

"Mediation and Other Stuff"



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Mediate.ca
Dispute Resolution Services

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Welcome to "Mediation and Other Stuff", my monthly newsletter about alternative dispute resolution from an Ontario perspective.

If you have a topic that you would like covered, please contact me.

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Choosing a Mediator

Mediation is now entrenched in the culture of civil litigation in Ontario and across Canada. There are courses, books and articles about most aspects of the mediation process. But there is little written about actually choosing a mediator. This is an important step yet many do not give it the attention it deserves. One of the reasons I left the Ontario Mandatory Mediation Roster

was that in over 40% of the cases, counsel did not choose the mediator but left it up to the program case coordinator to appoint the mediator. While mediators cannot make decisions about the outcome of a case the way arbitrators can, they do have a great deal of power over the process.

In selecting a mediator you should think about the following:

- *Should you be looking for a mediator with process or substantive expertise?*

Generally, process expertise is the most important, but in certain cases familiarity with the subject matter of the dispute can be important. Process experts tend to bring an open mind and skills in process design and conflict management but if the issues are very technical or involve complex legal issues, more time will be required to bring the mediator up to speed.

- *What model of mediation does the mediator use?*

Does the mediator always use a particular model of mediation, usually facilitative or evaluative, or is the process flexible depending on the dispute and the wishes of the disputants? Flexibility is the key to success in mediation.

- *What is the mediator's style?*

Will the mediator encourage the parties to negotiate directly or encourage their lawyers to negotiate on behalf of their clients? Does the mediator use joint sessions where everyone is together or does he or she jump into a caucus or "shuttle diplomacy" model from the start. What is the mediator's view of the role of counsel in the mediation process?

- *What training does the mediator have?*

The standard basic level of training is a 40 hour course. Has the mediator taken more advanced courses? What type and how long were these?

Training should be through a recognized training institution, university, professional or legal organization.

- *Does the mediator belong to professional organizations?*

Membership in mediation organizations shows a commitment to the mediation process and that there is a standard of conduct the mediator has agreed to uphold.

- *Is the mediator accredited?*

Accreditation, such as the ADR Institute of Canada's Chartered Mediator or the International Mediation Institute's Certified Mediator designations shows that the mediator has a certain level of experience and has met a standard of knowledge and skills in order to obtain it.

- *How much experience does the mediator have?*

While the mediator's professional background may be important, it is the mediator's experience you should really focus on. You should ask how many cases, and what types of cases, they have mediated? Is he or she a full or part-time mediator?

- *How good of a communicator is the mediator?*

Ask if the mediator has written materials including articles about mediation. Are the materials professional and well written? Did the mediator make you feel at ease when you spoke to him or her?

- *Fees*

Cost, although important, should not be the number one consideration. While in general, you get what you pay for, do you want the most expensive or least expensive mediator? You need to know what the mediator charges and what is included in the fee? Find out the mediator's hourly rate and if there are half-day and full day rates? Do the fees

include preparation time? How are the costs usually shared by the parties?

Is there a cancellation fee? Remember that unlike lawyers who can just pick up another file and work on it, the mediator has set the time aside and does not have the ability to just pick up another case. A staggered cancellation charge with the amount increasing as the mediation date gets closer, is becoming quite usual.

In general when you are interviewing mediators, feel free to ask any questions you may have about the mediation process.

Case of the month: The costs of compliance

Many people are not aware that the Condominium Act in Ontario requires mediation and if needed arbitration of certain types of disputes. These disputes often become matters of "principle". A relatively recent case in the Ontario Superior Court, [*MTCC 985 v. VanDuzer*](#) discusses the level of costs that can be incurred in condo disputes. While this case is specifically about a court application, it is a sobering look at how legal costs mount up and is a great advertisement for taking mediation, whether mandated or otherwise, more seriously as a dispute resolution process in condo disputes.

If you have any questions or comments, please contact me.

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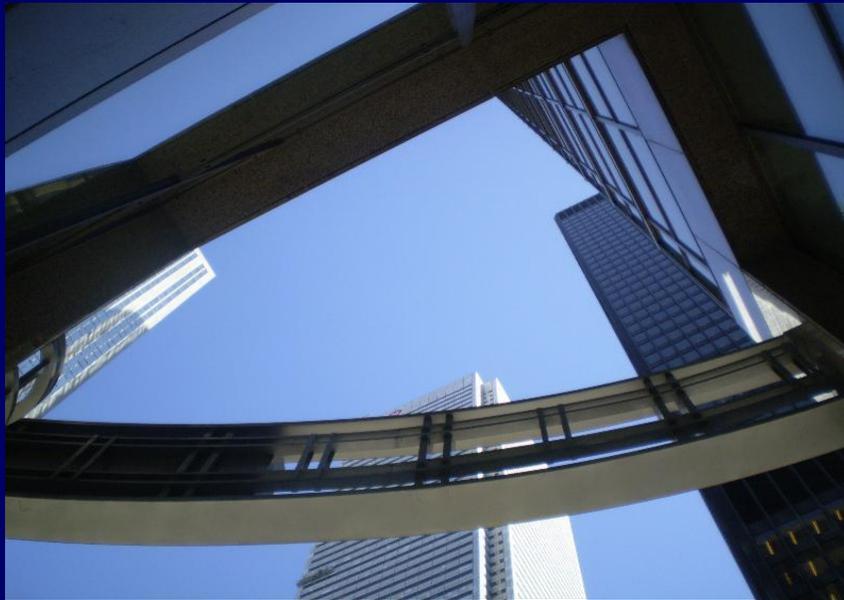
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