Family Law Lawyers in Ontario Have an Ethical Obligation to Consider Mediation and Arbitration

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Background

This paper provides background information for this session and general information on the rules and processes that apply to mediation and arbitration in family law proceedings.

The Law Society of Ontario Requires Lawyers to Consider Mediation.

Practicing lawyers are governed by the Law Society of Ontario and are required to follow the *Rules of Professional Conduct*.

Rule 3.2-4, states:

> *A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.*

The Commentary of *Rule 3.2-4* states:

> *It is important to consider the use of alternative dispute resolution (ADR).* ***When appropriate****, the lawyer should inform the client of ADR options and, if so instructed, take steps to pursue those options.* (emphasis added by author)

Thus, the question arises as to whether this regulation requires any lawyer engaged in family law, at a minimum, to discuss mediation and arbitration with the client. The question arises as to what situations, if any, might a lawyer rely on the words in the commentary "*When appropriate…"*

To determine which cases are appropriate, it may be helpful to look at the statements of The Honourable Justice K. Winkler, former Chief Justice of Ontario and President of the Court of Appeal for Ontario, in his article *Access to Justice, Mediation: Panacea or Pariah?*[1]. Justice Winkler stated as follows:

> *The corollary to the general rule that some types of cases ought not to be mediated is that other types should always be mediated. These include wrongful dismissal cases,* ***family law matters****, and any dispute in which there exists an imbalance in terms of financial resources or the ability to withstand delay, either occasional or deliberate on the part of*

> *the opponent. All of these cases, in my opinion, must be mediated at as early as stage in the proceeding as is likely to be fruitful.*

A more recent statement is also provided by Madame Justice Benotto, Justice of the Ontario Court of Appeal, in 2016, in which Her Honour states as follows, about the Ontario Family Law Rules:

> *The Family Law Rules were enacted to reflect that litigation in family law matters is different from civil litigation. The family rules provide for active judicial case management, early, complete and ongoing financial disclosure, and an emphasis on resolution,* ***mediation*** *and ways to save time and expense in proportion to the complexity of the issues. They embody a philosophy peculiar to a lawsuit that involves a family.*[2]

Thus, we have a judicial direction that when looking at a family law case, there must always be an emphasis on resolution, and mediation must be considered as one of the ways of getting there.

The question arises as to whether mediation within the court system, as conducted by judges at conferences, is the same, better than, or less effective than when the judges get involved in this process.

On this topic, Chief Justice Winkler, in the article described above, stated as follows:

> *Mediation by members of the judiciary poses problems of a unique nature. Judicial mediation first surfaced in the form of pre-trial conferences, although the term "mediation" was not used to describe this process. The usual practice was for the judge to provide a neutral evaluation of the case which the parties would then utilize in settling the case between themselves. Since its inception in the form of pre-trials, judicial mediation has expanded to encompass facilitative mediation beyond mere pre-trials and the term mediation has come to apply to judicial intervention. As the metamorphosis unfolded in the judicial landscape, some judges expressed a level of discomfort enacting in this capacity. These judges, who see their role as solely deciding cases in the courtroom, are by their own admission, less skilled than others in performing the role of mediator.*
>
> *As judges have become more facilitative in their approach to mediating cases within the court system, other concerns have surfaced. Should judges caucus with the parties separately? How interventionist should judges be? Even though the judge acting as mediator will not decide the case if it goes further, is mediation consistent with the role of the judge as a decision maker? How forceful should judges as mediators be in urging a settlement, given that the office of a judge may create unintended pressures on the parties to accept a solution with which they would not otherwise agree? These are only some of the questions that must be asked and answered. Many judges are still struggling to find the proper balance when performing the role of judicial mediator.*

In further support of the recognition that judges are not trained and focused on mediation, the *Family Law Act* of Ontario, allows a judge to appoint a mediator, the particulars of those provisions, reading as follows:

> *Mediation*
> *3 (1). In an application under this Act, the court may, on motion, appoint a person whom the parties have selected to mediate any matter that the court specifies.*
>
> *Consent to act.*
> *(2) the court shall appoint only a person who,*
> *(a) has consented to act as mediator; and*
> *(b) has agreed to file a report with the court within the period of time specified by the court.*
>
> *Duty of mediator.*
> *(3) the mediator shall confer with the parties, and with the children if the mediator considers it appropriate to do so, and shall endeavor to obtain an agreement between the parties.*
>
> *Full or limited report.*
> *(4) Before entering into mediation, the parties shall decide whether*
> *(a) the mediator is to file a full report on the mediation, including anything that he or she considers relevant; or*
> *(b) the mediator is to file a limited report that sets out only the agreement reached by the parties or states only that the parties did not reach agreement.*
>
> *Filing and copies of report.*
> *(5) the mediator shall file with the clerk or registrar of the court a full or limited report, as the parties have decided, and shall give a copy to each of the parties.*
>
> *Admissions, etc., in the course of mediation.*
> *(6) If the parties have decided that the mediator is to file a limited report, no evidence of anything said or of any admission or communication made in the course of the mediation is admissible in any proceeding, except with the consent of all parties to the proceeding in which the mediator was appointed.*
>
> *Fees and expenses.*
> *(7) The court shall require the parties to pay the mediator's fees and expenses, and shall specify in the order the proportions or amount of the fees and expenses that each party is required to pay.*
>
> *Idem, serious financial hardship.*
> *(8) The court may require one party to pay all the mediator's fees and expenses if the court is satisfied that payment would cause the other party or parties serious financial hardship.*

Thus, mediation is, from the judicial point of view, an alternative which should be considered. The court system can direct how the mediation will proceed. The lawyer should discuss mediation and explain how this works to a family law client. This involves looking at both the benefits and drawbacks of this process. Justice Benotto, in her judicial comment described above, draws to the attention of lawyers in this field that the mediation process should be considered as part of the "*ways to save time and expense…"*

There is the question of timing with mediation. A semblance of mediation is given to parties at the first Case Conference, at the Settlement Conference and at the Trial Management Conference (at each of these court attendances, *Rule 17* of the *Family Law Rules* states the purpose of the attendance includes "*exploring the chances of settling the case*." But, when it comes to timing, it is common for the client to attend with his or her lawyer, and the earliest that the court documents, applications, financial statement, etc., can be completed and served, is probably two weeks. After it is served, the responding party has 30 days to file their responding material, and there is a further ten days for reply documents. Thus, two months have gone by, and then the parties may look to a case conference being scheduled. In some courts, such as Brampton, the parties may consent to a Dispute Resolution Officer conference, which has the same effect as a case conference with the judge; to allow the matter to move forward in terms of motions or other court proceedings. A case conference with the judge is probably going to be scheduled at least 60 days after pleadings are completed. Thus, the timeframe is probably in the range of at least 120 days for a case conference with the judge, and perhaps 90 days if both sides agreed to a conference with a Dispute Resolution Officer.

Is this Proper Timing, and is a Case Conference a Good Form of Mediation?

To address the question of timing, we can go back to the comments of former Chief Justice Winkler, in his article referenced above, wherein he states:

> *In recognition of the truism that mediation is all about "timing, timing, and timing," the adjustment so that mediation takes place when it is most likely to succeed has meant that the success rate of mediation has skyrocketed.*

When Justice Winkler makes that statement, he is looking at civil cases, in which the Ontario *Rules of Civil Procedure*, require mandatory mediation at a very early stage before the matter can proceed. Thus, in family law cases, if one is going to try mediation, should this be considered prior to initiating pleadings? Instead of incurring the costs and passage of time of drafting, serving, and having pleadings corrected, which is probably at least 60 days, parties may be able to engage in mediation and complete their disclosure exchanges under the guidance or direction of the mediator as may be required, and take the case through the full mediation process. If in family law we were able to get the same result referred to by Justice Winkler, which he describes as the "*success rate of mediation has skyrocketed*," would this be good for the clients and for the lawyers involved in the case? Another alternative is to do both actions simultaneously. One could start a proceeding so that court orders could be obtained by litigation if necessary, consent if possible, and engage in mediation.

If parties are in engaged in mediation, is there any doubt that the court would encourage this, support this, and even give directions as to how it is to proceed if the parties asked the court? Therefore, I suggest that there is no reason to consider a cases as going into exclusively "*litigation*," or "*mediation*."

Disclosure in Mediation As Compared to Disclosure in Litigation

In the *Family Law Rules*, there are many rules or provisions that require, what Justice Benotto calls, as discussed above, "*early, complete and ongoing financial disclosure…*" This process is extremely thorough, starting with a sworn Financial Statement, with accompanying income tax returns. This document requires a party to answer questions about not only their income, but each and every expense, estimating how much they spend annually on clothes, etc. In mediation, there must be disclosure, but each and every detail of expenditure, and all historical income tax returns for the last three years, etc., may not be necessary. Information about income and other reliable documents can be provided by agreement, and in fact there are many provisions in the *Family Law Rules* that allow for this. The judge can make an order for disclosure of specific documents, and a judge can make an order for questioning. But, is this disclosure obligation already required by a lawyer acting for a client in a family law case?

I submit that the obligations of a lawyer addressing the court are set out clearly in the *Rules of Professional Conduct*. However, the same rules apply when a lawyer is involved in addressing a mediator. This is supported by looking at the following: firstly, the definition of what is a tribunal. *Rule 1.1-1* defines a "tribunal" as including "*courts, boards, **arbitrators, mediators**, administrative agencies and bodies that resolve disputes, regardless of their function or the informality of their procedures* (emphasis added by author).

It is *Rule 5*, which describes the responsibilities of a lawyer as an advocate. *Rule 5.1-1* states:

> *When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law, while treating that tribunal with candor, fairness, courtesy and respect."*

Rule 5.1-2 states what a lawyer shall not do:

> *"(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonorable,…*
>
> *(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, **suppressing what ought to be disclosed,** or otherwise assisting in any fraud, crime or illegal conduct,…*
>
> *(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by that tribunal,…"*

The obligations for disclosure as set out in the *Family Law Rules* are extensive, and they apply to any person in the court system in a family law proceeding, inclusive of self-represented parties. However, if that person is represented, either in court or in mediation, by a lawyer, then the lawyer has the duty which is consistent with the *Family Law Rules*, regarding disclosure, and making sure that the case is being dealt with without full explanation of the facts. Justice Benotto calls this "*complete and ongoing financial disclosure*."

It is the opinion of these authors that the disclosure and fairness obligations are consistent, whether in the court process or in mediation. In mediation, all cards are to be made available for review and consideration, just like in litigation. Further, if in mediation there needs to be factual statements as to why a person cannot obtain employment, or questions about their full employment, there is nothing that would stop the parties from agreeing to proceed through questioning as if it were a court order. If that step is required for the facts to be available to both sides and the mediator, then this is what can occur.

The Financial Costs to the Parties

Justice Benotto, in her quote set out earlier, says that there is to be an emphasis "*on resolution, mediation and ways to save time and expense in proportion to the complexity of the issues*." With respect to cost, mediators are an additional expense. In terms of the cost of the mediator, these can be proportioned in ways that are fair and balanced to the parties. As set out above, the *Family Law Act* allows a judge to proportion the expense in some cases. If one party's income is significantly greater than the other party's income, should the expense be shared equally for the mediator? Perhaps not. If one party had significant property prior to marriage, such that the division or equalization is not going to result in the parties being in a similar end result, should the mediation costs be shared equally? Perhaps not. If the parties agree to mediation, but cannot agree to the proportion of the costs, is that something they may ask a judge about? Yes.

Final Comments

The above is an analysis of mediation, the obligations of parties, and timing in comparison to court proceedings, and discussions about the costs that may be involved. The authors have concluded that mediation is something that a lawyer has an obligation to discuss with his or her client. Although there may be some cases were mediation is not appropriate, those cases are probably very rare and would be screened out by the mediator making inquiries of counsel when first approached about the mediation. For example, if there is a client who is behaving in a threatening and intimidating manner, perhaps it is too risky to have the mediation someplace other than a courthouse. But even then, the mediation could occur at the Courthouse, as there are mediation programs and locations at the Courthouse. At a Courthouse, metal detection searches for weapons, etc., are carried out as one enters. Police and other security personnel are in the building. Mediators are to screen for threatening behaviour, intimidation, etc. Mediation is suitable even in cases where there may be power imbalances and financial differences, so long as those factors are not allowed to affect the mediation process.

If mediation is discussed, considered, and implemented, then time will be saved in resolving most cases. It will also result in the financial means of the client being expended in the most

efficient manner. The family law client will be grateful to the lawyer, and appreciative of our judicial process, including all of the professionals that work in this system, including mediators and arbitrators.

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Endnotes

1. The Honourable Warren K. Winkler, *Access to Justice, Mediation: Panacea or Pariah?* Published in 2007 *Canadian Arbitration and Mediation Journal*, 16 (1): 5-9.

2. *Frick v. Frick* (2016), 132 O.R. (3d) 321; 2016 ONCA 799, at para. 11.