What is Mediation?

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Mediation is the Remedy

Mediation has become a popular option for parties involved in a conflict to resolve disputes. These disputes can range from a neighbor or community conflict divorce settlement all the way to a civil or business dispute. Many courts now require mediation sessions before a court proceeding, which can prevent further clogging of the court. In this paper, I explain the mediation process and why it is a beneficial way to resolve conflict instead of the often lengthy and costly litigation process.

What is Mediation

Unlike litigation, where there must be a winner or loser, mediation is quite a different procedure that works towards a win-win situation for the two parties. It is a form of alternative dispute resolution (ADR) in which the parties get to discuss and analyze their disputes with the help of an impartial third person (s). The impartial third person refers to the mediator, who is responsible for helping the parties settle. (Moore, 2014)

The flexibility with mediation comes in that the procedure can either be structured and scheduled or informal where the parties meet to discuss. In most cases, it is a structured process where the parties may even have representatives for their interests. Disputes that fall within mediation can either be pending in court or yet to be filed. Certain disputes require the parties to have tried mediation before going to court. While each state has its unique family law code, many counties in Texas hold that couples must attempt mediation before considering court.

Asides from divorce, various other cases are suitable for mediation. They include construction, personal injury, contract disputes, community relations, employment, and domestic relations. Mediation is mostly a voluntary conflict resolution process. Unlike arbitration, where

attendance is compulsory, this is not the case with mediation when it's not court-ordered. The procedure is also far less costly than litigation.

A mediator is a trained practitioner with good listening and people skills. They have to be articulate and have deft negotiation skills. These skills are crucial to navigating the mediation process, as the mediator's purpose is to assist the parties in reaching a resolution. The mediator does not make the final decisions for the parties but helps guide them through conversation, negotiation, and brainstorming to get a mutually agreeable resolution.

Mediation Over Litigation

When a party decides to file a legal action, their options in court can be pretty limited. Fully litigating a court case culminates in a trial, and depending on the result after the trial may mean that one or both parties file an appeal. If a person attempts to resolve their case, they are required to present evidence and arguments in front of a Judge and jury, when applicable, who decides the outcome of their case. Evidence means that they will have to take the witness stand and testify in a courtroom where their former spouse or business partner is present. For many litigants, this can be a very intimidating process that creates stress and anxiety.

Depending on the nature of the case, there is often a need to bring in expert witnesses to testify to the extent of damages, to establish agency, or present valuations or assessments of the opposing party's evidence. This can amount to considerable financial expense for all parties involved and lead to procedural delays and filings that keep the case moving through the courts for years.

Additionally, a courtroom is a public forum where parties will most likely be required to disclose personal and even private information about themselves and the opposing person or party. Sensitive information can be presented to embarrass the opposing party or gain leverage

with the Judge and jury. In some family law court proceedings, a party may be asked explicitly about topics on direct and cross-examination, which involve disclosing sexual partners, their drug and alcohol abuse, or physical and mental abuse, to name a few issues. Personal details may include financial records, medical records, reports from experts, and school records if children are involved, all of which become privy to the public if presented in court.

Litigation is an adversarial process that, in the end, can create a lot of animosity between the parties involved. Further, when parties go to trial, they have ceded control of the process and the resolution. The decision rests solely in the hands of a Judge or jury. Once the decision is made, the chance of appeal is not guaranteed, and the possibility of winning the appeal is even lower.

On the other hand, when parties choose to mediate their dispute before a mediator, they work together to decide how to resolve their issues. Mediation is not a trial, and no one testifies. Mediation plays a significant role in reducing adversarial court hearings and potentially reducing the length of time required to bring a conflict to resolution.

Convening the Mediation

In preparing for the mediation, a mediator may consider the information obtained from intake paperwork or phone interviews with the parties to craft a mediation plan. High-conflict sessions like divorce or child custody mediation would benefit from a carefully constructed plan to prevent the emotional pitfalls inherent in conflicts like these. The mediator creates a schedule for the session along with a list of possible concise questions and issues that must be addressed. This planning keeps the parties on track and less likely to get caught in an emotional cycle that could result in a failed attempt at resolution.

A mediator's role is to act as a neutral facilitator for parties who wish to resolve a dispute. The mediator sets the tone for the session with an introduction and explanation of the mediation process. After guiding the parties through discussion and negotiation, the mediator acts as a scribe and prepares the Mediated Settlement Agreement according to the parties' terms. In this role, it is also up to the mediator to be highly adaptive and observant of the parties, their unspoken interests, and non-verbal communication.

A mediation conference venue is usually a neutral place that serves the interests of the two parties. Such can be the mediator's office or a private facility. While mediation can go on over the phone, mediators' common approach is to make the process face-to-face, which can now be via online video conferencing. The mediation process will involve the mediator, the parties, the parties' attorneys, where they have representation, and any other person as may have been agreed. Community mediation often involves several community members.

In mediation procedures where parties have attorneys, the mediators will advise that they work with their attorneys on legal issues to make informed choices.

Opening Statement, Confidentiality & Neutrality

The Mediator's opening statement is one of the most essential parts of the mediation. It sets the tone. The opening statement is the mediator's opportunity to introduce the mediation process, explain the confidential nature of the engagement, and help relieve tensions from uncertainty and the stress from being in the same space with a party one may deem hostile. A Mediator will explain their role in the mediation process, which is that of a neutral party. They are not there to make decisions for the parties or to cast judgment regarding their conflict. In this opening statement, the Mediator will ensure all parties are oriented to the venue, give

instructions on where to find bathrooms and break-out rooms, and invite the parties to partake in any refreshments provided.

Additionally, the Mediator will explain the parties' ability to request a sidebar meeting with her where they are free to address questions or concerns outside the other parties' hearing. This sidebar meeting is called a caucus and is subject to confidentiality between the Mediator and the party. Time given to one party in caucus will also be given to the other party in equal measure with the same benefit of confidentiality. (Leigh, 2018)

The Mediator will review the confidential nature of the mediation session and the confidentiality agreement the parties signed. Mediation confidentiality is critical to a collaborative process. In a collaborative approach, the parties attempt to create a win-win scenario for both parties by acknowledging joint interest and understanding how the outcome affects all parties. In contrast, the competitive approach is win-lose, and one party is usually more aggressive and self-interested. In a collaborative session, the parties are interested in preserving their relationship, whether it be a professional relationship based on working in the same office or a personal relationship that relies on two parents to successfully co-parent after a divorce. Parties working as partners to resolve a problem could be successful in multiple negotiations instead of having a competitive or adversarial relationship. (Jasra, 2020)

The process would not involve the aggression, threats, or deception inherent in a competitive or adversarial negotiation. Trust and transparency allow both parties to reveal all information and details critical to a successful outcome. (McLachlan, 2014). Trust and transparency-generated communication style can only happen in an environment where all parties feel safe to share personal details and facts while knowing that the mediation

confidentiality will not be breached. Many court cases have highlighted just how seriously mediation confidentiality is taken.

The California Evidence Code §§1115-1128 governs mediation confidentiality, and the California Supreme Court has held up its statutes in several cases. The Court's decision on mediation confidentiality in 2004, the *Rojas v Superior Court* ruling, made it clear that all information shared in a mediation, including notes, photographs, reports, etc., is considered confidential, and no outside party can gain access to those materials. (Ehrlich, 2014) Exceptions to this only exist when all parties consent to share these materials or details outside the confidential mediation session. (California Evidence Code § 1118 -1128, 2022)

Identifying the Problem in the Initial Statement Through the Verbal and Non-verbal

After the housekeeping items have been taken care of, the Mediator will take a moment to discuss the agenda with the parties. While there was some pre-planning by the Mediator regarding known elements that needed to be taken care of in the mediation, this is also a time where the parties can give input on other items they feel need to be added.

The first step in the mediation process allows each party to open the session by telling the Mediator their reason for coming to the mediation and what they hope to accomplish in the session. While the parties have an opportunity to express their interests, they may also have unspoken interests, or in some cases, they may not know what they need to achieve a long-term resolution. The Mediator needs to pay close attention to what is being said along with non-verbal communication.

While the parties are open and honest about their interest and the perception of the problem or conflict that has brought them to the mediation, they will usually have decided on their best alternative to a negotiated agreement (BATNA) in the event they feel their counterpart

has disengaged from a good faith negotiation. (Fisher, 2011) This measure is appropriate to hold back and not jeopardize the truth and transparency necessary in the collaborative process. Still, it may be discussed between the Mediator and the parties in a caucus.

Often in caucus, a Mediator can discuss the importance of framing statements and questions to assist the party in communicating with the other parties n the mediation. Coaching parties using "I" statements helps them learn to take responsibility for their feelings and avoid placing blame on the other party in the conversation. This method can be a great skill to teach earlier in the mediation session.

Negotiations- Generating & Refining Options

Once the period for brainstorming and negotiating possible resolutions, parties can be coached on finding value in suggestions they may have left unexplored in previous conversations. Value creation in a negotiation can take the form of a multi-issue negotiation. This process involves breaking a more significant issue into smaller issues to be discussed in tandem. While this technique could be more mentally challenging, it could also be gratifying to the parties ***(De Dreu, 2014)***. The parties can present package deals that address multi-layered facets of their desired outcome.

Once the parties have come to a general agreement on how their area of concern can be resolved, they should be guided in refining the options presented and accepted as agreeable to both parties. The next task- how do we narrow this down so that we can draw a completely defined solution for all parties? What does this solution look like for you? Are there any further details that need to be added or anything about this idea that needs to be adjusted? If there are details that don't work for either party and it seems to be stalling the progress, a caucus may be

needed. The Mediator should coach the parties in evaluating their proposal and deciding what they may be able to do to make their offer more attractive. (Moore, 2014)

Strong Settlement Agreement Equal Great Implementation and Closure

It is imperative to make sure that all parties leave the mediation with clear and concise instructions and an understanding of how they are to implement the plan they agreed to in the mediation. While a Mediator is acting as a scribe when the parties are crafting their Mediated Settlement Agreement (MSA), the Mediator is still assisting the parties in working out the details. A detailed Mediation Settlement Agreement will go a long way in guiding them through the implementation of their plan.

At this point in the process, the parties may be exhausted from the process of communicating, brainstorming, and negotiating. They may even have concerns that the other party may change their mind regarding an area that was particularly hard for them to agree on, but that must not result in a poorly executed MSA. The Mediator should walk them through the items they have decided on and help them arrive at important guidance for its success. The MSA should include essential deadlines, mailing addresses for deliveries, payment details, and an appropriate point of contact for any information that needs to be exchanged.

Lastly and most importantly, there should be agreed-upon steps the parties will take if something in the MSA does not go according to plan or does not suit the parties as they believed it would. An agreement to come back to mediation to discuss the issue will establish additional security for both parties and avoid further disputes or costly litigation.

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