

MEDIATION: MYTHS AND REALITIES

By: William B. King

We often hear parties to a divorce ask "Why don't we just mediate everything right away and save time, stress and money?" This question assumes that mediation is a quick and economical means of resolving a divorce. But, when a potential client comes to us *after* going to mediation without clear goals and guidance, we are left with little we can do to help them recover from the disastrous consequences of their mediated agreement. Mediation is a tool to be used only when you have thoroughly prepared for it and then wisely engaged the services of a knowledgeable mediator.

Who Can Be a Mediator?

A mediator is also defined by statute as "a trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives".

There are currently no definitions of what constitutes training for mediators. Presently there is a proposed requirement for mediators to have 40 hours of training, be 18 years of age and a high school diploma or a G.E.D. equivalency. Our view is that these requirements, even if implemented, are grossly inadequate for anyone trying to help people sort out disputes in family law.

What is Mediation?

Mediation is a term defined in Colorado's statutes under the Colorado Dispute Resolution Act as a process by which a mediator attempts to see if parties can reach an agreed upon resolution to their legal issues. In a divorce this can include issues relating to children, property distribution, maintenance (a/k/a alimony), tax issues, payment of fees and other matters collateral to a divorce that may come up.

When Can a Mediator Provide the Parties their Legal Opinion of What is in Their Best Interest?

The simple and straightforward answer is never. To do so would be considered the unauthorized practice of law. This sadly has not been closely adhered to by many non-lawyer mediators.

When Should Mediation be Utilized?

The myth is that mediation should be undertaken before anything else is done. This puts the cart not only before the horse but into the next county. Fruitful mediation assumes that both parties come to the table with all the relevant knowledge needed to competently discuss the issues. And there is no other area of dispute resolution where emotions tend to be as high as divorce. Mediating at the outset is very likely to result in uninformed and emotional decisions.

The Colorado Rules of Civil Procedure (primarily Rule 16.2) absolutely require full disclosure of all relevant facts including detailed financial disclosures and all important facts concerning the children as a prerequisite to approving any agreement for resolution agreement. Settlement discussions need to happen only after full disclosure has been provided.

A major continuing myth perpetrated by non-lawyer mediators is that if you retain an attorney you are certainly going to trial. Not only do lawyers encourage and participate in mediation whenever it's best for their clients, but most Colorado Courts will require that the parties attempt mediation before going to a hearing.

This is not only self-serving on their behalf but totally inaccurate. Surveys of domestic relations attorneys taken at the 2015 summer Family Law Institute, with over 540 attorneys present, showed that in excess of 80% of all matters settle prior to trial. A February 2016, poll taken of the Family Law Executive Council (consisting of 21 lawyers highly specializing in

family law) estimated slightly over 85% of all cases settle prior to a trial.

We emphasize that, once all the important facts are in front of the parties and the rules are followed, most times a settlement is ripe to be concluded and sent to the judge for approval. And, when this happens, settlement may very well take place *before* mediation and the attendant cost and stress of mediation is avoided.

Does Mediation Require a Lawyer to Represent You?

No. You are not required to have legal counsel to attend mediation. Some cases with very short duration marriages, minimal assets where retirement accounts are not at issue or with no children's issues may not require legal advice. There is currently a committee of the Family Law Section of the Colorado Bar Association to draft a proposal for what may be termed "divorce small claims court". This will be developing and presented to the Office of Dispute Resolution Committee advising the Colorado Supreme Court. If you wish updates call us and ask for Bill King who sits on both the Executive Council and the committee advising the Supreme Court for more details.

If there are significant assets or income, in marriages of longer duration, if there is real estate, retirement accounts, business ownership, stock options, tax issues including the tax basis of assets being divided, issues related to valuation of assets, spousal support concerns, or requests for help from the other side with paying attorney fees, legal counsel is very important in making fair and thoughtful decisions.

Any issues relating to the most important topic, those concerning the care, access to and support of children are complex. You need to know not only how the law applies currently but what happens as situations change and new dynamics enter the picture. Planning ahead based on variable burdens of proof is critical in making decisions now that will affect the future and your future rights to make adjustments. The Court retains jurisdiction to modify all aspects of the children's care and finances until age 19 if not earlier emancipated.

Only a lawyer can provide legal advice. Unfortunately, we have seen non-

lawyers cross the line and try to provide legal opinions and advice. This has led us on many occasions to try and repair the damage caused by an agreement that is unfair or entered into by a party on incorrect assumptions of what the law says. Sometimes it is too late to correct these disasters. And, even if we can fix it, these fix is more costly and time-consuming than it would have been if good advice and full disclosure had occurred in the first place. This is clearly in instance where the maxim, “An ounce of prevention is worth a pound of the cure” applies.

A non-lawyer mediator is liable for his or her errors only if there has been “willful or wanton misconduct”. In other words, there may be no remedy for a substantial mistake made by a non-lawyer. Lawyers, on the other hand, are held to standards and are regulated by the Colorado Supreme Court.

What is the Difference Between Mediation and Settlement Conferences?

This is a major distinction to which many people, including lawyers and judges, have not been aware until recently. The same set of statutes dealing with mediation define what is known as a “settlement conference”. It is defined as “... an informal assessment and negotiation session conducted by a legal professional who hears both sides of the case and may advise the parties on the law and precedent relating to the dispute and suggest a settlement”.

In other words, if the parties feel that they may be able to work out the issues they have, they may retain a lawyer for the purpose of hearing the lawyer's advice and experience as to what the law says and offer an opinion as to a reasonable settlement.

The settlement negotiator may not counsel either side independently or represent either side if they can not eventually come to an agreement. However, the combination of getting real and competent legal advice along with saving costs and stress is worthy of consideration.

To get started in this option an engagement letter is entered by the parties

as to the process, the costs and agreement to supply necessary information to the legal negotiator. This would in almost all matters include the requirements for full disclosure mentioned above which have to be completed in all instances anyway.

If this option interests you, please contact our firm for more advice on how this user-friendly and economical option may apply to your case. This firm also has several attorney-mediators who can function as a mediator if requested. If you ask us to step in, you do so because of our expertise, knowledge, professionalism and decades of experience.

In summary, mediation is a process that is required by many Colorado courts but only if earlier attempts to settle are unsuccessful. Mediators come in various ranges of competency in Colorado, with no meaningful regulation or training, and they provide you with no remedy for their errors or misinformation. Get some advice on what is best for your unique case before going to mediation so that if you do go you do so armed with knowledge on such important issues. You owe this to yourself and your children.