

By Catharine M. Venzon

In a perfect world, parties would not need attorneys to settle their family disputes. In this world, both Mom and Dad would have time for a career and a family, with both parents taking an equal role in childrearing. However, we do not live in a perfect world, and as a result, more than half of recent marriages will end in divorce¹. Whether this separation is caused by financial woes, differing childrearing tactics, or any number of possible marital problems, safety in numbers does not do much to console a potential divorcee. A party seeking a divorce needs a compassionate advocate for their rights. Unfortunately, this is not always what they get.

In this age of lawyer bashing, slick entrepreneurs have found a new angle to exploit: Mediation for Matrimonial and Family Law. Sadly, mediation is not the one size fits all, affordable, quick solution to resolving disputes that its proponents would have us believe. In fact, mediation can contribute to escalated court costs, exacerbate friction between the parties, and cause irreparable harm to all. Scary as this sounds, many are jumping on the Mediation bandwagon with little or no knowledge of the process and its pitfalls.

As a result, Matrimonial and Family Law may lose its place in the Supreme Court as the domain for serious disputes involving families and children. If these issues are taken out of the Court system and given to untrained, non-professionals to decide, what does this do to the sanctity of the family? Supreme Court is a valuable resource to continue to provide family and personal matters with the safeguards that are given to all other serious litigation.

The core of mediation consists of one person's word against another. The mediator does not have to interview witnesses or gather facts. There is no investigation by a mediator to determine the information needed to make an intelligent, professional recommendation to the parties. In addition, there are no standard procedures that mediators are required to follow when guiding a husband and wife through a divorce proceeding (or any other type of proceeding for that matter). The end result can be highly detrimental to both parties.

Is Mediation Really Affordable?

Not necessarily. While a mediator may have lower hourly rates than, say, a brain surgeon or even an attorney, oftentimes you get what you pay for. In some cases the rates for a mediator may seem more reasonable than retaining an attorney, but it is important to consider what you will be getting for your hard earned money. Mediation can actually cost upwards of \$150.00 per hour. This amount is not much less than a typical divorce attorney. Considering the fact that

mediators are not mandated to have an advanced degree or take a rather tedious examination before they can practice, this seems like an awfully high price. Do you really want to pay this much to someone who doesn't have to tell you your rights? If you are arrested and are not read your Miranda Rights (that's when the police officer says, "You have the right to remain silent. Anything you say can and will be used against you in a court of law...", etc.), statements that you make can not be submitted in a court of law. In the same way, you would want to be aware of your rights in a divorce. However, a mediator is not required to tell a client about the rights that they have in a divorce. In addition, there is no requirement that information said to a mediator during consultation be kept confidential. Therefore, in theory, a mediator could meet with each spouse individually and reveal information that each told them in confidence to the other party. On the other hand, an attorney is required to keep all information conveyed in a client conference confidential. In fact, an attorney can face suspension or disbarment for violations of attorney client privilege.

No Rules For Mediators - Just Proposals

In fact, the guides for mediation practices are only that - guides. There are no established standards that are binding on mediators that would enforce good ethical practices. The main source of guidance for mediators is the Model Standards of Conduct for Mediators, as prepared by the American Arbitration Association. However, there are no punishments for mediators if they do not follow these guidelines. Since there is no license required to be a mediator, it follows that someone who is a bad mediator will not have any repercussions for any wrongdoing they might commit in the process of mediating your divorce. If there is no punishment for disregarding the guidelines there is no incentive for a mediator to follow them.

According to the Model Standards of Conduct for Mediators, the mediation process relies on the "ability of the parties to reach a voluntary, uncoerced agreement." However, it seems as though if this were the case, third party intervention would not be necessary. If a husband and wife could come up with an agreement on their own, a mediator would not be necessary. One would normally think of a mediator as someone to go to when you are having trouble settling a dispute and need a neutral third party to help out. Thus, the point of using a mediator would be to help a husband and wife resolve issues that they were unable to resolve on their own. But, the Model Standard implies that the parties should be able to resolve things on their own. How do these opposite ideas make any sense?

According to the Model Standards of Conduct for Mediators, any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. These qualifications can be as many or as few as the parties desire. This means that literally anyone can hang up a shingle saying "Don't waste money on lawyers - hire a mediator." Would you really want your hair stylist, mechanic, or landscaper acting as a mediator for your divorce? Even a hair stylist must be licensed to do business in the state of New York. A bad haircut will grow back - botched mediation in a divorce is much more difficult and expensive to remedy.

In addition, a mediator is required to disclose all potential conflicts of interest, but the parties may still choose this mediator provided they all agree. An attorney can be used as a mediator, but if this is the case the attorney cannot draft and file the separation agreement and divorce papers for the parties jointly unless the attorney can prove that they are not affiliated with either

party to the divorce. However, this is a requirement that only an attorney is held to because it is stipulated in the New York State Bar Association's ethical rules. It would be a conflict of interest to allow an attorney to assist as a mediator and then represent both clients. This conflict takes place when an attorney attempts to represent both sides of a divorce action. It is typically not possible for an attorney to have the best interests of both parties in mind when the parties are as disparate as those in a divorce action. The only way that an attorney can get around this conflict is to ensure that they can satisfy the "disinterested lawyer" test as proposed by the New York State Bar Association. This test provides a standard that would only allow an attorney to represent both sides in very limited circumstances. The bottom line here is that if an attorney, with years of training and qualifications, is not allowed to represent both sides of a divorce action, then a mediator who has possibly had no training should not be allowed to do this either.

No Compulsory Financial Disclosure

Perhaps the most troubling problem with mediation in divorce cases is that mediation is not right for everyone. In some cases, where the separation is amicable and both parties have equal bargaining weight, mediation can be a valid alternative to litigation. However, in all too many divorce cases the bargaining weight of the two parties is not equal. One spouse is likely to earn more money, have more education, greater physical strength, or some other manifestation of power in the relationship. This person is the one for whom mediation will probably be the most beneficial. Because there is no discovery requirement or financial disclosure requirement in mediation proceedings, the spouse who traditionally controlled the money, held title to many of the assets of the marriage or supported the other spouse fully, can withhold valuable financial information from their partner. The mediator doesn't have to take steps to determine the financial assets of the couple. There is also no punishment if one party fails to disclose income.

This often results in an unfair agreement that leaves the weaker party in a detrimental financial situation. This weaker party, who had less of everything to begin with, will now have an unfair property settlement and maintenance award, which will further work to their detriment. This situation is a perfect example of the way that mediation can cause a greater cost to the parties in the long run. When the weaker party is unable to function with the resulting unfair agreement, they may be forced to bring an action to have their award or agreement modified. This will surely require the assistance of an attorney in court, which is a cost that the parties were trying to avoid in the first place.

Comparatively, in a standard divorce action financial disclosure is required before the court makes any kind of decision or recommendation. A standard form is filled out by each party which lists, in excruciating detail, all of the assets and liabilities of the parties. In addition the most recent tax documents and each party's W2 forms will be required. This means that both parties and the court will know exactly how much money is at stake in the matter, and be able to accurately determine how the parties should be compensated. This can be even more important when children are involved because there are standards in place which can be used to mandate child support amounts. By law, a formula is used to determine the percentage of the parties' income that is necessary for child support. The percentage used is essentially the same whether the combined income of the couple is \$10,000 or \$100,000. In order to have a different award of child support, the parties must acknowledge that they have been informed of the

amount recommended by the Child Support Standards Act and have decided to disregard it. In mediation these standards may not even be brought to the parties' attention and child support awards can be grossly unfair to one party or both.

In addition to the disparities caused by nondisclosure of the parties' assets, there is also the likelihood that a mediator will not have the same knowledge of other aspects of the law as an attorney does. Since there is no required training or certification for a mediator, chances are they will not be able to have the parties' best interests in mind. For example, it is probably not common knowledge that a wife does not have to sign over her rights to her husband's pension during a divorce. In certain situations (particularly longer marriages and/or if the wife was not the sole earner) the wife can be entitled to a percentage of her husband's pension, even if the divorce takes place years before the husband is of retirement age. For someone who is financially disadvantaged this would make a big difference in the long run. If a mediator is not aware of current domestic relations law they will not know what their clients are entitled to obtain.

Victims Of Domestic Violence Further Abused

Concerns about inequality increase considerably when women have been the victims of domestic violence (this is not implied to discount the issue of male victims of domestic violence, but the overwhelming majority of victims at this time are women). Mediation does not take into account the special circumstances surrounding these victims. Women who are battered and abused may not be able to speak up for themselves in a mediation proceeding. Since they are silenced their views and needs will not be accounted for in the mediation process. Unlike an attorney, a mediator is not an advocate for either party. Thus, there is no one to represent the victim's side without prejudice. A person in an unequal partnership needs the guidance and undivided loyalty of an attorney who will defend their rights zealously. Battered spouses are at a disadvantage in mediation proceedings and may be pressured into settling on unacceptable terms. If represented by an attorney in litigation there is a much better chance for the victim of domestic violence to have their rights upheld. This is not to say that the victims will be forced to testify in court to the things that have been done to them. An attorney will be able to better represent a victim of domestic violence in a divorce action regardless of whether the victim decides to press charges against the abuser. The important aspect is that the attorney is aware of the victim's special needs and can consider them in preparation for the judgment.

Conclusion

In an ideal world a mediator would provide a valuable service to parties who are seeking a divorce which would allow them to go to their attorneys with a solution already in hand, rather than the usual battles that can ensue regarding custody and distribution of finances and other marital property. This would prevent the long drawn out battles between husband and wife over petty marital issues. In reality, the problem comes when parties attempt to sidestep the judicial process by using a mediator and the mediation process is not successful. Then the parties must go through the arduous divorce process with their attorneys and rehash all the issues that they attempted to settle in mediation. This is a frustrating ordeal for everyone involved and should be avoided at all costs. Instead it is advised that both parties retain an attorney at the outset to help the divorce process go as smoothly as possible.

The law office of Venzon Law Firm PC has for years worked hard to negotiate amicable settlements and only views going to court as a last resort. Our goal is to protect you and your rights in this difficult time. Fairness comes from both parties having capable, competent representation. Venzon Law Firm PC will do this for you.

¹ See U.S. Census data, Report on Marriage and Divorce, available at <http://www.census.gov/prod/2002pubs/p70-80.pdf>

² Attorneys, on the other hand, spend at least seven years in college learning about the practice of law and must take a three day long bar exam before they are allowed to represent clients. In addition to all this, once a potential attorney passes the bar exam, they still must pass the Character & Fitness review, which consists of a required interview with a member of the bar committee. In this interview the candidate's criminal past will be examined to keep those with a questionable past from becoming an attorney.

³ Available at <http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPaid=37505> , see link to Model Standards of Conduct for Mediators

⁴ See, New York State Bar Association Committee on Professional Ethics, Opinion 736.