

Mediation: The future is now --

The whys and hows of this method of resolving disagreements

By Hon. William L. Thomas*

Section 598.7 of the Iowa Code provides that the district court may order mediation "in any dissolution of marriage action or other domestic relations action." The section directs the Supreme Court to establish dispute resolution programs that include mediation, and grants the court regulatory authority subject to the provisions of 598.7(4) and (5).

Recently the court has directed the districts to report on what efforts they have pursued to establish mediation. The Sixth Judicial District has an established mediation program, and it is that program I will be referencing in this article.

The court is also considering replacing Chapter 11 of the Iowa Court Rules, entitled "Rules Governing Standards of Practice for Lawyer Mediators in Family Disputes," with the ABA/AAA/ACR Model Standards of Conduct for Mediators, promulgated in 2005.

In a word, change is afoot, and that usually makes lawyers nervous. I have no balm for your nerves, except to the extent that answers to a few questions might help.

What is mediation?

Chapter 679C governs mediation generally and provides for confidentiality of mediation communications and immunity for mediators under certain circumstances. It defines mediation as "a process in which

a mediator facilitates communication and negotiation between the parties to assist them in reaching a voluntary agreement regarding their dispute."

Note the emphasis on communication. This isn't just court sanctioned haggling or difference splitting. The idea is to provide the parties a safe, neutral place to communicate. The jobs of the mediator are to facilitate and assist, not dictate or direct; and the goal of the process is voluntary agreement about the dispute. No mention is made of settlement, which, though desirable, is to be reached by the parties, not by the dictation or direction of the mediator.

The mediator does not give legal advice, or make any recommendation to the court. A lawyer who mediates must be particularly careful about giving legal advice or being directive in the mediation process; once you start advising or directing, you may have two clients and that is frowned on in domestic relations cases.

Mediation respects the parties' right to self determination and encourages them to develop the working relationship they will need to enable them to parent their children after the final decree. Mediation can help the parties develop the tools to resolve future disputes on their own, thus reducing the need for modification and contempt proceedings.

Lawyers serve more as advisors and less as adversaries. The Court reviews the parties' agreements and, if the Court approves, incorporates them into orders and decrees.

Most people report greater satisfaction with mediation and its outcome than with litigation, since they feel more involved in the decision making.

Why is mediation better than litigation?

Sometime after my first full decade of presiding over divorce trials, I became convinced that there must be a better way. (O.K., so I am a slow learner.) While the adversary system is an improvement over dispute termination by broadsword, it is not as much of an improvement as we like to think, especially in family cases.

Mediation is clearly a better way to resolve, not merely terminate, disputes between people who will continue to have a relationship with each other after the current dispute. Parents will not stop being parents after the divorce decree is entered and the marriage ended. Courts can dissolve marriages, but they cannot undo DNA and unmake families. The parents will continue to have a relationship in the future. The adversary system merely fosters the battle mentality, and presents the parties with a destructive model for their future relationship.

Mediation is a more peaceful and much more constructive way to deal with inevitable conflict. And conflict is inevitable. If the model of conflict resolution is warfare or battle, people will be very reluctant to express the underlying conflict, which will not go away, even if unexpressed.

Mediation is a safer way to deal with what must be dealt with if people are to have any meaningful relationship with each other in the future. If the parents can deal with each other decently and less painfully, they are more likely to both be involved in their children's lives. The system may not do much harm when it drives parents away from each other, but it does incalculable damage when it drives parents away from their children.

Mediation may lead to a comprehensive settlement. Even if it does not, the parties can mediate the process of getting through the conflict to a final decision. In these days of reduced resources and delayed trials, that is a substantial benefit to the parties.


Litigation forces disputes into very narrow channels. Often the real issue, which

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actually energizes the dispute, is legally irrelevant. Until that source of energy is identified and dealt with, the dispute will go on, and on, and on, and on.

Who should mediate? What kinds of cases should mediate?

Some lawyers feel that mediation is "second class" justice. These lawyers want a judge to decide their cases, and I am flattered that they regard judge-imposed results as "first class" justice. I believe these lawyers are mistaken. I believe that first class justice will arise from the parties' own fully informed, peacefully made agreements. The judge is there to impose a result only if the parties cannot agree. The judge will probably learn enough about the parties' lives in a short divorce trial to impose a legally acceptable result, which may not reflect either party's idea of justice.

Mediation is certainly not appropriate in all cases. Whenever a party feels unsafe or lacks the capacity to make autonomous decisions in their own best interests, mediation is inappropriate. Cases involving serious physical or emotional abuse, chronic alcohol or substance abuse or serious mental illness usually should not be mediated.

Most discussion in a mediation concerns domestic abuse issues, and some people feel that the existence of any abuse means that mediation is impossible. I disagree, and have found the abuse typology of Janet Johnston useful. Based on her experience and research, she concludes that in many cases involving "situational" abuse, mediation is still a live option.

We already use mediation in small claims cases all over Iowa. Several areas have victim-offender mediation programs in criminal cases, both adult and juvenile. Some districts already have family mediation programs. There is no class of cases where mediation cannot help. Therefore, we should not exclude mediation from any class of cases, nor should we arbitrarily limit the issues the parties can discuss.

Some issues, however, should not be mediated. In cases involving domestic abuse, we should never mediate whether abuse happened, though we may formally or informally mediate custody, visitation and property transfers. In criminal cases, we should never mediate whether the crime was committed, though victim-offender mediation may deal with restitution and other issues.

Won't mediation just increase the expense of the divorce process?

Perhaps, but not likely. The Sixth

Judicial District program requires parties to participate in mediation before temporary matters are heard, and before a trial date can be secured. Legally mandated participation is not burdensome: show up and talk for a while. Parties are then free to leave, but usually they do not. Instead, they stay and discuss the issues and reach agreement on some or all of them.

Beyond that minimal requirement of participation, the parties' presence at mediation is voluntary. The same thing cannot be said about their participation at trial, or in depositions, or in your office answering interrogatories. Imagine a party walking out of a trial after five minutes saying he or she has had enough. Parties are less likely to complain about costs they voluntarily incurred as opposed to costs that were imposed by the other party or the court.

So, who are these mediators?

They are out there. And they are not aliens. People from many professions—law, social work, psychology, clergy and some with no professional background at all are mediators. What is important is not the profession or job of origin, but a calm temperament and good training.

Often lawyers think that the mediator must also be a lawyer. However, the mediator should not give legal advice, and it is difficult, though not impossible, for lawyers to break the habit of giving advice.

Training should be in divorce or family mediation. The issues are different from the average civil case and the source of energy for the dispute is likely to be very different from that which drives the parties in a construction or car accident case. Training is essential, and it must be high quality.

I emphatically recommend trainings approved by the Association for Conflict Resolution. The association has been in the business a long time and its standards are strict. Mediators in our program in the Sixth Judicial District must complete an ACR-approved 40-hour divorce mediation training program. Further, mediators must complete continuing education that includes training on screening for domestic abuse.

What are the advantages to the judicial system?

As you no doubt have noticed, resources are scarce. The Sixth Judicial District is now scheduling two- or three-day divorce trials 10 to 15 months in the future. We just don't have enough court reporters to cover all the cases, and that will not change quickly. A comprehensive mediation program in the district can take some of the strain off the system, and deliver good,



Chief Justice Cady appoints committee to study lawyer advertising rules

Iowa Supreme Court Chief Justice Mark Cady has appointed a committee to study existing advertising rules for Iowa lawyers.

The advertising rules were excluded when the court adopted the Iowa Rules of Professional Conduct based on the ABA Model Rules of Professional Conduct in 2005. Instead the court retained Iowa's long-time lawyer advertising rules with the intention of subjecting them to a separate study in the future.

A 16-member committee appointed by the chief justice will "assess the efficacy of the current rules and recommend whether new rules or amendments to the rules are necessary. The committee is scheduled to report its findings, conclusions and recommendations to the supreme court by Dec. 31.

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The future is here; relax and enjoy it.

**Judge William Thomas is a senior judge in the Sixth Judicial District. He has seen both sides of the litigation/mediation issue.*

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