Mediation/Arbitration- GETTING STARTED

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When to advise the client to proceed to Mediation/Arbitration

Mediation and/or arbitration can be more cost effective, more expedient and less emotionally taxing for clients that the court process. This is due, in large part, to the control the lawyers and clients have over the timing and the process, especially in comparison to court proceedings.

In the mediation process, the mediator will provide an independent and neutral evaluation of the issues and discuss with the parties what a "trier of fact", either a judge or an arbitrator, would be likely to decide. If the parties do not settle at mediation, the mediator's evaluation can help clients decide how they would like to proceed from there. This process is similar to the case or settlement conference, but mediation can be less intimidating to the client, as sometimes clients have difficulty distinguishing one court appearance from another. Often, clients mistake a case conference for a motion. Despite having the process explained to them, many clients expect that the judge at the case conference will make a major decision about their matter.

The mediation process allows the parties to craft their own creative solution to the issues. Parties are much more likely to be satisfied with a mediated outcome than a decision made by a trier of fact, and are less likely to challenge a mediated outcome because they feel that they had a hand in the decision making process.

Mediation and/or arbitration afford much more convenience than the court process. The parties and their lawyers can decide when and where they would like the process to take place. If the matter proceeds to arbitration, the procedural aspects can be much less formal than the court process. For instance, parties can conduct motions by conference call, they can proceed on off hours and can even proceed with contested motions in writing.

Although arbitration is less formal in process, it is no less substantive than a trial. As such, the process must be properly respected. Preparation for arbitration is as comprehensive as preparation for trial, and the client must be made aware that the arbitrator's decisions are as binding as a court's decisions. Accordingly, counsel should discuss with the client the attendant costs of arbitration, such as questioning, the preparation of briefs and evidence gathering processes.

When not to advise the Mediation/Arbitration process

If the parties do not have equal bargaining power in general, mediation may not be the proper forum for resolution. If domestic violence has been an issue in the parties' relationship, mediation may not be the best process.

If there has been a history of difficulties in obtaining proper disclosure, or a contempt order will need to be made, the mediation/ arbitration process becomes more onerous. Enforcement issues on an ongoing basis can become complicated and expensive.

In arbitration, if a contempt order is required, a court order incorporating an arbitral award will need to be made, which will require a separate court application and its attendant time constraints and expenses.

Choosing the Mediator/ Arbitrator

Generally speaking, it is always best to choose a mediator/arbitrator who is well versed in family law. Usually this means engaging an active family law practitioner or retired family law judge.

If parenting is an issue, a non lawyer can be considered, but counsel must be mindful of whether that person, whether he or she is psychologist or otherwise, has an understanding of what arbitration is, and appreciates the legal ramifications of arbitration and natural justice. Otherwise, counsel can be faced with an unhappy party moving to have the arbitrator removed, or attacking the process as offending the principles of natural justice.

Ideally, the arbitrator should possess the legal skills required. If the arbitrator is a non-lawyer, he or she should have access to legal advice. Clients should be made aware that the arbitrator may be consulting with an outside lawyer for advice. How this advice is paid for must be dealt with in the mediation/arbitration agreement.

For example, non-lawyers are often asked to arbitrate the issue of Child Support Guidelines s. 7 expenses, in the process of providing parenting coordination. While this may sound easy, the arbitrator must understand the process and the procedure. He or she must hear both sides, on proper notice. Counsel must be certain that a process is in place which will allow the non lawyer arbitrator to arbitrate these issues.

There is often a concern about interpersonal relationships between counsel and various arbitrators and mediators. Because the family law bar is very close, counsel may find themselves in a situation where a mediator or arbitrator in one matter is counsel on the other side of an unrelated matter. While one might consider that this notion flies in the face of an independent judiciary, the proximity has its benefits,

and can be an asset to the bar in general. For instance, if counsel knows that today's lawyer may be tomorrow's arbitrator, and vice versa, there is greater incentive to avoid sharp practice and to be as civil as the *Rules of Professional Conduct* require.

Retainers and Fees

Counsel must be very careful when reviewing mediation/arbitration agreements. Most agreements will contain a clause which states that the parties are jointly and severally responsible for the fees, *as are counsel*.

If the matter is proceeding to mediation/arbitration, the agreement must set out specifically how the fee apportionment will work.

Be aware that an arbitrator has the right to re-apportion the fee. Therefore, the fee for the mediation/arbitration can become a "costs" issue.

The Mediation/Arbitration Agreement

The agreement must be carefully reviewed with the client. Under the recent amendments to the *Arbitration Act* and the *Family Law Act*, a mediation/arbitration agreement is enforceable as a domestic contract which requires independent legal advice.

The Initial Conference Call

The initial call will just include counsel and the mediator/arbitrator. The call will often take ten minutes or less, and will serve, among other things, to introduce counsel to the mediator/arbitrator. The call will address dates, times, fees and retainers and the issues to be mediated/arbitrated. There will also be an agreement

on the timing for delivery of materials, such as mediation briefs, financial statements and disclosure briefs.

The Process

While mediation is an informal process, it is not a “drop in centre”. Preparation for mediation should be as rigorous as it would be for attendance at a serious case conference or pre-trial hearing.

Counsel should know their cases well, and be ready to delve into the details of the matter, if necessary. Ideally, both parties will have all their information diligently prepared so that counsel are able to pinpoint specific issues and may properly advise clients on the consequences of any decisions the client has to make at the mediation. Materials should be organized in such a way that each party obtains a fulsome picture of the facts as they are presented by the other party.

Parties usually agree, at the outset, that if their matter does not settle at mediation it will proceed directly to arbitration. If there is no resolution at mediation, and no agreement has previously been made by the parties to proceed to arbitration, the parties can still decide to proceed to arbitration. The parties can also proceed directly to arbitration without attendance at mediation.

If the parties proceed to arbitration, make no mistake, arbitration is a “trial in a boardroom”. The arbitrator, as the trier of fact, must be given as much deference as a judge. The same rules of evidence apply in arbitration as apply in court, unless the parties and the arbitrator agree to the contrary in writing. There may be witnesses and sworn testimony. It is wise to have a reporter at the arbitration, should either party need a copy of the transcript for appeal purposes. The reporter may cost $200.00 to $300.00 per day, but the extra expense is well worth it and is insignificant in relation to the other costs of the arbitration process.

Proper decorum at the arbitration is required. Each participant must fully embrace his or her role, and each of the other participants must respect the role taken on by the others during the process.

The whole arbitration process should be regarded by counsel in the same manner as a trial. Arbitration, however, can be much less costly than a trial. Pre-trial preparations are organized in a much more efficient manner. Although clients will pay their lawyers and the arbitrator for the actual time in attendance at the arbitration, the preparation costs will be much lower, as there are usually less procedural hoops to jump through. For instance, in arbitration, there is no requirement to attend a settlement conference or trial management conference. Additionally, if the parties are in a jurisdiction where trial dates are difficult to obtain, arbitration allows the parties the opportunity to resolve their matter much more quickly.

Rights of Appeal from Arbitration Award

Because the legislation is changing, the arbitration agreement should deal very carefully with the issue of appeal. As per the revised section 3 (2)(v) of the *Arbitration Act*, parties are no longer able to waive the existing right to appeal on a question of law with leave of the court. Other presenters will be addressing this issue in more detail.

Conclusion

Mediation and or arbitration can be an expeditious road for both counsel and clients, provided counsel are aware of the unique problems and challenges that come along with choosing an alternative dispute resolution method.

Counsel must not use alternative dispute resolution as an excuse to prepare in a summary fashion, and must remember that an arbitrator's position in the arbitration is equal to that of a judge.