

MEDIATION AND DIVORCE

Understanding the Process

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Mediation can be described as a process that employs the neutral participation of a third person to bring two parties in conflict to a mutually agreeable settlement. As background to a discussion of the application of mediation to the divorce process, it would be helpful to first look at some typical relationship circumstances that tend to exist between spouses when they have reached the point where one or the other has decided to end the marriage.

When marital partners begin pulling away from one another, the most obvious symptom of the growing distance is a significant breakdown or loss of trust. As the parties literally pull back from each other (emotionally and physically), the space between them becomes a vacuum. Nature abhors a vacuum and it is predictable that something will fill that void. Given the absence of any meaningful communication between the parties, what tends to grow unchecked in that void is anxiety. Anxiety is the emotional response to "not knowing"--not knowing what the other person is thinking or feeling, not knowing what they are doing or planning to do. When no actions are taken to establish some method of constructive communication relating to the most mundane aspects of daily life (especially regarding money and bills), and left unchecked, that anxiety will eventually blossom into full blown fear. Once either party reaches this critical state, it is common to begin to take actions that are emotionally-driven and often contrary to that party's true best interests.

Typical of such decisions are the following actions: canceling credit cards or charge accounts; withdrawing or transferring funds from bank accounts; changing the status of beneficiaries on life, health or auto insurance policies; and ultimately, hiring a lawyer "to look out for their rights."

While these actions are seen by the party undertaking them as defensive, they are invariably experienced by the other spouse as aggressive and threatening. The natural reaction of the other spouse is to respond in kind, taking reciprocal emotion-driven counteractions. Like the phenomena of mirrors facing each other which create an infinite series of reflections, each party reacts to the counter-reaction of the other party. A mutually-destructive downward spiral is generated and quickly gains so much momentum that it may move beyond the ability of the parties to contain it.

Not only are attorneys not capable of putting this fear back in the bottle once they are brought into the case, they are committed to follow policies and procedures of a system that assumes that the other side is an adversary and, therefore, to be treated with distrust and suspicion, like any enemy in battle.

The real problems typically relate to the rapidly evolving psychological and financial needs of the parties which are exacerbated by their lack of effective communication. Communication difficulties may lead to clients tending to hide behind their attorney. Attorneys tend to take the dialogue to a more technical and complex legal level, further exacerbating the problem and all but guaranteeing that the difficulties will continue to grow in size and scope. The issues between the spouses become subordinated to the "legal process." Since that process is so technically complex, clients commonly become dependent on their attorneys, effectively surrendering any ability to control the outcome. Solutions to problems, from the trivial to the most important,

become overshadowed by the legal process. Effective communication between the spouses has been all but eliminated and, in spite of all the actions taken by their respective attorneys, the parties undoubtedly feel more, not less, fearful and experience greater, not lesser, anxiety. This is the way things will typically remain for a year to year-and-a-half, which is the average length time it takes for most litigated divorces.

So, what is wrong with this picture and why do things seem to deteriorate so very quickly notwithstanding the fact that almost everyone desires to avoid this nightmarish scenario?

To find the answers, let us start by examining the circumstances at the point where anxiety exists (in the vacuum of the distance between the parties), but has not yet blossomed full-blown into fear. Conventional wisdom, tradition and one's closest friends tend to encourage getting a good, aggressive lawyer to "protect you." That advice requires one to put a great deal of faith in an unknown person and process, and to trust that "protection" is what will be achieved. The real question, however, is from whom and from what does one need protection.

The truth is that each spouse perceives the other spouse to be the one who is threatening. In acting on that perception of a threat, each party is an active participant in creating a self-fulfilling prophecy. Real protection comes first in the form of knowledge. Knowledge comes from the gathering and analysis of information. Analysis creates an understanding of one's options. Options create an opportunity to make proposals. Proposals allow negotiation. Negotiation creates an opportunity for compromise. Compromise allows agreement-making. Agreements resolve conflict. If emotional and legal forces can be controlled, these more practical concepts can provide an opportunity for effective agreement-making. The traditional adversary approach using separate attorneys does little to address the emotional forces. It often ignores them completely until they create behavior problems. Then, the system's answer to these problems is to hammer the other side with restraining orders and assume that this somehow solves the problems.

Unlike the adversary approach which is a competitive negotiating system, mediation creates and encourages a collaborative problem-solving effort. It is ironic that with our children we work so hard to teach them to relate to one another by demonstrating solutions that foster sharing and mutually acceptable outcomes. In our adult lives and relationships, on the other hand, we seem to often opt for competitive, aggressive dispute resolution driven by anxiety and fear. Mediation offers a safe and sane alternative.

In mediation, the participants retain total and exclusive control over the process and the outcome. Nothing happens in mediation until each party gives his/her consent. It is the function of the mediator to monitor the needs of each participant so that no negotiating takes place until each party is capacitated with all relevant information, knowledge and options and feels prepared to go forward with the negotiation dialogue.

These two characteristics insure that individuals can succeed in making agreements in mediation without regard to their differences in skill, knowledge, understanding or capabilities. Wives and husbands typically differ from one another significantly in these areas. Mediation allows for these differences in addressing the variety of needs each party has in moving through the information-gathering and analysis stages and in preparation for the final phase in which the actual negotiating takes place. Real protection exists in the form of voluntary agreement-making based on full knowledge, evaluation and informed consent.

In facilitating this process, the mediator creates a safe and neutral environment in which the dialogue can take place, helps the parties avoid the emotional impasses and hot buttons that effectively kill any attempt at communication. Additionally, the mediator organizes the acquisition of information and analysis (whether provided by the mediator or gathered from outside sources, or both) and monitors the progress of each participant in reaching the capability to carry on effective negotiations. The process is inclusive, not exclusive, which means whatever information each party desires to get to an agreement is looked at upon as being a constructive step toward the desired objective--mutual agreement. For example, if either party wants independent counsel or a second opinion on any aspect of the process, that need should be recognized and satisfied in a manner consistent with the collaborative process.

Ultimately, mediation has succeeded for the many people who have used it for a number of reasons among which are the following:

- You can try a mediation session to see if you like it or if it will be responsive to your needs and still opt for a more traditional adversary approach if it does not. It is hard to similarly “try” litigation. Once you cross that contentious line, it is unlikely you can step back away.
- Mediation typically costs 30-40% of what two parties will spend on a traditional divorce with separate attorneys.
- Mediation is a process of education and preparation that allows goal development and decision-making at a pace controlled by both participants.
- Control is maintained by the participants with regard to all aspects of the process.
- Success results from a thorough exploration and examination of all possible outcomes and is not limited to the narrower range of solutions required by the law.

In summary, the use of mediation to resolve disputes and reach comprehensive agreements allows the parties to control the process throughout, educate and prepare themselves on the issues and options before negotiating, keep open lines of communication during separation to prevent differences from developing into full-blown conflicts, spend valuable resource dollars on effective issue development and resolution, and ultimately guarantee that the outcome is one that is totally acceptable. Other issues and questions about the specifics of the process can be answered more fully during an initial consultation.