

# Trial & Error—

**DIVORCE:** MEDIATION VS. TRIAL: What's More Productive and Why

BY STACY D. PHILLIPS



Settling marital disputes out of court through some type of mediation is always the better way to go. Who needs more stress and financial losses? Typically, there are two different situations that arise in terms of legal battles in family law: those that deal with the division of property and support (child and spousal), and those that deal with child custody and visitation issues. The ones that seem most contentious are those dealing with children.

In California, every family law letter that is filed as an OSC (an Order to Show Cause) that calls for a new order or a modification of an existing court order, requires that both parties participate in court mediation. And, there are several out-of-court resolution possibilities in terms of handling custody and visitation issues.

**Settlement Letters:** Attorneys engage in a back-and-forth written dialogue expressing the parties' interest and desires, hopefully resulting in a "deal" that is drafted as a Stipulation and Order or a judgement filed with the court.

**Settlement Conferences:**

**Four-way—**Both parties and their respective attorneys agree to meet to negotiate issues on dispute. When an agreement is reached, a Stipulation and Order or a judgement is drafted and signed by both parties. One of the attorneys files the document in court.

**Hired Mediator—**This could be a retired judge or a disinterested family law attorney or even a therapist. Using the services of a judge are always a good choice. The judge will often say, "This is how I would decide the case if it were in my courtroom." This sense of reality helps dueling

parties by promoting "an equal power balance." A family law attorney acting as a mediator has a similar approach. In both instances, the professionals are active in the resolution process and regardless of who thinks they have the upper hand, both parties are at parity. If a therapist is used, an attorney will still be needed to draft a pre-document into a Stipulation and Order of a judgment.

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**Disinterested Third party –** The services of a clergy member or a mental-health professional is another possibility. Never opt for a family member or friend (no matter how good their intentions to officiate your mediation). After agreements are reached, the third party can approach legal counsel to formally draft the terms agreed upon.

There is no question in my mind that mediation is the wave of the future. So by selecting any of the above mediation choices, those of us practicing family law hope that differences can be resolved with the lesser amount of financial and emotional stress.

If mediation doesn't work—a trial is inevitable. Trials takes a toll on people's feelings, pocketbooks, and impact the psychological well-being of everyone. In a custody battle, children suffer. So I ask clients to think of their children first and put their own feelings and resentments aside — as valid as they may be. Trial is a trauma

children being fought over, don't need.

If you must proceed to trial, be prepared! Be realistic and know what the risks are! Know that the judge hearing your case may not rule in your favor, no matter how certain you are about what you think the outcome should be. Unrealistic expectations can prove disastrous if your case involves a child-custody battle. Results of a trial tend to be final, whereas mediation can be ongoing and eventually evolve into a peaceful and more equitable resolution.

**Q:** I'm a 43-year-old female with three children. My husband and I have been unable to resolve visitation issues. We're set to go to trial because he has stormed out of attorney-client conferences on several occasions, including a mediation session with the court appointed mediator. I don't want to go to trial. What should I do?

**A:** First: keep your cool. If your ex-husband has stormed out of many a meeting, chances are he'll demonstrate similar behavior patterns in the courtroom. Judges do not tolerate such actions — subtle or direct—and his inability to control his temper and his unwillingness to be cooperative could just work in your favor. I've seen this happen many times. So, no matter what, stay composed and appropriate during the entire proceedings. Work together with your attorney and let him or her fend for you. **W**

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