

MEDIATING WITH THE UNSOPHISTICATED CLIENT –
THE PROCESS AND THE PROSPECTS

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Where have all the trials gone? They've gone to mediation, of course. Trial skills are still invaluable, and the odd case actually does see the inside of a courtroom. However, the vast majority of disputes are moving through the mediation process, either by choice or by force. In order to effectively advocate on behalf of the client, counsel must be familiar with the various systems of mediation and how to best use each system to their client's advantage. Good counsel must also be able to familiarize the unsophisticated client with the mediation process to ensure that they have reasonable expectations regarding the process and the potential results.

Our firm is dedicated to assisting injured accident victims. This paper will focus on the different types of mediation that frequently arise in our practice, and the implications of these different mediations on the preparation of the unsophisticated client.

Ten years ago, "mediation" had only one meaning. It was a rarely used method of settling large cases, where you felt that your adversary was either too stubborn, or too thick-headed, to settle the case without assistance. The insurance litigation bar was still relatively small and cordial, and cases were often settled after reviewing two or three medical reports over a cup of coffee, or perhaps immediately following discoveries. Times have changed.

Today, when one speaks of “mediation” in the auto insurance context, it could mean one of four things:

- a mediation at the Financial Services Commission of Ontario (“FSCO”) pursuant to §280 of the *Insurance Act*;
- a mandatory mediation pursuant to Rule 24.1 of the Rules of Civil Procedure;
- a private, voluntary mediation; or
- a mediation pursuant to § 258.6 of the *Insurance Act*.

These four types of mediations are used in different ways, and for different purposes, by counsel. The efficacy of these different mediations varies significantly, depending on the nature of the case and the level of preparation. This paper will review each of these types of mediations, their effectiveness, and some tactical points to consider.

FSCO MEDIATIONS

Mediations at FSCO are a statutory creation, governed by § 280 of the *Insurance Act*. They deal only with disputes between an injured person and their own insurance company regarding accident benefits. Before commencing litigation or arbitration proceedings against an insurer, the injured person must refer the issues in dispute to a FSCO mediation (*Insurance Act*, § 281(2)). Failing to go through this process is a bar to further pursuing the claims through litigation or arbitration.

The Statistics

FSCO keeps detailed statistics regarding the percentage of mediations that result in full settlement, partial settlement or no settlement at all, under each of the three no-fault regimes. These statistics are further broken down by the format of the mediation (face to face or telephone). Although it is usually difficult to draw any real conclusions from

simple statistics, some interesting trends can be seen. It should be noted that, while the figures quoted in this paper are based on information received from FSCO, they are not “official” FSCO statistics.

Bill 59 cases (accidents from November of 1996 to date) are far more likely to be fully settled (i.e. mediation issues resolved, not necessarily a full and final settlement) at a FSCO mediation. While 54% of Bill 59 mediations are fully settled, only 41% of Bill 164 (accidents from January of 1994 to November of 1996) and 39% of OMPP (accidents from June of 1990 to January of 1994) mediations are fully settled. There are, arguably, a number of reasons for these figures. Bill 59 is much more restrictive in the types of benefits that are available to claimants, and there are fewer issues to argue about than there were under previous legislation. The treatment plan process can create an uphill battle, especially for unrepresented victims, resulting in more compromise of treatment claims. The tests for entitlement to various benefits has been made so onerous that very few accident victims bother to seriously dispute an insurer’s decision not to pay. It is apparent that, given the significant limitations under Bill 59 (test change for IRBs after two years, the 10 year cap and the \$100,000.00 limit on non-catastrophic med/rehab claims) it is easier to arrive at a settlement under Bill 59 than it was under Bill 164. There is less money, and fewer issues, at stake.

One should also consider the statistics showing that full settlements of Bill 164 claims have decreased steadily since 1997, as claims now under review deal mostly with the victims still needing treatment, or entitled to income replacement benefits many years post accident. These significant cases are more difficult to settle at a FSCO mediation.

There does seem to be a recent trend of a higher percentage of OMPP cases settling, probably as a result of most insurers' desire to close these older files.

Somewhat surprisingly, there is not a large disparity between the percentage of telephone mediations that fail (24%) and the percentage of face to face mediations that fail (21%).

In our office, if we believe that a mediation may result in a sensible settlement, we will request that it take place face to face. It is often more difficult for the insurer to look an injured victim in the eye and say "no". Conversely, if we believe that there is little chance for success, we will try to avoid wasting the time traveling to the FSCO office.

A number of mediations at FSCO are conducted by unrepresented insureds. Understandably, the older the case, the more likely that the victim will have counsel representing him or her at the mediation. However, over the last few years, the total percentage of victims who have counsel file for mediation on their behalf has remained relatively steady at around 80%. One-fifth of all accident victims apply for mediation, and likely attend the mediation, without the assistance of a lawyer. One can sympathize with the average lay person who has to read any one of the *Accident Benefit Schedules* in order to prepare for mediation.

How does one explain the relatively low percentage of cases that settle at these mediations? The list of reasons is long. The mandatory nature of the mediation, without any choice of the identity of the mediator or the length of the mediation, dooms many mediations before they even begin. There is no immediate consequence of a failed mediation to either party. Litigation and arbitration have not been commenced, and the insurer often hopes that the claimant will simply "go away". In fact, given that 20% of claimants are unrepresented, the insurer may actually be convincing a significant number

of people to “go away”. These mediations often become mired in small details (procedural and substantive), and it is rare to have a lawyer, insurer and mediator who are all willing and able to work through these details in the time allotted.

Given that this type of mediation is mandatory and unavoidable, counsel should consider how to use this procedure in the best interest of their client. Although one must be mindful of limitation periods, it is advisable to wait and include as many issues as possible into each application for mediation. FSCO mediations are unlikely to result in a full and final settlement of a case where the injuries are significant. Several applications for mediation result in several failed mediations and increased costs to the client. Further, the client will likely feel an extreme level of stress and anxiety before, during and after each mediation. Clients generally take their no-fault benefit claims more “personally” than they might take the tort claim, given the regular contact they have with the insurance company and the animosity that often develops. If it is obvious that the mediation will be a waste of time, advise the mediator and the insurer’s representative that the client will not directly participate in the mediation. Although it is important for the client to be available by phone for instructions, even this minimal level of participation can be extremely stressful for the client.

Legal costs are, strictly speaking, not payable following the successful resolution of an issue at a FSCO mediation. However, we routinely insist on some contribution towards costs at the completion of a relatively successful mediation. The quantum requested is usually relatively modest, and it will be based on the actions of the insurer leading up to the denial of benefits as well as the relative strength of each side’s arguments. The insurer’s refusal to pay costs really is akin to having them refuse to pay a claim because

there is no court order to pay yet. In the end, our position is very simple; pay some reasonable costs now, or pay much higher costs and the \$3,000.00 Arbitration filing fee later. When an insurer recognizes that they do not have a strong case, they will usually pay some costs.

Briefing the client for a FSCO mediation is crucial, especially if the client is to be in attendance. Given that these mediations often take place relatively early in the claim, the client has likely never been through anything like a FSCO mediation. The process should be explained in detail. The identity and role of the players should be made very clear. Expectation management at this stage is imperative. Tell the client what you realistically hope to accomplish, and what the subsequent course of action will be if the mediation fails. If there are problems with parts of the case, tell them so. There is nothing worse than having your client hear the weaknesses in the case for the first time from the mediator or the insurance company.

It is also important to brief your client with respect to their interaction with the insurer's representative at the mediation. This will often be the first direct communication between your client and the insurer's representative since you were retained, and the impression that your client makes at the mediation will often be a lasting one. While we usually advise our clients to say very little at a mediation (it is not an examination for discovery for the insurer), there are often questions that you can anticipate allowing your client to answer. "How has your condition changed since the treatment was terminated?" or "What is it about your job that you can't do?" are standard questions about which you can brief your client. These are also questions that will often bring out an amount of genuine emotion from the client, hopefully impressing upon the insurer's representative

the severity of the situation. Alternatively, the briefing session may show you that your client is not capable, either emotionally or cognitively, of answering such questions. Better to find this out before, rather than during, the mediation.

The Verdict on FSCO Mediations

The level of satisfaction with the process is dependent upon a number of factors, over which the lawyer has very little control. More often than not the FSCO mediation is simply an early step in a much longer process, and it should be treated as such. While the process has many shortcomings, good counsel should strive to maximize its utility. One should use this process to narrow issues, learn more about the insurer's position and prepare the client for the steps that lie ahead.

MANDATORY MEDIATION

This is a relatively new form of mediation, pursuant to Rule 24.1 of the Rules of Civil Procedure. Historically, mandatory mediation has been tied to civil case management under Rule 77. Up until recently, mandatory mediation was not very prevalent in Toronto. Only 25% of eligible cases were "randomly" selected for case management, and most lawyers were able to avoid mandatory mediation. However, as of July 3, 2001, 100% of eligible cases in Toronto are case managed, and lawyers can no longer ignore the mandatory mediation process

The Procedure

In order to understand the mandatory mediation process, you must first understand the case management process. Under Rule 77, plaintiffs' counsel must choose a track (fast track or standard track) and indicate that choice on the notice of commencement of proceeding. The fast track is not appropriate for most injury claims or any other complex

litigation. The claim is issued and then served in the usual manner. However, one must remember that, although there is technically six months within which to serve the claim, it will be dismissed by the registrar 180 days after the date of issue if no defence is filed.

It is up to the plaintiff's counsel (!) to ensure that the defence gets filed in time.

Once the first defence is filed, Rule 24.1 kicks in. A "defence" includes a notice of defence, notice of intent to defend or a statement of defence. 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. Case management does not permit the usual indulgences. According to Rule 24.1.09, mandatory mediation must take place within 90 days after the first defence is filed, but this can be extended a further 60 days if the consent of the parties is filed with the mediation co-ordinator (Rule 24.1.09(3)).

The parties can choose the mediator, as long as the identity of the mediator and the date of the scheduled mediation are provided to the mediation co-ordinator within 30 days after the filing of the first defence (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.

If a party fails to file a statement of issues (Rule 24.1.10) or fails to attend the mediation (Rule 24.1.12), the mediator must file a certificate of non-compliance. Non-attendance 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).

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

The Statistics

The government has been keeping some statistics regarding mandatory mediation. The statistics available to these writers are not particularly detailed. There is no way of knowing if auto insurance related claims settle at the same rate as other actions, although one would think that it is unlikely. The statistics referred to in this paper are relatively old, and one wonders whether the trends will change now that 100% case management is here, apparently to stay.

Out of interest, there were (when the statistics were published) a total of 324 roster mediators in Toronto and Ottawa. Apparently, 191 applications to become roster mediators had been rejected.

A roster mediator was selected by the parties in 51% of cases, a non-roster mediator was selected by the parties in only 4% of cases and a roster mediator was assigned in 45% of cases. A full 45% of the litigants left the choice of mediator to the luck of the draw.

Most importantly, of the mediations that had been held at the time the statistics were reported, 40% settled, 17% were partially settled and 43% failed. These figures are a vote of confidence for the mandatory mediation process.

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, for various reasons, will require examinations for discovery or detailed documentary production before the mandatory mediation will be useful. If that is the case, counsel can simply ask the case management

master to set up an appropriate timetable, with the mandatory mediation to occur after some of the other litigation steps have been completed. Persuasive reasons must be provided to the master, and one must also be mindful of the fact that mandatory mediations were designed to occur very early in the process to eliminate “unnecessary” legal costs. However, under the right circumstances, counsel should be able to fit the mandatory mediation into a time slot that is appropriate for the particular case.

After timing considerations are dealt with, the identity of the mediator is the next issue. It is surprising that 45% of counsel allow a mediator to be chosen at random. Even if the process is going to be a waste of time, it might be helpful to waste time with a mediator who actually knows something about the area of law in question. The roster is full of mediators who are well experienced in highly specialized areas. Further, the parties can agree on a non-roster mediator, although the chosen mediator would not be bound by the maximum rates set out in the Regulations. The mandatory mediation is likely to be more stressful than a FSCO mediation for the unsophisticated client, making the choice of mediator much more important.

Briefing the client for the mandatory mediation is even more important than briefing them for the FSCO mediation. Although many of the comments in respect of FSCO mediations apply here, there are several additional considerations. For one, it can take longer. Unsophisticated clients often lose their concentration and become overwhelmed during lengthy meetings, and they should be encouraged to take breaks or do whatever it takes to keep their energy up. Counsel are rarely involved at FSCO mediations on behalf of insurers (about 12%), but a lawyer will almost always be representing the defendant at a mandatory mediation. The unsophisticated client should be briefed about the infamous

opening statement, so that the “we-don’t-mean-to-hurt-your-feelings-but-we-don’t-believe-a-word-you-say” style does not catch them off guard. The client can lose their faith in the process at an early stage if they are not forewarned about what is likely to be said about them at the mandatory mediation.

The Verdict on Mandatory Mediation

The term “mandatory mediation” is something of an oxymoron. The whole idea behind mediation is to get willing parties together, under terms that they agree upon, to try and settle a case. This notwithstanding, mandatory mediation under Rule 24.1 has been very successful. Sharing the cost of a \$700.00 mediation and taking the time to prepare for and attend the three hour session is not a bad investment if there is a 40% chance of settling the claim before, or shortly after, examinations for discovery.

Ask most plaintiff’s counsel and they will tell you that mandatory mediation doesn’t work for personal injury cases. The complaints focus on the timing of the mediation, especially for cases that have not yet crystallized. The fact is that this mediation system is flexible, but very often misunderstood. If counsel used the system to their advantage, it is likely that the rate of settlement would increase significantly. For example, although the time frame set out by the Rule does not contemplate the more complicated claim, Rule 24.1.09(2) states that the court can extend the time frame (without any outside limit), considering the number of parties, the complexity of the issues and whether the mediation will be more likely to succeed if it is postponed to allow the parties to acquire more information. These are the very factors that are often cited by counsel in criticizing the mandatory mediation process. Since a timetable (outside of the default Rule 77 timeline) will have to be set in almost every complicated claim, why not set the timetable

very early in the litigation and ask that the mandatory mediation be delayed for six months or a year, or until after examinations for discovery? Alternatively, it could be postponed to allow sufficient time for the parties to complete documentary discovery and conduct medical-legal examinations. The options are wide open (within reason), but only if counsel take the time to consider the options early in the case. If no such steps are taken, a mediator will be assigned, a date will be chosen and an opportunity to successfully use this process will inevitably be lost.

Even if the case is not settled at the mandatory mediation, all is not lost. Good defence counsel will have already started to form their theory of the case by the time that they attend the mandatory mediation. Although they likely will not show all of their cards, their theory should be apparent. Once the theory of the defence comes out, the case can be tailored in part to respond to their theory.

Finally, the process can be used to determine if there are one or two important pieces of evidence that might allow the parties to bridge the gap and get the case settled. If possible, keep the settlement process alive, get the evidence, and settle the case sooner rather than later.

Mandatory mediation is not going to disappear. Good counsel should take the time to learn about the process and how to make it more useful for themselves and their clients.

PRIVATE MEDIATIONS

In the not too distant past, people went to trial without attempting private mediation. Today, it is very rare to see a case go to trial without at least one, if not more, attempts at private mediation. Given the cost of litigating, both financial and emotional for the unsophisticated client, it is almost always worth the time and effort.

Private mediators do not, to our knowledge, publish their settlement statistics. Many of the top mediators boast of settlement rates well in excess of 90%. If one includes cases that settle at the mediation and those that settle following, but arguably as a result of, the mediation, those statistics are, anecdotally, close to being accurate.

Make sure that you are well prepared for the private mediation. Since the parties have full control over the process, there is no excuse for attending without all of the necessary documents, expert reports, witness statements, etc. No stone should be left unturned.

Choose your mediator wisely. Consider not only the issues in dispute, but the personalities involved. If your client has unrealistic expectations, you might want to use a retired judge who can throw the weight of the bench behind his or her assessment. If the insurance adjuster is the problem, use a judge or defence lawyer, who they will trust as a mediator. Often the conciliatory mediators will ensure that the day is not overly, or unnecessarily, stressful for the client.

The earlier comments about briefing your client and learning about your opponent's case obviously apply to the private mediation. You should also spend some time briefing your client about how the case might be settled. If you don't believe that you can get the case settled, you shouldn't have agreed to the private mediation in the first place, and you should advise your client accordingly. Explain that the idea of mediation is reasonable compromise. Neither party should be ecstatic about the settlement, but neither party should be overly unhappy either. Compromise is the key, and your client must be advised to put aside all of the hard feelings that they have inevitably developed over the course of the litigation, in the interest of compromise. Discuss a bottom line, or at least a range, so that your client has confidence in the process, and reasonable expectations.

During the negotiations, involve your client in the decision making process. When the first offer is made, ask your client for instructions to reject the offer (if appropriate) instead of simply giving the counteroffer to the mediator. Make sure that your client is comfortable with the counteroffer that you are proposing. Ask your client if they have any questions as the day goes on. Encourage breaks, fresh air and food in order to keep them energized. The unsophisticated client has likely felt like a passenger with little control during the whole litigation process. Giving them a level of involvement, especially at this crucial point in the case, will provide them with a sense of ownership in the process and result, and hopefully a greater level of satisfaction with their counsel. Once you get close to a settlement, get instructions, in writing, from your client. Those instructions should, whenever possible, set out your fees, disbursements, G.S.T., and any other accounts that will come out of the settlement monies. If possible, be clear about the bottom line total that your client will receive after all of the other amounts are deducted. At the end of a long day, your client is likely to be tired and prone to confusion. If you make it clear, they will be more comfortable with the result and there will be little room for disagreement between you and your client at a later date.

Finally, whatever you do, do not let anyone leave the mediation until minutes of settlement are prepared and signed. Cover everything, including the date by which all funds are to be received by plaintiff's counsel, dismissal orders, disbursements, etc. There is nothing worse than spending a whole day hammering out a deal, only to find out later that the parties disagree about the exact terms.

The Verdict on Private Mediations

Private mediation is a must in most cases that have not been settled in the late stages of the litigation. However, it is not for every case. If as plaintiff's counsel you wish to seriously pursue a punitive damage claim, don't bother mediating. Although anything is possible, we have yet to hear about an insurer who voluntarily paid a large sum for punitive damages. You may have a client with extremely unreasonable expectations about the value of the case. While most unsophisticated clients would prefer to avoid the emotional cost of a trial, many injury victims want the opportunity to "tell it to the judge". If the parties have been on different planets in previous settlement discussions, sometimes mediation can be a waste of time. Finally, some lawyers have forgotten that cases can actually be settled without the help of a mediator. If there have not been detailed settlement negotiations, try a settlement meeting between the parties before investing the time and money in a private mediation.

Generally, with the right mediator, private mediations are often successful for both sides, and have become a process that is highly regarded and very useful.

§ 258.6 MEDIATIONS

This type of mediation was created as part of the *Automobile Insurance Rate Stability Act* (Bill 59), and is only available in tort claims arising from motor vehicle accidents occurring on or after November 1, 1996.

At the request of either the injured person or the defendant's insurance company, both parties must attend the mediation. It can be requested any time after the § 258.3 notice letter is received by the insurer, either before or after the litigation is commenced. In accordance with § 3 of Ontario Regulation 461/96, if the parties cannot agree on the

identity of the mediator, they each nominate a person and the two persons named decide on the identity of the mediator. If the parties are unable to agree upon a date, it must take place within 14 days after the mediator is appointed (whoever drafted the regulation has obviously not tried to book a mediation recently). Importantly, the defendant's insurer must pay for the expenses.

The Verdict on § 258.6 Mediations

In the five years since Bill 59 has been in place, our office has yet to use § 258.6. In fact, we have yet to hear of anyone that has used § 258.6. One can imagine that it might be useful for the plaintiff to force a mediation of a fatality claim before an action is commenced, in order to get the case resolved early and not have the client relive painful memories during the litigation. However, this provision seems to have little use in most cases. The one exception may be where the parties have agreed to mediate but, for whatever reason, the insurer is refusing to pay the cost of the mediation. A quick reference to § 3(6) of Ontario Regulation 461/96 should solve that problem.

CONCLUSION

Given the cost of litigation, fewer and fewer cases are making their way to trial. At the same time, more and more cases are making their way through some form of mediation. While good counsel will not allow their robes to gather dust, the focus today should be on effective mediation skills. As with any other area of the law, information and preparation are your greatest allies. Know the system and how to use it. Know the mediators and their strengths and weaknesses. Know your client and their expectations. Most importantly, know your case, your opponent's case, and the applicable law. The

statistics show that if you know all of these things, your unsophisticated client's case will get settled.

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