

TO MEDIATE OR NOT TO MEDIATE

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In today's world of high court costs, settlement in place of resolution by trial is the practical path.

Clearly a settlement crafted by the parties and their counsel will fit both parties better than a judges decision based upon information filtered thru the restrictive rules of courtroom evidence. The individual needs of the parties are important factors that a good settlement will address. The best settlements are based upon mutual accommodation.

Mediation is one of several dispute resolution alternatives (ADR) that saves litigants thousands of dollars on a daily basis in producing settlements. Most Family Law Judges require mediation as the last step prior to trial on property issues. At this point in the proceeding mediation is successful at least 90% of the time. Mediation is also considered ripe early on for issues involving child custody or visitation, as the parties usually know the facts and have thought this problem through.

Mediation has roots in ancient Roman and Greek culture now adopted by even unsophisticated cultures where it is commonly known as the “wise man” or “chiefton” approach.

Unfortunately, misconceptions are prevalent as to when and how to best utilize mediation. Somewhat like the discovery of penicillin, mediation is currently misused in situations that are counter productive. Recently (May 2008) the parties to a case paid the king of mediators his daily fee of \$10,000, which accomplished very little other to bring the parties to the table. Although hopes run high that the seeds the mediator planted in the form of settlement ideas will ultimately lead the parties towards settlement. This case was not yet quite ripe for settlement as the parties did not yet fully understand the issues. Accordingly, they did not spend wisely.

The most common form of mediation used by litigants is a mutated form that includes conciliation.

Mediation is a process whereby litigates use a neutral third party to assist them in finding a common solution that serves both parties. The primary goal of mediation is to secure a settlement. Fairness is sometimes sacrificed in the process.

The advantages of mediation are:

1. Parties work together to find a common solution, rather than against each other.
2. Cooperation greatly reduces the cost of battling out issues.
3. Avoids unnecessary court hearings.
4. Avoids confrontation.
5. The process assumes all financial issues are fully disclosed.

The key to good case management is knowing when and what issues to mediate. Mediation is most successful where the problem is well understood. This is why children issues work out well at the beginning of the case, while complicated asset issues have a better success rate after the parties have inventoried the assets and received professional advice.

All too often divorce parties attempt to mediate global settlements prior to inventorying assets or securing legal advice to determine if assets are either separate or community property. Sometimes couples are unable to complete the settlement they mediated when the court requires they disclose all assets to the other party under penalty of perjury. The unequal division discovered after mediation is difficult to repair as it may drive a new wedge between the parties that makes communication even harder.

Another caveat is that at times parties rush to mediate prior to determining the tax issues of a proposed settlement which can produce an unexpected obligation.

For example, if the wife takes the house while the husband receives his dental office of equal value; she may receive the house free of capital gains taxes on sale, while husband is straddled with capital gains taxes and depreciation recapture on the office. The settlement looked equal on paper yet in the final analysis husband received far less at the time of the sale.

Another business man over paid for the ranch in early mediation on wife's appraisal based upon a prospective development, which husband failed to verify. After the case was completed husband learned he bought property he could not develop.

In most cases where parties delay mediation until the inventory is completed, they find a settlement at hand eliminating the need for mediation. If the mediation process begins prior to identifying problems the process tends to turn into the corroborative approach to inventory problems or even a wasteful exercise of going nowhere.

Successful mediation usually entails a basic risk analysis from the neutral. This advisement is an element of conciliation which tends to re-

focus the parties on the real problem at hand of eliminating fights over false problems.

On the other hand, it should be known that a good practitioner will expose false problems early in the case, preventing the expensive mediation of such issues.

The disadvantages of mediation are:

1. In regards to assets it doesn't work well until the parties have inventoried.
2. A premature attempt often times proves to be wasteful of time and money.
3. Mediator's without court experience often times offer advice that leads the parties astray.
4. Mediation favors the bully as that person will not settle thereby forcing the weaker party into concessions.
5. Parties without legal counsel are without assistance to move the case along through the court system.
6. Mediator's are at conflict to serve two masters.

Mediation clearly has its place as a valuable tool to be utilized in the resolution of problems. However, caution should be exercised as all too often mediation adds expense when used too early in the process. As any

lawyer worth his salt, should be able to settle at least 98% of his or her cases without mediation.

In those few cases, which fail to settle in the normal process the Vista court recognizes the benefit of mediation by providing volunteer mediators to the parties in the last step before setting a case for trial. In those cases where the parties well understand the issues, mediation is successful 90% of the time in breaking down the last log jam.

In complex cases involving many issues, be prepared to set aside at least a half day for the mediation process after the issues are understood.

The mediator should be committed to: 1. Inform parties of the process; 2. Reveal any conflicts; 3. Maintain confidences revealed; 4. Be mindful of emotional issues at play; 5. Not offer legal advice, (however most do) as the parties expect guidance; and 7. The mediator should be familiar with family law practice.

In conclusion, it is this writer's opinion mediation is a valuable tool for the effective case manager, best used when all assets have been inventoried after the case fails to settle following the exchange of proposals in a conciliatory effort.

Mediation boils down to talking through a problem under supervision. This is a time tested method to resolve conflict dating back to ancient times.

Accordingly, mediation works best in conjunction with timely usage by a good case manager. As the best professionals in all disciplines are good case managers.