

## To Litigate or Mediate...That is The Question

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*Betty and Bob Couples have been married for 15 years. They are both professionals and own a home. They have no children. Although they have tried to keep their marriage together, they nevertheless have drifted apart. They are both reasonable people and do not want to create a drag down fight during their divorce.*

*Susie and Sam Spouses have been married for 23 years. Sam has been the provider, while Susie has stayed home with the children. One child has graduated from college, while the second is a junior in college and the third is a senior in high school. They own a beautiful home and have sizable assets. Their marriage has been over for some time and it is clear that divorce is the only option. To complicate things, Sam has decided that now he wants to quit his high-paying job and become a writer. He does not want to be responsible for Susie anymore, although Susie has virtually no marketable skills at this time.*

*Mabel and Mark Married have been married for 9 years and have a 5-year by. Mark has a civil service job and Mabel has been staying at home, taking care of their son, although she was a teacher prior to his birth. They rent a home and have few assets.*

Three different scenarios, with six different people. When a marriage is over, people have several options regarding how to dissolve their marriage. The option that is best for them will depend on each individual situation, and the advice of an experienced professional.

Generally, the following factors help determine which is the best option:

- Nature of the sources of obstacles to settlement
- Nature of sources of friction between the two parties
- Degree of communication between the two parties
- What the relationship between the parties might be in the future (i.e., are there children involved, joint business interests?)
- The amount of money being disputed
- The need for a quick resolution
- The level of sophistication of opposing counsel and parties
- The financial resources of the two parties
- The balance of power between the two parties
- Whether the opposing party is representing themselves vs. having retained an attorney
- Whether the process should be binding or nonbinding

A continuum of options is available for individuals as indicated in the chart below. Each is explained in more detail in the paragraphs after the chart.

<b>Options</b>	<b>Time to Resolve</b>	<b>Cost</b>	<b>Certainty</b>	<b>Uncertainty</b>
Avoidance	2 years	Low	No	Yes
Self-Help	2 years	Low	No	Yes
Negotiation	6 months-1 year	Medium	Yes-Self-Directed	No
Arbitration	1 year	Higher	Yes-Court Directed	No
Litigation	1-2 years	Highest	Yes-court directed	No
Mediation	6 months or less	Medium	Yes-self-directed	No

### **Avoidance**

Avoidance is a consciously chosen strategy in response to an acknowledged conflict. Some disputes are settled by avoidance merely because, over time, they are abandoned. Some lawsuits may be unwarranted when filed; others are dropped in order to avoid the legal hassle or expertise. In any case, avoidance may be an option when faced with a dispute.

Couples should choose avoidance only when they are not going to proceed with a divorce. If couples are both committed to resolving their marital difficulties, it is best not to begin legal proceedings.

### **Self-Help**

Self-help is simply a unilateral action by one of the parties designed to affect a resolution without the necessary legal processes. It does not require communication between the parties or the intervention of a third party. There are essentially no rules to self-help, and such action may even be illegal.

In matters of family law, a couple should not choose self-help since such action may result in even greater legal difficulties. For example, when a dissolution action is filed in California, an automatic restraining order is also entered against both parties. Aside from using funds for necessities of life and for attorney representation, the parties may not transfer or encumber community or separate property. Should unilateral action be taken without expressed or written consent or court order, the party in breach should be subject to court sanctions, attorney's fees and may be held in contempt of court. This could include incarceration for willful and deliberate actions or wrongdoings. Self-help is of no help and should be steadfastly avoided.

## **Negotiation and Settlement through Attorney Representation.**

Most conflicts are resolved through negotiation. It requires the parties' willingness to communicate about their dispute and usually their willingness to compromise.

Negotiation is possible when:

- the parties must cooperate to reach their goals
- they can influence each other to act in ways that provide mutual benefit or avoidance of harm
- they are affected by time constraints
- they want more control over the outcome
- they can identify and agree on what issues are in dispute, their interests, goals and needs are somewhat compatible
- external constraints such as reputation, cost, and risk of adversarial decision encourage participation in a private, cooperative process.

In family law matters, an attorney usually handles the negotiation because family law action often involves complex legal issues requiring legal knowledge and skill in meeting the needs and interests of a client.

Couples should choose negotiation when both parties, despite the good faith efforts, have reached an impasse. A negotiation requires a skilled attorney who is adept in the field of family law and with a strong track record of achieving settlements acceptable to both parties.

## **Arbitration**

Arbitration is the most traditional form of private dispute resolution. Like mediation, arbitration involves a third-party's intervention in a conflict resolution process. However, in arbitration, the third-party intervenes with the power to make a decision. Because of the power to make a decision, arbitration may be classified with litigation as an adjudicatory process. Arbitration, unlike litigation, may take place outside of the court system and may not be subject to courtroom procedures such as rules of evidence or appeal.

The courts' support arbitration agreements and awards, because they want to support freedom of contract and they do not want to handle the many cases the arbitrators resolve. Therefore, the grounds under which arbitrators can be challenged are very limited.

Parties can have considerable control over the arbitration process, particularly through their contractual agreement.

Couples should choose arbitration when there are only a few issues that require a fact finding and legal assessment. For example, there may be an issue of whether an asset should be categorized as community separate, or a mixed asset. A factual analysis is necessary before a decision can be made. An experienced family law practitioner, acting

as an arbitrator, is able to identify operative facts in an efficient manner and without the parties being saddled with delays and case-back ups that characterize family law calendars in the Bay Area. Arbitration provides an alternative cost efficient and time sensitive forum when the parties are unable to resolve factual disputes. By using arbitration, the dissolution may be resolved more expeditiously allowing the parties to move on with their new lives.

## **Litigation**

The most recognized dispute resolution is the publicly financed and administered court system with formalized rules and appeal able decisions made by a judge or jury. The litigation process often incorporates a number of features, depending on the court rules and statutes, usually associated with ADR (Alternative Dispute Resolution). These may include temporary judges using less formalized procedures, special masters, referees, court-annexed ADR, etc. Most significantly, even after engaging in some aspect of the litigation process, more than 90% of all cases are resolved through a negotiated settlement, often through the use of a non- court annexed ADR process.

Couples should choose litigation when there is no likelihood of resolving factual and legal disputes in a dissolution action. Generally, these cases are highly contested where the lines are drawn on many fronts including property, support and custody issues. This generally happens in only 10% of all family law cases, but litigation through the formal court process may be the only option for resolving disputes when the parties are in very unique and opposite positions. Ultimately, there is a judicial decision in which no one may end being happy with the results. This may also lead to an appeal of the trial court decision, and further attorney's fees, costs and delays in concluding the case. However, this may be the only option for some litigants and lawyers must be prepared and experienced in trial practice should settlement not be achieved prior to embarking in the litigation trail.

## **Mediation**

Mediation, in its simplest form, is negotiation facilitated by a third party. The process is private, voluntary, informal and non-binding. The mediator has no power to impose a settlement. There are several forms of mediation. Some mediators propose settlement terms and attempt to persuade parties to make concessions. Other mediators work with only party-generated proposals and try to help the parties realistically assess their options.

The mediator's role is to provide an environment in which the parties can communicate constructively and assist them in overcoming obstacles to settlement. The mediator will focus on each party's interests in order to generate options. Mediation is also cost-effective.

Couples should choose mediation when they would like to control the settlement process from the beginning to the end. By setting the agenda, process and procedures that the

couples developed, this tends to be more interactive and participatory method in defining and working toward dispute resolutions.

### **Conclusion**

Although avoidance and self-help are definitely options for parties dissolving their marital or domestic partner relationships, it is certainly not a recommended alternative. To determine the whether negotiation, arbitration, litigation or mediation is the right choice for your particular circumstances, it is highly recommended that you consult with a professional.