

# NEVADA SPECIFICS REGARDING MEDIATION

While the attached article from Fair\$hare is a useful background piece on mediation, those participating in mediation in Southern Nevada should be aware of several important distinctions that apply here.

- The ONLY subjects of court-ordered mediation in Las Vegas (through the court's "Family Mediation Center," or FMC) relate to child custody and visitation. The mediators will NOT discuss child support, alimony, or other financial issues.
- There are private mediators in Las Vegas for child related issues, and/or other issues in a case.
- Typically, the attorneys do NOT participate in mediation through FMC; the clients go in alone with the mediator. Attorneys may participate in private mediation if the parties agree to it. The best way of obtaining an acceptable result is to know your options, and what you want, before you go in. We can assist you in determining the possibilities before you go to mediation.
- Normally, mediation through FMC is CLOSED mediation, so that what is said in mediation should be held in confidence. Still, you should not disclose anything you do not want repeated later in litigation.
- You are NOT required to sign anything in mediation, and have a right to go over a draft of any mediation agreement with your attorney BEFORE signing it, which is usually a good idea.
- As with anything else in the litigation process, if you do not understand some aspect of mediation, please ask.

## **“FREQUENTLY ASKED QUESTIONS REGARDING MEDIATION”**

### **What is mediation?**

Mediation is a non-adversarial process designed to help people resolve conflicts. It is facilitated by a neutral third party trained in conflict resolution. In mediation, the decisions and agreements are reached by the participants, not an outside party.

### **What kinds of conflict get resolved in mediation?**

One of the first uses of mediation in this country was in the field of labor law; employers and unions used mediation to help resolve conflicts over contracts. A little more than ten years ago divorcing couples started to use mediation to settle issues about custody, division of property, financial support and alimony. The use of mediation in the area of divorce has grown dramatically. Mediation can be used to help resolve many conflicts and disputes occurring within intimate relationships. Examples include a family business involved in long-term planning, a group of doctors who have a practice that is breaking up, or a group of siblings who can't decide how to provide care for an elderly parent.

### **Why do we need to know about mediation?**

Times are changing. Many divorcing couples are looking for alternative ways to resolve issues related to divorce. Newspapers, legal journals, and mental health publications are increasingly focusing on inadequacies in the court system and the need for alternatives. Many states have passed legislation making mediation mandatory or permissive, as a first step in certain areas of family law litigation. In 1993, the American Bar Association formed a new committee on alternative dispute resolution. The interest and response of members has been overwhelming. Mediation is not going to go away.

### **Is mediation like the court process?**

No. Mediation is very different from the court process. When people use the court system to resolve legal issues that are involved in an adversarial process. The adversarial system is premised on the philosophy that one side is right and the other side is wrong. Even though we now have no-fault divorce in many states, the end goal of a divorce action is to win. For many people, the adversarial process promotes animosity and is emotionally draining. In those cases, few people leave feeling like winners.

Mediation is future-focused and needs-based. The goal is to arrive at a settlement that is fair to everybody and to do it through a process that is fair. People who use mediation to resolve their disputes make a fundamental commitment to work cooperatively, to mutually exchange information, to pick common experts, and, ultimately, to help each other understand information, to pick common experts, and, ultimately, to help each other do whatever is possible to meet the short and long term needs of the participants and their families. Some say it is a "win-win" system, but that is probably a little simplistic since few people feel like winners when their most intimate relationships fall apart.

### **Why are people searching for alternative ways to resolve their legal issues?**

There isn't just one reason. Some people don't have the emotional stamina for lengthy negotiations and court fights. Certain clients feel strongly about retaining the right to make their own decisions, rather than having decisions about their future made by outside third parties such as judges. In select situations, clients believe they can avoid the devastating costs that can accompany complex and highly adversarial matrimonial litigation. Some parents trust that mediation is a process that can keep their ongoing mutual role as parents on constructive and productive course. Other couples just have a jaded view of the traditional court system, and think they can reach better results some other way.

### **Is being in mediation like being in therapy?**

No. Although one job of the mediator is to help the participants hear and understand each other, the primary focus on mediation is not to help people reconcile their marriages or decide whether to

separate. The decision that a divorce will occur is generally made before people begin mediation. Mediation is not designed to help the participants learn more about their individual psychological issues, or how these issues may have gotten played out during their marriage. Mediation does help people reach fair agreements by providing a forum for empathic listening, the re-framing of conflicts, and specific planning.

### **What kind of things do people do in mediation?**

Mediation is very task-focused. A divorcing couple gathers information about their current economic situation and assesses their future needs and the needs of their children. These tasks include working on comprehensive budgets, making lists of assets and debts, sharing documents with each other to support the economic overview that is prepared, figuring out what kind of emergency money is needed for the future, understanding the educational needs of the children, trying to see what is available for retirement, etc. It is only after all of this information is gathered that people actually make final decisions about how to divide property and work out support, although they may make decisions along the way regarding immediate concerns.

As people work on these tasks, the mediator helps them explain things to each other and listen to each other. When a couple is struggling to resolve a difficult issue, the mediator helps them generate other options. In doing this work, the participants change some of their communication patterns and develop more empathy, allowing each person to strive for overall fairness.

### **Don't people sometimes disagree about what fairness really means?**

If people didn't have disagreements and didn't have conflicts they felt unable to resolve, they probably wouldn't be in mediation. Often, however, the conflicts have come about because people have made different assumptions, they have felt too vulnerable to listen to each other, and they have not had help finding creative solutions. When real information becomes the focus, and when they help each other figure out their life needs and get some support to find workable resolutions, their perceptions of fairness often become quite similar.

### **Is it true that divorcing couples always end up with joint custody?**

No. couples reach agreements about many different kinds of parenting plans. In mediation, the issue of custody is generally re-framed as a workable parenting plan that meets the needs of the children and the parents. Parents figure out how on-going life decisions (everyday decisions and larger decisions) will be made for the children, and what kind of living arrangements will be in place. Sometimes one parent makes most decisions and other times decision making is shared. Sometimes the children live primarily with one parent, and other times the parent work out shared living schedules. What is true is that many parents who work cooperatively in mediation often receive a lot of support and information about how to keep working cooperatively in post-divorce parenting.

### **Can you give an example of a mediated solution to property distribution that might be different from what generally happens in court?**

Let's use a real estate example from an actual mediation (with the facts changed a little to protect the parties). Often courts award certain parcels of real estate to each party, or order a buy out of real estate by one side, or real estate is sold and the money is divided. Courts generally would not structure a real estate partnership to follow a divorce so a couple could keep real estate in their family. In one situation, the couple owned a three million dollar country retreat they wanted to keep

for their children and grandchildren. If that couple had gone to court, one side or the other would have been pushed to agree to a sale. There would have been fights about value. In mediation, the couple's mutual desire to keep the land was heard and addressed. The couple got support to keep working cooperatively. They worked out ongoing joint ownership and use of the land as well as agreements regarding future maintenance and upkeep. They also negotiated the terms of a trust for the children so the land remained a family venture.

This outcome was probably different from a litigation-based solution. Sometimes a mediated decision is very similar to a decision a court might make. In those situations, however, a couple who has used mediation often feels more satisfied because they have had the freedom to explore many options and make the decision themselves.

### **What kinds of people act as mediators and what kind of training do they have?**

People with a range of backgrounds have been trained to work as mediators. Many are attorneys or therapists; others, such as financial planners, have also entered the field. Most mediators have a professional degree in a relevant discipline, such as a law or mental health, prior to their training as a mediator. Mediation training generally includes several content areas, mediators need baseline legal knowledge about local statutes and practices. Mediators also need to have some knowledge of the interpersonal process and the psychology of conflict. A third area involves knowledge of conflict resolution theory and the development of skills designed to help resolve disputes.

Some mediators work alone; others work in teams. A team approach particularly when the mediators come from different professional disciplines, often allows for more flexibility and a broader resource base.

Mediation, like many other professional fields in their early stages, is not yet regulated through licensure. Nevertheless, some states have passed laws setting minimum educational and training requirements for mediators.

### **Are mediators regulated by any particular ethical standards?**

Any mediator who has been trained and is actively working in the field should subscribe to some set of ethical guidelines. As mediation is not a licensed profession states do not have a body that passes ethical rules. However, most professional organizations for mediators must adhere in order to be members.

### **Are the things that happen in mediation confidential?**

This varies from state to state. Generally, the issue of confidentiality is governed by ethical rules and guidelines. Few states have statutes providing a privilege for communications between mediators and their clients. Most mediators ask clients to sign agreements that contain a confidentiality provision, and also a provision that says neither party will try to ever make the mediator testify in court. In Allegheny County, Pennsylvania, for example, judges in the family court have analogized mediation to settlement discussions, and have indicated they will not permit mediators to testify. The state of Virginia has a privilege statute for mediation and it is currently being challenged in the court system.

### **If people are in mediation, they must not need attorneys. Is that right?**

Attorneys still have a very important role to play when people are in mediation. Information and a comparable knowledge base are tools that empower each person; the development of self-

empowerment is critical to the mediation process. It is not the mediator's job to give legal advice. In divorce mediation, most mediators strongly support each person having independent legal counsel to provide that person with a complete overview of the law and to be available for advice and consultation outside the mediation process. If complicated issues come up, such as business valuation issues, or issues where the law is not very clear, the mediator may ask the attorney's to join the couple as part of a session. This lets the attorneys hear, first hand, what is happening, and provides an opportunity for the attorney's input.

### **Are the agreements reached in mediation binding?**

Some mediators may conduct their practices so that the agreements are binding. In some jurisdictions, courts mandate mediation for some issues related to the divorce; those processes may result in court orders. But most of the time when people go to mediation voluntarily, the document drafted is a Memorandum of Understanding and it specifically states it is not a legally binding document. Usually, the terms of the Memorandum only become legally binding after they are reviewed by the attorneys, and then either adopted or transposed into a separate document. The step that makes the Memorandum binding is handled by legal counsel for the parties.

### **Do people end up spending more money since they still need attorneys?**

People who are engaged in conflict spend the great amount of money when decisions are made by judges after extended trials. In the traditional process, even if issues do not get to trial, the cost of resolution can be very high if the parties and/or the attorneys are not willing to turn over financial information, when they fight about values, and when they can't cooperate about interim matters. Under these circumstances mediation costs less.

However, mediation may not cost less than a well-negotiated agreement by two attorney's who are committed in helping their clients settle cases. Of course, the clients also have to be committed to settlement and be willing to cooperate.

Mediation does not generally cost more even though each party also has an attorney. The role of the attorney is very different. They don't negotiate or litigate. They consult, advise, and finalize agreements as adjuncts to a cooperative process; thus, their cost is contained, although their role is still very important.

### **How long does mediation take? Is it faster than going to court?**

Whether conflicts are resolved in the court process or in mediation, some of the timing depends on the participants. Mediation is not necessarily a short process. For example, it takes a little longer for people who haven't physically separated before they start mediation, or for couples who are recently separated. Sometimes the length of time is related to the complexity of the economic picture and the time for one person to understand money issues, or time for one parent to understand certain issues related to the children. Mediation sessions can be hard, psychologically, and at times, one person or the other needs a longer break between meetings.

It is not best to choose mediation because it is faster, just like it is not best to choose mediation with the hope it will be a lot cheaper. The time it takes varies from situation to situation.

### **Is mediation the best option for everyone going through a divorce or other conflict?**

Mediation is a choice. It is a choice that works well with many people; it may not be the best choice for others. There are some people who find it too painful to sit through meetings with a spouse.

Some people don't feel strong enough to negotiate. It can be difficult for people in early stages of addiction recovery to work in mediation, as there may be too many habitual patterns that interfere. For others, just having space away from one's spouse may be important.

It's not harmful for most couples to attend orientation sessions with a mediator to learn something about the process. The orientation and perhaps a few sessions can help a couple and the mediator make a reasonable assessment as to how useful the process will be. There are some situations, such as those involving a history of domestic violence, when even an orientation session and a few meetings may not be advisable.

### **Should a person who has been a victim of domestic violence ever be in mediation?**

That's a difficult question. Some who work in the field of domestic violence believe that the power imbalance in the relationship between the couple is so one-sided that mediation can only be harmful to someone who has been battered. That is probably too absolute to be true. On the other hand, some mediators think it isn't a problem at all, and suggest that a really good mediator can always protect and empower the significantly less powerful spouse. That is simplistic and also not true.

One important role of the mediator is to understand the dynamics of power in relationships, and to use her or his skill, over time, to help a couple slowly adjust to those power dynamics. Power dynamics are complex. Clearly, when one spouse (usually the wife) has been the victim of physical beatings, injury, psychological abuse, financial control and isolation, it may be absurd to imagine that she can work cooperatively with the person who has perpetrated that violence against her. She may be too weary to talk about anything at that point. There are many subtle and less subtle power differences in most relationships. Is one who has never had financial control less employed than one who has suffered bodily injury? It often depends on the people.

Cases involving domestic violence must be approached carefully. Good mediators have training about these issues and should have their own practice guidelines about how to deal with current and previous occasions of domestic violence. In a number of situations, mediators may feel it is not possible to proceed with a safe and fair process given the presence of domestic violence issues. It is a challenge for mediators to be able to take a clear position about the unacceptability of the abuse of power and the use of violence, and to effectively help empower one person, while maintaining neutrality in the overall mediation process. To do this, mediators must understand violence and control, be able to address them directly with the participants and be self-reflective enough to know their own power issues, these capabilities allow mediators to create a safe environment.

### **Maybe some people are just too vulnerable to be in mediation. That's what some attorneys say. Is it true?**

Some are. When domestic violence, addiction, recovery, and other issues are present, mediators must be cautious. It's also true that there is no system that fully protects everybody. Sadly, the traditional legal system can't seem to do it either. Many people don't have the emotional strength to even let their attorneys fight for them. One party in litigation is often able to transfer assets or conceal money. Some people lie to their attorneys and to judges. If one party has access to move money, that party can often outspend the other, impacting the result. Unfortunately, too often, the vulnerable party is not protected outside of mediation. In mediation, at least the process strives for fairness, strives to balance power, and creates a forum designed to help people work out complex issues.

### **Is there a difference between mediation that is voluntary and mediation that is court-ordered?**

When people freely choose mediation, and freely make a commitment to work cooperatively with each other, the process works best. That doesn't mean that court-directed mediation can't work. When disputes and conflicts have persisted for some time, people may become so entrenched in their positions that they never imagine being able to work out solutions together. Sometimes when parties are told they must go to a mediator, and they sit down for the first time, they find that, with the help of the mediator, they are able to begin to frame issues differently and develop answers.

**Isn't mediation a waste if all the issues don't get resolved?**

Even if all of the issues don't get resolved in mediation, the mediation process can help resolve at least some issues, or help people decide on another process to end the conflict. It can help the parties and the attorneys begin to get on a more cooperative path.

For instance, it may be that parents can work out custody, child support and property division, but they can't reach an agreement about alimony. This may occur because a real difference in perception exists about what the law says. It may be that the last issue will have to be resolved through a negotiation often works better because the clients have become accustomed to cooperating and they just need slightly different help to make one decision.

**Do people lose their legal rights if they mediate?**

Legal rights are not endangered if people enter voluntary mediation. As the mediation process may take some time, it is important to be aware of legal deadlines, and attend to them on an interim basis through interim decisions. Again, most agreements reached in mediation are not legally binding. The involvement of attorneys can be quite active.

**How can someone find out more about mediation?**

Talk to trained mediators in your area. Contact local mediation organizations, the American Bar Association, the Academy of Family Mediators, the Society for Professionals in Dispute Resolution or the Association of Family and Conciliation Courts. Check for mediation training programs listed in many legal publications.

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