TIPS ABOUT MEDIATION FOR SELF-REPRESENTED PARTIES

One of the available conflict resolution processes is mediation. Simply put, mediation is a voluntary process that involves discussion between the parties to a dispute and an independent, neutral, unbiased third party, the mediator. The basic purpose of mediation is dispute resolution utilizing the skills and knowledge of the mediator to move the parties in conflict from their starting positions to a resolution that satisfies enough of their objectives.

Some disputes that are mediated involve claims which are before the courts. As a general rule, in Toronto lawsuits that are issued in the Superior Court of Justice must be mediated before they are permitted to proceed to trial. Leaving family disputes aside which are separately governed, mediation before trial is mandatory in Toronto actions unless a Justice of the Superior Court makes an order eliminating [exempting] mediation. To obtain such an order requires clear proof that the particular circumstances are such that mediation would likely be an unprofitable waste of time. The requirement for mandatory pre-trial mediation is the exception, not the rule across Ontario.

What this means is that parties who decide to sue generally are not required to go to mediation, in addition to those parties who are not before the courts. In either of these situations the parties may opt for mediation if they wish as a means of resolving their conflicts. Usually, the process starts with a telephone call by one of the parties to a mediator asking whether he or she would be willing to mediate. If all of the parties are willing, they will be asked to sign a mediation agreement that appoints the mediator and agrees to the terms of his appointment including fees and expenses and due date for payment.

Once this agreement is signed and returned to the mediator, an appointment will be scheduled and time allotted for the mediation usually divided into half or whole days depending on the number of issues and their complexity. Often parties who represent themselves without assistance from a lawyer, show up uncertain as to the way in which the process evolves. The better course of action, is for the mediator to ask each party to

prepare and deliver to one another and to the mediator a bound, indexed book of any important documents that they intend to rely upon and to discuss. While this practice is not compulsory, it is advisable because it informs everyone including the mediator of the documentary background to the conflict. Should the conflict not involve any documents, this step will be unnecessary. Some mediators ask for books of documents to be in their hands several weeks before the mediation so that they have time to review.

On mediation day, the parties will be asked to provide the factual background concerning the dispute and once all sides have done so to their satisfaction, the process will then shift to a request to provide the mediator with a checklist of the concerns that matter to each. Their concerns tells us what they want and define their *'interests'*. Those interests, leaving family disputes aside, typically involve property, contracts, and/or psychological issues such as peace of mind. For example, if two neighbours dispute the proper location and cost of constructing or relocating a side yard fence or retaining wall, their interests will involve their properties, money and their peace of mind. Next door neighbours who want to remain next door neighbours don't want to be in permanent conflict.

Once the parties 'interests' are listed, the process will shift to a listing of their *'common interests'* which in this set of circumstances will likely be the same. From this discussion the parties may shift their focus to a consideration of the parties' *'issues'* where required. An 'issues' discussion in this particular set of circumstances would examine the impact of locating a fence on the adjoining owners property and a review of the statute law regarding property line fences in Ontario, along with the right of an adjoining landowner to be free of encroachment [trespass] by his neighbour. Such discussion would highlight the legal seriousness of the dispute and the importance of resolving it. While the parties 'interests' define what they want or need, the 'issues' define the limits to legal entitlement. Assuming good will on both sides, the discussion would then shift to a problem solving stage known as *'workable options'*.

At times, the parties will suggest their own options to resolve the dispute. At other times, when those options are less obvious, the mediator will offer some suggestions of his own. Provided that the parties are really motivated to settle the dispute, accept its

seriousness, and the options are truly workable, meaning reasonable, financially affordable, and capable of completion within a sensible timeframe, the probability of resolution increases. The mediator will interject if the terms are unrealistic or unreasonable. Provided that the parties agree, the mediator will assist in writing a memorandum of their agreement for their review and signature. If any party is uncomfortable signing such a memorandum, a provision for lawyer approval may be added before it goes into effect.

Once this agreement is completed, whether conditionally, or unconditionally, the mediation will come to an end. Many mediations that do not involve a large number of issues can be resolved in a half-day. Again, it all depends on the number and complexity of the issues, the parties' level of commitment to the process and willingness to compromise while engaged in problem solving.

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