

The Ten or Twelve Top Reasons (More or Less) for Not Mediating a Dispute - Revisited

by Colm Brannigan

At the beginning of a new year, it seems a good time to look back on some of the common excuses, sorry, reasons, for refusing to mediate that occasionally continue to circulate especially in litigated cases.

Quite a few of these nuggets have been around in one form or another since the mid-1990s, so you have likely heard them before, but still, let us look at them again from the perspective of mediating at any time, and especially during the time of the COVID crisis.



It is always worth revisiting the familiar to see how they have stood the test of times so here we go.

1. We cannot mediate in-person, so we will just have to wait until the crisis is over.

At the beginning of the pandemic this excuse was often really code for “I am not comfortable using technology” (counsel and mediators) or “mediation must take place in person” (mediators).”

Now a year later, it just does not hold water. Many thousands of mediations have taken place in North America on video conferencing platforms such as Zoom and MS Teams. While there is a definitely a place for face-to-face mediation, unless there are special needs or access issues for the parties there is no need to postpone most mediations.

2. There is no real advantage to mediation. We should just go to court and get it over with.

Sounds good but makes little sense. The courts are open but not fully and this will be the way it is for some time. While virtual trials are going ahead in many jurisdictions, the backlog is growing, and it is unlikely that any case will make it through the court system in anything approaching a reasonable period of time. Courts were backed up before the pandemic and will continue to be for the foreseeable future after it. Mediation makes more sense today than ever before especially in litigated cases, whether required under mandatory mediation or not.

3. We have a great case, and we are going to win.

Can you guarantee a win even if you have a great case? What does a win mean for your client? We all know that even winners can feel like losers after the time money and effort that it costs to obtain a court decision. Parties are more likely to comply with a mediated settlement they were involved in making. Litigation is a zero-sum game and mediation can do away with the need to have winners and losers through acceptable and client determined outcomes. And that is not even considering that you may have to take steps to try collect on any judgment awarded with the risk of further expense or even the other party becoming judgment proof or bankrupt in the intervening time.

4. If we suggest mediation, the other side will take this as a sign of weakness.

This old gem has been around for more than 20 years and should be retired. Suggesting mediation sends a clear message to the other side that you have the confidence to put your case forward in a meeting with them and to listen to their case in order to find an acceptable have a resolution, with the help of a mediator. It also makes good business sense which is why many major corporations even though they have the resources is to litigate, use ADR options and especially mediation, when possible.

5. The other side has suggested mediation so they must be trying to stall or maybe they are just trying to get more information from us and use the mediation as an early discovery.

Remember the mediation is voluntary unless part of a mandatory mediation program. An experienced mediator will soon see if a party is not acting in good faith and call them on it and encourage them to use the opportunity to make progress towards a settlement. If you believe that the other side is trying to take advantage of the situation you can terminate the mediation. This rarely happens even in mandatory mediation cases.

6. We have years of experience settling cases, but the other side is totally unreasonable. Mediation is just a waste of time.

Almost the opposite applies here. If you have been negotiating with the other party, even if it has been frustrating and unsuccessful, this is a strong indicator that mediation is worth seriously considering. While lawyers are good at negotiating, and do it every day, a trained and experienced mediator can help you move through impasse by unblocking barriers, including communications, that are standing in the way to a realistic resolution.

7. Mediation just means splitting things down the middle. We are not prepared to compromise and if we wanted to do that, we could do it ourselves without any outside help.

Mediation is much more than just looking at the parties' positions and splitting them. Mediation gives the parties a better understanding of why they are each taking their positions. It helps them look at the important underlying interests that are also driving the dispute but may not have been surfaced.

It also gives your clients the opportunity to their "stories" to the mediator in a way they could never do in a formal court setting. Do not underestimate how important this is to them. This may allow them to move forward and, with counsel's help, arrive at a practical solution that is in their comfort zone of what a fair and reasonable outcome is to them.

8. We are already into the litigation process so if we try mediation and if we do not settle, we will have just wasted more money and time.

Mediation can be scheduled quickly so you can probably fit it into your litigation schedule so you that you will not have further delay.

If you settle the case will be resolved and you can get on with more productive and positive activities. You will also have a happier client.

Even if the mediation does not fully settle the case, it will narrow the issues that need to be litigated and at the same time provide you with a much clearer understanding of the parties' positions and why they are taking them.

Many mediations that do not settle on the day of the mediation often settle shortly after the so-called failed mediation as the parties and their counsel have focused on the process of settlement and can continue negotiating towards an acceptable with or without further assistance from the mediator.

9. It is too early to mediate as we have not commenced proceedings, or its cousin, the other side has not commenced proceedings and we must wait until we are sued by the other side. Closely followed, in both of these by, we need to complete examinations for discovery.

Mediation can take place at any stage in a dispute including before formal court process has begun. While discoveries are needed in complex cases, they are not needed in every case nor should mediation not be attempted if you think there is a reasonable possibility for settlement as this would be extremely beneficial to your client.

A mediator can help you decide what information you really need to conduct meaningful settlement negotiations. The mediator will also help with communication and often the exchange of information and the beginning of serious negotiations can happen much quicker and efficiently through mediation than waiting for discovery to take place and then mediating.

10. We need a binding decision in this case, or it is our client's policy to go to trial.

This is a very valid point if true. You need to think about why you need binding decision or a precedent. Most lawsuits are actually "fact suits" and may or may not have any real precedent value because of this.

An outcome in mediation is binding as the parties document the settlement in writing has either an agreement or minutes of settlement. There are also provisions in Ontario's Commercial Mediation Act, 2010 to ensure compliance with mediated settlements under it. There are cases where a precedent is needed, although these are few and far between in most civil litigation matters, and if that is really the situation then you should definitely take it to trial and appeal if necessary.

11. Mediation makes sense, but it is expensive.

It can be, but overall, it is not a major expense, particularly if it helps you resolve the case. Cost is only one part of the value" proposition of mediation not as important in the process as picking the appropriate mediator for the case.

At a minimum, a mediator should have completed basic and advanced training, have liability insurance and be a full member of an ADR or other professional organization. You can also look for professional designations such as the basic "Qualified" and advanced "Chartered" designations of the ADR Institute of Canada to help you in making your selection.

But yes, there is quite a variety in the range of mediator's fees and quality of mediators.

At the low end, Ontario's mandatory mediation rates are \$600.00 for a half-day including preparation (which have not been increased since 1991) with an experienced mediator being in the \$1,500.00 to \$3,000.00 range for a half day and some "name" mediators charging \$10,000.00 for a full day.

There can also be meeting room or other facility costs, that are usually shared equally by the parties.

One distinct advantage of online or virtual mediation is that there is no cost for meeting facilities nor travel time. Most mediators will quote you a 1/2 day or full-day rate so you will know what your costs are up front instead of the unknown and significant costs of not attempting mediation and just continuing the litigation. The earlier the mediation takes place the greater potential for savings including time, legal and other costs.

12. Litigation is fun.

To be fair, I only put this in so that I would have an even dozen, more or less in my list. I have not heard anyone say that to me in many years and really there is no rational response to this position. Luckily most, if not all counsel, consider the best dispute resolution options for their clients and mediation is generally one of them.

But if you see litigation as the only way forward, and sometimes it is, you can incorporate mediation into the process and still have the opportunity for a court battle if the matter does not settle.

Colm Brannigan biography and additional articles:

<http://www.mediate.com/people/personprofile.cfm?auid=816>

February 2021

View this article at:

www.mediate.com/articles/brannigan-reasons-for-not.cfm

This article is provided by Mediate.com:

- Over 15,000 Articles & Videos
- Most Visited Mediation Website
- Most Used Mediator Directory
- Targeted Geographic Marketing
- See [mediate.com/Services](http://www.mediate.com/Services)