

Is Mediation for Everyone?

The benefits of mediation, both financial and psychological, are endless, but you may feel that you and your spouse don't fit the picture of who belongs in mediation. In some instances, couples have a legitimate concern, but most are needlessly worried. Some assume, for instance, that they must agree on everything in advance and harbor no anger. These couples, if they existed, would certainly be candidates for mediation, but they do not resemble typical mediation clients. However, for some couples mediation is not appropriate, and I will discuss these later in the chapter. First, I'll describe some common situations that cause some couples to wonder whether mediation is possible.

Let me assure you that you *can* mediate when the following situations exist:

1. Tax fudging
2. Asset dispute
3. Affairs
4. Lack of communication
5. Child custody disputes
6. Leaving the marital residence disputes
7. Lawyers already hired

8. Already divorced
9. Substance abuse

1. TAX FUDGING:

Chuck and Jane were in their mid-thirties, with two young children, ages five and seven. He was self-employed as a computer consultant, and she worked part-time as a telemarketer. During the second mediation session, Jane said she was worried that Chuck had been less than truthful on the business section of his tax return. Since all clients are required to provide copies of their tax returns, I reviewed his business tax form, Schedule C, with the couple. First, I explained the form, then reviewed each business entry to see if both were satisfied with it. Each was. However, when we got to the car expenses, Jane pointed out that the business expense included personal miles that Chuck drove in his car. "It's not fair. It's not all business. I don't get to write off my personal travel expenses," she said. She asked how much Chuck deducted for mileage, and I pointed out that he deducted \$5,340. Jane said that she thought the business expense was more like half that amount. It was up to Chuck to explain the inclusion of personal miles in business use or to document all of the miles as business use. After some discussion, he agreed to adjust the deduction from \$5,340 to \$2,670 for the purpose of their negotiations.

The question that Jane had to address was whether she was willing to understand the business deductions involved. The mediator helped with this. Let me add that, in mediation, the client must be assured that her spouse will accurately provide her with his actual income.

2. ASSET DISPUTE:

A common asset dispute often occurs when one person thinks that the item in question is one's own individual asset while the spouse believes it is a marital asset. Early one morning, for example, a man called to inquire whether mediation was possible since he and his wife were having an angry disagreement about

a piece of land he inherited from his father. He said, “I know it’s mine, but she thinks it’s both of ours.” This kind of dispute is exactly the type of conflict for which mediation is intended.

Let me offer another example. Paul and Nancy had been married for ten years. It was a first marriage for him and a second for her. They entered the mediation room engrossed in an argument over their house. During the session, Nancy explained that she had received the house as her share of the assets upon her divorce from her first husband. Paul, however, felt that the important issue was that he had paid the mortgage for the entire ten years of their marriage. Nancy believed that the house was hers, while Paul strongly believed that the house was now a marital asset. This was a good dispute to resolve in mediation. They had each consulted with a lawyer who, of course, supported their respective positions: Her lawyer confirmed that it was a separate asset, while his lawyer confirmed it was a marital asset. During mediation, they negotiated a settlement in which Nancy bought out Paul’s interest for less than one-half of the equity—a little more than she wanted to pay, and a little less than he wanted to receive. Most people who come to my office have serious disagreements concerning division of assets. It’s my job to help them to resolve these conflicts.

3. AFFAIRS:

It’s amazing to see the number of divorcing people who blame an affair for the end of their marriage. Rather than seeing it as a symptom of a bad relationship, a spouse may consider it the cause of the break-up. Apparently, a number of people who want to end their marriage see infidelity as a clear way to go about it. While one might assume that it is easy to end a marriage, that’s generally not the case. One person will want to continue, and the one who wants out has no “good enough” reason to divorce. An affair changes those dynamics—now there is good reason. The deceit that typically surrounds an affair invariably results in a lack of trust by the spouse, who labels the affair a betrayal.

If a potential client is a betrayed spouse, and reads or hears that I advise individuals with a financially distrustful spouse *not* to use mediation (see page 24), he may think, “If she had an affair and lied to me, of course, she’d lie about her finances.” This is rarely true. During my seventeen-plus years’ experience as a mediator, I’d estimate that one spouse in well over half of the couples has had an affair. An affair is common in the portrait of a divorcing couple, while actual financial dishonesty is not.

Mediation can be very effective even though your spouse is having an affair. In fact, situations that are emotionally explosive, that include feelings of rage and betrayal, have so much to lose in the adversarial world that these couples are much better off in mediation. The adversarial court system and the divorce lawyers can fan those angry flames. The faithful spouse has intense feelings of anger and hurt, and those strong emotions could propel a court action that would cost thousands of dollars, and yet a judge cannot resolve the issue of an affair. The mediator cannot resolve it either; however, he can help focus on what’s important, as well as allow each side the opportunity to be heard. A courtroom is a place to resolve legal disputes; an affair is a personal issue. Someone may say, “Legally, isn’t adultery a crime?” Yes, in many states it is, but they don’t put people in jail for committing adultery.

4. LACK OF COMMUNICATION:

Sometimes I’m asked how a couple will be able to mediate if they don’t speak to each other. I explain that they can communicate through the mediator. Keep in mind that the inability to talk to each other is common for a divorcing couple. People who barely speak to each other at the start of mediation will eventually start talking. Mediators are not magicians, but they have the skills to help people to communicate. (However, before you assume that mediation means reconciliation, let me point out that it doesn’t.)

5. CHILD CUSTODY DISPUTES:

The other night I was at a dinner party when the man sitting next to me asked me what I did for a living. When I explained I was a divorce mediator, he responded, “I wish that I had used you three years ago when I needed you. My wife and I had a terrible custody battle over our two kids.” When I asked him why he didn’t use mediation, he replied, “Well, I know that mediation is for people who get along well. But we didn’t. Not that the court helped us get along. Fact is, the judge and those others only made it worse. Things are really bad between us now.”

His comments regarding who is appropriate for mediation are typical. Mediation has developed a reputation as a forum for couples who get along well. As I’ve said, there are very few divorcing couples who fit that description. Certainly, couples who get along well also do well in mediation, but it’s definitely not a requirement.

Years ago, mediation proved itself within the field of disputed child custody battles—arguments in which there is strong unresolved anger, bitterness, and fear. It is the most difficult of conflicts. Early studies focused on the mediation of these disputes because research, common sense, and our own eyes showed us that the children affected by these traumatic custody battles suffered terrible emotional scars. In spite of parents spending thousands of dollars in what each believed was the best interests of a child, all parties suffered. Said one Massachusetts judge, “Custody battles are more difficult to hear than murder trials.”

In just about every state, custody is an open door. The court always has jurisdiction over child custody, and a parent can always go to court to petition a change in custody if it is in the best interest of a child. Because of this, a parent who is dissatisfied with a court decision can bring a new court action, propelling both parents into court again. Mediation helps to resolve the issue of custody in a way that both parents can live with, so that neither feels the need to litigate further.

Studies show that the mediation of custody disputes works. In

1993 southern California mediator Nina R. Meierding analyzed the Ventura County Superior Court records of couples who reached a divorce settlement through a private mediator. The purpose of her survey was to measure long-term satisfaction and compliance to mediated agreements. She found that the survey dramatically illustrated the high level of satisfaction of divorcing couples who used private mediation.

The State of California mandated that every couple arguing custody use the services of a mediator to resolve their dispute. Today, that practice continues, and states throughout the country are following suit by considering legislation that requires all custody disputants to use a mediator. I predict that, eventually, the common practice will be to send all custody disputes to a mediator.

6. LEAVING THE MARITAL RESIDENCE DISPUTES:

For most couples about to divorce, that first step of separating is a difficult one. How does one spouse move out of the marital residence, whether it's a house, condominium, or apartment? In some cases, there is a specific problem. For example, a couple has made the decision that the wife will move out, but prior to leaving, she consults with her lawyer, and the lawyer advises her not to. Ostensibly, the lawyer does this to protect the client from later changing her mind and wanting use of the marital residence. She feels stuck, wanting to separate but not willing to go against the advice of her lawyer. In this all-too-common situation, the tension rises, and two people are forced to go on living together under conditions of great tension.

During an impending separation, practical money matters must be addresscd. The spouse moving out typically needs money to rent an apartment or buy a house. People recognize that buying real estate is expensive. Renting a place is also expensive, since most landlords require the current month's rent as well as the last month's, and most places also require a security deposit. Mediation offers a way for couples to work through

the difficult decision of who must leave, as well as other crucial questions: When? Should both leave? Who pays the moving expenses? Who pays the other expenses? It probably comes as no surprise, but it costs more money to run two households than one, yet there is not more money coming in. How, then, shall the couple allocate their resources? Separation comes with myriad other questions: Who will continue to pay joint debt? Who is responsible for the mortgage or the rent? Should the address on legal forms be changed? What will it mean if the address does change? Mediators can help generate answers to these questions. Many assume that separation is a simple process, but there are issues, including legal ones, that must be addressed and resolved. A mediator can help people reach good decisions, as well as lay a foundation for future decision making.

Some couples think that if they use a mediator to work out the details of a separation, it means that they must proceed to a divorce settlement. For those who want a separation but do not see divorce as their final goal, a decision to separate does not necessarily mean a decision to divorce. A mediator can provide help with the terms of the separation.

7. LAWYERS ALREADY HIRED:

I do a fair amount of public speaking about divorce mediation, and a frequent comment is “My wife and I already have lawyers, so I guess it’s too late for us to use a mediator.” The often surprising answer is that’s not true. Even if one or both of you have hired a lawyer, it’s still not too late to use mediation. Though the mediator cannot give you back the money you’ve spent on legal fees, your future costs will be dramatically reduced. If you want an idea of how much money you’ll save if you use a mediator, ask several divorcing people who used attorneys how much they spent, and then subtract mediation fees. The amount may shock you.

Also ask how long it was from the day a lawyer was hired to the date of divorce. Many people assume that if more than two

months have passed since they hired their lawyers, they are almost done with the divorce process and it's too late to use a mediator. It's rarely too late, even if a fair amount of time has passed. However, if you are looking for the support of your lawyer for mediation, chances are, you may not get it. Not that all lawyers oppose mediation; indeed, a growing number do support it, but remember, for most lawyers, mediation means less earnings. It would be a little strange if they all were enthusiastic about earning less.

8. ALREADY DIVORCED:

Arguments that arise after the divorce is final are called post-divorce disputes. For couples who use attorneys to reach a divorce settlement, post-divorce disputes are not unusual. Mediators who do post-divorce work are generally not in session with prior mediation clients; more likely, their clients used attorneys or wrote a divorce settlement on their own, and they now turn to a mediator to solve a new dispute.

Mediation clients are much less likely to need post-divorce help in reaching an agreement. Fewer than 1 percent of my clients do. However, some couples do return to mediation to resolve an issue. When disputes occur, they tend to occur among ex-spouses who have minor children and financial ties.

The usual course of meetings for postdivorce mediation depends on whether or not the couple used a mediator to reach their divorce settlement. If they did use mediation, I meet them together. I use a different approach with clients who did not use mediation, meeting them jointly for part of the session, and then separately.

Post-divorce negotiation is often more difficult than negotiations before the divorce. During a marriage, both spouses may be motivated to be reasonable in order to work things out, but that's not true after divorce, when neither person seems highly motivated to be reasonable. Generally the more specific the agreement clients work out at the time of the divorce, the fewer arguments erupt at a later date.

9. **SUBSTANCE ABUSE:**

One day a psychologist friend of mine, Donna, called me. "I was going to refer a couple to you who requested the name of a good mediator, but I wondered if they could use mediation," she said.

"Why is that?" I asked.

"Well, the wife has an alcohol abuse problem, and my understanding is that one needs to be clear-headed in mediation."

"Do you see her while she's drunk?" I asked.

"Of course not," Donna responded. "We schedule sessions during the morning, and she's fine then."

"Then," I said, "we could schedule mediation sessions during the morning or any other time when she's fine. By 'fine,' you mean not drunk or drinking, right?"

"Yes," Donna replied, "that she is not under the influence. Somehow it never occurred to me that if she could do therapy, she could do mediation."

Couples in mediation reflect couples in our society. Because of the prevalence of alcohol and drug abuse in our culture, and because clients are representatives of the culture we live in, many couples who use mediation have a problem with alcohol or drugs. In order to mediate with an individual who is a substance abuser, whether alcohol or another kind of a drug, he or she must be sober/clean during the mediation sessions. Mediation is also possible when the person is in treatment. Mediation is *not* possible except under these conditions (see page 25).

Indeed, in certain cases, mediation can provide an ideal forum for those couples affected by alcohol or drug abuse. If there are children involved, during the mediation, the parents can take alcohol and/or drug abuse into consideration and are able to be open about their drinking without fear of legal repercussions. The mediation room is not a court of law, and there is no public record. Rather, it allows an honest airing of concerns and the opportunity to explore solutions. In a public courtroom, people who are accused of such abuses will typically deny the seriousness and extent of the use. During mediation, the

mediator works with the client to assure child safety, rather than to focus on blame.

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None of these problems I've just discussed are reasons not to use mediation, particularly if the mediator has significant expertise in the areas that must be addressed. However, there are a few instances when I feel that mediation usually is not appropriate. These are:

1. Financial dishonesty
2. Severe substance abuse
3. Untreated serious mental illness
4. Domestic violence

1. FINANCIAL DISHONESTY:

Considered inappropriate for mediation are financially dishonest people, men and women who fit the following specific description: They lie about money to their spouses; they will continue to lie during the mediation sessions; their spouses do not know the true financial situation; and most important, the lie(s) is/are significant. All factors must be present to rule someone out of mediation. For example, if your husband is a civil servant and says that he has no other income, and yet you live in an expensive, mortgage-free house in the most exclusive section of town, this may be an example of a significant lie. Warning bells should ring. (Actually, they should have rung years ago!)

If you think your spouse has lied about finances, you must decide whether the lies are significant enough to make the mediation process inappropriate. I once encountered a man who said he wanted to use mediation, but he didn't think he could because his wife was dishonest about finances. I asked what he meant. "Well, just last week she told me that she hadn't bought anything new," he said, "and yet today I found a receipt for a new blouse on her bureau." The question that he had to answer

was whether or not the wife's lie about the purchase of a blouse was significant in terms of its implications for the mediation process. Because she had lied about the blouse, would she lie about some significant asset? Was she lying because she had no access to her own money? Or was it an accepted pattern in the marriage for dealing with clothes purchases by the wife? Does her purchase and subsequent lie about the blouse mean that she will withhold important financial information? This is something he must decide, but in my experience, such a situation would not preclude mediation.

2. SEVERE SUBSTANCE ABUSE:

As I said earlier, mediation is possibly only if the abuser can be sober/clean during the mediation sessions or is in treatment. If your spouse is actively drinking or doing drugs and cannot attend a session when clean/sober, mediation is inappropriate. It is impossible to mediate when someone is under the influence of alcohol or drugs.

3. UNTREATED SERIOUS MENTAL ILLNESS:

If either spouse is mentally ill and is unable to take part meaningfully in the mediation process, that couple is not appropriate for mediation. Only if that person can function competently while on prescription drugs would he or she be able to take part. For instance, a man once called to say, "My wife has a diagnosis of schizophrenia, and she's not taking her medicine." I don't let myself be influenced by a mediating client, so we set up a free introductory session. Sure enough, during our session, she appeared unable to function because she said she was hearing voices. I concluded that the couple was not appropriate for mediation.

In only one of my cases did one spouse consider the other too mentally ill to take part in mediation. A woman said her husband was "crazy." She told him one night that she was leaving him and didn't like the way he was acting—sometimes upset and angry, other times hurt and sad. However, when they came

to the mediation table, he seemed like every other client. What she saw as mental illness may simply have been stress over the sudden knowledge of the divorce. Sometimes, people in the midst of a divorce may not see their spouses as clearly as a professional can, and they may overreact to behavior that doesn't seem normal.

4. DOMESTIC VIOLENCE:

Situations of domestic violence create the most difficult dilemma as to whether or not to mediate. This subject is by far the most hotly debated topic within the field of mediation. In the United States, the extent and pervasiveness of domestic violence has only recently come to our attention. For many, the issue was tragically brought to the forefront with the murder of Nicole Brown Simpson. The famous O.J. Simpson, who some label a chronic wife-abuser, was on trial for his life, defended by a team of high-priced lawyers. Would O.J. and Nicole have been appropriate candidates for mediation? What about those abusers who are not alleged to be or tried as murderers?

The term *domestic violence* is generally defined as the use of physical force, or the threat of such force, to gain control over a current or former spouse or lover. The acts of domestic violence include pushing, slapping, hitting, choking, shoving, using a weapon, physically restraining, or the threat of any of these.

Domestic violence is unlike other types of violence in that there is frequently a pattern, called the cycle of violence. We know that the rate of abuse increases at certain times. One of these times is when the woman is pregnant and most vulnerable to her mate while his jealousy of the coming baby intensifies. Another event that can trigger abuse is when the wife separates from her husband. This act exacerbates his feelings of abandonment and the corresponding attack on his self-esteem.

In all situations of domestic violence, the differences in power between spouses is extremely unbalanced. The perpetrator has all the power. The victim has virtually none, and most of

the time, she is too terrified of her husband to use what little power she does have. Were she in mediation, she would not be able to state her settlement interests because of the fear that, after the session, he would beat her simply for stating her wants. Traditional divorce mediation, with both spouses in the same room, cannot work with couples who are in the classic male battering cycle of violence. Many courts recognize this and have instituted rules prohibiting mediation when domestic violence is evident. You absolutely cannot mediate the violence, which means the mediator cannot condone the trade-off of “I’ll give you what you want if you don’t beat me.” Most experts in the field advise the victim never to mediate if abuse has been or is currently a factor.

SCREENING FOR DOMESTIC VIOLENCE

Two Schools of Thought

If the courts do not forbid it, the issue of whether private divorce mediators should work with clients of domestic violence is controversial. A number of mediators believe that a mediator should *not* work with a victim of domestic violence under any circumstances. However, since a mediator cannot determine if someone is a victim or a perpetrator by merely looking at him or her, this group believes that a mediator must screen potential clients in order to determine if domestic violence exists or existed. If the screening indicates violence in the relationship (currently or in the past), the mediator will decline to work with the couple. Screening typically involves a written test given separately to each spouse.

Other mediators do not agree. These mediators do not screen and, in fact, regard screening as biased (against the alleged perpetrator). They believe that a good mediator will learn during the session if there is an issue of domestic violence. The

theory here is that if there is domestic violence, which interferes with the mediation process, it will surface, and then the mediator can treat the issue as an instance of power imbalance (which a good mediator should be able to address).

Typically, a mediator who screens does so with every client, and the screening is administered separately to each one. The mediator does not simply ask, "Have you ever been beaten?" Nor can the mediator ask, "Has there been domestic violence?" because study after study has shown that women answer no to both questions. No one wants to be identified as a victim.

If you are a victim of abuse, please understand that many mediators will screen you out of the process. If you are determined to use mediation, there are competent mediators who can work with you, but you must proceed with caution. It is imperative that your mediator have the following qualifications: (1) understand the cycle of violence; (2) have received training to deal with the victim and the perpetrator of domestic violence; (3) understand all of the safety issues; (4) have a referral network with shelter advocates; (5) know the available legal action; and (6) have five or more years' experience as a mediator, at least some with clients where there has been domestic violence. However, it will be up to you to know and follow all safety precautions.

Prior to mediation, you should consult with a woman's advocate (an expert in the field of domestic violence) as well as someone who can advise you as to how appropriate mediation is to your specific situation. The violence must be over, and you absolutely must not be in physical danger from your husband, nor fear him. Finally, you may want to obtain or keep in place a legal restraining order. You must choose an experienced mediator who knows and follows safety rules (one typical rule is that spouses must leave the office separately with approximately twenty minutes in between each leave-taking, so that the perpetrator cannot follow the victim), and you must admit any abuse to the mediator.

To repeat, it is crucial that you choose a mediator who is knowledgeable in the field of domestic violence. Do not hesitate to question potential mediators as to whether they can and are willing to mediate if domestic violence is present. Ask for their comments. When I mediate with couples who are in this situation, I caucus with each individual, which means meeting separately with each client. Often I must caucus because there is a legal restraining order that prohibits the perpetrator from being near the victim. However, in situations of domestic violence, it is common to caucus whether or not there is a restraining order in effect. Let me add, however, that I have seen a number of divorcing couples where the woman's attorney advised the client to obtain a restraining order in order to gain legal leverage when there was no abuse nor any fear of abuse. This misuse of a restraining order is a travesty of justice and creates almost as much difficulty for the mediator as the issue of domestic violence, because there is also a victim, the unfairly accused husband. Mediation is a field with very few formal rules, so not all mediators may caucus with every case of domestic violence. As a client, you need to decide what you want and need. As always, the more you know about what your choices are, the better your chance of reaching your goal.

If the violence has ended, mediation can work if all of these factors are in place, but *it cannot work* if all are not present. Remember, there is no excuse for hitting someone. It is the perpetrator who has destroyed the chance of mediation, not the victim.

There are cases where violence has occurred in the past, but the present situation is stable. If this is your situation, mediation may be appropriate. For example, Stan and June presented a stable current situation with a past incident of domestic violence and no current fear by the victim. They had been married for twenty-six years and separated for four months. Their discussion revealed that at age seventeen, June discovered that she was pregnant, and married her nineteen-year-old boyfriend,

Stan. Stan quit college and got a full-time job (although in later years he took college classes during the evenings). Both sets of parents were angry and called daily to give the “kids” a piece of their mind. June was sick all of the time, not just in the morning. One evening at dinner, June was angry over what she considered a useless and frivolous purchase Stan had made. To this day, neither remembers what the item was, but both recall the situation. June made a nasty insult to Stan, who quickly got up from the kitchen table, tore his new shirt on the table edge, yelled back at her, and pushed her against the wall. That night June told Stan she’d leave him if he ever pushed her or did anything like that again. He swore he wouldn’t, and a significant issue is that he has never hit her nor used threatening behavior since that time. When they began mediation, June was not afraid of Stan, nor did she fear him during the mediation process. Though this couple did have an episode of domestic violence in their past, they were indeed appropriate candidates for mediation.

You Feel Afraid

I place a subgroup of people into the category of domestic violence even though there has been no history of violence. In these situations, the wife is afraid and feels threatened by her spouse, although her husband has never hit her. She is not able to stand up for herself for fear that she will be physically assaulted for the comments she makes during mediation. Do not ignore your feelings. Remember, domestic violence rates increase significantly at times of separation. A potential abuser may resort to violence when his partner walks out the door. If you are afraid that your spouse will hit you and that you will not be able to stand up for yourself and ask for what you want, mediation is not for you.

If you want to use mediation but are married to someone for whom it is not appropriate, I sympathize, but I assure you that the process will not work if your spouse is financially dishonest,

is a serious substance abuser, or is seriously mentally ill. In the instance of domestic abuse it will not work unless you have a mediator with a great deal of expertise in this area, and since this is rare, my advice is not to use mediation unless you are highly motivated, understand all the precautions and risks, and know that you are employing a mediator with the expertise to handle this most difficult of situations.