12-SUM Fam. Advoc. 52

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Mediation and Negotiation

ALTERNATIVES TO LITIGATION

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In mediation, one or more mediators assist the parties in reaching a mutual resolution of their legal claims. In negotiation, the parties' lawyers attempt to reach a resolution, but each lawyer owes a duty of advocacy to his or her own client.

Mediators do not represent the interest of either party. They function as impartial third parties attempting to help the parties negotiate their own agreement. The mediator may or may not offer suggestions, comment on the reasonableness or fairness of either party's proposals, or seek to balance the parties' negotiation strengths and weaknesses.

Mediators work individually or in pairs. In most jurisdictions, if the parties are unable to reach an agreement during mediation, the mediators do not submit any kind of recommendations to the court.

Arbitration differs from mediation in that arbitrators have the duty to decide if the parties are unable to agree. A case may be arbitrated by one person or by a panel, typically consisting of three arbitrators. An arbitrator may first attempt to mediate an agreement between the parties, but if that is unsuccessful, the arbitrator then enters a decision. In cases of “binding arbitration,”' there is no further judicial review of the award, unless by appeal. In cases of “nonbinding”' arbitration, the arbitration decision, which may include findings of fact and conclusions of law, is submitted to the court along with whatever other evidence the parties present. The judge then makes the final decision.

Types of mediation

In divorce, formal arbitration is not frequently used, except according to the terms of a separation agreement, and then usually for enforcement purposes only. Mediation has become widely available, and is most frequently used in custody and visitation disputes. Many jurisdictions provide by statute or court rules that such disputes may not come to trial until after the parties have attempted mediation. The purpose of these mandatory mediation provisions is to focus the parties on the children's needs in a nonadversarial setting and to remove the custody or visitation issues as bargaining points in the property and support determinations.

Most mediators are either lawyers or mental health professionals with special training in divorce mediation. Their qualifications differ greatly, and most certification programs are not mandatory. Often, courts provide free mediation services as a part of their conciliation courts. Other courts maintain lists of qualified or court-approved private mediators. There are also private agencies that offer divorce mediation services. Arbitration may be offered by court-maintained arbitration lists comprised of local lawyers, privately arranged through the auspices of the American Arbitration Association, or through independent arbitrators.

It is important for the lawyer to understand what use will be made of discussions, agreements, and decisions that come out of the mediation or arbitration process. Statutes, local court rules, or informal administrative procedures should be consulted in order to understand in advance what will happen to information gathered during mediation.

In some jurisdictions the mediation process is entirely confidential, and except for any agreement that may be reached, nothing said during mediation may be discovered or admitted into evidence, and the mediator may not be called as a witness. Some mediation agreements are not binding until approved by lawyers for both parties. Some jurisdictions permit mediators to testify by deposition or in person only if the parties agree. Other jurisdictions forbid mediator testimony even upon stipulation by the parties.

In some jurisdictions, the mediator submits a report to the court. The parties may have more latitude in determining how the mediator may be used when private mediators, rather than court staff, are used.

An agreement may define the terms of the mediation in the absence of local law limiting such a right. Separation agreements or stipulated decrees that provide for mediation of future disagreements should include language that clearly sets forth:
• the use that may or may not be made of discussions during mediation;

• whether the mediator shall or may provide a report, response to discovery, or testimony; and

• whether the mediator may later enter into a relationship with either party (for example to provide family therapy or a subsequent custody evaluation).

Choosing a mediator

There is no best profession, type of training, or background for a mediator or arbitrator. The lawyer must match the credentials, philosophy, procedure, and style of the mediator or arbitrator with the issues and parties in each case.

Some courts that maintain their own staff mediators or panels of court-approved mediators or arbitrators mandate their use. However, one may be able to select from among the pool. Clients may prefer to use staff mediators, even where they are not mandatory, because their services are often provided at no cost or a very low cost compared to professionals in the private market. Another benefit to using the court's personnel is that they understand what is required by and expected of the mediation process in that jurisdiction.

Usually such mediators have been ***53** specially trained in divorce mediation and belong to one of the several national organizations of divorce mediators. It is also likely that they will participate in continuing education to maintain and improve their skills.

Private mediators frequently come with a more diverse set of credentials. Some are mental health, behavioral science, or legally-trained professionals with no specialized training in divorce mediation. There are generally no licensing or certification requirements for divorce mediators as such. Several national organizations, however, do provide training and voluntary certification. If a mediator claims to be certified, it is important to find out what organization did the certifying and what the requirements for certification are. It is imperative to get complete information concerning the prospective mediator's or arbitrator's background and training.

To the extent that the lawyer has any control over who the mediator is, it is important to find out not only what the person's general professional background is (e.g. lawyer or psychologist), but also what specialized training that person has. Further, the mediator's biases and philosophies must be explored. It is common, for example, for mediators to have preferences for or against joint custody or particular patterns of visitation.

Finally, attention should be given to the mediator's procedure and style of conducting the mediation. Where the two parties are equally intelligent, articulate, and sophisticated in the matters being mediated, a facilitator who merely moves the discussion along may be the most useful type of mediator. However, where there are emotional, intellectual, or financial power imbalances, the mediator may need to take a more aggressive approach, suggesting alternatives and pointing out unfairnesses in various proposals.

If the mediator is required or permitted to make a report to the court or to testify about what was said during mediation, it is particularly important that the mediator be properly qualified and exercise a role appropriate for the parties' interpersonal dynamics. If the mediator is working from a philosophical or procedural stance opposed to that of the client, a negative bias may be carried over into the report or testimony.

If the mediation is protected from any disclosure, then the most important criteria are the mediator's substantive knowledge and abilities to mediate a fair settlement, protecting each party against any overreaching.

A mediator to avoid at any cost is one whose only goal is to achieve an agreement. Such a person may exert undue pressure on the party who will “give in”' the most easily. Such a mediator may also routinely “split the difference”' on any disagreement, regardless of whether one party's original position was extreme and the other's more moderate or whether the compromise is good for the children. Even mediators who view their roles primarily as neutral facilitators nonetheless must have some professional responsibility for injecting balance and fairness into the procedure.

What issues will be mediated or arbitrated will affect the selection of the mediator or arbitrator. In most cases, mediators are involved in custody and visitation issues, although they may address property and support issues. Arbitrators, however, are typically involved in property and some spousal-maintenance issues. Some knowledge of the applicable law, or access to a properly-qualified lawyer, is necessary for the mediator or arbitrator.

A mental health background, with emphasis in child development as well as family dynamics, is helpful where custody or visitation are at issue. Knowledge concerning business, taxes, or real estate may be of more use when division of property is the primary issue.

The role of the lawyers

In arbitration cases, the parties' lawyers may present their case to the arbitrator in a way similar to trial. However, the procedure is typically more informal, and strict rules of evidence do not apply. The lawyers are present during the arbitration session, may present evidence, and may argue to the arbitrator on behalf of the client's position.

There is no consensus on what the role of the parties' lawyers is or should be in mediation. In most cases, the lawyers may not participate directly in the mediation process. Many times they are not permitted even to be present in the room. They may be available outside the room for consultation by the clients during mediation. The parties may be asked to sign mediated agreements that do not become “binding”' stipulations until approved by both lawyers. Some mediators or mediation services provide a neutral lawyer to make available legal information (but not advice) to both parties and to draft any mediated agreement.

It is particularly important that lawyers representing parties in mediation have a clear understanding of the role and rights they have. It is equally important to instruct the client concerning the mediation process and the client's need to discuss any agreement with the lawyer before it becomes final.

Flaws of mediation

Where there is a power imbalance between the parties (perhaps most obvious in spousal-abuse cases, or where one spouse is totally naive about financial and property matters, or where one party offers “side deals”'), take special precautions to ensure that the vulnerable party is not taken advantage of.

Barred from the mediation room, the lawyer is hampered in his or her duty to protect the client from overreaching by the other party. Many mediators attempt to obtain agreements without making any judgments about the appropriateness of the agreement or the dynamics leading up to the parties' assent to it.

The lawyer may seek an order to waive mandatory mediation, ask to be present during the sessions, or write a letter to the mediator, with a copy to opposing counsel, to highlight the power imbalance, the client's intimidation, or other relevant circumstances.

Custody or visitation

Because of the court's *parens patriae* duties toward children, it cannot delegate its decision-making authority. Even the parties cannot bind the ***54** court by an agreement concerning custody, visitation, or child support. Any orders the court may make on such issues are modifiable in the future if the circumstances of the parties change. Therefore, there can be no binding arbitration of such disputes.

It is important to understand the options and requirements for custody or visitation mediation available in your jurisdiction. You may be able to choose among various types of mediation.

Questions include:
• Is mediation mandatory?

• Is there a free mediation service? If not, who will pay for the mediation?

• What are the qualifications of a mediator? May the parties choose the mediator?

• What is the role of the parties' lawyers in mediation?

• If the parties are unable to reach an agreement, may statements used in mediation be disclosed and used at trial?

• Will the mediator submit a report to the court or communicate recommendations?

• May the mediator later participate in any custody or visitation evaluation for modification litigation?

Financial issues

It may be possible for the parties to agree to arbitrate the division of property and debts. Because the state's *parens patriae* duties are not involved, other than to ensure basic fairness, an agreement to arbitrate should be binding. If the agreement was contained in an antenuptial agreement, the rules regarding the enforceability of antenuptial agreements may apply to the provision for arbitration. However, since arbitration involves the procedure used to divide the property and debts, rather than the division itself, unless an interested arbitrator is required by the agreement, the overreaching problem is not likely to arise.

Fewer jurisdictions provide for mandatory mediation of financial issues than of custody or visitation issues. Since mediation is not binding, there is no bar to the parties voluntarily agreeing to mediate financial issues.

A lawyer considering mediation of financial issues should ask the following questions:
• Is there a free mediation service provided by the court or a community agency? If not, who will pay for the mediation?

• Does the mediator have an adequate understanding of the financial issues involved and the ramifications of various alternatives? If not, does the mediator consult experts as needed for assistance with those issues?

• What is the role of the parties' lawyers in mediation?

• If the parties are unable to reach an agreement, may statements and documents used in mediation be disclosed and used at trial?

• Will the mediator submit a report to the court or communicate recommendations?

12-SUM FAMADVO 52

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