



# Colm Brannigan

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## Colm Brannigan's ADR Notes

I hope you enjoyed what seemed to be a very brief summer. Welcome to my "revised" newsletter now called "ADR Notes".

This newsletter will be sent out quarterly and also may go out on an irregular basis whenever I see a case, and/or an ADR item that I think is worth sending out to you.

It has been quite a while since I sent out the last issue so I hope you have interest in receiving my newsletter? If not, please let me know or unsubscribe below.

One of the least understood and used ADR processes is the hybrid Med-Arb. Many lawyers and ADR professional see the process as being alien to both mediation and arbitration and as a consequence rarely, if ever, suggest the process to their clients.

This is truly unfortunate as a properly designed med-arb process can produce significant benefits to all involved.

Osgoode Hall Law School Professional Development, the Alternative Dispute Resolution Institute of Ontario and the Family Dispute Resolution Institute of Ontario are presenting a program, Med-Arb: Efficiency or Justice Compromised? on October 12, 2017 in Toronto. I am pleased to have been asked to speak at the program and look forward to doing so.

If you are interested in more information, a link to the program is here.

[http://www.osgoodepd.ca/upcoming\\_programs/med-arb/](http://www.osgoodepd.ca/upcoming_programs/med-arb/)

I am also in the process of redesigning my website, [www.mediate.ca](http://www.mediate.ca) and the new version should be live in the next month.

This newsletter contains an article on whether there is a "standard" Agreement to Mediate and a comment on a recent case on mediation and costs from the UK.

As always, I welcome your feedback and please feel free to forward my newsletter to any of your colleagues.

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## Is There a "Standard" Agreement to Mediate?

Mediators are almost always asked by the parties to a dispute or their counsel to send a copy of their "standard Agreement to Mediate" for review, but is there such a document? If by "standard" we mean some prescribed form followed by all mediators, then the answer is simple, no.

Virtually every mediator has his or her own form of Agreement to Mediate. Some are very good, some perhaps not so good. Some are based on the Agreement to Mediate provided in most training while other are quite customized.

The purpose of this article is to encourage mediators and counsel to review such agreements and carefully consider what terms should be in every Agreement to Mediate.

This article comes from my recent experience in mediation where an individual had not read the Agreement to Mediate before arriving at the meeting. As his client was starting to read the Agreement, which incidentally had not been sent to him ahead of time, he was told by the lawyer, who is an experienced litigation lawyer, "just sign it, it is a standard agreement." Well was it?

I had never worked with that person before, so how could he know the terms in my Agreement? Even worse, a question was asked a little later on about the confidentiality of caucus. The answer was set out in the Agreement. This was an embarrassing moment for everyone and may have given the other parties the impression of not being properly prepared for the mediation. As it happens, the mediation failed to bring about a resolution perhaps because of a lack of preparation by that party.

Reflecting on this experience and considering that in almost 20 years as a mediator, I have only once been asked by counsel for a change to bolster the confidentiality clause which I then happily adapted as part of my Agreement tells me that the myth of the "standard" agreement is out there.

This article is focused on mediation where, in the absence of a mediation being covered by

statute, such as the Commercial Mediation Act, 2010, there is no mediation "law", other than common law, covering such important issues as confidentiality. As a result we have to cover these important terms through the Agreement to Mediate. The Agreement to Mediate is fundamental to the process and provides the mediator with the power (jurisdiction) to conduct the mediation.

In it the parties agree to maintain the confidential nature of the mediation process, and of course, pay the mediator for his or her services. Without these minimums you cannot conduct a mediation of any complexity.

No mediation, whether under the Ontario Mandatory Mediation Program or otherwise, should take place without a signed Agreement to Mediate in place.

The ADR Institute of Canada's Model Code of Conduct for Mediators requires a written agreement, and if the format cannot be agreed upon then the Institute's Standard Form of Agreement to Mediate should be used. Most mediators go far beyond the terms of the ADRI standard form, which is a fairly basic document.

What should be in an Agreement to Mediate? From a review of several agreements, here is a sample of 25 topics they contain although not necessarily in order of importance of various provisions.

These are obviously not in every agreement, nor do I go into the specific detail, but they give a flavour of the terms that those mediators believe are important.

- Short explanation of mediation
- Mediator's role
- Mediator Impartiality/Neutrality
- Scope of Mediation
- Mediation is Voluntary
- Confidentiality
- Caucus
- Authority to Settle
- Pause Litigation while mediation ongoing
- Date and venue for mediation
- Mediation Briefs
- Mediation Fees
- Hourly rates/fixed fees
- Deposits/undertakings to pay
- Cancellation fees
- Co-operation of the parties in the process
- Good faith effort to resolve
- Mediator Non-Disclosure
- Attendance at Mediation - who can/will attend - notice
- Destruction of Mediator's Notes
- Exclusion of Mediator Liability
- Settlement Must Be in Writing
- Party Disclosure - who (if anyone) can the disputants talk to
- Place and Time of Mediation
- Continuing Mediation if not resolved?
- Termination of Mediation

How comprehensive should an Agreement to Mediate be? They seem to vary between two and six pages so there is obviously a significant amount of difference in what individual mediators include in their "standard" agreement.

Some agreements that try to cover every contingency and manage to do so more or less, but most do not. There are also short agreements which incorporate standard terms and conditions that are either on the mediator's website or attached to the agreement.

Some mediators insist on having everyone attending the mediation sign the agreement. Others are content to have counsel sign on their client's behalf. Some, such as myself, often use a hybrid approach where counsel sign the agreement and then all attending the mediation sign a separate confidentiality agreement.

It is important that the agreement be in clear language so that the parties can understand it. The agreement should not be so complex that it requires legal advice to understand. It is not a good idea to have it in a smaller size font so that it is fewer pages, as this makes it much more difficult to read and discourages proper review.



As a mediator, do not guarantee absolute confidentiality. Surprisingly, some agreements do this, but we all know there are circumstances where you can be compelled to testify about what transpired in the mediation.

Periodically review your agreement to see if it can be improved especially if there have been cases decided in our courts or other courts that might affect the agreement.

Consider exchanging your agreement with colleagues so that you have their comments on it and you can do likewise with their agreements. Some mediators are reluctant to do this perhaps for fear that their colleague will "steal" their agreements but we often put them up on our websites and we always send the agreement to the parties, so why not?

If you commonly work with the same lawyers in multiple cases, you should advise them when you make changes to your agreement as otherwise they may just rely on a previous Agreement to Mediate and not review the most current document.

It should go without saying, but it is also important for lawyers and their clients to read the agreement before the mediation, even if they have worked with the mediator in the past, as there may be changes made to the document. Because of this, the mediator should send out the agreement as soon as possible after being retained.

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## Case Comment:

Over the last few years the courts in the UK have become very supportive of mediation and encourage its use when appropriate.

I have commented in earlier newsletters on this trend and how the courts use costs orders to encourage litigants to mediate. Not every case is appropriate for mediation, but once you embark on that path you should move ahead and not delay.

A recent UK decision, *Thakkar v Patel* [2017] EWCA Civ 117, confirms the proposition that once you have agreed to mediate, you should not drag out the process.

In that decision Lord Justice Jackson stated that:

"The message which this court sent out in [PGF II SA v. OMFS Company 1 Limited [2013] EWCA (Civ) 1288; [2014] 1 WLR 1386] was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed.

The message which the court sends out in [Thakkar] is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction."

There is an excellent overview of this case in Herbert Smith Freehills - ADR notes at <http://hsfnotes.com/adr/2017/05/05/court-of-appeal-sends-further-message-on-mediation-dont-drag-your-heels-in-arranging-it/#more-3606>

While courts in Ontario have been increasingly supportive of mediation, I am not aware of them taking this type of strong approach but perhaps they should?

I would appreciate comments/suggestions about this topic.

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As always if I can be of help in providing information about mediation and arbitration, please contact me.

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