Ontario's new mandatory mediation program

by Walter Seaton, P.Eng.

Expected to become mandatory for most engineering- and construction-related civil suits in Ontario by 2001, mediation can save time, money and reputations.

Do you carry out your technical work with scrupulous attention to detail? In your relationships with your clients, do you always conduct yourself in a highly professional and ethical manner? Do you have in place rigid quality control procedures to ensure that only a faultless product leaves your premises? Of course you do–but that doesn't mean that you don't need to consider what you would do if you were sued for negligent or unprofessional behavior.

Why? Because you can be sued anyway and, because of the way our legal system is structured, failure to defend yourself is taken to be an admission of guilt. A surprisingly large number of the engineers who are faced with the need to defend themselves in such a situation are "partied in." This is a process by which the original defendant will seek to spread the blame and thus deepen the pocket from which a judgment can be drawn.

The time between your receiving notice that a claim has been filed against you and a judgment being made can become a nightmare of motions, discoveries, pretrials and adjournments lasting several years. An inevitable result will be substantial legal expenses, not all of which will be recoverable, even if you obtain the most favourable outcome. Also, there will be a considerable amount of lost time for senior personnel of your company, none of which will be recoverable.

Mediation

Mediation can short circuit the litigation process, saving considerable time and money. It is a private process, confidential to the participants, which can help maintain useful business relationships, which are inevitably destroyed during a long and acrimonious litigation.

The mediation process is generally still not well understood and many misconceptions abound. It is a flexible, non-binding process in which an impartial third party–the mediator–facilitates negotiations among parties to help them reach a settlement. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options. It is also a "without prejudice" process, meaning that any admissions made or offers to settle cannot be used in any further litigation. It is not a battleground for lawyers but, rather, an opportunity for the parties involved to explore creative avenues for resolving their differences. Unlike formal litigation, it is not restrained by externally imposed rules and procedures.

The new mandatory program

In Ontario, these rules and procedures are governed by the Courts of Justice Act and the related Rules of Civil Procedure. On January 4, 1999, the new Rule 24.1 came into effect, requiring that increasingly more cases submitted to trial go to early mediation, including most engineering- and construction-related cases, with the exception of lien actions. Rule 24.1 also includes detailed specifications on how mediations are to be conducted, right down to stipulating the mediator's fees.

Since the beginning of 1999, mediation has been mandatory for about 25 per cent of the civil cases before the Ontario Superior Courts in Toronto and Ottawa. Early next year, it is expected that most civil cases in both cities will go to early mediation. When the pilot project ends early in 2001, it is likely that mandatory mediation will become part of the Rules of Civil Procedure throughout Ontario.

Here's how the mandatory process works: Once both a statement of claim and a statement of defence have been filed with the court, the parties involved are instructed to select a suitable mediator and advise the court of their choice. To help in this process, and because there is currently nothing to prevent unqualified individuals from offering to provide these services, the Ontario Ministry of the Attorney General has established a roster of mediators, all of whom meet a required standard of training and experience as mediators and of familiarity with the civil justice system. If the court has not been advised of a choice within a specified time, it will automatically and arbitrarily assign one of the roster mediators.

The mediator will select the time (within 90 days) and venue of the mediation, which is required to take at least three hours. If the claimant does not attend, the court will probably dismiss the case. If the defendant does not show, the court's decision will probably be in favour of the claimant. In either instance, the case is less likely to go to trial.

Success rates

Naturally, mediations sometimes fail. But failure of a mediation does not put any of