

DIVORCE MEDIATION - A PRIMER
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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 oftentimes 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 post-divorce 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.

DIVORCE MEDIATION PROCEDURE

The first mediation session involves conferencing the case with the two litigants at the same time 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 mediation and court process and the various issues involved in the resolution of any marital estate. Litigants are also provided with various documents needed to complete the process, including a questionnaire for the Case Information Statement to be generated, and other important legal materials.

My mediation clients are also counseled that it is in their best interests to confer with their own consulting attorney during the process and have the draft Memorandum of Understanding, which I ultimately provide to them and is my final work product, reviewed by said attorney before the matter can be reduced to a new legal contract entitled the Property Settlement Agreement. This consulting attorney will be able to offer individual legal advice to each litigant; whereas, the mediator is an impartial party whose only role is to lead the parties through negotiating a settlement so there is no need for litigation.

The second session is not scheduled until the litigants fill in their questionnaires for the Case Information Statements and any other critical discovery is completed, such as valuations or other relevant information gathering. If indeed our clients need help with completing the questionnaires for the Case Information Statements, we offer this service, also. Our clients will also have had an in-house meeting with one of our attorneys with regard to the finalization of the Case Information Statement.

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 rarely 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 a few months, 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. An experienced mediator will be able to suggest solution scenarios.

At the end of the process, a document is prepared called a “Draft Memorandum of Understanding.” It is 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 “Draft Memorandum of Understanding” and all aforementioned attachments before conducting a review consultation. Thereafter, the attorneys convert the “Draft Memorandum of Understanding” to a formal contract known as a Property Settlement Agreement offering any individual legal advice that each deem necessary in order to best protect each client on an individual basis, without the mediator’s impartiality. This gives each party a chance to have an attorney concerned with the individual party’s best interests and partial to the party’s best outcome. The consulting attorneys then will guide the litigants through the Court system in an uncontested fashion with the consulting attorneys leading the way.

In terms of selecting mediators, I sincerely believe that experienced divorce attorneys who have training and experience in divorce mediation are best suited if the case involves financial issues, alimony concerns, and custody matters. If the case involves only parenting matters, a psychologist or M.S.W. is suitable to handle the dispute. It is also possible to use more than one mediator and to 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. However, the only thing prospective mediation clients have to be able to do is say “yes” to try mediation and come to the first session. It is then up to the skill set of the mediator to guide them through the process and focus them so that they continue 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, who has been a family law attorney for over 26 years, is an Accredited Professional Mediator and would be delighted to mediate your divorce or simply answer any further questions by calling 609.267.0070 or emailing contact@sjerseylawyer.com or visiting www.burlingtoncountydivorce.com or www.sjerseylawyer.com.