

Why Mediate?

Good communication is the foundation of a good divorce. If a separated couple can communicate effectively they will be able to parent their children well and likely resolve all their financial issues. The obvious problem is that poor communication is the cause of much relationship breakdown in the first place. If a couple are unable to deal with each other directly in a constructive manner then one option is to work through their lawyers. How effective that is depends on the lawyers' ability to clearly convey their clients' views to one another and hear the other's point of view. Despite the fact that legal training largely tends to overlook these soft skills many legal professionals are capable of doing this. That said, some lawyers still fall into the category of those who transmit but don't receive. Even if the lawyers are skilled at communication it is all at one remove from the clients raising the risk of misunderstandings and frustrating delays. A message delivered on Friday may be timely and avert conflict. If the lawyer happens to be away from her desk that day, the same message delivered on Monday may arrive after the conflict has erupted. In any case, many people cannot afford lawyers and, if they can, are limited in the financial resources available for legal fees. Mediation is one route to solving communication problems and, with that, the dispute.

Mediation is available for all types of family law dispute, whether parenting or financial. There are many mediators from different disciplines and with different skill sets. Social workers, psychologists, faith based counsellors, lawyers and paralegals. There can be a real disparity in training and ability of those advertising themselves as mediators and it is essential to research the choice of mediator well. Referrals from a trusted and knowledgeable source are the best approach to finding a good mediator. A couple need to find the right mediator for their dispute. Not all lawyer- mediators have the sensitivity to mediate parenting issues while non-lawyer mediators may not have sufficient familiarity with financial questions of support or property rights to be able to guide a couple to a fair resolution.

Mediation is a flexible process with more than one model. Separating spouses may meet with a mediator on their own or with their lawyers present. In a more complicated financial case the parties might bring along their financial advisers, accountants or business valuers. Ideally, mediation takes place in one room with all the parties working together. In a high conflict situation, it may work better if the spouses remain in separate rooms and do not interact directly, leaving the mediator to conduct shuttle diplomacy. Mediator styles also vary tremendously. Some mediators see their role as facilitators of a settlement while others have a more interventionist style. Ideally, whatever the style, the mediator will provide guidance, creative solutions and help the parties to reach a deal of their own making, rather than one imposed by a court or arbitrator.

Once a settlement is reached and incorporated into a contract, the spouses should still get independent legal advice on the deal from their respective lawyers to ensure that they understand the contract. At that stage there is a risk that a mediated settlement will fall apart if it is unbalanced or too far removed from the parties' rights and responsibilities. The more skilled and knowledgeable the mediator, the less likely this is to happen.

In Ontario, mediation is currently voluntary for separating spouses. The concept of mandatory mediation has attracted some attention and support but it has not yet been imposed on families. Whether the benefits of mediation would be the same for spouses who are compelled to enter into the process is debatable. A recent reform that is bearing fruit is the expansion of access to free or reduced cost on-site mediation at Ontario family law courts. Early mediation is usually the most cost-effective but it is an approach worth considering whether early on or at the court door.