

Being an Effective Mediator

Mr. Barry Fisher and Mr. Michael Silver are two of Toronto's top mediators. In separate interviews for the ADR Institute of Ontario (ADRIO) they offered insights on what it takes to be effective as a mediator and also provided a window on their work and approaches to mediation.

By: Mary Korica

Mr. Silver describes his practice as "a bit of everything other than family law," listing off estates, employment, construction and commercial law as well as intentional torts, libel and slander. For his part, Mr. Fisher specializes in labour and employment law, his exclusive areas of work. Another difference between the two practices is that Mr. Silver tends to get cases where interpersonal issues are particularly intractable and factor significantly into the resolution. Conversely, Mr. Fisher's cases generally involve relationships that have ended rather than ongoing ones.

Although emotional rifts also characterize the conflicts that he is called to mediate, practical matters tend to be the more dominant issues to be resolved.

Both expert mediators commented that the effective mediator must have knowledge of the law. In fact, Mr. Fisher advocates for the mediator to have a high level of legal expertise in their area of practice — in his experience the lawyers for the parties often expect it, and the perception of the mediator as an expert contributes impor-



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Barry Fisher and Michael Silver were interviewed for this article. ADRIO would like to thank you both for your contribution to this article.

tantly to the effectiveness of his or her interventions. Mr. Silver considers it important for the mediator to know about the rules of evidence and to have a sense of how judges arrive at decisions. He believes it is necessary for the mediator to have an appreciation of the substantive legal issues, but that a high level of expertise in the subject matter of the litigation is not always essential. Still, he emphasizes that it is the responsibility of the mediator to know their own limitations and not take cases outside of their

competencies.

Mr. Fisher and Mr. Silver are both adamant that a mediator must be active and assertive to be effective. Both note that parties may not be able to generate constructive solutions. In the interest of helping the parties arrive at a settlement, both mediators say that they float ideas, make suggestions and offer up settlement proposals based on what they hear from the parties. According to the ADR industry and literature, they are therefore on the "evaluative" side of the practitioner spectrum. Both

mediators emphasize the heavy responsibility that the mediator assumes to deliver fairness, objectivity and wise counsel, particularly when adopting an evaluative approach, and all the more so when not using joint sessions. (Neither mediator considers joint sessions to be particularly helpful—Mr. Fisher does not meet with the parties jointly at all and Mr. Silver does so only minimally).

Mr. Fisher calls his mediation style "highly evaluative", while Mr. Silver says "I move in the centre, a little

more evaluative or a little more facilitative depending on the

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case, and I sometimes make that move in the same mediation.” Mr. Fisher argues that there is a demand for evaluative practitioners because clients consider expert guidance more likely to bring about their primary goal — a settlement. He emphasizes the need for the evaluative mediator to behave confidently, which does not necessarily mean talking often or unequivocally. It may mean holding their opinion to the end of the process, honestly conveying uncertainties the client should be aware of, or explaining the mediator’s (well-founded) change of opinion.

Similarly, Mr. Silver talked about how steering the mediation with objective insight and reality-checking are part of the job of an effective mediator, but added that the robustness of a mediator’s role should be tailored appropriately to the context. He emphasized the need for the mediator to have a principled approach, including intervening when clients are persistently unreasonable or compromising the integrity of the mediation process.

Mr. Fisher and Mr. Silver described the effective mediator as patient, persevering and empathetic. Both expert practitioners highlighted the need to be sensitive to relationships, to dynamics between all of the people involved in the mediation, and they count the lawyer-client relationship among those. Both say they go to pains to work with the lawyers representing

the parties, not against them, while still remaining neutral as mediators. Mr. Fisher and Mr. Silver also believe that the effective mediator has a strong sense of human nature, decision-making and negotiation as

well as a high sensitivity to cultural differences—particularly in an environment as diverse as Toronto. When asked for advice they would offer up-and-coming mediators, both practitioners noted that the field is difficult to break into. Mr. Fisher recommends focusing on an area of expertise that is likely to generate income and that is related to your experi-

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ence, whether work or education or otherwise. He added that it is important to know what you are good at and what you are not good at. Also, in a highly developed marketplace like Toronto's, it is important to have a brand: "People want to know what they are getting". And he says "Develop a style that works and don't worry about what the books say."

Mr. Silver echoed Mr. Fisher's points. He encouraged aspiring mediators to develop a good reputation among their potential client base. And he said that "there is no education like being out in the field." Noting the gap between classroom learning and actual mediation practice, he recommended training from experienced practitioners: "At the end of the day, it's something that's hard to put one's finger on, and you learn by doing."

Both Mr. Fisher and Mr. Silver say it is also important simply to

enjoy the job. Both speak about their chosen profession as something they find meaningful and fulfilling. Mr. Silver recalls being told by a party after a successful settlement that "this would not be possible" in the client's home country—that they would not be able to have faith in a third party helping to resolve the dispute objectively and without

risk of bribery. Mr. Silver went on to say that "this is a gift, that we can engage in this process." For his part, Mr. Fisher says, "I know it sounds corny, but I enjoy helping people solve what they perceive as intractable problems. The nicest compliment I get at the end of a mediation is 'I can't believe this settled'. In other words, that I made a difference." ❁

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