
Psychology and Family Law

Marriage Dissolution: Coercion or Compromise?

By Mark Baer, Esq.



Thanks to an increasing awareness of alternatives to adversarial litigation, more and more divorcing couples are considering the possibility of using mediation. Inasmuch as the default for resolving such matters is litigation, both parties must agree

to an alternative such as mediation, or they end up with the default. However, the concept of mediation means different things to different people.

The use of mediation as a means of resolving conflict has existed for thousands of years. In fact, it originated as a way of resolving disputes privately and fairly, maintaining social harmony, valuing mutual accommodation, and promoting the importance of accepting personal responsibility.

Unfortunately, most lawyers and judicial officers today believe that family law mediation is *evaluative*, and are unfamiliar with *true* mediation in marriage dissolution matters. Evaluative mediation is virtually identical to settlement conferences, presided over by judges. The mediator helps the parties resolve their disputes by evaluating the legal strengths and weaknesses of each party's case under the law. The mediator assists the parties in evaluating the legal merits of the case, and analyzing the costs and benefits of reaching a mediated agreement at that time, versus seeking a judicial ruling in court later.

The privacy and confidentiality aspects of mediation are one of its many benefits, because participants have no fear that in sharing sensitive information, it may later be disclosed to their detriment. If the parties sign a confidentiality agreement, the courts will enforce it. According to the California Evidence Code: "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." However, while the terms of the resolution may be private, the dispute itself may very well be public, depending upon whether the mediation took place before or after the commencement of any litigation.

Social harmony is a traditional value espoused by mediation, signifying a state of people being positively and collaboratively disposed to one another. So we might ask, does evaluative mediation promote social harmony?

Conflicts of any type can be resolved either through force or through diplomacy. In most legal disputes, disputing parties try to exert force on each other through the courts, in order to get their way. In other words, evaluative mediation can be viewed as simply another form of litigation, and as such, it does not preserve social harmony.

Social harmony is generally promoted by compromise, as opposed to coercion. Yet both litigation and evaluative divorce operate on the strength of coercion, not compromise. "We call it an adversary system, but a better term would be a coercion system," says family court Judge Bruce Peterson. "The parties bash each other in order to persuade the judge to coerce the other person to do something they do not want to do." True compromise is not coerced.

Personal responsibility is another traditional principle of mediation. Does evaluative mediation value the concept of accepting personal responsibility? Since it can be said generally that law is all about blame and fault, we might ask, where does the concept of personal responsibility fit in? We are living in a day and age in which--possibly due to the ascendance of legal "solutions" for interpersonal conflicts--almost nobody takes personal responsibility for their actions and behavior. Yet how do we improve our circumstances, or the circumstances of the society at large, if we merely blame others for our fates? How do we solve problems, if we just point fingers?

Dr. Brené Brown, Ph.D., of the University of Houston Graduate College of Social Work, has spent the past decade studying vulnerability, courage, worthiness, and shame. She states, "Blame is about discharging pain and anger. Accountability is about understanding how vulnerable we feel, expressing that, and asking for what we need. Blame has nothing to do with accountability. Accountability requires long, difficult, respectful conversations. Blame fizzles out with rage, where accountability is in for the long haul."

No matter how angry we are, we ultimately can't change others. But we can change the way in which we act and react. Blaming, seeking to "beat" the other, and demanding one's way, without examining one's own responsibility, serves nobody's interest and is actually harmful. I propose that people involved in family law disputes would ultimately benefit far more from accepting responsibility, and pursuing constructive compromises, than just blaming one another. True mediation is possibly the best way to do this.

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