

MAKING THE MOST OF MANDATORY MEDIATION

Mandatory mediation is required in all actions governed by civil case management under Rule 77. In Ottawa and the County of Essex mediation is also mandatory in simplified procedure cases under Rule 76. Mediation has become an important part of the litigation process in Toronto, Ottawa and Windsor and the bar can expect mandatory mediation to expand to other areas of Ontario in the future.

The Procedure

Once the first "defence" is filed, Rule 24.1 is triggered. A "defence" means a notice of intent to defend, a statement of defence and a notice of motion in response to an action. Where there are multiple defendants, all of the defendants must be encouraged to deliver a statement of defence as soon as the first defence is filed. According to Rule 24.1.09, a mandatory mediation must take place within 90 days after the first defence is filed, but this can be extended a further 60 days in a standard track case if the consent of the parties is filed with the mediation co-ordinator (Rule 24.1.09(3)). Otherwise an order of the court is required and should be sought well before the mandatory mediation deadline.

The parties can choose the mediator from a roster maintained by the region's local mediation co-ordinator or anyone else on consent of the parties. Within 30 days after the first defence is filed the plaintiff must file Form 24.1A (Notice of Name of Mediator and Date of Session) with the mediation co-ordinator, identifying the mediator and the date of the scheduled mediation (Rule 24.1.09(5)). Failing this, a mediator will be assigned from the mediation roster (Rule 24.1.09(6)), and that mediator will fix a date for the mandatory mediation.

The court is sometimes asked to permit the parties to select a mediator after a roster mediator has been appointed. In some cases this order is sought because the parties simply failed to appoint their own mediator or obtain an order extending time within the 30 day period provided by Rule 24.1. In other cases the request is made when a new party is added or two cases are brought together for case management and trial.

Although Rule 24.1 does not specify criteria for setting aside the appointment of a roster mediator, Master Albert suggested criteria in *HSBC Bank of Canada v. Jackson* [2002] O.J. No. 302 as follows:

In case managed actions counsel should not expect relief from the court on consent, without providing evidence of why the relief sought is appropriate. Rule 77.01(4) prevails over rule 3.02(4). Where counsel seek to remove a mediator assigned by the mediation co-ordinator from the roster, several criteria should be considered, including:

- (a) Why do counsel want to replace the roster mediator? Is it likely that the proposed change of mediator will reduce unnecessary cost and delay, facilitate early and fair settlement of the claim or bring the proceedings expeditiously to a just determination?
- (b) What steps has the assigned roster mediator taken? Has she or he agreed to step aside?
- (c) Is there a conflict of interest issue?
- (d) Have the parties provided the information required by Form 24.1A (proposed mediator's name and date of mediation session)?
- (e) Will the proposed change of mediator delay the proceedings significantly?

The court expects the bar to treat roster mediators fairly. The mediator who is asked to step aside should be compensated for any cancellation fee and it is helpful to include

with the motion materials confirmation from the roster mediator that there is no opposition and that cancellation fees, if any, have been paid.

Each party must file a statement of issues at least 7 days before the mediation session (Rule 24.1.10) and attend the mediation in person (Rule 24.1.11). If a party fails to attend or file a mediation brief the mediator must file a certificate of non-compliance. This will likely force an immediate case conference, where a case management judge or master may establish a timetable, dismiss the action or strike the defence, award costs, or make any other order that is just (Rule 24.1.13). To bring the issue of the mediation breach before the court quickly, some case management masters will require counsel to attend a case conference court. This could require counsel to sit through a list until their case is reached. By taking steps early to obtain required relief, counsel can remain in compliance with rule 24.1 and prevent avoidable court attendances.

It is important to remember that the timeline set out in Rule 77 continues to run during the mandatory mediation process.

The Statistics

The government keeps useful statistics regarding mandatory mediation. Regarding the identity of the mediator, a roster mediator was selected by the parties in 51% of the cases, a non-roster mediator was selected by the parties in only 4% of the cases and a roster mediator was assigned in the other 45% of the cases.

Most importantly, of the mediations held by the time the statistics were reported, 40% of the cases were settled, 17% were partially settled and 43% did not settle at mediation, although anecdotally there is some indication that many of these cases settle before trial in part due to what transpired at the mediation. These figures are a vote of confidence for the mandatory mediation process.

The Strategy

Obtaining relief from the court: Leave of the court may be sought on motion (Form 77C) or at a case conference. The case management masters will often grant relief on consent by means of an "in writing" case conference, which occurs when the parties submit an agreed upon timetable for approval, including requests for necessary extensions of time, supported by compelling reasons to support the timelines and relief sought. There is no regulated form for such a case conference but there is a form readily available from the case management registrars or at trial scheduling court. If the parties cannot agree on a timetable then the relief must be sought by way of motion or at a case conference conducted by appearance or by conference call.

Case management is flexible. If counsel seek appropriate relief in time, and the court is provided with persuasive reasons as to why the relief sought meets the needs of the litigation, then the relief is almost certain to be granted. The court must be satisfied that the extension of time is reasonable taking into account the circumstances of the case and the intent and purpose of the rules. Rule 24.1.09(2) lists mandatory criteria which the court must consider before extending time to complete mediation:

- (a) the number of parties and the complexity of the issues in the action;
- (b) whether a party intends to bring a motion under Rule 20 (summary judgment), Rule 21 (determination of an issue before trial) or Rule 22 (special case);
- (c) whether the mediation will be more likely to succeed if it is postponed to allow the parties to acquire more information.

Timing: The single biggest complaint about mandatory mediation is that it occurs too early in the process. Unfortunately, this perception is a result of the general misunderstanding about the flexibility of case management. Some cases will require examinations for discovery or documentary production before the mandatory mediation will be useful. If that is the case, counsel should request that a case management master approve an appropriate timetable, with the mandatory mediation to occur after some of the other litigation steps have been completed. Persuasive reasons explaining why the mediation should be delayed must be provided to the master. Counsel should be aware that mandatory mediation is designed to occur very early in the process to eliminate avoidable legal costs.

Many cases are ripe for mediation at an early stage. Senior litigator and mediator Paul Iacono Q.C. believes that, "There are certain kinds of cases that can be resolved quite easily at a three-hour mediation ninety days after the Statement of Defence has been delivered. A classic example would be a wrongful dismissal suit. The issues in that type of litigation are not going to change after ninety days."

Selecting the mediator: The identity of the mediator is also a consideration. It is surprising that 45% of counsel allow a mediator to be chosen for them at random.

The roster is full of mediators who are experienced in highly specialized areas. Further, the parties are permitted to choose their own non-roster mediator, although such a mediator would not be bound by the maximum fees set out in the Regulations.

Preparing for the mediation: A statement of issues must be provided to the other parties and the mediator at least 7 days before the mediation. While the statement of issues is expected to be brief, it is an advocacy tool and counsel should see it as an opportunity to persuade the other parties to see the case from their client's perspective. All important documents should be attached to the statement of issues so that the mediator and the parties have all of the tools necessary to achieve an acceptable resolution of the issues.

Preparing clients for the mandatory mediation is extremely important. The mediation generally lasts three hours or more, and clients may be overwhelmed by these lengthy meetings. Clients should be briefed about the opening statement, as they will likely hear about the weakest and most damaging aspects of their case from the other lawyers. Clients can lose faith in the process at an early stage if not forewarned about what is likely to be said at the mandatory mediation. Clients should be briefed about the role of the mediator, the caucus procedure and the "without prejudice" nature of the discussions. Clients should also have some idea of the desired outcome of the mediation, including a range for settlement and a better understanding of the other side's position. If clients are well briefed, nothing that happens during the mediation session should come as a surprise.

Counsel must remember that the mediation is not a mini-trial. According to Iacono, "Mediation necessitates shedding "adversarial like" thinking. Mediation implies compromise. Mediation implies listening and reacting to someone else's problem."

Even if the case is not settled at the mandatory mediation, the process can still be useful. The parties can narrow the issues, identify key pieces of evidence that might help to resolve the matter in the future, and gain a better understanding of the interests and positions of the opposing parties. At the very least, the parties can agree upon a timetable to be submitted to the case management master for approval.

Conclusion

Good lawyers should not ignore the mandatory mediation process. It is a part of the changing litigation landscape. Says Iacono: "Lawyers, and particularly litigation lawyers, are finally realizing that a client retains them to solve a problem."

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