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Mediation encourages attorneys to step out of their 'zone of control'

When a client or family friend calls my office several times and won't specify what the issue is in a voice mail, 90 percent of the time they are looking for a referral to a divorce attorney. In my estate planning practice, I work with many clients (and friends) who are going through a divorce or who have just survived one. The more information I have about the divorce process, the better I can assist and support my clients.

In an effort to further my education, last month I attended a 40-hour intensive divorce mediation training program at Northwestern University's School of Continuing Studies led by Ericka Gray and Margaret Powers. The program drew therapists, counselors, financial advisers and attorneys from all over the country as well as Canada. The distance many attendees traveled to participate in the program heightened my awareness of the incredible training opportunities we have in our own backyard. Most importantly, the training opened my eyes to a new way of looking at divorce issues and working with clients to reach resolutions.

We are all familiar with the ramifications of litigation. While I often say that I am a "lover" (transactional attorney) and not a "fighter" (litigation attorney), I frequently hear colleagues express their frustration about the unpredictability and contentiousness of the litigation process. This is exacerbated in the context of divorce, where emotions are incredibly heightened. With traditional litigation, a judge or jury will decide the prevailing party.

In contrast, in alternative dispute resolution, including mediation, the outcome is determined by the parties themselves. The mediator is not the judge or the jury, but rather a neutral third party whose role is to facilitate the parties in reaching their own resolution. Family law attorney Loren E. LaPidus of Di Giacomo & Somers LLC, explains, "An adversarial process results in decisions being imposed on the par-

ties. Mediation frees people to make their own decisions."

As attorneys, we are trained to listen to the facts. Once we have the facts, we are typically the ones to identify the issues and present our clients with solutions. In direct contrast, a mediator acts as a neutral third party whose primary goal is to facilitate communications. Through a series of open-ended questions, the parties define their objectives, identify the issues and come to their own resolutions. Closed-ended questions, typical of traditional litigation, often require a yes or no answer.

While they can be incredibly useful in checking facts, they discourage conversation and can create tremendous frustration for the participant interested in expressing herself. In contrast, an open-ended question — "Can you clarify that for me? Tell me more." — allows for clarification and explanation. This line of questioning does not mean that a mediator cannot offer suggested solutions, but this must be done in a non-threatening manner so the participants do not feel defensive or question the neutrality of the mediator. For example, the mediator may ask, "Do you have any suggestions about how we might ... ? What do you think about ... ?"

Many states, including Illinois, recognize that contentious court battles that place children in the middle of the dispute are incredibly damaging for all parties involved — the parents and children alike (not to mention the attorneys). In divorce cases with child custody issues, the Illinois Supreme Court mandates mediation.

Beth Fawver McCormack, a principal at Kamerlink, Stark, McCormack & Powers LLC, is a mediator as well as a collaborative law fellow. Beth shared her experience as a court-appointed child's representative, where she makes recommendations based upon an evaluation of the facts and circumstances of each case. Since attending mediation training, she has been successful in giving parents one last opportunity to control the outcome of their divorce, rather than having one thrust up-

THE BUZZ



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Lindsey Paige Markus, a principal at Chuhak & Tesson PC., draws on her early career in business, finance and clinically applied neuroscience to communicate with clients and develop creative solutions to fit their estate planning and asset protection needs. Lindsey was named an Illinois Super Lawyers Rising Star in 2010, 2011 and 2012. She is licensed in Illinois and Florida.

on them by the court.

"There is a balancing act in helping the parents manage their own outcomes rather than imposing your recommendations, which they consistently ask for," she said.

Children are aware when their parents make the decisions surrounding their future rather than having an evaluator question them about their own wishes. The mediator may be called upon to help the parties reach a mutually agreed upon settlement for parenting schedules or may be enlisted to also address the division of assets. While mediation may be court ordered, after the initial session, the process must be voluntary in order to achieve results.

The mediation process is successful because the participants are empowered. Each party has the opportunity to express their grievances. Nevertheless, the me-

diator carefully balances the participants' need to express themselves with focusing on the issues at hand. The mediator works to help the participants maintain perspective and reach resolutions. The process is traditionally non-binding, but if the parties are able to come to an agreement, the mediator will document the agreement between the parties in a memorandum of understanding. This memorandum of understanding is then used by the parties' attorneys to draft a separation agreement or settlement agreement to file in court. Perhaps one of the most beneficial outcomes of the process relates to maintaining integrity and respect for one another even in the middle of parting ways. As LaPidus said, "A skillful mediator can channel the anger and stresses which can arise in divorce into a positive energy which can ultimately lead to the establishment of new, evolved relationships post-decree." In this way, mediation provides a platform for future decision-making as well.

More than anything, mediation training (and practice) requires attorneys to step out of their zone of control. Rather than leading the conversation, attorneys who act as mediators delicately guide the conversation. Since participating in mediation training, when contentious issues arise between clients at a meeting (i.e. in determining who will act as guardian of their children), I now find myself acting like a mediator. Instead of immediately offering suggestions, I try to help the clients find their own solution, offering insight without quickly jumping to my suggested resolution.

Clients love coming up with the solution on their own. As they feel like they are involved in the process, they become enthusiastic and develop some sense of ownership. Will I leave my practice concentrating in estate planning and focus on divorce mediation full time? Not this week ... but the training has left me intrigued to learn more about alternative resolutions and how they may impact pre-nuptial agreement negotiations and estate litigation issues.

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