This article relates to private-sector mediation in civil and commercial cases in the Ontario Superior Court of Justice, which is the kind of mediation I practice. While the fundamental principles of mediation are common to mediation in all its forms, I have not attempted in this series to provide detailed information about specialized mediation such as family and child mediation, labour mediation and the mediation programs provided in some of our courts. The reader is cautioned to take care in applying information contained here to mediation processes in other, specialized fields.

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What is mediation?

Mediation is a settlement method in which the parties to a dispute work to resolve it with the help of a neutral person, called the mediator.

People tend to be more familiar with hearings in Court than they are with mediation, so I will develop the definition of mediation by comparison to litigation.

How litigation works:

(NB: For simplicity's sake, I refer here to a trial conducted by a judge alone.)

"Litigation" refers to dispute resolution processes in the public courts.

Litigation is coercive. It cannot be ignored. Once you have been served with process in a litigation case, you must respond in accordance with the court rules – otherwise the case will simply roll on without you, and judgment can ultimately issue against you without any input or resistance on your part.

Unless the parties settle it, a litigation case is resolved in court at a trial. A judge presides at the trial. The function of the judge is to make decisions. Specifically, a trial judge is required to conduct a hearing at which he or she will –

- hear the parties testify in the witness box as to what they say occurred;
- review the physical evidence – such as documents and photographs – that each party presents;
- sift through the testimony and physical evidence submitted by all parties to decide what is true and what is not, and thus decide what the "true story" is;
- hear the parties' arguments as to what law they say is applicable to the case;
- consider the parties' submissions and decide what law is to be applied; and
- apply that law to the "true story" (as he or she determined the story to be) in order to decide the result and give judgment in the case.

The judge's determination of the "true story" lies at the very center of the litigation process. When law is applied to the facts to decide the case, it is not applied to the story as told by one of the parties, but to the "true story" as determined by the judge. This is how responsibility, or liability – or fault or blame – is determined under our law. This is the process that determines the "winner" in litigation.

How does mediation differ from litigation?

Mediation is voluntary:

Mediation is based on the consent of the parties, and cannot happen without that consent. If the parties to a private dispute agree that they want to mediate, they can do so, whether court proceedings are in progress or not.

You may have heard of "mandatory mediation", a specialized Court procedure that exists in some areas of Ontario. Under mandatory mediation, the Court rules require the parties to attend a mediation session, but mandatory mediation does not change the rule that mediation is based on the consent of the parties: while they must attend the session as prescribed by the mandatory mediation program, the parties cannot be forced to bargain or to make a settlement.

The mediator is not a decision-maker:

As seen in the list relating to litigation, above, there is a neutral third-party at the centre of the litigation process. That is the judge, who makes decisions about testimony, evidence and law, and ultimately decides the case between the parties.

A mediator also acts as a neutral third-party in a dispute, but a mediator is not a decision-maker. Rather, the mediator is a facilitator. The mediator assists the parties to communicate with one another, and coaches and problem-solves with them, to help them to devise their own solution to the problem. The mediator has no power to make any decision about the issues in dispute between the parties.

Divisive issues may be shelved at mediation:

In mediation, no attempt is made to determine the "true story", or to decide liability, because the result at a mediation is not based on either of those things.

The "true story" and liability are complex, contentious issues, and pursuing them tends to drive the parties apart as each struggles to show that he or she is "right". In litigation, arguments about such issues are pursued until a "winner" is decided, but in mediation it is recognized that this difficult work is counter-productive, *and that it does not need to be done*. The parties may feel the need to air these issues, and may do so, but finally issues about the "true story" and legal liability are put aside, and mediation moves forward without trying to resolve them.

Mediation does not aim for a result which accords with law:

Why doesn't mediation aim to address issues like the "true story" and liability?

Philosophically, mediation is based on the idea that there is no right answer to a dispute – and, in fact, the courts agree. There are court decisions in which it has been observed that a series of competent judges, faced with exactly the same facts and evidence, can arrive at different conclusions – and the fact that their decisions differ does not mean that any of the decisions is wrong. If litigation results are considered at mediation at all, it is most useful to think of them as a *range* of possible results.

But mediation is also based on the belief that competent adults, participating in a fair process, can come up with a solution for their problem that is just as "right" as any trial judge's decision. The parties know their concerns and interests best. As long as the parties' answer isn't itself illegal, they may decide anything. There is no requirement that their settlement at mediation be consistent with any result a judge might reach at a trial.

Mediation seeks a practical result that is acceptable to all parties:

Just as mediation does not seek a result that accords with a result at law, mediation is not concerned with deciding which of the parties is "the winner". And while a mediation settlement is reached through bargaining, it is not based on one party accepting the opinion of the other -- in fact, settlements are generally reached without the parties ever agreeing about the facts of the case or what would have happened at a trial.

Mediation focuses on solving the problem, by finding terms on which the parties are willing to settle the dispute: *if the parties are able to find a solution with which they can both be satisfied, there is no reason to pursue legal issues like "true story" and "fault"*.

Mediation is based on the following principles:

Good faith:

Participants at mediation have a duty to act in good faith. This means that discussions in mediation are to be conducted with courtesy, so differences are aired in a reasonable way, and bargaining is civil, without bullying or aggressive posturing.

Of course, mediation takes place in the context of a dispute, and the parties sometimes struggle with strong emotions. Mediation assumes that this may happen. It provides a structure within which such feelings can be acknowledged, and then moves past them, so strong emotions don't derail the process. One of the jobs of the mediator is to monitor the tone of the discussions, and to intervene or separate the parties if communication between them becomes difficult, so the mediation can continue.

Fair disclosure:

Good faith in mediation requires that all parties make fair disclosure.

Some context will help to explain this rule. In litigation, there are complex rules about the admission of evidence. For example, at trial, witnesses must give an oath or affirmation to tell the truth, and are questioned to test the credibility and strength of their testimony. Documents are generally submitted through the testimony of witnesses who have personal knowledge of their origin and authenticity. *These procedures are designed to protect the court and the parties from being misled by unreliable or falsified evidence*.

In mediation, the litigation rules about the admission of evidence do not apply. Communication in mediation is informal, like ordinary conversation. Documents, generally, are not subject to formal proof. This informality makes mediation more direct and quicker than litigation procedure, and less expensive.

But in the absence of litigation-style protections, what protects the parties in a mediation from being misled by unreliable or falsified evidence? Their protection is this rule, which imposes a duty on all parties to a mediation to make fair disclosure of relevant information and documents to the other(s).

Proceeding by concealment or ambush is not permitted in mediation. Failure to make fair disclosure is grounds for an application to the court for review of any settlement reached. If satisfied that there was a failure to make fair disclosure, the court can order that the settlement be set aside, and will likely order payment of legal costs by the offending party as well.

"Without Prejudice":

Settlement communications at mediation are protected by a special rule of law – they are "without prejudice", or "off-the-record", which means they are not subject to disclosure and cannot be admitted into evidence in any proceeding, for any purpose, including attacking credibility, whether made orally or in writing.

Among other things, this rule prevents statements made in settlement discussions from being put before the court as evidence against the party that made them, should mediation fail and the case proceed in litigation.

This rule is designed to encourage parties to speak freely in their settlement discussions, and thus maximize the chance of settlement, knowing that nothing they say can be used against them afterwards.

Confidentiality:

Mediation is a private process. Statements made at mediation are not intended for publication or disclosure to anyone other than the parties and the mediator, whether the statements are oral or written. All participants at a mediation are under a duty to maintain confidentiality.

In keeping with its private character, mediation does not take place in a courtroom, and no judge or other court official is present. There is no court reporter. No recording of the session is made. No report is made to any authority as to what is discussed. However, if one party fails to perform obligations under a settlement agreement reached in mediation, the other party is freed of the obligation to maintain confidentiality in order to put the settlement agreement before the court to have it enforced.

All other proceedings "on hold":

While a mediation is in progress, no party Is allowed to begin any new proceeding related to the issues in dispute, and no party may take any fresh step in any proceeding that already exists. This rule is designed to ensure that the status quo is maintained, and that no additional pressure is brought to bear on any party while mediation is in progress.

What are the advantages of mediation?

Participation of the parties:

Parties often find mediation more satisfying than a trial, because they can play an active role in resolving their dispute, rather than having a solution determined and imposed on them by a judge.

Relationship:

In situations in which the parties have an ongoing relationship, mediation is particularly helpful because it promotes direct communication and cooperative problem-solving, and because the history of relationship may become a force not only for settlement of the dispute, but for healing the relationship itself.

Privacy:

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Informality:

The mediation process is informal. No oaths are administered, and there is no formal questioning of witnesses. No judge is present. Parties in mediation may speak more

openly than is permitted in court. Many people find mediation to be a less intimidating and more comfortable process than a trial. Because mediation is informal, it is also possible to conduct the process more quickly than is possible with litigation, which can save the parties both time and money.

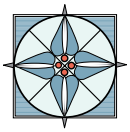
Economy:

Mediation can be less expensive than resolving a dispute through litigation, but not if conventional litigation work is permitted to railroad the mediation process. The expense of litigation – not just a trial, but all the related procedures that make it possible to prepare a case for trial -- can eat up resources very quickly. If that is permitted to occur, those expense may wipe out any savings that could otherwise be accomplished through a settlement at mediation – although it should be noted that, if settlement is achieved at mediation, it will still save the parties the cost of a pre-trial conference and trial, so settlement at mediation – even a more expensive mediation -- would always be more economic than a result reached through trial.

Speed:

It is often argued that mediation resolves disputes more quickly than is possible through conventional litigation. Again, that can be true, as long as the parties don't let the case get bogged down in litigation work rather than cooperating to move the case along – although, as before, if settlement is achieved at mediation, it will still resolve the dispute more quickly than would have been possible if a trial were necessary.

Please see next page for a summary of this article in chart form.



Future articles in this series will explain various aspects of mediation in more detail, including the role of the mediator, how the mediation session is conducted and what clients can do to prepare themselves to participate. You can access the series through the Index for "Understanding Mediation" at jdemaray.com.

litigation	*mediation*
litigation is coercive: if a party fails to respond after service, the action will proceed against him/her anyway and judgment issue without his/her input	participation in mediation is voluntary
parties cannot withdraw from the process (except by settlement)	parties have the right to withdraw at any time, for any reason
the legal system assigns the judge	the parties can pick their mediator
the government pays for the judge	the parties pay for the mediator
the process & the result are public	the process & the result may be kept private and confidential
the parties are minimally involved in the process up to and including trial	the parties are actively involved in the process and in the result
the processes of receiving evidence and arguments of law are formal	mediation process is informal
the judge decides the case	If there is a decision, the parties make it (the mediator does not decide the case)
the judge decides what the 'true story' is, and who is responsible (at fault)	the legal ideas of the 'true story' & 'fault' are not determinative at mediation
the judge must decide the case in accordance with applicable law	parties can decide in any way they like; their settlement need not accord with law or a result possible at trial; the only limitation is illegality
the result (a "judgment") is a public pronouncement of law	the result, if any, is a private contract between the parties
steps taken to enforce the judgment are on the public record	if there is default in the performance of a mediation settlement, application generally must be made to a court for enforcement, and will thus be public
slower process	faster process possible if process is managed well
expensive	less expensive process possible if process is managed well