General Concepts

Mediation Defined:

Mediation is the next step beyond direct negotiations. It involves a neutral third party who attempts to "facilitate" settlement negotiations between the disputing parties. [See CA Evid § 1115] "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

"Mediation vs. "Negotiation":

Negotiations are the most common method of dispute resolution and should be the first step in the settlement process. Negotiations generally take place directly between the parties and their attorneys - a third neutral party is generally not involved. There are many forms of mediation - generally all of them involve the participation of a neutral third party.

Advantages And Disadvantages Of Mediation

Advantages:

There are numerous perceived advantages to mediation of domestic relations disputes:

- Mediation may diminish the conflict between the spouses during and after mediation, benefitting them and their children;
- There is usually a higher level of initial compliance with settlements reached through mediation (people are more likely to comply with agreements in which they have participated);
- Mediation is less costly than a comparable adversarial divorce; and
- Support agreements reached in mediation may provide "extras" not usually provided by court orders (e.g., agreement for college tuition and post-high-school support for children otherwise capable of earning their own support).

Disadvantages:

However, there may be significant disadvantages to divorce mediation. Many lawyers feel that where the economic issues are complex and varied, or one spouse dominates the other, the case is better suited for the adversarial process than for mediation. Here are their concerns:

Discovery Issues:

Marital settlements cannot be negotiated without full disclosure of the spouses' finances and property. There is no way to compel such disclosure in mediation. Thus, mediation is often successful only after discovery is complete.

Valuation of assets:

Expert opinion may be required where community assets are difficult to value (e.g., raw land, closely-held corporations or a professional practice).If the case goes to court, each spouse will have a separate expert, and opposing counsel can cross-examine on valuation questions. However, mediators often encourage spouses jointly to select one expert for this purpose. Choosing a single expert may be risky for the spouse who is less familiar with the asset in question. The expert's valuation may be affected by whatever information is obtained from the spouse who is more familiar with the asset.

Joint custody arrangements:

Mediators often recommend "joint custody" of children. But this simple solution may prove unworkable where parents are hostile and inflexible toward each other. In such cases, court-ordered custody and visitation rights may be a better solution.

Power imbalance between spouses:

Disparities in the spouses' education, abilities, and their psychological and emotional makeup often impact mediation. This is because mediation depends to some extent on the spouses' ability to communicate their concerns. To the extent one spouse dominates the conversation, the other spouse may be at a disadvantage.

Domestic violence:

Mediation may be inappropriate where one spouse has a history of abusive behavior toward the other. The concern is that the mediator may urge reconciliation, putting the battered spouse at further risk. Court orders restraining domestic violence may be a safer route than mediation in such cases.

Family Court Programs

Mandatory Mediation of Child Custody Disputes:

Publicly funded court-annexed programs are now in effect in California and several other states for mandatory mediation of child custody and visitation disputes. All contested child custody or visitation issues in a pending case (other than a domestic violence case) must be set for mediation before or concurrently with the setting of the matter for hearing by the court. [Ca Fam §§ 3170, 3175; see also O.C. Sup.Ct. Rule 703(C)] Mediation proceedings are also required in connection with contested requests for visitation by a step-parent or grandparent of the child. [Ca Fam § 3171]

The mediator has the duty to "assess" the children's needs and interests. But only the custody and visitation issues are mediated, not support or property division. [See Ca Fam §§ 3180, 3178]

The mediation proceedings are mandatory. A recalcitrant parent's failure to participate in the mediation may estop him or her from being heard on the custody or visitation issue in court. [Marriage of Economou (1990) 224 Cal.App.3d 1466, 1487, 274 Cal.Rptr. 473, 486; and see O.C. Sup.Ct. Rule 703(C)(1) --$50 sanction may be imposed for failure to attend mediation]

The purposes of the mediation proceeding are (1) to reduce acrimony that may exist between the parties, (2) to develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child and (3) to effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child. [Ca Fam § 3161]

Nonbinding Arbitration of Community Property Disputes:

In marriage dissolution actions, the court has discretion to order issues involving the character, value and division of community property worth not more than $50,000 submitted to "judicial arbitration." [Ca Fam § 2554] "Judicial arbitration" is the nonbinding procedure set forth in Ca Civ Pro § 1141.10 et seq. Either party reserves the right to a trial de novo following the arbitrator's award.

Dependency Court Mediation:

Each juvenile court has been encouraged to develop a dependency mediation program for the benefit of the children before it. The goal is to provide a problem-solving forum where all interested persons can develop plans in the best interests of the children, emphasizing family preservation and strengthening. [See Ca Wel & Inst § 350(a)(2)]

"Classic" Mediation Between The Parties

There are numerous forms of mediation depending on how active a role the mediator takes, whether attorneys are actively involved, and whether the mediator is empowered to render a binding decision.

In "classic" mediation, the mediator meets directly with the parties (attorneys generally not involved) and attempts to facilitate settlement negotiations. The mediator's primary function is to help the parties evaluate their positions realistically so they can move toward settlement on their own. The mediator usually plays a passive role, and does not express any judgment or opinion on the merits of either side's position. The mediator's main role is to help the parties evaluate their positions realistically, and to keep them talking and thereby moving toward settlement. This process is particularly valuable to preserve an existing relationship between the parties.

Classic (or "facilitative") mediation may be useful before a lawsuit is filed, or after discovery when information has been fully developed, or at any time when settlement is stalled because of communication breakdowns. A facilitative approach is often used to clarify the issues and break an impasse through direct discussions

Voluntary Settlement Conference

The term "mediation" also applies to voluntary settlement conferences before a retired judge or other experienced litigator. Here, attorneys usually represent the parties and make their presentations. The mediator (settlement judge) takes a much more active role in attempting to settle the case, and often expresses an opinion as to its merits and settlement value, but is usually not authorized to render a binding decision.

A voluntary settlement conference is similar to the "classic" mediation format. However, unlike classic mediation, there is no concerted attempt to get the parties to focus on their respective interests, attack the underlying problem, and come up with their own solution. Instead, a VSC is more focused on settlement of litigation. An evaluative approach provides a candid and confidential assessment that often helps move the parties toward settlement. At a settlement conference, the settlement officer plays a much more active role than in "classic" mediation. The settlement conference judge, usually a retired judge or experienced litigator, will both express an opinion (often quite strongly) about the substantive merits of each party's position, the probable outcome at trial, and the settlement value of the case; and attempt to persuade the parties to accept the compromise position.

Binding Mediation

Parties sometimes authorize the mediator to render a binding decision in the event an impasse is declared with respect to settlement negotiations. The dispute resolution procedure then becomes, in effect, an arbitration. This provides a fast, inexpensive way to overcome deadlock where the remaining alternatives are arbitration or trial, which are more formal and time consuming proceedings.

For example, the parties may agree that the mediator will formulate a monetary or nonmonetary final position, which will then be incorporated into a written settlement agreement to be signed by the parties or entered by stipulation as a binding arbitration award or judgment. Typically, the parties also agree in advance to certain limitations on the mediator's discretion (e.g., "high/low" limits)

Selecting A Mediator

Many domestic relations mediators are mental health professionals. Some are also lawyers. Some hold advanced degrees in psychology, social work, counselling or a related field. These practitioners have their own associations, including the Academy of Family Mediators (AFM); the Society for Professionals in Dispute Resolution (SPIDR); and the Association of Family and Conciliation Courts (AFCC).

Lawyer vs. non-lawyer mediator:

Mediators trained as psychologists or marriage counselors are often skilled in improving communications and bringing the parties to agreement on custody and visitation plans. However, using mental health professionals rather than lawyers may create certain problems. Dissolution cases are often divided between custody and financial issues . . . but it is sometimes difficult to tell which is which when a spouse's new interest in parenting appears to be directly related to support issues. If it is primarily a custody dispute, the parties may prefer a mediator with a psychological background. If it is primarily a financial dispute, someone who is well-versed in the financial and legal issues involved, rather than a mental health professional, may be preferred.

Drafting Settlement Agreements After Mediation

If settlement is reached through mediation, some mediators actually draft the settlement agreement. Other mediators simply prepare a "memorandum of understanding" on key terms for the parties to sign. The mediator then turns this over to the spouses' independent counsel to draft a formal settlement agreement.

There are also certain statutory limits on what can be negotiated in a marital settlement, through mediation or otherwise:

- The spouses or their attorneys know that community assets--once the assets have been identified and their value determined--must be divided equally if the case goes to court (see Ca Fam § 2550). Therefore, marital settlements rarely result in unequal division; and if they do, the spouse obtaining the larger share usually makes greater support payments or pays for the unequal division in some other way.
- The spouses or their attorneys also know court-ordered child support must be within the statewide uniform statutory guideline (see Ca Fam § 4050 et seq.). Thus, any agreement for child support will normally meet or exceed the statutory guideline. (If it does not, the spouses' agreement will not necessarily bar the court from ordering a higher amount; see Ca Fam § 4065.)
- Finally, the spouses or their attorneys know there are certain statutory presumptions regarding child custody and visitation orders (see Ca Fam §§ 3040 et seq. and 3080 et seq.); and that the court retains power to determine what arrangements are in the best interests of the child (Ca Fam § 3011). Thus, the spouses' agreements cannot bar the court from reexamining the child custody or visitation issue.