

Considering Divorce Mediation

Mediation can save you a lot of money and misery. If you are not convinced, do two things for yourself: First, read this book. Second, talk to divorced people who did *not* use mediation—as many as you can. Ask questions and most of all, listen. Chances are good that the stories you hear will make you run, not walk, to your nearest divorce mediator. However, the nearest mediator may not be the one for you. Even if you have already contacted a mediator, this book will help you decide whether you have made the right choice. If you discover that you have not, it is not too late to switch.

Mediation provides a place to make informed decisions and a mediator helps you gather the relevant information you need to make those decisions. This is why mediated agreements last, whereas divorce agreements negotiated by divorce lawyers so often end up with the parties back in court. Study after study has concluded that a minimum of **50** percent of all divorced people are back in court within one year of their divorce on a contempt, which occurs when a person does not follow a court order and the other party brings a court action, or a modification, which happens when one of the divorced persons brings a court action to change a prior court order. This percentage figure is

rarely disputed. In fact, professionals who work in the divorce field believe it is significantly higher. When you understand how the two worlds work—mediation versus the adversarial courts—it will be clearer how one method so often leads to a fair resolution, while the other leads to a bitter court battle.

As you consider mediation, it helps to have a clear understanding of the process. In providing an overview, I use my practice as the example, since I know it best and understand how it works. I have had a private mediation practice in Framingham, Massachusetts, since January 1981. In addition to myself, I have a panel of four trained and experienced mediators. The majority of our work is comprehensive divorce mediation. We all follow the same procedure.

Upon a first call from a potential client, our assistant makes two inquiries. First, she asks whether the caller would like to receive a free divorce mediation information packet (sent in an envelope which does not have the word *divorce* on it—a minor point, yet one that may be important to a client). Second, she asks if the caller wants to talk to a mediator. If the response is yes, a mediator then describes the mediation process and answers the caller's questions. The mediator, of course, cannot discuss any of the specifics of the situation with the caller, as mediators are meant to be impartial and may hear such information only during a joint session, with both clients present.

Following the initial call, the caller's spouse also may phone to speak with the mediator, but in our office, this does not occur often. At some point, one of the couple calls back to set up an appointment, scheduled for ninety minutes. The first half hour is a free, introductory session; the next hour is optional. If the couple chooses to go ahead with the mediation, the time has been reserved for them. However, if either or both of them does not want to use the optional hour, the appointment ends, and there is no charge.

The purpose of this introductory session is for the mediator to describe the process to the prospective clients. I encourage

each person to ask questions, but frequently the couple will say something along the lines of “I don’t know what to ask.” Be assured that you will know what to ask after reading this book.

During this session, I review the basic process, such as the average length of a session (ninety minutes), the average number of sessions for a couple with minor children and a house or a condo (five after that first appointment), and the fees charged (an hourly rate, with no retainer required). I list all of the charges and discuss cancellations and appointment changes. (This is an area that you should understand clearly: chapter 7 takes a longer look at fees and charges.)

The mediator gives each person a copy of the mediation contract to take home to review, so if there are any questions, there will be time to consult with an attorney before signing. The contract will be signed at the start of the next session. I explain the contract by saying that it is written in English instead of legalese, however, *it is a legally binding contract*. If you are uneasy about signing such a contract for any reason, you should consult with an independent lawyer and bring your concerns to the mediator. Remember, every professional should be willing to explain to you the terms of a proposed contract. Do not hesitate to ask for explanations and charges.

Each mediation client must disclose all of her or his income, assets, and liability. Most clients are well aware of this requirement. Mediators differ as to how much documentation is required. Our office requires documentation, so that each person is satisfied that his or her spouse has been forthright at the negotiation table. Another area that a mediator should discuss with you is confidentiality. In my state, Massachusetts, the law provides for complete confidentiality from the court of the mediation process. This means that neither the mediator nor her notes can be subpoenaed into court to testify or give evidence for or against her client(s). Be sure to ask your mediator if your state has a confidentiality law for mediators and exactly what the law means.

A good mediator reminds clients that mediation is voluntary. She should impress upon you that a mediator is not a judge or an arbitrator, and that she cannot make any decisions for you. All decisions will be made by the couple. Some mediators may advise you to consult with an independent attorney. In fact, a number of mediators require each client to have a consulting attorney. Our office doesn't, and I think that this requirement is more common among nonattorney mediators. No mediator should attempt to minimize your right to consult with a lawyer.

The more information you receive from your mediator, the more satisfied you will feel and the better prepared you will be. At this point in time, you should feel satisfied with the mediator's qualifications if you are to continue with the process. The following chapters will outline the guidelines of a good mediator.

In the next session, I begin by asking for specific information concerning each client's financial situation, with questions along these lines: What is your salary? Do you receive bonus income? Do you have a pension plan? If so, do you know how much is in the plan? Not only does this provide me with the necessary information, but it enables me to find out the financial expertise of each client, thereby avoiding unfair agreements down the road.

Next, I describe the relevant aspects of separation and divorce. Clients generally ask a lot of questions in this area, such as "What is a legal separation?" or "Are there different kinds of divorce?" and the most frequently asked, "What is the waiting period for a divorce?" Then I point out the documents required for divorce, such as the certified copy of their marriage certificate. Even though it is the first session, it is not too early to let clients know that they need this certificate, as it may involve a lengthy wait to obtain it if they were married in a distant location.

For clients who have minor children, we have a child custody session. I begin by finding out the present parenting arrangements, then determine the arrangement each person wishes. If

a couple's wants are unrealistic, or if they differ from each other, a mediator will help the clients resolve their disagreements, as well as explain the applicable state laws concerning legal and physical custody.

A small number of states are now writing laws without the words *custody* and *visitation* because of their negative connotations, though the majority of states still use these words. The mediators I know do not use either of these terms in discussing a parenting plan, employing them only when necessary. Don't ignore the language your mediator uses. Remember, you have a right to quality mediation. Someone who uses inappropriate, careless, or negative words may not be the mediator for you.

There is a lot of information available concerning the parenting of children of divorcing couples. I emphasize that the most important criterion for the adjustment of a child is the degree of conflict between the parents. The greater the degree of conflict, the greater the problems for the child. Parents want as much information as possible to help their child minimize the emotional trauma of the divorce. For those mediators who do not have a background in developmental stages or other necessary children's issues, the clients may be referred to a professional with expertise in this area.

The focus of the next session is child support. It begins with a review of each person's expense sheet. Mediators call these forms budgets, but don't let the word scare you. Budgets are actually expense forms, which may include your present or future expenses, depending on the specifics of the situation. Expense forms are an invaluable tool for examining important financial matters ahead.

Over the last few years—in response to federal dictate—every state has implemented legal child support guidelines. However, these guidelines differ from state to state. Some states allow parents to disregard the guidelines if there are good reasons to do so, while other states do not. Even if parents do not intend to follow the guidelines, and assuming they reside in a state where

this is possible, the judge will still expect the clients to be aware of these guidelines, and mediators can help clients to understand them.

Many child support decisions are involved in the typical mediated divorce agreement: the amount of monetary support; whether this amount changes over the years; if it does change, the criteria to be used; and, the most difficult decision, the duration of the payments. Most clients want to be able to renegotiate child support payments between themselves or with the help of a mediator so that, in the event of unemployment, they need not go to court.

The final topic in this session, if applicable, is the payment of a child's college expenses. Parents vary on their ability and desire to legally obligate themselves to pay for college. Once again, even though mediation clients have wide discretion to make their own decisions, most want to know if there is a legal obligation for a parent to contribute to the expenses of their college-age children. Some states require divorced parents to pay for such expenses, others do not. More than one client has angrily complained that it doesn't seem fair for the law to force a divorced parent to pay for college when it doesn't force a married parent to pay for it—that is, a married parent usually cannot sue his or her spouse for money to pay for college, but in divorce, the spouse *can* do so. Clients should also be made aware of the tax consequences of child support. Taxes are not only a complex area but are part and parcel of a divorce agreement. Unfortunately, not all mediators are familiar with this difficult area.

All clients participate in the property division session. Our office provides clients with the applicable state laws on that subject. We begin with real estate, specifically the marital house or condo. Invariably, this session is a difficult one as clients grapple with the inevitable question, Who gets the house? In order to help clients make a good decision in this area, we need specific information, such as the fair market value of the property. You will also need to provide debt information on the property, such

as the mortgage, equity line, and any liens. This subject often makes for hard choices: whether to sell the house, own it jointly, or have one person keep it. And at some point during this session, I explain everyone's favorite topic, capital gains tax!

At the assets/liabilities session, what is discussed depends on the specific financial situation of the divorcing couple. Assets are the items a person owns, and includes pensions, retirement accounts, stocks, bonds, vehicles, employment and self-employment plans (pension plans, 401k plans, stock options, insurance plans), bank accounts, investments, and apartment or house contents. Some assets that are not so common are closely held corporations, trusts, valuable collections, and antiques. Generally, in divorce settlements, assets must have a fair market value. Liability is the opposite of the asset coin: credit card debt, car loans and leases, school loans, IOU's, and the like.

A topic with the power to create incredible bitterness in the adversary system—and that all agree represents something other than the item itself—is the division of the contents in the residence. Mediators call this contents division; divorce lawyers disparagingly refer to it as the pots and pans issue. A significant number of our mediation clients are able to divide most or all of the contents themselves, though it is not easy to allocate items such as children's photos. Mediators can be especially helpful in this area by suggesting ways to accomplish this in the least painful manner.

After agreeing on which person is responsible for which debts, we discuss insurance and the availability and payment of health and/or dental insurance for each client and child. In many states, an ex-spouse may legally continue his or her coverage through his or her former spouse's health insurance plan. This is an increasingly important area with complex state and federal laws that will directly affect your pocketbook. In many states, life insurance is not required to be included in a divorce settlement, yet this is an important area if there are minor children or other financial obligations from one or both parents.

Some divorce agreements also include disability insurance. Two optional mediator sessions remain, one on alimony and the other called the final divorce session.

Alimony may not be a topic for all clients, but if it is part of the settlement negotiation, it is typically a highly charged topic. The tax consequences to both husband and wife are extremely complex, and if the mediator does not have a considerable degree of expertise in the area of taxes, it will be money well spent to consult a tax expert.

Filing for your own divorce is called *pro se*, Latin for “do it yourself.” Pro se clients will go to court on their own, without attorneys. The majority of my clients file on their own and, therefore, attend the final divorce session. (Filing for your own divorce is common in most states, rare in others, and unheard of in some. Ask your mediator about the law in your state.) The purpose of the last session is to sign forms and documents and to prepare for the court process. And last, we provide free time at the end of the session for clients to comment on the mediation process.

Some people assume that mediation means compromise. It doesn't. In fact, people in mediation are more apt to get the settlement they want because they are actively involved in the decision making, rather than stating their position through their respective lawyers. Indeed, disagreements are a routine part of the mediation process. Though they may seem difficult to resolve, they can be successfully settled with a good mediator. However, both husband and wife must agree to use the mediation process and, unfortunately, it is not unusual for either to be reluctant to see a mediator. If this poses a problem, chapter 3 discusses how to get your spouse to try mediation.