

ARBITRATOR/MEDIATOR SPOTLIGHT

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ARBITRATION PLACE

An all-encompassing approach

CAREER & BACKGROUND

I cut my teeth in the litigation group of a large national firm, and later honed my skills at a leading Bay Street litigation boutique. After a decade on Bay Street, I formed my own boutique firm in 2017, now known as Keenberg & Co. I handle all kinds of commercial disputes, in court and in arbitration, for business owners, executives, shareholders, partners, funders and creditors. I'm a Certified Specialist in Civil Litigation, known for my ability to navigate substantively and procedurally complex cases.

My approach to dispute resolution is as informed by my pre-law careers in business and in the creative arts as it is by my experience as counsel. First, my business background (and current position as CEO of KeenCo) gives me common ground with the business clients I serve and gives me insight into their business needs, goals, pain points and operational realities. I keep commercial considerations in broad focus so I can remain undistracted by legal wrangling that loses the forest for the trees.

Second, my prior experience as a professional actor, director and writer instilled in me an abiding appreciation for the power of narrative, a knack for storytelling, and a deftness with subtext and character study. These skills allow me to glean the unspoken motivations, interests and needs that underlie people's positions and conduct, to make astute credibility assessments as an arbitrator, and to help parties understand each others' perspective and interests as a mediator.

ARBITRATOR/MEDIATOR PRACTICE

I am both a Qualified Arbitrator and a Qualified Mediator. I have a Master of Laws, specializing in Dispute Resolution from Osgoode, and I have completed the Toronto Commercial Arbitration Society's prestigious Gold Standard Course on Commercial Arbitration. Since 2021, I have been teaching the Gold Standard Course as a principal faculty member. My neutral practice is broadly focused on commercial and professional disputes.

I am also a pioneer of a new arbitration process that I call case management arbitration. Case management arbitration allows parties to outsource their interim procedural motions to a private arbitrator instead of waiting months or years for a long motion date. The parties keep their cases in the courts for the merits decision but can move forward more quickly through the interim steps required before they can set down for trial. It is especially useful now, with the continuing backlog crisis. Most commonly, the issues I decide as a case management arbitrator are related to productions and discovery, refusals and timetabling. These interim decisions can also allow the parties' settlement positions to ripen more quickly (e.g., by ordering production of documents that close the information gaps that had previously created barriers to settlement) thereby creating earlier opportunities for settlement.

BENEFITS OF ARBITRATION/MEDIATION

Parties have an idea about what "having their day in court" will feel like, but the litigation process rarely delivers on its promise of a cathartic justice experience. Even a win can feel like a loss when a dispute has dragged on for years, and everyone has spent fortunes on legal fees. Unlike court, where the lawyers take centre stage, both mediation and arbitration offer disputants greater agency in the resolution of their disputes. Parties can tell their own stories, select their own decision-maker or facilitator, tailor their resolution process rules to suit their specific dispute, and do it all on their own timelines. Greater agency leads to greater satisfaction with both the resolution process and the outcome. Ironically, parties are more likely to attain that elusive "day-in-court" catharsis in mediation or arbitration than in court. I've had unsuccessful parties in arbitrations express genuine gratitude to me for the fairness of the arbitral process. They are able to accept their loss with equanimity because they felt heard and had confidence in the process. Similarly, settling parties report greater satisfaction with non-monetary terms offered in mediation that are designed to address unmet emotional, psychological or reputational needs and interests – the types of terms courts are not empowered to order – than they do with greater dollar amounts. The unique justice experiences offered by mediation and arbitration are what drive parties to return to these voluntary processes again and again.



TIPS FOR COUNSEL TO BE MORE EFFECTIVE IN ARBITRATION/MEDIATION

Counsel often struggle to adjust their litigation mindsets as necessary to optimize their clients' chances of success under the distinct processes undertaken in mediation or arbitration.

The easiest way to tweak your mindset in the right direction for mediation is to remind yourself who your primary audience is, and tailor your communications to that primary audience. The primary audience is the opposing party – not the mediator, and not opposing counsel. Your job is to persuade the opposing party to settle. Your fine arguments about legal merits won't persuade an adversary about the righteousness of your client's legal position – especially when that adversary has their own counsel advising them of the righteousness of their own legal positions. Instead, arguments rooted in a solid risk analysis that takes into account business risks, costs (before incurred and projected), time, and diverted attention, that focus on common interests, will be more compelling. A mediation brief written in the client's voice, setting out their story, will also be more helpful to the mediator who is looking to uncover hidden interests, than a pseudo-summary judgment factum would be. Think carefully about the barriers to settlement – why haven't the parties been able to resolve this dispute themselves? Communication failures? Disclosure gaps? Obligations to a third party? Once identified, those barriers will provide a roadmap for how to get to the root of the dispute, which will in turn clear the path to resolution.

In arbitration, counsel can easily tweak their mindset by focusing on their clients' process goals and timing interests. Seasoned litigators who dabble as arbitration counsel are often surprised by how front-loaded the arbitration process can be. Counsel are generally expected to do the vast majority of their investigative work, dispute analysis, and evidence marshalling before the First Procedural Meeting with the arbitrator. Again, a slight adjustment is necessary to move away from the one-size-fits-all litigation mindset into the bespoke arbitration mindset of questioning and tailoring and proposing process rules to fit the specific dispute on a timeline that respects their clients' ongoing business needs.