DIVORCE MEDIATION - A PRIMER

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Few topics have created more apprehension and misunderstanding among my colleagues than divorce mediation. The purpose of the present article is to briefly describe the philosophy and procedures involved with divorce mediation in an attempt to allay the legitimate concerns of fellow matrimonial practitioners as well as the general public who might be interested in trying the process of mediating one's divorce.

PHILOSOPHY

All attorneys find themselves immersed in a process adopted from Old English common law known as the traditional adversarial system. The fundamental belief is that diligent advocacy will result in a just and truthful result. The adversarial system is probably well suited for criminal cases, car accidents and contract disputes; however, it is often ill-suited for resolving disputes among family members.

The offended party in a criminal or civil action does not have to see the criminal, tortfeasor or breaching party each week. There is no need to have a continuing relationship. In family law, when children are involved, quite the opposite is true. Civil contact must occur on an ongoing basis. The adversarial process absolutely, and without apology, aggressively retards the development of an effective postdivorce relationship. In many cases, the adversarial process tragically and irretrievably destroys the ability of either parent to maintain a civil relationship.

Mediation is an alternative vehicle to dispute resolution. Divorce is both an emotional and legal process; mediation readily acknowledges this and maintains as its highest value the integrity and preservation of a quality post-divorce relationship between the parties, whether for the benefit of children or for the dignity of the litigants involved. A competent and successful mediator has the skill set to assist the parties in separating their emotional reactions from the legal tasks at hand.

There are at least two different models of mediation: One described as academic/passive; and a second described as pragmatic/aggressive. I subscribe to the second and believe it is the most effective way to handle matrimonial matters, having mediated both civil and matrimonial disputes since 1989.

PROCEDURE

The first mediation session involves conferencing the case with the two litigants and orienting them to the process. First, information is gathered from the litigants the same way an attorney does when meeting with a client for the first time. Thereafter, litigants are

provided with a general description of the court process and the various issues involved in the resolution of any marital estate. Litigants are also provided with various legal documents, including a blank Case Information Statement, and other important materials that the mediator is responsible for compiling in order for his clients to reach a legally sound resolution to their divorce.

My mediation clients are also counseled that it is in their best interests to confer with consulting attorneys during the process and have the final Memorandum of Understanding which I ultimately draft for them reviewed by said attorneys before the matter can be reduced to a Property Settlement Agreement.

The second session is not scheduled until the litigants complete Case Information Statements and any other critical discovery is completed, such as valuations or other relevant gathering of information. If indeed our clients need help with completing their Case Information Statements, we offer this service, also.

The mediation sessions last no more than one-and-a-half to two hours. The sessions usually total less than five, and, in fact, I have never had a case exceed five sessions. It is also my experience that those parties committed to mediation can complete the process in a matter of weeks, depending upon the schedules of the mediator, the clients and the consulting attorneys, if any.

Most mediators do not request retainers. The litigants pay the mediators on a session-by session basis. The sessions are confidential and devoted exclusively to problem-solving. They do not provide an opportunity for either party to vent their emotional agenda or engage in recriminations. The reality is that New Jersey has been a no-fault divorce jurisdiction for almost thirty years. A good and effective mediator creates a "strictly business" agenda and has the skill set to guide the litigants to stick to the agenda.

At the end of the process, a document is prepared called a "Memorandum of Understanding." It is simply a written manifestation of the parties' tentative agreements. The introductory pages of the Memorandum list all dates and times of sessions, all documents reviewed, a statement of the purpose of mediation, including confidentiality, and thereafter documents the tentative agreements of the parties. Attached to the Memorandum are the Case Information Statements and any other documents made available by the parties through the mediation process.

The parties are then directed to meet with their consulting attorneys, if any. The clients are also instructed to provide to their consulting attorneys the "Memorandum of Understanding" and all aforementioned attachments before conducting a review consultation. Thereafter, the attorneys convert the "Memorandum of Understanding" to a more formal Property Settlement Agreement, occasionally with nominal revisions. The matter then proceeds through the Court system in an uncontested fashion.

In terms of selecting mediators, I sincerely believe that experienced divorce attorneys are best suited if the case involves financial issues and/or alimony concerns. However, if the case primarily involves only parenting matters, a psychologist or M.S.W. is probably better suited to handle the dispute. It is also possible to use more than one mediator and bifurcate the issues.

In any event, I would always suggest that a mediator be approved by the New Jersey Association of Professional Mediators (www.njapm.org) and/or the Administrative Office of the Courts. It is true that not all cases are immediately suited for mediation. The case is not suited for mediation if one or both of the litigants are not emotionally prepared to sit down and rationally discuss the issues.

I strongly believe that any case can be successfully mediated, and the only thing prospective mediation clients have to do initially is agree to come meet at the same time in the initial mediation consult. From there, the skill and expertise of the mediator will have a great influence on the litigants' ability to move forward with the process despite their differences. However, as acknowledged at the commencement of this article, divorce is both an emotional and legal process. We cannot engage the legal/problem-solving/business decision approach if both parties are obviously not willing to try mediation and are not ready emotionally.

I respectfully submit that dogmatic adherence to the traditional adversarial practice in all family law matters is inconsistent with our fiduciary obligation to litigants. We must explore reasonable alternatives to litigation. It is a sign of progress that many members of the matrimonial Bar acknowledge this fact and have moved into the twenty-first century by embracing mediation and other forms of alternative dispute resolution.

Bio: Christopher Rade Musulin has been a family law attorney for over twenty years and would be delighted to mediate your divorce or simply answer any further questions at 609.267.0070 or contact@sjerseylawyer.com. His Website is: www.burlingtoncountydivorce.com or www.sjerseylawyer.com.