

Newsletter # 4

I hope everyone enjoyed the great summer weather. Now that the summer months are over, and the Blue Jays are out of the running for the pennant, it's time to get down to business...the business of mediation.

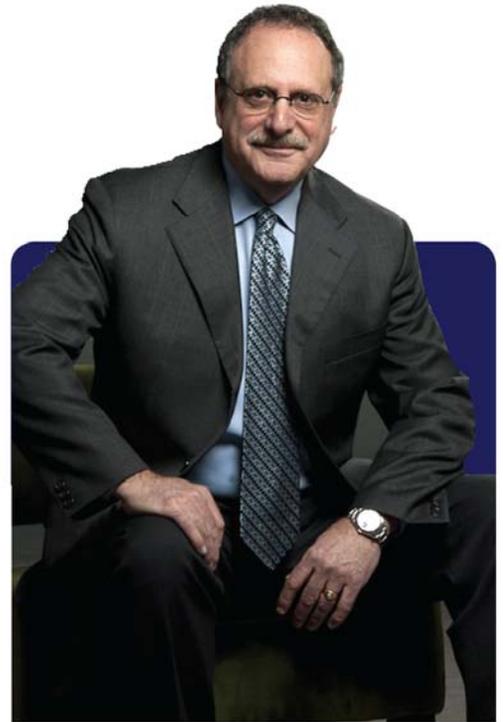
One of the most difficult decisions parties ought to make prior to the commencement of mediation is whether to go with one individual serving as mediator/arbitrator or, in the event that the mediation fails, be required to switch to another to conduct the arbitration. In other words, should you agree to mediation/arbitration or mediation followed by arbitration? As I've previously indicated, without the threat of arbitration following a failed mediation, the impetus to settle isn't nearly as compelling. Arbitration should always follow a failed mediation.

There are pros and cons to either using the same person as mediator/arbitrator or using separate individuals to conduct each process. Using a mediator/arbitrator will invariably result in cost savings, since he or she won't have to spend time (and your money) getting up to speed on the facts in order to arbitrate, having heard the parties on the issues during the mediation. On the other hand, you may not be able to be as open with the mediator, knowing he or she will become the arbitrator should the mediation conclude without a deal. As well, you might have faith in someone as mediator, yet not trust his or her skills as an arbitrator, or vice-versa.

Even in the court system judges won't generally hear motions and certainly not trials once they've heard conferences in a particular matter, in order to allow the parties to speak freely and hopefully achieve a settlement. Conferences with a judge are mediation-type processes and are therefore "off the record"- you are not allowed to repeat what was said at mediation at any subsequent hearing. So judges exclude themselves from deciding a case if they've been privy to mediation, but not so mediator/arbitrators.

Nevertheless, opting for a mediator/arbitrator is quite common, with the parties reposing trust that positions taken and facts revealed won't come back to bite them in the arbitration phase.

As stated, it's a critical decision, and one, which ought to be made prior to the commencement of the mediation - unfortunately before you have a sense of the direction in which the mediator is leaning. As earlier promised, the next thrilling installment will deal with power imbalances.



HOWARD E. WARREN is a lawyer and has been in the practice of family law and civil litigation since 1977. Howard studied mediation at Harvard, has been certified as a family law arbitrator, and can mediate/arbitrate any dispute. He serves as a Dispute Resolution Officer in the Newmarket Superior Court.

Warren Mediation Group Inc.
2 Sheppard Ave. East, Suite 802,
Toronto, Ontario M2N 5Y7
howard@warrenmediationgroup.com
T: (647) 890-3384
F: (416) 598-4316
www.warrenmediationgroup.com

Warren Mediation Group provides Alternative Dispute Resolution, Family Mediation/Arbitration, Estate Law Mediation/Arbitration, Commercial Mediation/Arbitration and other ADR services in the Greater Toronto Area, York, Simcoe, Peel and Durham Regions.