FAMILY LAW MEDIATION - WHEN/WHY

Mediation activity is very ancient, presumably starting with Phoenician commerce, if not in Babylon 2300 BC, and developed in Greece and thereafter utilized in Roman civilization. In China mediation has been a national tradition with a long history of cultural bias toward conciliation. Native Americans historically have utilized mediation techniques in conflicts. Historically, US tax dollars have gone more to courts in which attorneys argue and judges or juries make decisions about our disputes than to mediation of disputes.

Courts provide individuals with an opportunity to have their case argued with the greatest vigor. Courts protect individual liberties. We need the court to continue to do their outstanding job in this regard.

Recently, people are questioning whether we are sometimes captives of the system. "Can we solve problems without accusations, complications, and the expenses court cases entail?" In seeking an answer, mediation is one place lawyers are looking.

While historically mediation has been used in the US extensively in labor disputes, in the last 10 years there has been a mediation boom throughout various categories of law. This system is being advanced as the new solution to endless types of problems.

In Family Law the mediation of custody disputes began formally in the Bay Area in the early 1980's and became mandatory throughout California. However, today mediation is increasingly being used in dissolutions for identification, valuation and division of assets, seeking agreement on child and spousal support, in pre-nuptial and post marital agreements, as well as to resolve custody disputes.

Although the mediation bandwagon is rolling, some resist getting on board. Far less is known about mediation by parties than normal court proceedings which have enjoyed a long running television exposure reflecting justice handed out by Judge Judy, and the current versions of Divorce Court.

The following questions are often raised:

> I don't want to split the baby - isn't that what would happen in mediation?
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> I have tried to settle but the other side is hopeless - what can a mediator accomplish?
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> I don't want to educate the other side about my problem if there is no certainty anything will come of it. Shouldn't I be in court where I know an outcome will be declared one way or the other?

These are important questions.

Because a mediator has no authority. All the mediator can do is to act as a peace making go-between. The mediator's power is in the art of persuasion, tact and skillful playing on human emotions and motives.

It is natural to question what a process such as mediation has to offer when there is no certainty of reaching any definite conclusion. Yet, cases small and large continue to be resolved successfully each and every day through mediation.

What a mediator does is two simply stated tasks:

1. Help define problems;

2. Aid finding solutions to problems.

This does not tell us much about a successful mediation. One of the most difficult challenges in mediation is the determination of timing. A given strategy may cause failure at one time, but may bring success at another.

Determining When Mediation is the Best Option in Family Law

Several reasons frequently recited for using mediation in Family Law cases are privacy, maintaining control over the decision making process, reducing conflict, limiting the cost of splitting up, and helping children through the process.

In addition, in reviewing your case, you may ask the following questions:

1. What is stopping the case from settling right now with just the attorneys involved?

2. What special opportunity can the mediation provide to my client?

3. What are my goals for the mediation?

4. If there has been a communication breakdown, can I alone restore it?

5. How can I motivate the other party? The other attorney?

6. What relief is available through mediation that is not available through the court?

In selecting what cases to take to mediation and when, you should be able to conclude that your participation in mediation may accomplish better protection of your client's interests than participation a trial can offer. Realize that mediation can lead to a better understanding of everyone's vital interests, thereby enabling solutions that do not exact painful concessions.

When general mediation principles and mediation advocacy concepts apply to Family Law cases, unique issues seem to arise in Family Law and, as a Family Law mediation advocate, you must consider such particular matters.

As we are all painfully reminded on almost a daily basis, Family Law is among the most emotionally charged and volatile practice areas. Most commercial mediators will not go near a Family Law case. Disputes involving the parent-child relationship, property, or both, are fueled by the emotional upheaval involved with the break-up of a marriage. Divorcing parties are asked to make good decisions at a time when they are least emotionally able to do so. Communication between the parties is either non-existent or antagonistic. The trust level between the parties is often zero, non-existent.

<u>Is the divorce process taking on a life of its own?</u>

Even well-intentioned parties who are focusing on the needs of children have difficulty making decisions. Divorce carries with it significant losses: the marriage itself, problems with children, property division, often having to leave the family home, and the likely loss of extended family. Fear of the future runs rampant. Staking out a position becomes necessary. Divorce eliminates communication. Mediation may provide closure and restore the future ability to communicate on an acceptable learned basis. When children are involved, such restoration is critical.

Is imbalance of power an important concern for on when considering mediation for your client?

This is an extremely important factor in Family Law mediation. A traditional wife may feel that the husband is controlling, is better able to wage war, and has a power advantage. Through her counsel, the wife may feel compelled to react in such a way as to equalize power. Such efforts frequently antagonize the husband and escalate the conflict. Even if we get through child sharing and property division, this is a major problem when trying to settle attorneys' fees.

Should counsel attend the mediation?

Generally mediators may suggest that each side have counsel to consult with prior to, during, or following mediation settings, and there should always be the condition that no agreements will be reached without counsel having the opportunity to review all of the documentation, advise the client, negotiate needed changes, and approve the final paperwork. If your client is the traditional woman, you must be mindful of various studies that suggest women who are not represented by counsel at mediation do poorly and often "feel" coerced. It is my experience that women possess more power on some issues and do not neglect a compliant individual fearful of expressing her opinions. Further, mediation techniques should help dissolve this imbalance. The mediation process should not be coercive or should not take advantage of either party. Mediation with attorneys present is more expensive, but the presence of counsel forces issues to a faster conclusion, and in the long run may be less expensive.

If during the mediation process, a legal question comes up or a question as to whether a proposal is "fair," this is an attorney-client matter. A mediator must not dispense legal advice and should not comment on the fairness of a proposal.

Cases Appropriate for Mediation

This is often defined in the negative, the assumption is that the vast majority of cases are appropriate for mediation, however, a few types of cases might not be appropriate.

1. A case in which the real decision-maker, for whatever reason, either cannot or will not attend the session itself.

2. A case involving what is perceived to be an important political/legal issue.

3. Lack of Good Faith: A case in which an ostensible settlement had been reached previously, but one side has already breached that agreement.

4. Domestic violence cases. This is frequently cited as a type of case not being amenable to mediation. Consider if your position would be different if counsel attended all mediation sessions. This also relates to the power imbalance issue.

5. Highly volatile cases. (Could this knock out the majority of Family Law cases? I am concerned about not allowing a party the privacy afforded by mediation and the ability to exact security promises that may be beyond the normal scope of the court process should be available to everyone.)

At What Stage Do You Mediate?

As a general rule, the sooner the better. The earliest practical time is when the parties are in a position to evaluate their case.

Subjective reasons for early mediation. Parties are more flexible, ideas harden over time and reevaluation is more difficult as the amount invested increases - emotionally and financially. As parties go down the litigation road it is easier to say, "I've gone this far, why not go all the way to trial?" (If you can get what you reasonably need at mediation, why keep going and take the risk? No one will guarantee the result at trial. Trial judges make mistakes, so you may have to appeal to correct a wrong decision.) People want closure. They want to start putting their life back together. If a trial is a long way off, then closure is a long way off. Sometimes the process of litigation creates a dislike of a party to opposing counsel, and this can create a new level of rigidity.

Objective reasoning for early mediation. Cost containment is often the most compelling factor. Attorneys fees at this stage may be less of an obstacle and lawyers may be more willing to readjust their fees earlier in the litigation. Court dockets don't always move as fast as we may hope, and you may end up with two days of trial one week, and three days two weeks later, and so on and so on.

Choosing the Right Mediator

Presently there are no certification standards for mediators. It is voiced that certification may be inevitable. Be it good or bad, there is no certification help out there to assist you in selecting a mediator.

Appropriate Mediation Training. Specific mediation training is essential. While subject matter expertise is another hot topic, you certainly would not look to a labor negotiator to handle your case as their first Family Law mediation.

Actual Mediation Experience. New and appropriately trained mediators may do a superior job mediating their first dispute, but learning to mediate, however, is like trying cases. You approached your 20th trial different than you approached your first trial.

There is no magic number of mediations before someone becomes seasoned, but I think if someone has conducted 25 mediations, I would certainly consider them. After 100 mediations, I went back to training and developed new techniques to assist in resolution of cases. After 600 to 700 mediation cases, I realized that each case is different, that you don't know it all, and that you learn something every time you mediate.

A question to ask prior to the mediation is whether the mediator has resolved more than 50% of their cases. If not, ask why. Certainly the training, background, qualification and breadth of experience are more important and reliable to me than a proffered success ratio.

Practice Background

Should the mediator be an attorney? While there are nationally recognized, top-notch successful mediators who are not attorneys (they predominate in custody matters, but also do all the other issues), in a California Family Law matter where there are property and support issues involved, if you do not have one of the top recognized non-attorney mediators, then an attorney-mediator experienced in Family Law is necessary. Do they have to be a Family Law Specialist? Certainly not, rather this is simply an indication of training and background which is one of the factors you should always consider.

While many cases are not "just about the money," most cases are resolved involving some monetary basis. Litigation background of the mediator in these cases may be of great assistance.

Style of Mediator

Pick up the phone and call the mediator. Talk to the mediator. Ask questions about style. Are they Evaluative? Facilitative? Transformative? Do they use separate caucus? Will they? No mediator minds a 15 minute investigative conversation.

Because mediation does not settle every case, despite good faith participation in mediation, one party may not be willing to disclose certain matters to the other side because the case may not settle and such matters may prejudice the party's position at trial. The party may be willing to share this information with the mediator, but only under the protection of an absolutely confidential separate caucus. Further, certain sensitive issues will be discussed only in private quarters. While I am a proponent of joint sessions in Family Law, upon request and some inquiry by me, I will do private caucuses if requested. Very seldom is there a smoking gun. With Declaration of Disclosures in Family Law, it all seems to come out sooner or later.

Many mediators believe that money issues should only be discussed in the separate caucuses and communicated through the mediator. A monetary offer cuts to the bone, and traditional "high ball" or "low ball" proposals, while quite familiar to the lawyers, are received poorly or may evoke a strong emotional issue. This is a question to ask the mediator. It seems that in other civil mediation, private caucuses on money issues are mandatory.

Lawyer Participation. Select a mediator who encourages lawyer participation. Lawyers make their clients feel more confident, assist in problem solving, can give indications of whether a proposal is "fair," and can advise their client as to the law on the subject. With good lawyers present, there is not a problem of imbalance of power. Even with the lawyers present, the parties can and must participate fully. In a mediation session, we define issues and search for solutions. I try to exhaust all of the solutions from the parties first before considering solutions proffered by counsel. It is much better received by the parties if they come up with the solution.

If one of the attorneys evokes a strong negative reaction in the other party that the chance of resolution may be contaminated, if the parties have no imbalance of issue problems, or if the dispute is not over an issue of law or contested fact, but rather it is fueled by a personal/emotional factor, lawyers may feel this is the type of case where they can be at telephone standby, and the parties can proceed alone with the mediator.

Male or Female Mediator

Would one or the other be more effective in dealing with the other side? If the wife had an affair, would a female mediator be a better choice for your male client? If the husband had an affair, would a male be a better choice for your female client? If the wife left the husband for another woman, would having a male mediator be better or worse? I don't know the answer to any of these questions, but you as counsel need to look at the core emotional issues in your case and examine in your own mind to get some insight as to what type of mediator would have an effect one way or the other. If it doesn't matter, you have a larger field from which to choose.

Preparing Your Client for Mediation

Once you decide it is the right time to submit your matter to mediation, your advocacy concerns typically turn to assembling information in a brief, scheduling, anticipating, speculating, planning, etc. Settlement demand letters and Declarations of Disclosure get the mediator up to speed quickly. If you go to trial, you will have had several client meetings reviewing testimony and preparing for cross-examination, and, when appropriate, even videotaping and playback. If you were accompanying your client to their deposition, you would not consider going without adequate preparation.

The goal of all parties to a mediation should be to reach a final, binding, life-long resolution of your client's case on the day of the mediation. To do this, you need to have your clients as fully and completely prepared as if for deposition or trial.

You must consider the extent to which your client's active participation will assist or hinder your case. If your client can articulate their position in an effective manner, it will greatly assist their case as the opposition will be evaluating your client's effectiveness with an ultimate trier of fact.

While some of the principles set forth may appear basic, it is always helpful to review them prior to each mediation, whether it is your first, fifth, or five hundredth mediation. After all, it may be your client's first and last mediation session.

Client Role at the Mediation

The following points are for a mediation when the attorney is present. If you are not going to be present, then your need to "prepare" your client for what is to be expected is even greater. You should arrange to be on telephone standby and insist on having your client call you at a break, or have lunch with you during the session.

"Concentrate on listening to the points raised by the other side at the joint session and the mediator at the joint and private sessions as they will pinpoint what they perceive to be the strengths and weaknesses of your case."

"Mediation is your opportunity to evaluate and re-evaluate your case in light of the information provided to you by me and the other side."

"I want you to participate in the negotiations and discussions when we are in private caucus. Try not to lose your temper, or you will lose your point and our focus."

"Since you will be asked questions by the mediator in the initial joint session, we will discuss beforehand the remarks you should make and the feelings you want to express. Remember, this must be done in a constructive manner. I want you to talk in an accurate, believable and consistent manner. Do not whine or complain. When you come across as genuine, you will be most helpful to your case."

"Unless we decide otherwise - and remember to alert me in private as to any new information of which I am not aware - at the separate caucuses and because of the confidentiality of the process, you may speak freely and openly to the mediator. If you ever have a doubt about what to say, always tell the truth."

"This mediation will hopefully allow to have a neutral, objective review and analysis of your case. Since the mediator will be repeating what the other side is telling her/him to a great extent, this is what we can expect to hear at trail. Expect the mediator to play devil's advocate in the private caucus. Do not conclude that this means that the mediator is agreeing with the other side."

"If an agreement is reached, it will be put in writing. I will review it with you and, if it is acceptable, I will ask you to sign it."

"Remember, we are trying to walk away with a lasting agreement, not win an argument. Be patient with yourself, this may be a new experience. Enter the mediation with an open mind and allow the process a chance to work."

Identifying the Issues for Mediation

As a result of the Declarations of Disclosure in Family Law cases, the identification of assets and valuation of various issues often becomes immediately clear. Where there is an issue of misuse of community funds, this is immediately apparent.

In the past I asked parties to list their five most important issues and to try to list them in the order of importance. Experience reflects people could almost always come up with at least five issues, so I expanded the list to the Top Ten Most Important Issues. Most people never get to ten. At a mediation, I solicit agreement on the order of importance and I ask the parties to assist me in listing issues in the order they think they should address them. While a spousal support issue may be the most important to the receiving spouse, in order to review the factors of FC 4320, who will own and hold what assets is frequently an issue that must be addressed first. Inform them of this, but let them decide.

The simplicity of having the parties list their issues and agree on the order of importance and discussing them in that order, empowers the parties to take control of their process. They know they are being heard, they are determined what to do, not like at court where the traditional judge made them wait in the hallway, spoke only to counsel, and then "told" them what a "legal" decision would be.

Of course, in the San Francisco Bay Area there is a high number of extremely competent informed Family Law Judges. Unfortunately, they do not always have one or two full days to set aside to assist in mediating your case.

Conclusion

Mediation is only one technique available to resolve disputes. Negotiation between the parties is always the best because it is satisfactory to all, and is made by the parties, so it is "voluntary." Unassisted negotiation does not always succeed, and when it does not, the next most desirable process is mediation because it brings with it the benefits of negotiations: a resolution must be satisfactory to all concerned. Litigation is a risky business and the outcome in court is never a certainty. Even if a mediated settlement entails some sacrifice, it may be preferable to a risk of a court imposing a greater sacrifice.

Even though mediation may not always produce an instant solution, it offers critical benefits worth pursuing. It is a creative process. The parties define their problems more precisely, which generate new solutions not considered previously. Even if the mediation is not successful, mediation nearly always narrows the issues in dispute. The parties clearly know their options.

Creative problem solving is not frequently encouraged by the court system. There simply is not enough time. Firm positions must be taken and maintained with the standards and case law. Altering a position in litigation is perceived as detrimental, whereas the flexibility afforded by mediation allows a party to change a position without "losing face." It is in fact encouraged, and acknowledged!

There is a further benefit to mediation. If a matter is litigated, the losing party may contest the result and the appeals may go on for years. Once the appellate court makes a decision, the matter may return to the trial court, and another trial with further findings and orders may be made which themselves may be appealable. A party may spend more time trying to secure compliance with a judgment than it took to receive the judgment in the first place.

When mediation succeeds, it brings closure. Parties more readily comply with a settlement that they have voluntarily worked out together at mediation. For all these reasons, mediation has multiple benefits that make it one of the best peacemaking processes and one you should consider.

Brian McDonald