Mediation: An Oasis, or Litigation Minefield?

Vicki J. Greene

Vicki J. Greene a 33-year attorney, is AV-rated and heads a boutique family law firm in Century City. Her long standing representation of Alec Baldwin is acknowledged in his book, "A Promise to Ourselves." She has a published decision (with Gary J. Cohen), IRMO Cryer, Jon and Sarah (2011) 198 CA4th 1039 and is an experienced trial lawyer.

While mediators most certainly believe they provide an invaluable service – and they do – mediation is not for everyone. Moreover, not all mediators are qualified to handle what passes through their doors. Complex marital estates require full disclosure, due diligence, valuation, accounting, business and tax advice. One mediator representing both parties' interests may be doing more harm than good for the disadvantaged and ill-informed spouse.

Therefore, while one or both parties may believe they share a common goal – to avoid protracted and expensive litigation – the "out-spouse" is often ill-prepared to face the complicated challenges presented to them for the first time in mediation. Moreover, if the ill-prepared and disadvantaged spouse has been dominated throughout the marriage and remains intimidated by their spouse, they do not possess the emotional composition to negotiate for themselves (or to explain what is required to a mediator). One does not divorce someone better than whom they married. Or, a tiger does not change its stripes.

Equally important is that no one has a crystal ball. If one party or the other, usually the weaker disadvantaged spouse, seeks to modify, set-aside or enforce a mediated agreement, they will be hamstrung by Evidence Code sections 703.5 and 1115 et seq. – mediation confidentiality – unable to prove what was discussed or intended to be written in their agreement. This may not occur until years later, leading to remorse, depression or the "why was I so stupid" syndrome of feeling helpless and alone in the world – from a financial perspective. This may also occur when the issue is children.

I, as an experienced trial attorney, have seen firsthand the litigation minefields created in mediation. This is not intended to admonish. Rather, I sincerely hope this article will enlighten those who remain naive or hide behind rose colored glasses. Mediation or collaborative divorce is not necessarily the wave of tomorrow. There is still much need for the adversarial process and for the judicial system. Mediators, and clients choosing to attend mediation, still have a lot to learn from the perspective of the litigation they unwillingly create.

Indeed, standard to mediation is a mediation consent agreement, a retainer so to speak, which sets forth the rules of engagement. Mediation confidentiality rights are governed by Evidence Code sections 703.5 and 1115 et seq. To sum it up, everything said or exchanged during the course of a mediation between the parties, their counsel and the mediator (not just the in person sessions with the mediator, but from beginning to end of the mediation process) is confidential and may not be used for or against a party in court. The final product, if reached in mediation, meaning the written agreement itself, is admissible in court and enforceable by the court. If no agreement is reached, it is as if the mediation never occurred. There are exceptions to these rules, but those exceptions, if either party wants them to apply, must be in writing and signed by everyone involved.

What this means is that if there was a failure to disclose, for example, the purchase of a lottery ticket with community funds (In re Marriage of Rossi (2001) 90 Cal.App.4th 34), it will be impossible to prove the failure to disclose. Any efforts to prove the claim are precluded by Evidence Code sections 703.5 and 1115 et seq.

Of course, the legal quagmire is that your client may not be trying to prove what was said in mediation, but rather, what was not said. However, the outcome is the same. A party is not required to disclose or defend what they did or did not say in mediation. Indeed, the opposition would argue that the claim cannot be proven, because the claimant cannot establish that the alleged omission was not discussed in mediation. Either way, the evidence does not come in. The uninformed spouse has no recourse (which is very different from what occurred in Rossi, when husband complained about the $2 lottery contribution and ended up with $11 million).

Please do not take my word for it. Read the Evidence Code and the published decisions on point, including Eisendrath v. Sup. Ct. (2003) 109 Cal.App.4th 351: no implied waiver

of privileged communication; In re Marriage of Kieturakis (2006) 138 Cal.App.4th 56: presumption of undue influence did not apply to mediated agreement; Wimsatt v. Sup. Ct. (2007) 152 Cal.App.4th 137: Court of Appeal strictly construes mediation confidentiality even when the equities suggest contrary results; and, Simmons v. Ghaderi (2008) 44 Cal.4th 570: evidence of alleged oral agreement reached in mediation inadmissible.

In Eisendrath, husband claimed a lack of awareness of certain key information upon which his mediated agreement was reached, including that husband did not know wife intended to remarry and move their children away from him. Wife claimed husband knew and that she negotiated for the terms they reached by giving up other rights. Oddly, it was husband who asserted mediation confidentiality and the Court of Appeal agreed, resulting in husband losing the underlying action to set-aside the spousal support portion of his non-modifiable family support agreement, which he was required to pay long after his former spouse remarried. This was not the only problem facing the Eisendraths who remained locked in custody move-away litigation (including two unpublished appeals), support and property division litigation for an additional ten years after their mediation ended in 2002.

Another case on point, although not at the appellate level, came to me in 2005. Sally Arnall was married to Roland Arnall for 37 years. Roland Arnall founded Long Beach Savings and Loan and later, Ameriquest. They obtained a bifurcated divorce – status only – in 1997. No final judgment was ever entered. They reached a mediated agreement that was never filed with the court or entered as a judgment. In 2004, Sally picked up a Forbes Magazine and learned that her former spouse was a billionaire, worth an estimated $4 billion. She had only received a fraction of that and, recalling her experience in mediation, knew something had gone terribly wrong. This is where I came in.

Fortunately for Sally, a judgment had never been entered, so the divorce case was still pending. Moreover, the case was assigned to Judge Richard A. Denner, the trial judge in Rossi. Discovery was reopened and Sally pursued that which she did not know and was ill-prepared to address during her mediation. The case continued to two years before heading to trial.

It was on the third day of trial – before the court was forced to rule upon mediation objections asserted by Roland – that the case settled for an undisclosed amount. However, not without a fair share of drama, as Roland's counsel was convinced Sally would never get into evidence what she alleged had not occurred in mediation (even though through discovery, she learned the missing pieces). Roland Arnall died six months later. For Sally the decision to settle was a smart decision. Sally had no business being in mediation in the first place. She knew nothing of her husband's finances or financial empire and lacked the strength or conviction to stand up to him, even with a mediator and her then counsel.

By now, you must be asking yourself, how can this happen. Certainly, all of these litigants had access to legal counsel and the money to pay for legal counsel. What were they thinking? Indeed, each of these litigants (without going into specifics which are confidential) hoped for peace and harmony with their former spouses. A more congenial atmosphere to resolve their problems. To avoid court. Mr. Eisendrath's peace of mind lasted approximately 30 days. Sally Arnall's peace of mind also did not last. Both ended up in the same place: with new counsel, a courtroom and the mediation confidentiality overshadowing their sense of justice.

It is not that mediation is bad, per se. It just is not for everyone or every situation.

It also comes riddled with minefields – potential explosions – as the family progresses through the uncharted territory of the post-mediated agreement years, not knowing what relief they may need and be unable to access.

Is there a moral to this story? Yes. Buyer beware, of course. But also, a mediator needs to recognize when he/she is in over his/her head: lacking sufficient information and experience to properly help both sides come to a fair and equitable agreement. Neither party can make an informed decision without full candid disclosures, completing their due diligence and obtaining expert opinions that are necessary or appropriate. The terms of the agreement also should be reviewed carefully by a qualified litigation draftsman. Why a litigator? Because it is only through an experienced litigator that a mediator and/or the parties can fully understand the limits of the written word – which is all that is admissible in any further proceeding following mediation.