

MEDIATION

For clients who are embroiled in a legal battle, mediation is the best way to resolve the dispute. The reasons for this are many, but the most important reasons are that in mediation, they have a chance to:

- End a long and in most cases, cost prohibitive process;
- Bring to a close the trauma, fear, confusion and speculation that typically comes with a legal conflict;
- Come to a "fair" agreement (which I define in my mediations as "an agreement you can live with") without taking the risk inherent in asking a third party, (i.e. the Judge/Chancellor/Jury), to make a decision for you; and
- Especially in family law mediations, (but in any cases where a future relationship is expected between the parties) encourage better communication, harmony and healing

Attorneys can make a huge difference in the success or failure of the mediation.

Because the parties, typically do not know about or understand the mediation process it is incumbent upon their attorneys to take the time to explain what mediation is really about. Many times I have mediation clients who have not been told anything about what is going to happen or even why they are there. Clients sometime believe this is just another cog in the wheel of "justice" that they have to put up with and pay for to get their issues resolved.

Clients, for instance, have probably been told that mediation is faster and less costly than litigation. Clients may hear these words but do they really understand their full impact and meaning? Tell your clients about the reality of litigation costs and increased attorney fees. Give them real numbers to consider.

Clients also need to know that there is so much more to mediation than just "settlement" in terms of the positive benefits.

For instance, in divorce cases, clients need to be advised by their counsel about the importance of fostering better relationships and communication between the parents when children are involved and that barring any unusual circumstance; children love both parents and do not want to choose one parent over the other or to even be faced with that possibility. They need to be advised that numerous studies confirm children of divorce adjust in a healthy manner when there is little or no fighting between the parents.

The best legacy divorcing parents can leave their children is to be civil to each other and to communicate respectfully with each other during their divorce. I know this seems like a pipe dream, but I assure you it is not. My style of mediation is to keep the parents and attorneys together in the same room and so many times I have seen parents undergo a transformation during mediation when given a non- adversarial, safe and confidential setting in which to communicate. Most people do not want to fight and do not want to spend money unnecessarily that they now need to support two households. I have received so many thank you notes and letters from mediation clients who were in the fighting mode for years and then because of the mediation process were finally able to work through emotional barriers and frustrations, move on and begin the healing process.

Does mediation have an emotional aspect to it? In divorce cases, yes, absolutely and even other types of cases usually have some emotional aspect to them. As with most other areas of law practice, mediators wear many hats including discussion leader, effective listener, referee, and counselor. Mediation gives disputing parties an opportunity to change things in a constructive way.

When you have any mediation which involves relationships that are expected to continue after the dispute is ended, this transformation matters and can occur. I know of no other process in the legal field that can achieve it. As is often said, litigation promotes antagonism; mediation promotes harmony between the parties.

Very importantly, the attorney should and the mediator must really, really stress to the clients the risk of asking a third party to make decisions about their money, property and their children. No attorney will or should ever guarantee their clients will prevail on any position and in fact, it is unethical to do so. Yet, I have mediation clients who absolutely, positively are convinced that they will "win" and the Judge will agree with them. Sometimes, sadly, it is because an attorney has led them to believe that he/she knows what the Judge will do. All trial attorneys have won cases they thought they were going to lose and lost cases they thought they were going to win. This seems so obvious to legal practitioners, but I assure you it is not obvious to your clients.

If your client has not had any previous experience in the legal arena, they will not know that:

- If they go to trial, the Judge may not hear everything he/she wants the Judge to hear because of the Rules of Evidence or the Judge's patience and available time is limited.
- Just because the Judge orders a person to do something, doesn't mean it is going to happen (thus the high number of contempt petitions filed)

Mediation is the client's opportunity to retain control over how their case gets resolved. In divorce cases, it will be an especially important opportunity to make their own decisions about how their money and property is divided and to make their own decisions about what will happen to their children. Ask them if under any other scenario, they would even consider allowing some unknown, unrelated third party to make decisions about their children. The answer will probably be "no". When you think about allowing someone else to make those decisions it is, quite frankly, very risky.

The client should be told that they may not get the opportunity for mediation again. Their mediation day could be their one shot moment to end the battle and bring closure peacefully.

Clients should go to mediation as soon as possible, once the client is prepared by their hard work in gathering facts and records, with the advice of their attorney, with important facts about the value of all assets, balances on all debts, monthly expenses, income of the parties, papers to prove all the above financial facts, and the client goes to mediation with all necessary information and documents to resolve the issues at hand. A client also needs to be advised by their attorney how to communicate and negotiate at the mediation. The sooner you get to mediation, the less entrenched the parties are in their respective positions.

When in mediation, filter out the noise of litigation. Set the tone for success of your mediation by emphasizing that you can and do communicate well. Posturing by the attorneys, is discouraged and should be non-existent or kept at a low level. Posturing is counterproductive to mediation and belongs in the courtroom not in the mediation room. The client's attitudes about negotiation and settlement and their own behavior during the mediation are important.

Mediation is a way to resolve issues with dignity, respect, compassion and understanding while saving money.