

Newsletter # 3

It is commonly believed that litigation was first developed by the Greeks. The Greeks also developed the medicinal practice of leeching. It was the Americans who first combined the two, and contingency fees were born. Coincidentally the Greeks also developed the practice of mediation—you would think that with all that inventiveness they could get a handle on economics—but I digress.

Mediation has many advantages over litigation. I'll deal with just a few, contrasting a typical family law case with mediation/arbitration "med/arb". In family law in Ontario, you start a matter and respond to it with pleadings, and move to a first appearance. Next comes a case conference, which is followed by any Motions and Questioning (examinations for discovery). Next up is a settlement conference, an exit pre-trial and finally a trial. With mediation/arbitration you have a mediation brief, which can double as an arbitration brief, and move to any Motions and Questioning, and then right to arbitration. Obviously, settlement can occur at any stage, and each process is designed with that in mind, but there are fewer appearances in med/arb than litigation, and fewer appearances generally translates into more speed and less cost.

With litigation, at the end you have a trial, and generally you find out which judge will be making decisions that affect your life and that of your children when he or she makes a grand entrance and the court clerk says: "all rise". With med/arb, you choose your mediator/arbitrator—and you don't have to stand up.

Finally, with litigation, your file is open for the public to see. In family law, as with most other types of litigation, there is a requirement of fulsome documentary disclosure. Thereafter, all of your personal and business financial history is there for all to see. In med/arb your file remains in the privacy of the mediator/arbitrator's office, unless a party launches an appeal. For the most part, confidentiality is only available in med/arb, not in litigation.

Stay tuned fun-seekers. Soon we'll talk about power imbalances.

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