DISPELLING DIVORCE MEDIATION MYTHS

I started writing this article to establish once and for all that mediation is not what's done at court in the early settlement panels, or during settlement conferences with judges. Then, I journeyed to North Falmouth, Massachusetts, where I attended the annual conference of the Academy of Family Mediators Low and behold! What did I learn? What occurs at court in the settlement conferences, early or otherwise, conducted either by volunteer attorneys or judges, is something called "evaluative mediation".

The purpose of this article is to debunk the myths and near-myths about mediation. I will begin with a new perspective on the old early settlement panel/judicial conference, and then address some of the other myths that need to be dispensed with.

Mediators have struggled to create a proper definition for mediation.In facilitative mediation, which is what I do (most of the time), the neutral works with the parties to a dispute to help them resolve certain issues. The facilitator-mediator believes in the self-determination of her clients to resolve their dispute.She assists the parties in creative problem solving so they may settle their problem in a manner that comports as closely as possible with their own idea of what is appropriate and fair. The focal point of facilitative mediation is on the process. The mediator helps the parties develop and evaluate proposals for resolving the conflict based on interests and needs of the parties(and in divorce their families as well). When followed carefully, this is the purest form of mediation.

Evaluative mediation is based on rights. The mediator focuses more of the substance of the case, the parties' competing rights and the likely trial outcome. The mediator, acting often more like an expert, assesses the strengths and weaknesses of the legal case. The evaluative mediator facilitates the discussions by acting as an agent of reality. Examples of evaluative mediation are the judicial settlement conference, the early settlement panel, the court-appointed neutral expert evaluation and non-binding arbitration.

In pure or facilitative mediation, the mediator avoids stating her opinions as to the "right" outcome, i.e what the parties ought to do. Moreover, she disavows all sorts of coercion. She will above all not urge or force the parties to enter into a settlement. Onlythe parties can choose to do that (or decide not to). As stated in previous articles, the parties do not surrender authority over their lives to attorneys, judges, experts or even to the mediator. **They properly reserve that authority to themselves.**

By contrast, the evaluative-mediator will not hesitate to render her opinion, based upon her degree of expertise in a particular substantive field. She will also use her training and skills to push and coerce the parties to settle. In the context of an early settlement panel, the mediator will review the facts, listen to the attorneys, sometimes listen to the parties, and then offer an opinion, based on knowledge of the law and the substance of the case, as to the outcome. Similarly, the court appointed expert, often by way of the caucus, will shuttle back and forth between and among the parties (and their attorneys), so as to promote fact-finding and discussion, attack the weaknesses in each party's case and obtain concessions necessary to the ultimate resolution.

Whether through the early settlement panel model, or various "rent a judge" programs, through judicial settlement conferences or by means of the court appointed neutral expert, parties will continue to seek opinions and recommendations as to the outcome of their case. After all, many people fear decision-making and seek ways to avoid taking responsibility for their own decisions.

Whatever the model, evaluative or pure facilitative, mediation can provide a far more satisfactory means of resolving disputes.Mediation, even with lawyers involved is more cost-effective. The reason for that is fairly obvious.Mediation reduces if not eliminates the need for expensive and aggravating motion practice.With a mediator at the helm, controlling the process, discovery can be obtained, experts may be employed and information (with supporting documentation) can be presented during the mediation sessions.Not only is the high cost of litigation contained and reduced, but also the parties are able to contain the exceedingly high and escalating costs of experts. Just think of it, by means of mediation, discovery motions can be eliminated, emergent applications may be curtailed and/or eliminated; and the multiple experts can be dispensed with. For example, from the outset in mediation the parties agree to bring all necessary information to the mediator's table, where it can be reviewed and discussed informally with the mediator. The parties share the information with their attorneys, who can advise them. When and if there are emergencies, such as one of the parties needing immediate access to funds, the parties working with the mediator can provide such access by consent, thereby eliminating in many instances the need for an emergent application.If there is a business or practice to evaluate, the parties can interview and retain the services of one expert to perform necessary evaluative work. The parties and the mediator can meet with the expert, define the expert's role and the costs involved. At each juncture, the parties, who should be represented by counsel, may determine the scope of their employment of the expert (and the concomitant costs).

Thus, mediation does not merely add another layer of costs.Rather, it neatly and sensibly controls those costs and allow the parties to decide for themselves how much of the family's hard-earned assets and earning ought to be used in this process.

Since mediation focuses on each matter and the mediation sessions are tailor-made and designed to deal with the divorce issues, mediation is usually time-effective as well. This assumes that the parties are cooperating in the process; and further, that often strong emotions do not hinder, delay or block the process.Of course, those same emotions are even more evident in the context of divorce litigation. Litigation brings out the worst in people. And in the worst cases, suspicion turns to paranoia; anger and fear become ingrained.Sometimes, couples in divorce end up more entrenched in the divorce than they ever were in the marriage. Parties who commit themselves to the mediation process frequently find that as an end result not only do they have a mediated settlement that they (and their children) can live with, but also they are better able to communicate with each other in the future. They also recognize that there is a future for each of them and their family after the divorce.

In any process, there is always the potential for unfairness and error. In the litigation process, there is huge potential for unfairness.What about the litigant who cannot afford his own attorney? What about the litigant who has oodles of money and can run litigation circles around his spouse? What about when the attorneys are not evenly matched? What about the novice judge who never handled a divorce case? What about the judge who has a strong bias against men or women? For mediation to begin and progress, the parties themselves must sense that the process is fair; and the mediator, if not entirely without biases, is striving hard to keep the process balanced and fair to the clients.

The fact that this works can be seen from the extent of client satisfaction with mediation over litigation.That is not a myth. That's the way it is; and the way it will be as mediation becomes more and more familiar and useful to attorneys and their clients as one of a number of methods of resolving disputes.