

The Law and You

Mediation - A Better Way to Resolve Disputes

We live in a complex world with diverse relationships. From these relationships, disputes often arise.

We have disputes with contractors, employers, schools, neighbors, and even family members, to name just a few. Since divorce is prevalent in our society, disputes between divorcing spouses are also common.

Unfortunately, these disputes frequently seep into the courtroom.

I am regularly involved in litigation dealing with trusts and probate matters. These cases usually result from disputes between siblings. And, they are very costly to the litigants.

When disputes are resolved in the courts, attorneys are most often present. And that increases the cost enormously. Legal fees for cases that go to trial can range from a few thousand dollars to tens and even hundreds of thousands of dollars.

Depending on the dollar value of the dispute, legal fees can exceed the amount that may eventually be awarded by a court. At the end of the case, litigants begin to wonder whether it was worth it.

In a recent column, I discussed ways to protect trusts from the children for whom the trusts are intended to benefit.

Most all trusts permit the trustee to pay legal fees from assets of the trust. So when the beneficiaries of a trust have a dispute with the trustee, the trustee can dip into the trust's funds to pay the legal fees—usually to fight the trustee's siblings.

But beside legal fees, there are other reasons to avoid the courtroom to resolve disputes.

It is almost always better for those with disputes to resolve them between the parties.

When a dispute enters the courtroom, the outcome is unpredictable.

Litigants can never be certain how a case will be decided by a judge. Further, litigants will have to spend time in responding to discovery, depositions, attending hearings, and of course, testifying at trial. All of this can create substantial stress.

An alternative to the courtroom is mediation.

Mediation is a type of negotiation that uses a third party, or a mediator. Specially trained mediators become facilitators for negotiations between disputing parties.

Mediation usually works like this. The parties meet briefly in the same room with the mediator. Each side has the opportunity to make an opening statement. Each statement summarizes the nature of the dispute and what is expected from the other side.

After this brief opening, the parties move into separate rooms. The mediator then shuttles back and forth between the parties. It is what I like to call “shuttle diplomacy.”

The mediator meets with each side separately to discuss their respective views of the case and what it is they want as an outcome. As the mediator shuttles back and forth between the parties, the mediator attempts to bring the parties closer and closer to a mutually agreed upon resolution.

The mediation session may last just a few hours or all day. It may also span several days, depending on how complex the issues are and whether progress is being made.

The parties usually split the costs of the mediator, whose fees range from \$125-\$250 per hour. Other arrangements can be made, and if the mediation involves a trust, the mediator's fee is often paid by the trust.

When the mediation session is concluded, the parties sign a settlement agreement or stipulation. This means that the parties have reached an agreement that is acceptable to

them. This is in stark contrast to a case that goes to trial with a judge or jury making the decisions for them.

While attorneys are often present during mediation, legal fees for mediation are only a small fraction of what they would be if the case were resolved in the courtroom.

Mediation is becoming more acceptable to resolve disputes. During 2005, Utah enacted a new law that requires mediation in all divorce cases where disputes exist.

While a particular case may not be resolved through mediation, most are. I estimate that more than 80% of my own cases have been settled through mediation.

In the Salt Lake area, all probate cases with disputes are first referred to mediation before referring the case to the trial court. This pilot project may be extended throughout the entire district court system by rule from the Utah Supreme Court or through legislation much like divorces.

If you have a dispute, you should first attempt to negotiate a resolution with the other party. If unsuccessful, however, consider mediation as the next step. Use the courtroom as the last resort.

If the other side commences litigation, you can still use mediation to resolve the case. You can also request the judge to order mediation. You should consult with an attorney who is familiar with mediation.

Check your local Yellow Pages.