

Speed Mediation
By Frank Garfield
Los Angeles Daily Journal
August 25, 1999

In general terms, mediation is the art of facilitating the negotiated resolution of a dispute between two or more parties in conflict. There are as many different styles of mediation as there are mediators, although mediators should be alert to adapt the focus and pace of the mediation to the needs of the parties. The variations in the parties' needs are especially noticeable in the family law context where mediations tend to involve multiple sessions over a period of months.

Some couples are primarily concerned with remaining firmly in control of the process and relegate the mediator to a subsidiary role. Other couples focus on the quality of their communications, and may consider the mediator's role mostly facilitative. Still other couples are preoccupied with substance, and expect the mediator to suggest specific provisions that will enable them to accomplish their goals. Whether the emphasis of the parties is on maintaining control or enhancing their communications or improving the content of the deal (or any one of a number of other concerns), the astute mediator tailors his or her professional style to the parties' particular requirements.

Typically, the couples who fall into these illustrative categories do not express a desire to conclude the process as soon as possible. Efficiency may be a general principle, but speed is not their primary goal. Indeed, whether in the context of litigation or mediation, the dissolution of a marriage develops a rhythm of its own, as anyone discovers who tries to speed up the process against the will of one or both parties. Speed is often regarded as incompatible with the natural rhythm of the case, and inconsistent with the deliberation required to reach a sound result.

But there are couples who place a low value on controlling a process they wish to end at the earliest practicable time; reject the idea of improved communication with someone from whom they are trying to disengage; and have little interest in the fine points of an overall deal.

It is sometimes said that mediation is a process, not an event. For these couples, the opposite is the case: Mediation is an event, not a process. They are not looking for a transformative experience; to the contrary, they are interested in buying a product. That product is a stipulated Judgment of Dissolution of Marriage (and all the forms that go with it). "Speed mediation" seeks to strip away from the process everything not essential to delivering that product.

The traditional model encourages the parties to adapt the process to meet their needs, to give voice to their emotional perspectives, to explore myriad solutions to every issue, and to be creative in developing the best possible alternative. What characterizes speed mediation, in contrast, is simplicity, which also makes it controversial. As Renoir once put it: "Nothing is as disconcerting as simplicity."

There are certain characteristics of couples and cases that may be appropriate candidates for speed

mediation. Those characteristics include the following:

- The parties understand that their issues are mostly unremarkable, similar to the issues in thousands of other cases that have been resolved in the 30 years since the Family Law Act was enacted.
- Both parties accept the end of the marriage, and are prepared to close that chapter in their lives and move on to the next. Neither party feels the need to process feelings – whether of anger, pain, or sadness – in the mediation.
- Efficiency and economy are important values. It may come as a surprise to mediators who are preoccupied (if not obsessed) with the process, but many couples just want to get through it. They regard it in much the same way as major surgery: Get us in and get us out so we can get on with our lives.

Mediators who have been trained as mental health professionals may, in particular, recoil at this model. For one thing, they aren't set up to deliver the product. Drafting a judgment and preparing the paperwork necessary to process that judgment look suspiciously like the practice of law.

While it is beyond the scope of this analysis to explore all the ways in which speed mediation differs from other mediation models, an example may help to make the point: In many models, the mediator's role is to stimulate the parties' own thinking about the issues and the variety of possible solutions. Discussing the advantages and disadvantages of half a dozen or more options is by no means uncommon. The idea is that by going through this process, the parties will end up with the best solution for them. In speed mediation, the mediator often suggests a solution that he or she thinks will work. It may not be perfect, but it's usually good enough.

Consider a couple who needs a basic custody and visitation order. The parties may already agree on the general parameters of a parenting plan, and believe that they will be able to work out the details as they go along. Precisely because the parties agree on the generalities ("We think it's important for the children to spend as much time as possible with each of their parents"), they may be surprised to discover that they disagree about the specifics (such as how vacations will be divided, which parent will have the children on important holidays, etc.).

Some mediators would take the position that if a general agreement is satisfactory to the parties, it should be satisfactory to the mediator. This approach might produce a provision in the Judgment such as the following: "Mother shall have primary physical custody of the children subject to father's rights of liberal visitation according to a schedule to be determined by mutual agreement." The Court would certainly make such an order upon stipulation of the parties. The problem is the order would be of no help in resolving later

disagreements.

Other mediators might explain to the parties how important it is to reach agreement on the details. This could lead to prolonged negotiations as the parties try to figure out just how – exactly – they wish to resolve the myriad issues involved in even the most basic parenting plan. The parties might even reach impasse over issues that are more theoretical than real.

To be sure, there is something to be said for letting the parties do it their way – even if “their way” is a general agreement likely to lead to problems later on or the intense negotiation of every detail that could produce immediate conflicts. But surely the mediator must take some responsibility for the outcome.

The speed mediator is disposed to avoid both of these extremes. Recognizing the perils of dispensing with the specifics altogether as well as the perils of undermining the parties’ general agreement, the speed mediator might suggest that the parties consider a “standard” parenting plan.

A judge routinely takes this shortcut when called upon to decide custody and visitation issues for parties who may be too angry at each other or too afraid of making a mistake to negotiate their own deal. The judge simply orders the parties to follow what is widely regarded as a “standard” parenting plan (commonly referred to by family law practitioners as a Freeman order).

The speed mediator obviously has no power to order anything; however, the parties are often willing to accept a proposal that emanates from a neutral source, appears to be balanced and fair, and is presented as standard. This last point is worth emphasizing: It is amazing how many parties have more interest in knowing what others have done in the same or similar circumstances than in either making it up later as they go along (the general approach), or in leaving nothing for subsequent negotiation (the specific approach).

Parties who are candidates for speed mediation want solutions that will work for them at an affordable price. To these couples, the equivalent of a Freeman order is by far preferable to general principles that are inadequate to govern their rights and duties in the long run or excruciatingly detailed provisions that may cost much more than they are worth. By pointing out the advantages of the middle course, and even encouraging the parties to go down that road, the speed mediator is acting as a knowledgeable guide. This does not deprive the parties of the right and responsibility to make the final decision about which way they want to go.

A famous general once said: “The greatest enemy of a good plan is the dream of a perfect plan.” When it comes to mediation, the greatest enemy of a satisfactory solution is the dream of an ideal solution. To put it in quantitative terms, for an investment of 50% of the time, energy and money, most couples can get 90% of the desired result; it is the final 10% of that result that causes the parties’ investment to double.

Speed mediation isn’t for everyone. This analysis should not be interpreted to mean that mediators should necessarily change their existing mind-set (whatever it is). However, mediators should at least

consider the possibility that their clients are interested in a product, not a process, and that where they end up is more important to them than how they get there.

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