A Critique of Mediation, Challenging Misconceptions, Assessing Risks, And Weighing The Advantages

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Only a few years ago, mediation was regularly confused with meditation, medication, or arbitration, another mode of conflict management, but a distant cousin. The confusion was not limited to the public, but extended to lawyers, judges, and mental health professionals as well. While some confusion remains, the proliferation of legislation, court programs and the public profiling of mediation services has minimized at least the most raw forms of misunderstanding about the mediation process. The discussion has now shifted to who and when should parties in conflict mediate and how should that mediation be done. Parties are often confused and fearful of losing their rights and being taken advantage of. Lawyers frequently believe their clients will be at risk, and they will lose business. Courts must be sensitive to monitoring fairness and the rule of law, and moving cases. Mental health professionals like the concept of settling conflicts in a less adversarial manner, but they are concerned for their clients well being and often confuse mediation with counseling. And, mediators run the risk of overselling themselves and the process and sometimes are not clear about their role as a mediator as opposed to a counselor, lawyer, or other expert. For mediation to be fairly evaluated, legitimate concerns need to be separated from misconceptions about the process; then the risks can be properly assessed and the advantages weighed.

THE PARTIES CONCERNS

The simplest definition of mediation is a negotiation process between three (or more) parties: the two disputants and a third party mediator. The mediator has only the authority the parties allow him or her. The mediator effectively negotiates his or her authority with each of the parties and in turns helps them negotiate between themselves. More formally, the mediator facilitates the informed and consensual management of the issues or conflicts that are presented.

Mediation is safe. Many people are concerned that they will not be able to negotiate effectively with the other party and they will lose. This is so especially if one party appears to be an experienced negotiator and the other party questions their ability to negotiate. If the mediation process is conducted properly, **there are four reasons why no party can lose or compromise any right or interest they have in the mediation process:**

1.) **The mediator has the professional duty and responsibility to protect <u>both</u> parties;** that means he or she will assure that both parties have all necessary information, know the issues, know the available options, and, know the pros and cons of each option. **The mediator is not neutral;** it is his or her responsibility to make sure both parties are heard and to ask hard questions of each of them. The mediator is not disengaged, or hanging back and above the fray, but actively involved to assure that neither party is being taken advantage of.

2.) **The parties are strongly encouraged, (and are often advised or directed), to obtain professional advice from attorneys, accountants, financial planners, or counselors <u>at any time</u> they wish in the course of the mediation process**. No tentative understanding can effectively become an informed agreement unless access to professional consultation is free,

unfettered and encouraged. Any mediator who in any way discourages professional consultation by a party in the course of mediation should be viewed with suspicion.

3.) **The parties will not be asked to sign, initial or in anyway formally execute a proposed mediated memorandum of understanding**. Therefore, no party is allowed to become legally obligated to an agreement. After each party has reviewed the memorandum and/or consulted with their individual attorneys, only then will each of them decide if they wish to be legally obligated--but that does not occur in the mediation process. Accordingly, no mediator should ever allow any party to sign, initial or otherwise formally execute an agreement in mediation. For a mediator who is not an attorney, allowing signature is tantamount to the unauthorized practice of law; for the mediator who is a licensed attorney, it is a violation of their professional duty as a mediator.

4) **Any or both parties are free to withdraw from and terminate mediation at any time, for any reason, without consequence or sanction of any kind**. The process must be voluntary if it is to hold any integrity and, each of the parties is the sole arbiter of that determination. While a party may decide to remain in mediation because he or she has determined there are few other options, that is fundamentally different from feeling coerced to remain in mediation.

Mediation makes good business sense. Many parties think they can mediate only if the other party is "reasonable" like they are, or they are on good terms. That is not accurate. **People who are distrustful and, even angry with the other party or parties can still successfully mediate an agreement.** Clearly, if business people can negotiate their differences, or employees and management can come to agreement, or if the Arabs and Israelis can work out a peace accord, parties to a divorce can do the same. For most people, with the protections in place, the negotiation of disputes makes good business sense. **Mediation is less about cooperation and good will, than it is a matter of good business.** Trust and good will are certainly helpful, but not necessary for settlement to be reached Mediation allows people the opportunity to more directly control the decision making about their lives--their money, property, and children. Mediation does not make sense in one of the parties is so preoccupied with "winning," and "winning" means to him or her destroying the other party. However, few people operate from this flawed perspective. By contrast, most people in conflict will at some point say and do silly and defensive things when they feel threatened and out of control of their lives. The majority of people who have the normal apprehensions when faced with the stress of conflict should not be confused with those who operate from the more extreme perspective. Mediation often helps to minimize the unnecessary hurt and anger that often occur in the midst of a conflict.

THE LAWYERS ROLE AND RESPONSIBILITIES

Mediation offers new roles and opportunities for lawyers, both to become mediators, but as well, to become more effective and appreciated for their legal expertise. Lawyers play an important role in assuring the integrity of the mediation process. Parties cannot make competent and informed decisions without sufficient legal advice. Most attorneys review the proposed mediated agreement with their clients and assure they understand the issues. **The key difference is that the role of attorneys in mediation is that of a consultant to their client; they do not act as they otherwise do in their traditional role, as the primary negotiators of the agreement.** Mediation allows attorneys to do what they do best, and most commonly do in other kinds of legal matters: give their best advice, leaving the decision-making responsibility to the clients.

Too many people mistakenly believe attorneys get rich handling divorce cases; the most cynical even believe attorneys are only out to generate higher fees at the clients' expense. This is seldom the case; most attorneys are focused on protecting their clients interests, and, as they are trained to do, think defensively about everything their experience has taught them can go wrong despite the best intentions. Most attorneys, however, recognize that most people cannot afford to pay high attorneys fees, and oftentimes they are not fully paid for their services. By contrast, attorneys representing clients in mediation are likely to be paid their full fee, and what is more, the client is often more satisfied with and appreciative of their services.

Mediation does not take business away from attorneys. While they may bill fewer gross dollars for their services, they collect significantly more, and obtain more business as a result. No competent and experienced mediator will denigrate the work of attorneys or discourage clients in mediation from consulting with counsel. The attorneys' responsibility is to advise their clients as they see fit and leave to the client the responsibility of making their own decisions accordingly. The more complex the matter, the greater the importance of the attorneys' consultant role in the mediation process to assure the parties are fully informed of their rights and responsibilities. The mediator cannot give legal advice, and does not supplant or duplicate the attorneys' role. The whole matter is still likely to cost less because the parties remain the primary negotiators.

JUDGES, COURTS AND MEDIATION

The mediation process is appreciated by many judges for two reasons: first, cases are resolved more quickly and effectively and are less likely to require further judicial attention and that reduces judicial caseloads. Second, many judges do not enjoy making personal decisions that affect other peoples lives and especially the lives of their children. They will if they have to, but know that the determinations they make will never be as effective as the decisions parties might make for themselves. Most studies have confirmed that people are more satisfied and likely to comply with agreements they have developed themselves as opposed to agreements negotiated by attorneys for them or the determinations of a judge after trial. The latter will be far more likely to require further legal action for enforcement.

However, for mediation to work, judges must respect the rights of the parties to make their own decisions and not intrude on the mediation process more than is absolutely necessary. In court mediation programs, sometimes the court or a judge will set rules for what can be mediated and set requirements about how that mediation is to occur. Sometimes courts gauge the success of mediation solely upon whether or not there is an agreement. If people begin to feel that they are being coerced to mediate an agreement that fits the courts' expectations, the process of mediation will begin to look like a sham. It is the courts' responsibility in the design of the mediation program, and the mediators' responsibility as a matter of professional duty to assure that the process is not misused.

THE MEDIATOR'S RESPONSIBILITIES

What should be clear is that the mediator is most important in maintaining the integrity and allowing for the success of the mediation process. **The mediator is responsible for protecting the parties and assuring that their decisions are informed and well considered**. His or her skill, training and experience are major factors in the clients' decision to work with a mediator.

Most professional mediators have completed training programs to become mediators. Just being a lawyer, mental health professional, clergy or accountant is not usually enough to fully appreciate the role and responsibilities of being a mediator. While training alone is no guarantee of competency, it at least demonstrates some commitment to being a good mediator. As well, a good mediator is likely to be a member of some national, state or local professional organization. There are two well-regarded national organizations: the Academy of Family Mediators (located in Lexington, Mass., tel.: 800 292 4236), and the Society of Professionals in Dispute Resolution (located in Washington, D.C., tel.: 202 833 2188). Both organizations have set standards of practice for mediators and maintain professional practice review procedures.

Good mediators are not neutral. They do not simply hang back and remain "above the fray" or disengaged. They are, rather, directly involved helping the parties to effectively negotiate. Mediators have a professional duty to be balanced between the parties, assuring each party has sufficient information to make informed decisions, understands all of the issues that must be addressed, knows the options that are available, and have thoroughly considered the risks and advantages of each option. The mediator asks the parties hard questions and probes and checks their understanding in pursuit of a resilient, durable agreement. Thus, the mediator should be responsive to any question a party may ask about the mediators' skill level and experience. If the mediator is to be effective, each party should feel personally comfortable with the mediator. After all, the mediator will be privy to the most intimate details of the parties' lives.

As well, the mediator should be able to explain the mediation process clearly, including his or her style or approach, the rules, the structure, and an estimate of time and cost. Fees should be straightforwardly discussed. Most good mediators have written mediation agreements that spell out the responsibilities of the mediator and the parties. Prospective parties considering mediation may want to interview more than one mediator before making a decision about whether or not mediation makes sense for them and about the particular mediator.

Managing conflict is not easy; resources (time, money, property) are typically scarce and it is seldom that all parties are satisfied. Be wary of a mediator that overstates the advantages of mediation. Often, the best outcomes are those where no party feels that advantage-of and move ahead with their lives. **Most issues can be mediated**, not just parenting responsibilities (time arrangements and decisions), but as well, financial responsibilities (child support, maintenance, school and health expenses, insurance), and property division as well. In fact, mediation is now commonly used to manage business, workplace and many other kinds of disputes. It is an efficient and effective way to manage many , if not most, disputes.

In family and divorce conflicts, mediation allows people to have the opportunity to get divorced differently than they were married. That is to say, that people can learn to negotiate issues with each other even when they may have been unable to do so in the course of their marriage. At the same time, mediation is not counseling and the mediator should generally be clear about the distinction. Some parties find the mediation process to be a "healing" experience; others find the process to be merely a means of surviving a stressful and difficult life circumstance. However they experience the process is in the final analysis for the parties to decide and not the role of the mediator to style.