

Newsletter # 12

Well here we are at an even dozen Mediation Newsletters. We seem to have covered a lot of ground in the past year and a half, yet I still feel I still have lots to say about mediation. My enthusiasm for the subject has not waned a bit.

I've heard a number of my colleagues comment that while they enjoy mediating when the parties are represented by lawyers, they don't enjoy, and sometimes refuse to mediate without counsel present.

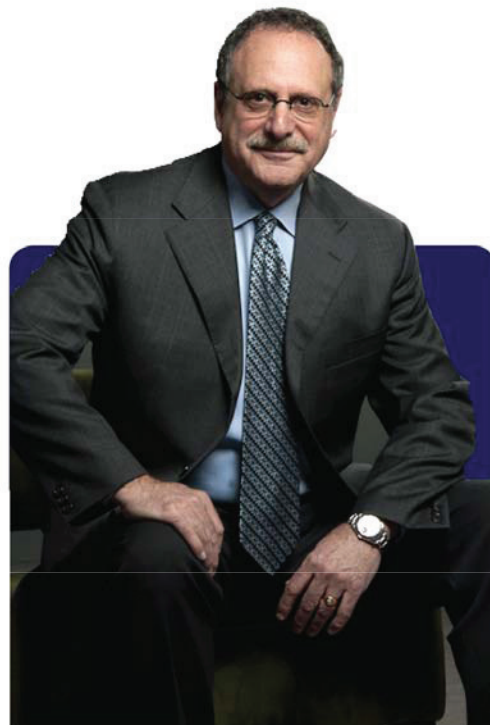
In my experience as both a mediator and as a DRO, I am somewhat ambivalent about the presence of counsel. Certainly with counsel present there is less work for me to do. Lawyers generally do the work of explaining the law to their clients, while I tend to deal more with its interpretation, based upon the facts of the case. Lawyers for the parties also often do the drafting of Minutes of Settlement and Agreements, although that chore too sometimes falls to the mediator.

Working with parties in the absence of counsel is more challenging. The parties rely upon you to explain the law to them. That being said, often parties have done their internet homework, and are often quite savvy, particularly when it comes to calculations of child and spousal support.

Generally with unrepresented parties, my role as mediator is to draft an agreement enshrining the deal, and then send the parties off to counsel for independent legal advice.

Regarding the issue of power imbalance the matter is altogether different, depending upon whether lawyers are present. I know of few mediators who get involved with the issue of power imbalance at the mediation stage when lawyers are involved. Without counsel, unless you have arranged for screening, which is not required except for arbitration, it is really up to the mediator to ensure that the parties are bargaining fairly and safely without fear of coercion or retaliation.

Personally, on balance I find it somewhat easier to work with lawyers present, but I often find it more rewarding to get a deal done in the absence of counsel. In either event, given the economic times we live in, just as the judiciary is experiencing more self-represented parties, mediators too are finding more and more parties who want to proceed without counsel, and we must adapt to it.



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