

The Divorce Agreement Newsletter

Wednesday, January 18, 2017

Variations on Conventional Divorce Mediation

Since the mid-to-late 1970's, when divorce mediation was getting started as a national movement, the standard model was a mediator and the two parties. The parties' attorneys generally did not participate, but were available for advice. The most common variation was that there was a co-mediator, who was often there partially for a mutual learning process.

Fast forward to the present. Many mediators have handled hundreds of cases, and some even thousands. Partially due to collaborative practice, mediators have become aware of how divorce lawyers, financial specialists, and mental health professionals all have valuable skills and knowledge relevant to the divorce process.

So there can be an impartial financial specialist, or each party can consult his or her financial planner. One or two mental health coaches can be used in a mediation if needed. Each party can bring his or her attorney to the sessions. One variation on this is often effective is in cases where the parties and the mediator have made substantial progress, but one or more sensitive issues remain unresolved. The parties are encouraged to bring their attorneys to a (hopefully) final session with a draft agreement to mark up, and with the expectation that the final issues can then be resolved and the agreement signed.

A mediator is prohibited from recommending the settlement terms based upon a prediction of what might happen in court. But the parties can agree upon a neutral case evaluation from an experienced divorce lawyer or a retired judge, leaving the mediator free to still carry his or her proper role. A neutral financial planner could recommend a settlement to protect the financial futures of the parties. A mental health professional who works with children could make suggestions based upon their best interests.

If a collaborative case gets stalled out, the team could bring in a mediator in a final effort to avoid litigation.

Then there is the form of mediation practiced by consortiums of retired judges. Since these sessions are normally set up with adversarial counsel present, often in the context of an existing court case, and with the temptation to use projections of the court outcome as the driving focus for the settlement terms, arguably they are not ADR at all. They are perhaps better described as conventional attorney settlement conferences with a

specialist on court outcomes as a neutral third party. The retired judge in a given case may or may not be fully acquainted with range of knowledge and skills that would be expected of an experienced divorce mediator. But if the goal is just to keep the case out of court, such cases are often settled in this format.

Anytime third party professionals are involved in mediation sessions, it is essential to have a written agreement that includes them under the umbrella of the confidentiality protections for the mediation.

A final option, when a mediation reaches an impasse, is for the mediator to mediate the terms of an arbitration agreement. Most mediators now consider it unethical for the mediator to be the arbitrator, but the mediator can assist the parties in finding a suitable third party for that role.

If the mediator is not barred from drafting the mediated agreement in the particular jurisdiction, he or she should consider doing so. However, the agreement should be drafted in clear readable prose so that the parties can participate in the editing process. If the mediator is an attorney, he or she should avoid the archaic and constipated form files that even some of the otherwise most respected law firms still use.

Mediation has evolved in many ways since the early days of Jim Coogler, John Haynes, Steve Erickson, Marilyn McKnight, Judy Wood, Virginia Stafford, Mark Lohman and others. Steve, Marilyn and Mark are still mediating. But the field of divorce mediation has expanded thousands of times over, and is continuing to do so as we still keep asking the question, “How do we structure this mediation so as to make it the most likely to result in a fair and workable agreement for our clients?”