



## TRUE OR FALSE? MYTHS AND MISNOMERS ABOUT MEDIATION

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Part of the difficulty we experience in encouraging parties engaged in conflict to take advantage of the opportunities that mediation provides surrounds a misunderstanding of what mediation is, how it works and what can be accomplished. To help address this, we are pleased to provide a quiz about mediation which addresses some common misconceptions.

***True or False? The goal of mediation is to settle. Mediation has failed if it does not produce a final resolution of the dispute.***

False. While mediation is often “sold” by success rates, the goal is not to make the conflict go away at any cost. Parties to a dispute should not feel forced to settle. Rather, the idea is that taking the time to understand each party’s interests, focusing beyond just legal positions and injecting some creativity into the exploration of resolution possibilities will generate options.

Each party then weighs their options against their other possible courses of action in respect of the dispute and settles only if a proposed resolution is preferable. Provided the parties come to the table with proper intentions, mediation has only truly failed if parties select the course of action – settlement or otherwise – which is not their best option.

Mediation also provides the opportunity to do more than settle the dispute. It offers the chance to better understand the interests of all involved in the conflict and even to preserve relationships through a conciliatory approach. This is particularly helpful in condominium settings where parties to a conflict remain in community with each other.

***True or False? The mediator will make the parties in conflict look into each other’s eyes, hold hands and sing Kumbaya.***

False. At mediation, you cannot ordinarily be “made” to do anything. At the root of the process is the notion that parties participate voluntarily and in good faith. You can make the most of the mediation opportunity by approaching it with an open mind, comforted by the fact that your agreement is required before you are bound by anything and should feel free to ask questions or express concerns about the process to address any hesitations or uncertainties that you may have.

The amount of direct interaction that you have with others involved in your conflict can vary based upon your comfort level and the nature of the relationship, together with the mediator’s approach. By expressing your concerns at the outset of the mediation or earlier, you can get a better sense of what to expect and ensure that you are not asked to do anything in the course of the mediation that you are not comfortable with.

***True or False? All mediations are exactly the same. The mediator has each party state their case, then separates them into different rooms. The mediator then goes back and forth between rooms exchanging numbers until both parties have compromised. The resolution is basically a split down the middle which you can compare against your chances in court.***

False. Mediation is a party-driven, party-focused process. Accordingly, every mediation is different. While there may be some consistencies in the overall framework of the process, it is not set in stone. Each mediation unfolds differently and has plenty of room for adaptation to suit those participating.

The separation of parties into different rooms is known as “caucusing”. While mediation is intended to bring parties together, caucus provides an opportunity to reflect on options privately, or to “cool down” if emotions are inflamed. It is not used in every mediation, though it has been found to be useful when appropriate. Often, when parties participate in mediation with legal counsel present, caucus provides a comfortable setting to obtain legal insight and advice.

***True or False? The mediator will never opine in any way on the facts or settlement options for consideration.***

False. While the role of the mediator is traditionally that of a neutral, impartial third party whose role is to facilitate the process and not provide any judgments of the situation or ideas for a potential resolution of the situation, there are styles of mediation which include such.

The mediator may be willing to provide an evaluation of the dispute or offer his/her settlement ideas if desired; however, it is important to clarify this at the outset of the mediation process to avoid any surprises as to the role or participation of the mediator. This is particularly important as the mediator may need to conduct research prior to providing an evaluation and will want to ensure that all parties are agreeable to receiving his/her thoughts to avoid any perceptions of bias.

Some mediators actively provide settlement options for consideration and others are hesitant to do so. If you feel strongly one way or the other about your mediator participating in this way, express this in advance. Your preference as to your mediator’s “style” may be worth considering and exploring during the mediator selection process.

***True or False? Mediators and lawyers are in competition with one another as they have very different goals. Mediators always want to find a settlement while lawyers always want to go to court. Mediators see lawyers as obstacles in the way of their process.***

False. The participation of legal representation in the mediation process offers several opportunities for the parties. Whether legal counsel ensures that a party's interests are properly advanced (even if the party is nervous or emotional) or ensures that legal implications are adequately understood, the presence of legal counsel can help make the most of the mediation opportunity. While lawyers are not present at every mediation, there are several circumstances in which the presence of legal representation can enhance the mediation process, particularly as mediators cannot provide legal advice.

Ultimately, mediation is what you make it. Expressing your concerns or preferences in advance and otherwise taking time to be clear on your expectations of the process can go a long way in making the most of the opportunities that mediation presents. The process is not stagnant or inflexible. Rather, it is dynamic and ever-evolving, and can be catered to the needs and interests of those participating to ensure everyone is comfortable.

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Marc actively manages condominium conflict and advocates for mediation in the early stages of condominium disputes. He earned an Honours Bachelor of Arts at the University of Toronto (Trinity College), holds an Executive Certificate in Conflict Management from the University of Windsor Faculty of Law and is a member of the ADR Institute of Ontario, the ADR Institute of Canada, the Toronto & Area Chapter of the Canadian Condominium Institute, the Association of Condominium Managers of Ontario and the Institute of Law Clerks of Ontario.

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Marc Bhalla carries professional liability insurance and is a regular contributor of articles to **CONDOCENTRIC.ca**



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