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Best Process Management Practices for OMMP Roster Mediators

Guest Speakers: Jonathan Fidler, Darryl Gonsalves and Lawrence Herman

By: Mary Korica

The Ontario Mandatory Mediation Program Special Interest Section of the ADR Institute of Ontario ("ADRIO") presented a live program and webinar on best practices for OMMP roster mediators on Wednesday, November 27, 2013 at the ADRIO office in Toronto.

The meeting's panel members were Mr. Jonathan Fidler, mediator and chair of the Toronto Local Mediation Committee, Mr. Darryl Gonsalves, client services representative of the Ontario Mandatory Mediation Program and Mr. Lawrence ("Larry") Herman, mediator and an ADRIO director.

Discussion began about the most common mediator issues encountered by the OMMP office. In addressing how to deal with unresponsive parties, Mr. Gonsalves recommended that mediators in all cases send a letter to the parties introducing

themselves as the OMMP-selected mediator and requesting potential mediation dates. The mediator can then present to the unresponsive party the dates offered by the other side, and even schedule the mediation if the party continues to be uncooperative, thus establishing a basis to file noncompliance due to nonattendance.

Regarding the issue of nonpayment by one or both parties, Mr. Fidler emphasized that there is no enforcement mechanism and that nonpayment is not cause for filing noncompliance. In the case of nonpayment by represented parties, Mr. Fidler recommended repeatedly contacting the counsel involved by various means (email, phone calls, letters), documenting each instance and, as a last resort, threatening to issue a complaint to the Law Society

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(since nonpayment constitutes professional misconduct). In the case of nonrepresented parties, Mr. Fidler noted that small claims court is an option.

Mr. Herman recommended use of free facilities such as the ADR Centre, counsels' offices or the private examiner's office for mediations, and if parties insist on private facilities that the mediator ensure advance payment. He recognized that some mediators require retainers, but felt this could potentially dissuade clients.

Mr. Herman emphasized the necessity of having a mediation agreement. He noted that Rule 24.1 does not provide sufficient governance over the mediation process, and omits, for example, a clear fees payment provision. He recommended that, for represented cases, the mediation agreement have the parties' counsel personally guarantee payment and potentially even designate them as indemnifiers of the account. The agreement can set out terms for late payment, including interest charges.

Mr. Fidler and Mr. Herman both agreed that regardless of whether the agreement requires payment before or at the mediation, the mediator must conduct the mediation in the event of nonpayment, including in cases of mandatory mediation where the mediator was privately engaged. Otherwise, complaint or insurance issues might legitimately follow for the mediator. Mr. Fidler reminded the audience that the ADR Rule is not designed to protect the commercial interests of the mediator, but rather governs the mediator's duty to the civil justice system. He argued that it is incumbent on the mediator to minimize risks to themselves to the degree possible, including through a mediation agreement.

There was general consensus that the legally-mandated \$600 fee for

mandatory mediations is significantly out-of-date and should ideally be raised by the provincial government. However this was also considered to be unlikely. Mr. Fidler conveyed that the Local Mediation Committee had considered the issue and found it not within their mandate to lobby for change. He recommended that the practitioners use their professional association and other lobby mechanisms to pursue the issue.

Mr. Fidler debunked the notion that the mediator can charge whatever the market can bear when conducting mandatory mediations privately (namely, by bypassing the OMMP office, which in and of itself is a legitimate course of action). While acknowledging that no policing mechanisms exists, he maintained that the fee should be \$600, as set out in regulation, in all cases where clients have expressed that they are requesting a mandatory mediation. Mr. Fidler recommended asking the requesting party at initial contact whether they are securing the mediator for a mandatory or for a private mediation, and then charging according to the party's answer.

Mr. Herman cited a precedent that statutes can be varied by commercial agreements to argue that it should be considered acceptable for parties to be charged somewhat higher than \$600 for a mandatory mediation if they agree in writing in advance of the mediation. Mr. Fidler noted that no complaint had yet been received by the Local Mediation Committee about overcharging for mandatory mediations, but that this is a possibility. The only protection in this case would be for mediators to follow the letter of Rule 24.1. He emphasized that the Rule sets the fee to protect access to justice in all cases of mandatory mediation, regardless of circumstances. He also noted

that mediators can remove themselves from the roster and conduct non-mandatory mediations under any rates. Both panelists noted that the Rule allows for a different rate to be charged if the mandatory mediation extends beyond three hours, provided that is agreed to in advance. Disbursements for travel and other expenses may also be charged if specified in advance in the agreement to mediate.

In discussing the value of being on the OMMP roster, Mr. Herman and Mr. Fidler agreed that it can be a

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ADRIC will be working on a customized French Member Portal.

useful marketing tool for a mediator to gain recognition and work. Mr. Fidler and Mr. Gonsalves emphasized that expectations of income from roster work should be limited. All agreed that mediators must also market themselves through other means to ensure workflow above the three to four cases that Mr. Gonsalves stated OMMP is likely to assign a roster mediator per year.

Mr. Fidler debunked the notion that the mediator can charge whatever the market can bear.

Mr. Herman argued that in some quarters there may be an unfounded connotation of inferior status associated with roster vs. non-roster mediators. He argued that mediators on the roster should combat this by describing themselves as mediators without qualifiers such as "roster mediators". He also noted that for some ADR-related work, the fact of being on the roster confers status rather than taking it away. In any case, Mr. Herman encouraged mediators on roster assignments to use those opportunities to promote themselves by sharing their resume with parties and displaying substantive knowledge that may set them apart.

Mr. Gonsalves confirmed that OMMP assignments are distributed alphabetically. In cases where a roster mediator is assigned but the parties choose to use another mediator, that roster mediator receives priority for the next assignment. In response to audience questions, Mr. Gonsalves also confirmed that if one or more parties express preference for a particular roster mediator, that mediator is assigned to the case. The panelists agreed that this is appropriate in

cases where both parties express the same preference, or where all parties agree to one party's preference for a particular mediator—to do otherwise would penalize a mediator for competence and rapport. However, concerns were expressed over situations where the OMMP program assigns one party's preferred mediator unbeknownst to the other side. Mr. Fidler committed to look into the matter.

In the case of a party wishing to remove the assigned roster mediator from a mediation, Mr. Gonsalves recommended that the assigned mediator have the party indicate this in writing to them, copying the other party.

Mr. Herman cautioned that when a mediator feels at all impugned, they should report the incident to their insurer to protect themselves. He also recommended clarifying with self-represented parties ahead of time who will be in attendance at the mediation and whether those present will have authority to decide the matter.

In response to an audience question, panelists confirmed that, as per ADR Rule 24.1, all parties and their counsel are required to attend the mediation in person unless a court order indicates otherwise. This is regardless of whether all parties and counsel consent to any participant's absence. Mr. Fidler suggested that if a participant could not attend, the mediator could offer to conduct the mediation as a private mediation rather than a mandatory one, though they would still be required to charge at the \$600 rate. Mr. Fidler also reminded the audience that it is not acceptable for a mediator to sign off on a mediation that has not occurred.

Those interested in joining the OMMP roster or learning more about it were asked to refer to

www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/ 

Jon Fidler, C.Med., practised negligence and insurance litigation after being called to the Bar with Honours in 1975. He was certified as a specialist in civil litigation by The Law Society of Upper Canada. Since 1988 Jon has also been actively involved as a mediator with an emphasis on insurance related disputes. He is one of the most sought after mediators in Ontario. He is a past chairman of the Insurance Law Section of the Ontario Bar Association and he also has served on the Executive of its ADR subsection. Jon sat as a Deputy Judge of the Small Claims Court in Metropolitan Toronto for more than 10 years, and has been the only Chair of the Toronto Local Mediation Committee for the Ontario Mandatory Mediation Program.

Darryl Gonsalves, B.A., C.Med has been working with the Attorney General, most notably with the Ontario Mandatory Mediation Program (Toronto) for 10 years.

Lawrence ("Larry") Herman, C.Med., specializes in mediating personal injury, insurance, commercial transactions, employment dismissal, and financial services disputes. He practiced business law and commercial litigation from 1977 to 2000 before deciding to devote his career to ADR exclusively. He is the Principal of Herman Mediations and an associate mediator of the Sadowski Resolutions Group. He utilizes unique dispute resolution skills to resolve complex and multi-party litigation with high settlement rates, combining aspects of facilitative and evaluative mediation. Larry is a member of the Law Society of Upper Canada, a member of the Board of Directors of ADRIO and an O.M.M.P. Roster Mediator since 2000 (Toronto and Ottawa).