore, if the only question is "when" and not "if" a mediation is to occur, there is every reason to proceed to mediation as soon as the dispute has been recognized.

Choosing the Mediator

Once the decision has been made to mediate, the most important consideration is the choice of the mediator. Very seldom do the litigants have any experience with mediation and therefore the choice of the mediator will rest with counsel. Among factors that the lawyers must consider are:

1. Is it preferable to have as a mediator someone who is familiar with estate issues and their ramifications?

2. To what extent would the litigants and the process benefit from a mediator who will provide a degree of evaluation of the issues in dispute and the positions of the litigants?
3. How "proactive" a mediator is desired?

Much has been written about the two schools of thought regarding styles of mediation and mediator. The different approaches arise from the emphasis that one places upon "interest-based" mediation versus "rights based" mediation. The "interest based" approach would suggest that it is not necessary for the mediator to have any specific legal knowledge about estate litigation or estate law generally. Rather, what is important is that the mediator be equipped with the training and skills of mediation; e.g., active listening, understanding of human behaviour and the ability to introduce new perspectives and approaches.

A "rights-based" approach would require that in addition to these qualities, the mediator have experience and knowledge in the field of estates and estate litigation to be utilized in discussing possible outcomes and moving parties toward compromise and resolution. While the debate over which approach is best will continue, there appears to be a growing consensus that the best mediators are those who are skilled in both approaches and are able to recognize when the mediation requires an emphasis upon an "interest-based" focus and when a "rights-based" direction must be followed.

A mediation is not a pre-trial. That is, counsel and the parties are not looking to the mediator to "play Judge" and adopt as his principal role the evaluation of strengths and weaknesses of the legal case of the parties. However, increasingly, it appears that counsel welcome an objective evaluation or "reality-check" from the mediator. Counsel often wish to have a mediator who is very active in the process and who will give opinions and assessments to counsel and their clients about the respective cases of the parties, while being sensitive and open to the human dynamics and emotional components.

Plenary Session

The first of two main components of the mediation process is the plenary session, which occurs at the outset and is attended by all counsel, parties and in some cases, by non-parties whom a litigant wishes to have present. Following the plenary session, each litigant and his or her lawyer are located in a private office. The mediator will then meet with each individual litigant and lawyer to discuss their perspective on the case and to attempt to develop elements of common ground that can lead to a possible settlement.

At one time, the three components of the plenary session were:

a. The mediator introduces the process and ground rules and discusses with counsel and the parties the reasons why every effort should be made to resolve the dispute through a process of negotiation, re-evaluation and compromise;
b. The lawyer for each party is given an opportunity to make a brief statement about their position and what they hope to achieve in mediation; and
c. Each of the litigants is invited to speak to the opposing parties in the presence of all parties and their lawyers.

In the 11 years of experience with mandatory mediation in estate disputes, there has been a growing recognition of the vital importance of a) and the tenuous value of b) and c).

While one does not want to discourage a litigant from speaking at the plenary session, it is important to be mindful again that estate litigation is almost always of a deeply personal and highly emotional nature. Therefore, it should be clearly stated by the mediator that each of the litigants will have unlimited opportunity to

express to the mediator their views, concerns and goals in the break-out sessions. At the plenary session there is always a concern that despite admonitions from the mediator that any statements by any of the parties must be civil and constructive, no matter how tempered a litigant may believe his comments to be, they can have inflammatory consequences which impair the likelihood of a constructive outcome. Therefore, the mediator must demonstrate skill and sensitivity such that no parties are prevented from speaking at the plenary session, yet all parties are strongly encouraged to defer most of what they wish to say to the privacy of the break-out room.

As to opening statements or summaries by the lawyers, it is seldom beneficial to encourage these statements at the plenary session. Despite the best of intentions and efforts on the part of counsel, opening statements tend to stress the differences between the positions of the parties and therefore have a very negative impact upon the tone and atmosphere of the mediation process. This is particularly harmful at this very sensitive and early stage of the mediation. It is also quite unnecessary since the mediator will have thoroughly reviewed the mediation briefs submitted by the lawyers and the parties, and will therefore be well versed in the facts and issues of the case.

The mediator's opening comments to the litigants and lawyers are extremely important in terms of the facts that should be conveyed and the tone that should be established for the mediation. In reality, these comments, which typically last no more than 25 or 30 minutes, are directed to the litigants, not to the lawyers. The areas that should be covered by the mediator include:

a. The nature of the process and the mediator's role. The mediator is not an adjudicator, but will work with the parties and their lawyers to develop a resolution that is acceptable, albeit grudgingly, to all of the litigants.

b. Beyond the requirement of civility, there are no "rules" for a mediation, as contrasted with the adjudicative process. The litigant must understand that if the matter proceeds to court, there are myriad rules regarding how and what evidence is to be presented. That is, the nature and extent of facts that may be placed before a Court is greatly circumscribed by the Rules of Civil Procedure and the rules of evidence. One of the great advantages of mediation is that anything which any litigant believes is relevant, is relevant. Furthermore, the mediator, the lawyers and the parties can decide upon any approach to the mediation which is of a potentially constructive nature. In some circumstances it may be appropriate to have more than one plenary session or the mediator may wish to caucus with just the lawyers from time to time. It may be advantageous for certain of the litigants to sit down and discuss matters directly. The mediation is a very fluid process which can respond to the wishes of the parties and the specific needs that arise in the mediation.

c. Everything that is stated and which happens at the mediation is strictly confidential and thus the litigant does not have to be concerned that something she might say during the litigation could be referred to if the mediation is unsuccessful and the matter proceeds to trial. Furthermore, when the mediator meets with a particular client and her lawyer in a break-out room, everything said within that room is confidential and private to the people who are in that room. The one exception to that rule is that if the mediator feels an important point has been raised which should be brought to the attention of the other parties, and the party who has raised the matter gives the mediator specific permission to communicate it to the other parties, then the mediator may do so.

d. Although the process is labelled "mediation", it is in fact better understood as "mediated negotiation". That is, the mediator is not there to provide solutions. A resolution will only occur as a result of compromise on the part of all of the litigants. Both sides must be prepared to make concessions that they would rather not make in order to bring about a negotiated settlement.

e. There are many reasons why every effort should be made by all of the parties and lawyers to resolve the matter at mediation. These reasons include:

1. Avoiding tens of thousands of dollars (and often hundreds of thousands of dollars) of legal costs that will be incurred if the matter proceeds through the adversarial process.

2. Bringing to an end the emotional toll that an estate dispute almost invariably exacts upon all of the litigants;

3. The eventual outcome at Court is always uncertain. While the lawyers will use their experience and intellect to provide their clients with an assessment of the likelihood of success or failure at trial, such assessments are not an exact science. The experienced lawyer can cite examples of circumstances when she was completely surprised (positively or negatively) by a Judge's disposition of a case.

4. Statistically, the vast majority of legal disputes settle without a trial. In the face of this reality, it makes manifest good sense for the parties to resolve the dispute at the earliest opportunity.

5. Almost all estate disputes relate to family dynamics and personal history. Parties should be strongly encouraged in that context to make the necessary compromises to resolve the matter among themselves privately, rather than have a Judge i.e., someone totally outside of the family, impose a decision upon them.

Caucus or "Break-out" Session

These confidential sessions with individual litigants and their lawyers are extremely important to the litigants as well as the mediator. For the litigants, it provides an opportunity to be heard by an objective third party, which is unlikely to have happened to this point. Obviously, this requires the mediator to be sensitive, attentive and engaged. It also provides the mediator with the very important opportunity to "connect" with the litigant and gain each litigant's confidence. If each litigant believes in the overall objectivity and desire for fairness on the part of the mediator, this will greatly assist the mediator in facilitating an eventual resolution.

Some "Do's and Don'ts" for the Lawyer regarding the Mediation Brief

1. DO - begin the mediation brief with a very succinct overview of what the mediation is about and what is at stake. This should not include details and explanation and should be no longer than one-half to three-quarters of a page. The objective is to immediately inform the mediator of the nature of the dispute and the issues to be addressed.

2. DON'T – include copies of a number of cases. If you are going to refer to caselaw, then it is preferable to make reference in the Statement of Issues to the principle that you are relying upon from the case. Where one or two cases are particularly crucial to the legal position that your client is

advancing, then it may be appropriate to include full copies of these cases only.

3. DO – be brief and non-repetitive in the Statement of Issues.

4. DON'T – make inflammatory and argumentative statements. To do so will only embitter the other litigants and make the task of the mediation that much more difficult.

5. DO – set out any thoughts or proposals as to how the parties might resolve their differences, whether or not such proposals had been discussed among the parties and counsel previously.

Court Decisions about the Mediation Process

While there are few judicial determinations relating to the mediation process, there were two Ontario decisions of note in 2006. *Hagel v. Giles et al*[1] addresses the binding nature of an agreement reached at mediation. One of the litigants was a party to the mediation by conference call. Ultimately, all of the parties to the mediation accepted a proposed resolution which was not reduced to a signed agreement at the mediation. The Plaintiff, who was personally in attendance at the mediation, took the position that he had reluctantly accepted the proposal because he was in a state of despair and hopelessness and asserted that there was no enforceable agreement in the absence of signed Minutes of Settlement. On a motion for Judgment brought by the other party, the Court concluded that it had authority to enforce an oral agreement reached at a mandatory mediation. Even accepting the Plaintiff's feelings at the mediation as he described them, the Court determined that those feelings did not obviate his acceptance of the proposal, as there was no coercion or improper conduct on the part of the other parties. Rather, the Court concluded that the Plaintiff was

[1] (2006), 80 O.R. (3d) 170 (S.C.J.)

simply having second thoughts about the deal. Therefore, the Court granted Judgment in accordance with the settlement. The case is also a testament to the importance of incorporating any resolution reached at mediation into an immediate written agreement.

In *Rudd et al v. Trossacs Investments Inc. et al,* [2] after agreement was reached at the mandatory mediation, a dispute arose and a motion was brought for enforcement of the settlement. An Order was sought to compel the mediator to testify about communications at the mediation. The motions Judge ordered that the mediator could be examined as a witness on the pending motion with the questions being of a restrictive nature. On appeal to the Divisional Court, the decision of the motions Judge was set aside. The Divisional Court concluded that the ability of the parties to engage in full and frank disclosure is a fundamental component of the mediation process and the parties would be less candid if they could not be absolutely assured that their discussions would remain confidential, absent only extreme issues such as disclosure of criminal activity. For this reason, and the fact that a mediator would lose the appearance of neutrality if required to testify in proceedings between the parties, the Court held that the public interest in maintaining the confidentiality of the mediation process outweighed the interest in compelling the evidence of the mediator.

In another recent case[3], the Court dealt with the competing public policy interests: the *Freedom of Information and Protection of Privacy Act* versus the interest in promoting settlements of disputes through confidential settlement negotiation. The Information and Privacy Commissioner held that materials prepared for a mediation of numerous court proceedings were not exempt from release under the provisions of the *Freedom of Information and Protection of Privacy Act*. The Ontario Divisional Court overruled the decision and gave

[2] (2006), 79 O.R. (3d) 687 (Div. Ct.)
[3] *Liquor Control Board of Ontario v. Magnotta Winery Corp.* (2009), 97 O.R. (3d) 666 (Div. Ct.)

priority to ensuring the confidentiality of the mediation process so that discussions could be completely uninhibited.

Preparing for Mediation

A. Counsel

The probability of a successful mediation is greatly enhanced by thorough and appropriate preparation by counsel. The relative informality of the mediation as compared to court procedure is not an excuse for lack of preparation by counsel. Most mediators have eliminated the procedure of having counsel make introductory statements at the mediation setting out their client's position; counsel should inquire of the mediator whether or not an introductory statement will be expected.

Counsel must carefully and critically examine the strengths and weaknesses of her client's case and the opponent's case and make a written list of these points. Also, counsel should carefully consider the magnitude of the legal fees in the event that the matter goes to trial, the likelihood of each party (or the estate) being responsible for the legal fees, and the impact of liability for costs upon a possible successful outcome for each litigant.

In preparing for trial, counsel is focused upon doing everything possible to bring about a successful outcome for his client; i.e., to obtain a Judgment in his client's favour. The approach at a mediation must be entirely different. For a successful mediation, counsel must prepare by considering creative options and settlement strategies that would represent possible acceptable levels of compromise for all of the litigants. Counsel must be frank and prepared to acknowledge weakness in her client's case and significant tangible as well as intangible reasons why her client would benefit through compromise and settlement of the dispute at

mediation. An adversarial, belligerent or overly assertive attitude and demeanor by counsel has been responsible for failure in mediations on many occasions.

B. **Client**

It is extremely important that counsel spend significant time preparing the client for the mediation process. The vast majority of clients have never experienced a mediation and therefore it is necessary to discuss with the client in detail the significant characteristics of a mediation (confidentiality, frankness), the role of the mediator (not an adjudicator), the mediation process (plenary session, caucus meetings), and the need for material concessions and compromise of all litigants if the mediation is to succeed.

It should be emphasized that at a mediation, counsel is not to be the "mouthpiece" for the client. The client should be encouraged to communicate to the mediator whatever concerns or matters are on the client's mind in relation to the dispute and the client should be prepared to share these thoughts openly with the mediator during the breakout sessions. It is very important that the client understand that the mediation process will afford opportunities to air grievances and discuss perceived areas of unfairness that would not be available at a trial.

Counsel must have specific and pointed discussions with the client regarding settlement possibilities and the degree to which the client is prepared to compromise. Specific discussions about settlement possibilities should be discussed well before the day of the mediation. However, it is not recommended that the client be encouraged to determine prior to the mediation what her "line in the sand" is. That is, it is unhelpful for litigants to come into a mediation having determined a point below or above which they will not move. It is preferable that their counsel engage them in specific discussion regarding levels and degrees of financial concession and compromise without a focus on a final position. In this

way, the client is more open to comments and offers coming from the opposing parties as well as suggestions and observations of the mediator.

Perhaps most importantly, the client must understand that the objective at the mediation is not to convince the mediator of the correctness of the client's position. Rather, it is an opportunity to discuss the issues fully from the client's perspective, listen to the advice the mediator and compromise their position, with a reasonable expectation of compromise on the part of the other side. No mediation can succeed without significant concessions by both sides, and the client must be prepared for that reality.

Conclusion

In the last 20 years, mediation (mandatory or otherwise) has been incorporated into the litigation process in jurisdictions around the world. However, its effectiveness is totally dependent upon the atmosphere created by and the active engagement of the mediator, lawyers who have realistically prepared their clients for the mediation process, and clients who understand that mediation does not mean winning or losing, but "negotiation" and "compromise". Although one occasionally hears lawyers for litigants state that the bitterness of the parties or the entrenchment of their positions is such that the matter could not be resolved by mediation, the fact is that if the mediator, lawyers and litigants approach the mediation as set out above, there is no case which cannot be resolved at mediation.