

Focus PERSONAL INJURY

Cost should not be only factor in selecting mediator



Joseph Campisi

The requirement to conduct mediation in most civil actions in Toronto, Ottawa and Essex County in southwestern Ontario serves to facilitate access to justice for the average litigant.

The purpose of Rule 24.1 of the *Rules of Civil Procedure* is to reduce cost and delay in litigation and to facilitate the early and fair resolution of disputes. After all, the litigant is afforded an opportunity to participate first hand in a process designed to resolve a legal dispute before the costs and delay associated with embarking on a trial are incurred.

The question arises, though, whether these goals are diminished in some way as a result of the recent phenomenon where some insurers are refusing to mediate actions with mediators who do not charge roster rates.

Mediations are to be conducted by mediators chosen or assigned from the local list or by others with the parties' consent.

According to the applicable regulation, the mediator's fee for a two-party, mandatory mediation session of three hours shall not exceed \$600 plus HST. In contrast, a privately-contracted mediator will charge anywhere between \$3,500 and \$5,000 and in some cases, even more, for a full-day mediation. It is difficult to compare a three-hour private media-



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tion to the roster rate because many private mediators do not conduct half-day mediations.

With some insurers refusing to agree to the selection of private mediators, has the mediation process lost its ability to resolve effectively disputes in the area of personal injury law?

This question may be unfair because it presumes that private mediators are more effective at resolving disputes — this requires clarification.

There is no doubt that private mediators bring a wealth of practical experience to the table. Many have practiced in the area of personal injury for at least 30 years before mediating full-time. Also, they have fostered relationships with the personal injury bar, and

the level of trust developed over the years bodes well during the negotiation process. Simply put, litigants benefit from the level of expertise and experience of private mediators and the chances of resolving an action early and in a fair fashion are high.

Can the same be said of roster mediators? In my experience, there are a number of experienced and competent roster mediators who have the skill to settle claims as fairly and efficiently as private mediators. I have encountered roster mediators that are professors and practitioners who offer important insights.

As counsel, we have to perform our due diligence in selecting mediators that are familiar with the law and who have the skill set

to mediate in an effective manner. Turning back to the purpose of Rule 24.1, the argument can be made that the goal of reducing cost is enhanced through a roster mediation given the lower rates that are charged.

Having said this, cost should not be the only consideration when selecting a mediator. Perhaps this is best illustrated in the misconception that smaller cases should be addressed by roster mediators because the stakes are quite small and hence they are easier to settle. In fact, most mediators will tell you that smaller cases are more challenging because the parties have less room to manoeuvre and every dollar counts. There also tends to be a trend to request half-day mediations for smaller cases,

but this too can present similar challenges.

In general, there are a number of factors that ought to be considered when evaluating a mediation, such as the relationship between opposing counsel, the maturity of the dispute, whether productions have been exchanged and, most important, the intention of the litigants.

For instance, there are insurance companies that take a tough stance in interpreting the verbal threshold in motor vehicle accident tort claims, and many times these insurance companies insist on the use of roster mediators. They do so because their intention is to fail the mediation session at a reduced cost, and in this way they fulfill their obligation to mediate under the *Rules of Civil Procedure*. Unfortunately, in this sense, roster mediators have been associated with failed mediations.

Clearly, different variables will impact on the success of a mediation, some of which counsel have no control over. However, what counsel do have control over is the selection of a mediator. Lawyers ought to be diligent in selecting mediators who can effectively resolve the particular personal injury claim before them. With hope, insurers will understand this and be flexible when selecting an appropriate mediator.

Joseph Campisi is a plaintiff personal injury lawyer at Carranza LLP and an adjunct professor at Osgoode Hall Law School.

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