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Early Mediation Can Facilitate Divorce Cases

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Family lawyers should embrace early mediation as a creative tool that makes them more attractive to clients and helps them cast a net for a wider client base. Early mediation is an alternative methodology to assist parties in resolving their conflicts. It puts in place a process for cooperative dispute resolution that, once established, can ease tension and cost for a divorcing family.

As disputes diminish and divorcing parents' relationships are preserved, client satisfaction will improve, which is vital for an attorney's business model. Attorneys are missing the modest means market that is going it alone. To recapture this market, attorneys can and should offer the efficient and economical pathway of early mediation to attract a disappearing client base.

In the form of mediation that attorneys typically use, the attorney prepares a client's case for trial, engages in discovery, including interrogatories, production, depositions and expert retention, all before mediations are sought (usually as the last best alternative to the unsure results of a trial). During this process, pendente lite matters are handled through either short calendar hearings or old-fashioned negotiation. The result is that the parties have learned that litigation is the "one-size-fits-all" notion of resolution, until they finally have their marathon mediation, typically on the eve of trial. This mediation, by necessity, is evaluative, in the sense that each party, primed for trial, is making all mediation decisions based on likely outcomes if a trial ensues.

While useful, this "late-in-the-game" mediation should not be the only option an attorney recommends to her or his client. It portends a long, difficult road for someone who wants nothing more than to pick up the pieces and get on with life. Instead, early mediation should be considered where it presents an opportunity to minimize cost, time and emotional conflict.

Early mediation allows parties, with the advice of their attorneys, to control the cost and conflict embedded in their divorce from its inception (without signing away the right to litigate where it may become necessary). A mediation process that is structured early in the divorce process, rather than after hearts have hardened and battle lines drawn, offers a client the opportunity to take control of both the process and the outcome.

The first steps taken by attorneys to stabilize a family's finances and parenting pendente lite provide the attorneys with a perfect opportunity to introduce early mediation as a less invasive way to avoid the costs inherent in litigation or litigation preparation.

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Early mediation necessarily involves multiple sessions that last one, two or three hours, where issues are identified and resolved both sequentially and concurrently. While discovery will likely be necessary, early mediation can result in a more facilitative environment provided by the mediator where participants: identify the nature of their disputes, discuss how they are currently resolving them, and design a process for how they want to resolve the disputes. The process is then applied to the identified disputes both as they arise and proactively.

Attorneys will rightly compare this model to collaborative divorce. It is not collaborative divorce, at its most fundamental level. While there are other differences between the two processes, most important, here the parties are not giving up their right to have their chosen counsel stay with them sink or swim, trial or settlement, as they do in the collaborative process.

Working with a mediator over time, the parties are able to build on their shared interests to come to healthier agreements at the end of the process. Although this model is often used by mediators who work with unrepresented parties, whether or not they have review counsel, it should not be exclusively for them. Counsel will have a higher level of client satisfaction if they offer this option as an alternative to more traditional end-of-case mediation or straight litigation (whether in court or arbitration).

As decisions are made on issues both as they arise and proactively, the parties will better understand each other's motivations so that incentives for settlement can be explored creatively. Use of this process will be invaluable in matters where there are two active, involved parents. Creative approaches early on as to how parents structure custodial decision-making and parenting time is invaluable. Finally, if early mediation is running into roadblocks regarding parenting, the attorneys will have a much earlier opportunity to determine whether counseling, forensic work or other third-party forces are necessary for the ultimate resolution of the custody matters.

What cases are appropriate for early mediation? Painting with a broad brush, there are a variety of categories that are arguably suitable. First, there are cases where parties are choosing to "go it alone" and not use attorneys due to the expense of litigation. Mediation costs less. Yes, you will make less money on a case, but you will have served the client well and in this very large basket of business, these are cases you are not getting now, anyway. Another large catchment are clients who want to solve their case amicably. As long as there is not an inherent, uncorrectable power imbalance, early mediation changes the paradigm from a default to litigation to a default toward agreement. This has to be more satisfying to the client.

When would I be hesitant to recommend early mediation? If discovery is being hotly contested and the person holding all the data also holds all the dollars, then an approach that provides for a decision maker to protect the nonmoneyed spouse may be necessary, at least initially. Power can shift in a relationship, and mediation can be helpful, once the pendulum has been placed in motion.

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Why am I recommending this form of mediation, which is likely less economically fruitful? The answer is simple: because it can be good for families and it can be good for the bar. I recently presented at a professionalism seminar on the role of the courts in dealing with self-represented parties, and whether an unintended consequence of the court's facilitating parties representing themselves is hurting the bar. Undoubtedly, as the courts must ensure access to justice for the indigent, an unintended collateral effect is that self-representation has been made easier for a party who would traditionally have hired an attorney, even if it is a stretch. To offer your client early mediation, you offer them a value-added expertise. Most law schools are offering training in mediation because they know it is good for the clients. I argue that it is also good for the lawyers.

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