

To Mediate or Not That Is The Question: By Justin Thomas Allen, JD, Mediator and Attorney at Law—JTAFirm.com

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The trend of the California courts seems to be to encourage parties to mediate disputes or to enroll in other forms of Alternative Dispute Resolution (ADR). This article focuses on Mediation, which is a non-binding form of ADR. Is this trend a good one? It all depends on who you ask, as seems to be true in just about any area of law. I for one believe that mediation is an important part of litigation. Because it allows the parties to air out their disputes in a less intimidating setting rather than a court of law.

The mediator stands between the parties figuratively speaking in most instances, yet literally speaking in other circumstances. The mediator is charged with the duty to keep the confidences of those involved in the process. This confidential nature is what makes the process as successful as it can be. It is disarming to be in a room with someone that you have the ability to trust. Trust is at the heart of Mediations due to the fact that the parties are often at the worst time in their lives.

As a matter of choice, people don't litigate unless there are important issues at stake or feelings are hurt. Often Mediation is the only place that one can go to get an apology, to find alternative remedies including anything from erecting a sign in memorial to a lost loved one, or just about any other equitable type of recovery. Mediation is a place where feelings can be addressed whereas a court of law is deliberately made to place feelings aside and award money instead.

As a mediator and litigator, I have observed after the fact, issues that arise in peoples' lives including: dealing with school bullies; restoring home and finances to elder persons who find themselves taken advantage of; making sure that the nursing homes are treating elders with special care as they deserve; and many other types of serious issues. Mediators have the ability to take two or more sides to a controversy and condense all of the noise down to the ultimate question based on their experiences. What are the parties looking for? If you can think outside the box to determine the answer to that question, you are well on your way to resolving the dispute.

The mediation process is not compulsory except in regard to child custody cases and certain real estate transactions or based on other contract. Thus, the parties are willing to come to the table voluntarily. Remain cognizant of the fact that no one wants to litigate a dispute, despite all of the gamesmanship and saber rattling that goes on during the process. Litigation takes years, it takes lots of money, energy and there is no way to predict what a jury will do when exposed to the facts of your case. That information should be of no surprise to many of you, yet to others, it will be helpful in resolving your dispute.

Mediation has the potential to resolve disputes that have the potential for resolution in a permanent manner. This is because it permits parties to fashion a written settlement agreement that is very difficult to overturn based on CCP Section 664.6 which is the enforcement mechanism for most agreements. In the event of failure to comply with terms agreed to in mediation, the court will retain jurisdiction to evaluate the reasons for non-compliance and make a ruling, more times than not, resulting in enforcement of the agreement as crafted.

The process of mediation will begin in many different manners. It is all dependent on the parties. A good mediator will contact both sides counsel prior to the mediation and request input as to the mannerisms of each particular client and their likes and dislikes for the procedure that will be followed. The procedure is fluid in application. The myriad options for construct of a mediation, include but are not limited to: 1) both parties meet in the same room and discuss their dispute in an amicable manner and then split into caucus (separate rooms). When the parties split into the separate rooms then the mediator walks between the rooms and passes non-confidential information back and forth until an offer is made. This is similar to the "car sale" scenario although the topics are often much more important than the purchase of a car. 2) the parties and attorneys remain in separate rooms from the outset and the mediator walks between rooms, gathering information and tailoring it to the given situation. 3) The mediator asks the attorneys to speak with one another, since it is often true that the attorneys are in control of whether or not an offer is recommended to a client, so the logic follows that if the attorney is on board then a deal can be made. 4) The Mediator and parties themselves, without attorney meet together to try to talk it out. The logic for this method is that attorneys are built to fight to the end and the parties themselves may be the only way to call a truce and resolve a contentious battle in the best interest of the respective party.

Mediation is a valuable tool to utilize if you believe you are capable of resolving a dispute. Keep in mind that the dollar figure that you have in mind is either too low or too high, depending on the side you are on. Just like the car deal, you will meet in the middle typically at the end of the day.

I enrolled in Mediator training through Pepperdine University Straus Institute, because I recognized that mediation is a lasting process which is growing more every year. I also went through the training because more and more of my cases were going into mediation and I wanted to evaluate the process from the inside out to determine the techniques which are employed to obtain results for each of my clients. The process is highly dependent on the mediator as well as the parties. If the mediator is not able to adapt to the given circumstances; fails to maintain confidences, fails to evaluate the case using the parties ultimate goal or does not listen, then the mediation is doomed to failure. Likewise, if the parties are not willing to be flexible and open-minded, then the process will not work. At its essence mediation is a process of negotiation.

Good luck in your use of the mediation process. If you are looking for a mediator for one of your cases, consider reviewing my credentials and experience. I have been on the Mediation

panel at San Joaquin Superior Court in Stockton since January of 2009 and I have been actively practicing law since 2005.

Thank you for reading.

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