Sex, Lies and Divorce Mediation

by Judith M. Wolf

Divorce mediation is undoubtedly one of the fastest-growing areas of alternative dispute resolution (ADR). It is probably also the least understood. This article will attempt to define mediation in a family law context. It will seek to dispel many of the myths surrounding divorce mediation and to answer the questions frequently asked by attorneys and potential clients.

The resolution of domestic disputes through consensus, negotiation and settlement is as old as the tribal council. It has, apparently, taken us decades to catch on. Many divorce lawsuits turn into ugly, highly adversarial proceedings. In 1973, when Arizona began granting "no fault" divorces, the goal was to remove the shame and guilt from divorce, especially from the public divorce trial. In practice, that has not been the case. Parents in custody matters accuse one another of abuse and neglect. Domestic relations judges gossip that neither party in the divorce trial tells the truth. Whether legally relevant or not, courts read pleadings about "the other woman," "mommy's boyfriend" and who coerced whom to commit tax fraud. Sex and lies are sadly a part of everyday life for the divorce bench and bar. Divorce mediation is one attempt to discourage the deceit and diffuse the negativity.

In divorce mediation, a neutral facilitator meets with the divorcing parties to assist them in managing and organizing a settlement. The model of co-mediation has been very successful in this context: most often a mediator who has a legal background working with a mediator with mental health strengths. Most professionals agree that gender balance is best achieved in a co-mediation with male and female mediators.

Divorce filings have increased substantially in Arizona over the past ten years and it takes longer than ever to complete a litigated divorce. Post-decree filings have increased as well. Mediation can be used by previously divorced parties to resolve modification issues or issues of enforcement. Although mediation doesn't always resolve disputes incident to a divorce or post-decree situation, it is a viable alternative to litigation.

Although mediation is often compared with other ADR methods, it is important to distinguish it — especially from arbitration and the settlement conference. In arbitration, the neutral arbitrator serves as a judge, listening to the evidence and the arguments of the attorneys and rendering a decision. The decision is the arbitrator's view of how the divorce issues should be resolved. In mediation, it is the parties' agreement that controls. The settlement conference, although more similar to mediation than is arbitration, also has some distinct differences. The settlement conference generally occurs when a case is advanced, but sometime prior to trial. By that time the parties, and their attorneys, have often become positional and polarized, and, in many instances, informal settlement discussions have taken place and failed. The settlement judge must recognize that emotions, and by that time, the stakes, run very high for both parties. The judge will often invite each side to make an opening statement before negotiations begin. That offers each party an opportunity to state his or her case as optimistically as possible, before entertaining compromises which may be introduced by the settlement judge. Mediation is distinct from a settlement conference in that the parties are generally not as positional and may in fact be unclear or uncertain as to what their independent view on any given issue may be. Mediation often occurs very early in the life of a divorce, so that creative options have not yet been considered, and discarded.

At the first mediation session, the mediator helps the divorcing parties identify the issues to be resolved, and helps to generate strategies for resolving them. The issues could include custody, access or visitation, child support, spousal maintenance, property division and the valuation of assets. It is often advisable to include input from other professionals in the mediation process. If the parties do not agree on the valuation of the family residence, for example, obtaining a market analysis from a real estate broker or appraising the property is an option. If there is a family business or professional practice, the mediator might suggest a list of business evaluators from which the parties could select an appraiser. The range of values provided by the business evaluator would then be used to settle the property division aspects of the case.

The key to mediation is that although the mediator helps the parties manage, organize and reach consensus on all of the disputed issues, it is the parties themselves who decide how to approach the resolution of their issues and what kind of settlement works best for them.

The Advantages of Mediating a Dissolution

There are numerous reasons why mediated divorces can be an advantage for the divorcing couple. Clearly, mediation is not for everyone. If one spouse's agenda is vengeful, mediation may not meet that party's needs. If there has been domestic violence or child abuse, many professionals question whether mediation is an appropriate avenue for resolution. If parties will not fully disclose assets and liabilities,

mediation cannot proceed. If a power imbalance between mediating parties cannot be resolved or controlled, mediation may pose a risk to the weaker party. In most other instances, mediation is a very viable option. The advantages are clear. Mediation is:

Efficient. Resolutions obtained through mediation normally take between four and ten weeks; a divorce settlement obtained through litigation, or a trial, can take up to two years. In the litigation context, once a Petition for Dissolution of Marriage is filed, it generally takes two or three months to complete a hearing for temporary orders, discovery may consume from six more months or even a year, and the case will be set for trial in approximately 18 months.

Cost effective. Mediated cases generally cost from $2,000 to $4,000, compared with the cost of traditional litigation, which, in complex cases, could exceed $50,000. Attorney fees are frequently an issue of dispute in litigated divorces and post-decree matters. It is not unusual to have attorney fees that exceed the parties' assets at the time of trial. In many situations, the spouse with less access to the community funds may be severely limited in his or her ability to wage the discovery war, hire the best expert or take the case to trial. That situation may result in an attorney withdrawing from representation due to non-payment of fees. Even where the attorney is able or willing to work without getting paid, the fees may become the largest liability of the community and thus the attorney's need to settle (and get paid) may be in direct conflict with the best interest of the client, or the needs of the children. The impact of those fee-related concerns is greatly diminished in mediation.

Convenient. Divorcing parties have the flexibility to make appointments based on their schedules, not that of the judicial system. Mediation appointments occur in the mediator's office rather than in the courthouse.

Voluntary. Divorcing parties reach their own agreements — the mediator is a facilitator who helps identify issues and manage creative solutions.

Confidential. All information discussed or disclosed during mediation is private.

Advantageous for children. Mediation often provides an opportunity for the divorcing parties to enhance their communication. It allows parents to reach mutually acceptable and individualized agreements concerning their children. Parents are not diverted from parental duties because of lengthy, adversarial court proceedings. Parents are not forced, as part of the litigation process, to say destructive, harmful things about the other parent. The parents can work with the mediator to fashion a parenting plan that will address the division of custodial time and the allocation of legal responsibility, and that will govern the parties' relationship to one another as parents, and to the children. The advantage of a mediated parenting plan is a key issue, since many divorce cases in Arizona involve minor children.

An emotionally healthy way to get divorced. Mediation involves attending to the emotional needs of clients and providing for their financial requirements. The open mediation process allows parties a better opportunity to understand their feelings and, in many cases, to build communication skills they can use in ongoing dealings with their ex-spouse. The psychological aspects of dissolution are often ignored in litigation, because there is no practical way to deal with them. Those issues can be more easily acknowledged, and dealt with, through mediation.

Creative and individualized. In mediation, the parties can craft a more creative, individualized plan than litigation generally provides. The domestic relations courts are extremely over-taxed with original and post-decree divorce matters. Idiosyncratic agreements that meet the specialized needs and desires of divorcing parties seldom find their way into the average divorce trial — there simply isn't time. Parties who want to try imaginative parenting plans, unusual property divisions or innovative support options are well advised to reach those agreements during mediation. Tax implications can also be handled in a more practical and creative way through mediation.

The Mythology of Mediation

A number of myths have evolved regarding mediation — many of which are untrue, and which serve as a deterrent to the potential user of mediation — either the client or the attorney.

Mediating parties must be able to communicate. Untrue. If parties were able to settle their disputes without the intervention of a third-party facilitator, they wouldn't need mediation. Most people who start mediation cannot communicate. Their attempts at self-help have failed. They are angry, hurt, discouraged and suspicious. It is the job of the mediator to elicit information from each mediating party, and to manage and organize their attempts at communication to a joint focus — the mediated agreement.

If one party is angry, mediation won't work. Untrue. Mediating parties frequently begin to argue during mediation. It is the mediator's job to keep the couple focused and on task. If necessary, the mediator will separate the parties and conduct private "caucuses," working with each party separately during the mediation, to effect a final, joint resolution of the divorce.

Women are not protected by the mediation process. Untrue. Interestingly, research conducted over the past ten years on mediation has shown that women, as a group, are more pleased with the results of mediation than are men.[1] If there is a power imbalance between the parties, it is critical that the mediator recognize the imbalance and take steps to remedy it. Most frequently, power imbalances are really data or information inequalities. It will be important in that situation for the mediator to discuss with the less-

informed party how best to obtain that information. Often, the mediator may suggest the assistance of an accountant and financial advisor, as well as, of course, independent legal counsel. Such options for those support services can be offered. Generally, once that party has had professionals with whom to review the financial information, the perceived power imbalance is rectified.

Mediation is for reconciling differences. Untrue. Mediation is not designed to bring the marriage back together. Parties who appear for mediation have generally decided there is to be a dissolution.

Mediation is a form of counseling where everybody sits around and talks and nothing is really accomplished. Untrue. Mediation is not counseling. The communication that occurs among the parties and the mediator is substantive, focused, goal-directed conversation, not a discussion of marriage-related issues and a rehash of what went wrong.

You can't mediate complex, large-asset divorce cases. Untrue. The issues being mediated are not determinative of the success, or failure, of mediation. That has much more to do with the skill and training of the mediator, and the desire of the parties to effect their own settlement without an adversarial process.

Mediation is a waste of time and money, since it's non-binding. Untrue. While it is true that mediation is a voluntary process, it is goal-directed to a settlement of the dispute. Further, if mediation is successful it will take far less time and cost far less than a trial.

You can't do mediation until all discovery has been completed. Untrue. While it is helpful to know the nature and value of assets before negotiating a property division, for example, that information can and should be obtained during the mediation process.

The Role of the Attorney

All parties to mediation are advised to seek independent legal counsel — to assist them during the mediation process and to review the settlement documents resulting from the mediated agreement. Attorneys are also encouraged to participate in the mediation; although in divorce mediation, it is not uncommon for parties to attend mediation sessions without their attorneys. If you, as the attorney, are to be involved in a mediation, there are some guidelines or suggestions that should be followed. Initially, selling the idea of mediation to a divorce client may be difficult. As the advocate, you should be aware of skilled mediators whom you would feel confident in entrusting with your client, and his/her issues. It would also be advisable to understand some of the common criticisms of mediation, so that you can reassure your client. Obviously, a positive presentation of mediation as an option will go a long way in encouraging your client to be involved in and successful in mediation. The more you, as the advocate, know about mediation, the better. Another problem may be to sell the other party on mediation. Advocates sometimes worry that proposing mediation is conceding weakness in their position. That concern should be alleviated by the court's overwhelming support of mediation and other alternative dispute resolution options.

Once the mediation has been agreed to by both sides, it should be scheduled as early in the litigation process as possible. The attorney's job then is to prepare the client for mediation, whether or not the attorney will actually be present during the mediation. Discuss with the client all the issues, and facts supporting those issues, to determine possible areas for creative solutions and compromises. Evaluate whether enough discovery has been completed to negotiate as an informed participant. Decide whether it makes sense for an expert to attend the session. Encourage the client to look forward to imaginative ways in which the case may be settled, rather than backward on all the things that failed with the marriage, or that are negative about the marital partner. Tell the client to be patient with the process. Mediating a divorce is hard work. Often clients want something from the litigation process that cannot be satisfied — revenge. Review for the client the inability of the judicial process — be it mediation or litigation — to satisfy that blood lust, and then reinforce the positives of settling rather than litigating the divorce.

Divorce mediation is being recognized as a viable option to litigation in our state and around the country. Its virtues are its non-adversarial nature, the opportunity to reduce stress on the family, especially the children, and to do so in a cost- and time-effective way.

The Status of Mediation in Arizona

Attorney mediators in Arizona have been concerned about their role in drafting divorce-related documents. An inquiry was made to the State Bar regarding that issue. The Bar issued Option No. 96-01 on February 7, 1996 indicating that ER 2.2 does not apply to an attorney mediator who acts exclusively as a neutral for mediating parties or who prepares a non-binding memorandum of understanding if full disclosure is made to the participants that the mediator is not acting as an attorney. The Bar stated further that since there was significant disagreement within the review committee regarding the appropriateness of the attorney mediator drafting other divorce-related documents, lawyer mediators should use their own professional judgment on that issue.

Mandatory mediation of custody and visitation issues through conciliation services or other court-related entity is present in most counties in Arizona. In Maricopa County, Rule 6.8 requires that all custody-related issues in divorce be mediated. In most of the larger counties, private mediation for custody-related issues is also specifically provided for in the local rules. Maricopa County has been exploring the use of special settlement commissioners, but it is awaiting further developments on the certification of mediators before establishing a mediation panel. In 1996, Arizona passed House Bill 2093, which authorized superior courts in each county to decide if they wanted to charge fees for ADR services. The next step is to pass local rules to implement the charging of fees for ADR services. The Arizona Rules of Civil Procedure, Rule 16 (g) invests the court with authority to order ADR in any case, on its own motion or the motion of any party, where the court has created or authorized an ADR program "by appropriate local rules." Such a local rule was proposed in Maricopa County in 1996. Rule 2.20 would give the courts the power to order litigants to participate in ADR procedures, which could include the use of private mediators whose fees would be taxed as costs. Although the rule was approved by judges and lawyers on all of the relevant county committees, it was not adopted by the Supreme Court. Pima County had also proposed a rule similar to Local Rule 2.20 which was also not adopted by the Arizona Supreme Court. Coconino County currently has such a rule, Rule 18 Alternative Dispute Resolution, which establishes a specific program, managed by the county court system, for the use of ADR procedures. The goal is to obtain approval of such local rules throughout the state.

Currently, there is no certification or licensure for mediators in Arizona. The Alternative Dispute Resolution Association (ADRA), however, has been working on draft certification rules for several years. Although certification is still not in place, it is likely that for certification in the area of divorce mediation, individuals will be required to complete a 40-hour basic mediation course and a 20-hour advanced course in divorce mediation. In addition, they would have to be observed conducting mediation by an expert panel. The Academy of Family Mediators publishes a listing of approved training programs and accepts members at both a general membership level (any interested person) and a practitioner level (one who has completed at least 60 hours of formal training, has completed at least 100 hours of mediation and has submitted for approval at least six completed mediation agreements).

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ENDNOTE

1. See, for example, Emery, R.E., and Wyer, M.M. "Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents." *Journal of Consulting and Clinical Psychology*, 1987a, 55, 179-186.
   Davis, G., and Roberts, M. *Access to Agreement*. Milton Keyes, England: Open University Press, 1988.
   Pearson, J. "The Equity of Mediated Divorce Settlements." *Mediation Quarterly*, 1991, 9 (2), 179-197.
   Kelly, J.B. "Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes." In J.B. Kelly (ed.), *Empirical Research in Divorce and Family Mediation*. Mediation Quarterly, no.24. San Francisco: Jossey-Bass, 1989b.