

The King's Speech: A Lesson for Estate Mediation – by *Genevieve A. Chornenki of The Estate Mediation Group*

“Estate mediation” sounds pragmatic, quick and convenient, like high-quality convenience food: just empty the packet, add water and stir. In practice, however, it is not nearly so linear or sanitized – and the current civil/commercial mediation model needs modification so that individual participants have advance guidance and preparation.

The mediation model most commonly applied to estate disputes is the standard civil/commercial one that involves a goal-oriented meeting on a specific day with lawyers and clients in attendance. The mediator works with everyone in one big group (plenary session) or a series of smaller sub-groups (individual meetings or caucuses) and helps the participants move toward a resolution. When settlement is reached, it is documented and later approved by the court if necessary.

More often than not, on the day of the estate mediation individuals arrive fearful, anxious and under stress. They have little or no experience of mediation, and perhaps even less experience of constructive communication and problem-solving.

None of this will come as a surprise to a person familiar with estate mediation. Estate disputes are notoriously emotional events for the individuals involved. This is why many lawyers and mediators consider the plenary session in the civil/commercial model to be dangerously combustible.

The fears and risks associated with estate mediation, and the plenary session in particular, are typically managed by means of three general strategies:

- Each lawyer acts as a shield and does the talking for his or her individual client or client group;
- Each lawyer acts as a police officer with the expectation that he or she will “control the client”;
- The individuals involved in the dispute are not permitted to meet, and remain in separate rooms for all or most of the day.

These are all valid strategies with appropriate application to estate mediation. They are appropriate because the standard civil commercial model – which I call the “add-water-and-stir” model - makes no real provision for preparation of individual participants. It does not coach them to play an active and effective primary role.

On some occasions, the conventional risk-management strategies are impractical. One example is a mediation involving siblings who have ongoing responsibility for the assets and/or personal care of an elderly or disabled relative and must communicate and jointly make decisions while their responsibilities are outstanding. Isolating them in separate rooms and using the lawyer as a spokesperson or police officer serves a short-term purpose on the day of mediation, but does nothing to equip the individuals with the insight and competencies necessary for an effective conversation.

When the mediation is over, those siblings must still continue to communicate and carry out their duties in the best interest of their loved one. In a standard civil/commercial model, they will have come out of the mediation process with no real learning and no enhanced skills.

There are other situations where the conventional risk-management strategies must also be relaxed in favour of more direct participation by the individuals involved. Some individuals are simply not prepared to delegate the talking to their lawyer and insist on a more direct role. The difficulty is that even when individuals are motivated to participate more directly in estate mediation, the model does not support them. It cuts them loose without adequate preparation, practice or guidance.

Imagine the following exchange, which is a composite of the sort of conversations that takes place between individuals at estate mediation. In this example, the substantive issue concerns the use and ownership of the family cottage. One brother speaks directly to the other in the belief that the logic of his preferred solution is as obvious to others as it is to him.

He begins, "Look. We don't have to be here all day. You've never given me any good reason why my e-mail proposal won't work."

His brother's response perplexes him. "I spent a lot of time with Mom during those last two years."

"You've mentioned that before."

"She required a lot of effort..."

"Well, someone had to do it."

"...doctors' appointments, shopping, meals..."

"That was your choice. You didn't have to."

"Who else was there? You were posted to Paris."

"Hey, if you weren't unable to do it, we would have hired someone. Simple as that. But we're here to talk about the cottage. I thought we'd agreed about that."

"Well..."

"Oh no. You always do this to me. Agree and then you change your mind."

To an outside observer, it quickly becomes clear that conversations like these tend to reproduce old patterns including habitual assumptions, interpretations and judgments. And while the genuine intention may be to produce a new result in the form of a mutually agreeable outcome, all that happens is that the individuals reinforce the status quo.

The civil/commercial model of mediation has not been adapted to the needs of the individuals involved, who are invited – and in many cases mandated - to take part in a process without adequate provision being made for proper preparation.

A popular current movie, *The King's Speech* makes the case for preparation that responds to the individual and his context.

King George VI was unable to speak in public. He stuttered at the beginning of some words and was unable to enunciate others at all. He ascended to the throne when his brother abdicated to marry a divorced woman, and thereby assumed a role where public speaking was not optional.

Readers who have seen the movie will know that King George VI succeeded in overcoming his impediment by means of guided coaching and support offered in a private and non-judgmental environment by a non-partisan coach. That coach gave the George VI a view of himself and of his potential capabilities that was not accessible to the king on his own.

The coach led the king through a series of exercises and practices that enabled him to establish new and more effective competencies. But it took time - nobody just added water and stirred.

The King's Speech contains an important lesson for estate mediation. Individuals need support to effectively say and do the kinds of things that mediation invites them to do. This may not be relevant in some kinds of mediation, but it is extremely relevant in the mediation of most, if not all, estate disputes.

The practical implication of this is that the current civil/commercial mediation model should be critically examined and extended or modified, so that individual participants have the option of advance guidance and preparation. This would include assistance such as:

- Inviting individuals to be aware of their own reactions, and what triggers those reactions;
- Helping them understand what value, need or identity has been violated **to** **provoke** the reaction;
- Educating them about the distinction between intention and effect and permitting them to understand the extent to which they are interpreting another person's actions correctly or otherwise;
- Guiding them in their consideration of what they want to communicate and why;
- Helping them to identify the key message they want to convey to others including the impression they want to give, the effect that might have on the others and what someone else might find provocative;
- Developing their own assessment criteria – how they would know whether they accomplished their conversational goals; and
- Giving them multiple opportunities to rehearse one or more options on how to convey their message and helping them determine the extent to which they met their assessment criteria.

Preparing an individual for estate mediation could be accomplished in at least three different ways:

- By providing Individual participants with a non-partisan conflict coach for one-on-one guidance;
- Estate mediators can offer a preparation phase in the mediation process. This can include preparation templates for individuals to use, as well as one-on-one individual meetings;
- Counsel can learn and apply the skills and knowledge necessary to incorporate conflict coaching into their client preparation.

It is time to step back and examine the add-water-and-stir approach to mediation for estate disputes, and evolve to a model that respects and integrates the needs of the individuals who hire mediators and lawyers to help them.

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