

Divorce: To Mediate, Collaborate or Litigate, -  
That is The Question.

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When confronted with a divorce, you don't need to be a legal scholar to know the risks of going to trial and having a judge decide the issues in a court of law. Just talk to your friends and relatives who have been through a bitter divorce in the courts, or to any honest divorce lawyer. They will tell you that the costs, both financially and emotionally, of a court battle in a divorce can be ruinous, not only for the divorcing couple but also for their children.

Although Abraham Lincoln was not a divorce lawyer, his words show that he understood the costs of litigation and the benefits of a settlement:

“Discourage litigation. Persuade neighbors to compromise whenever you can. Point out how the nominal winner is often the real loser in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of becoming a good man.”

“Never stir up litigation. A worse man can scarcely be found than one who does this.”

In the context of a divorce and in today's down economy - with stock market investments down 50% and real estate equity also substantially declining - only the wealthiest couples can afford to have the adversarial court system resolve their divorce. The importance of making an economical divorce settlement has never been greater.

When pursuing a divorce settlement, which is the best way to go? Is it better to mediate, collaborate or just go to the most aggressive divorce lawyer around and tell him or her to resolve your divorce outside of court?

Be wary of the aggressive divorce lawyer approach. Some of these lawyers, known as “bombers,” are overly aggressive at your great expense. They are, at heart, predatory animals that have an insatiable hunger. Their hunger is for money, and they know that the road to maximize their fees leads inevitably to the courthouse, just the place you wanted to avoid at the outset. More will be said about bombers later.

Mediation should be given serious consideration, especially in our current difficult economy. If mediation works, it is the most economical choice because the parties, for the most part, pay for only one professional – the mediator – and they can split the cost of the mediator's fees. Mediation works when both spouses can negotiate on their own behalf, have a relatively equal balance of power in their relationship, and have shared values. Almost always, when a divorcing couple mediates they are “pro se,”

meaning each spouse represents himself/herself without legal advice and without a lawyer.

The mediator remains neutral and may or may not be a lawyer. The mediator has the couple disclose their relevant financial information; helps them identify their needs and concerns, especially what is most important and meaningful to them; explains applicable legal principles (if the mediator is a lawyer), and brainstorms options and solutions with them in an effort to tailor a settlement that meets their needs and those of their children. Once an informal understanding for settlement is reached, the mediator urges each spouse to consult with his/her separate, independent mediation-friendly divorce attorney (known as “review counsel”) to review the formal divorce settlement agreement that is drafted by the mediator, and to give legal advice to the client.

Mediation is not appropriate for everyone. Many divorcing people need more legal advice and support than is typically available through mediation because the relationships between many divorcing spouses often contain serious power imbalances. Often one spouse has a stronger will or personality than the other, one spouse is more articulate and a better advocate than the other, and/or one spouse has more money, resources or information than the other.

Collaborative divorce is designed to remedy such imbalances, which otherwise could result in an unfair divorce settlement. In a collaborative divorce, each party is represented by a collaborative attorney, trained in the disciplines of divorce mediation and collaborative law. These attorneys provide legal advice and support to their clients during, and between, settlement conferences. Rather than starting divorce proceedings in court, an initial agreement known as a Participation Agreement is signed by the parties and their attorneys. The Participation Agreement provides, among other things, that the parties shall not go to court, or threaten to do so, during the settlement process, and that the attorneys shall not be the litigators or trial counsel should negotiations nevertheless break down. The parties also agree to Ground Rules. The first Ground Rule is “to attack the problems and concerns at hand, not each other.” As suggested by the first Ground Rule, negotiations are respectful, although not necessarily friendly, given the high level of conflict and distrust that may exist between the couple. Financial disclosure and interest-based negotiations occur at settlement conferences known as four-ways, attended by both spouses as well as their collaborative attorneys, and mediation techniques are used by the attorneys during these conferences. The goal, as in mediation, is a settlement agreement tailored to satisfy the needs and concerns of both parties and their children.

In inter-disciplinary collaborative practice, a team of collaborative professionals is available to help the parties. In addition to the lawyers, the collaborative team includes mental health professionals (divorce coaches and a child specialist), and a financial specialist. The mental health professionals help the couple cope with intense emotions, improve their communication, and focus on what is most important to them and their children. The financial specialist helps the couple better understand tax consequences, their finances and how best to divide their assets and income. These other professionals, with greater expertise in their specialties than the lawyers, facilitate the settlement

process while also being economical, as their hourly rates are usually significantly less than those charged by the lawyers. Having a full inter-disciplinary collaborative team greatly increases the likelihood of a good divorce settlement.

Some people mistakenly reject the collaborative process because of the attorney disqualification requirement: they don't want to hire new lawyers to litigate their divorce if collaborative negotiations terminate without a settlement. This is almost always a mistake. Besides the obvious benefits of a collaborative divorce – avoiding the pitfalls of adversarial divorce litigation and obtaining the support and valuable input that most divorcing couples need from collaborative lawyers and professionals – one needs to understand the greed and viciousness of some divorce litigators in order to understand why the attorney disqualification requirement in a collaborative divorce can be so beneficial to the clients. Let us digress for a moment.

In or about 1988, there was a local bar association dinner where two Supreme Court Judges roasted the divorce lawyers at the dinner. One of the Judges asked the audience: “Do you know how some of you divorce lawyers service your own clients?” Then, he answered his own rhetorical question: “When I was a boy, I once saw a bull service a cow, and you should have seen the condition the cow was in after the bull was through with her; that's how some of you divorce lawyers are servicing your own clients.” The audience reacted with stunned silence. The Judge's remarks hit home for the bombers as well as the ethical divorce lawyers there with first hand knowledge of bombers' greed and tactics.

Bombers, while representing divorce litigants in the adversarial court system, engage in unprofessional, inflammatory and abusive conduct. Their motivation and modus operandi are to drag out the litigation, saying and doing things along the way to escalate the conflicts and disputes, unnecessarily increasing the hours of time spent on the case, until their fees become monumental. As Abraham Lincoln would say: “Never stir up litigation. A worse man can scarcely be found than one who does this.”

In collaborative law, where the divorce attorneys' sole motivation is a good settlement and the lawyers cannot go to court or serve as trial counsel, there is no financial incentive to engage in such abusive tactics. Moreover, such abusive tactics do not happen because the collaborative approach attracts lawyers who are honest and ethical, and who promote peace and resolution.

So, when getting a divorce, think of the court as a place of last resort: do not go there unless it is absolutely necessary. Divorce mediation is an option for some, but for most divorcing couples the best way to go is to have a collaborative divorce.