

ROLE OF THE DIVORCE MEDIATION CONSULTING ATTORNEY

- Support the Mediation Process
- Educate Your Client
- Gather the Necessary Information
- Review Options
- Strategies
- Review the Legal Documents

As independent mediation grows, so will the role of the consulting attorney. Most couples in mediation should choose to confer with legal counsel and in doing so will create a new area of legal practice.

The consulting attorney actually may represent the client by becoming his/her attorney of record or may do no more than consult and advise.

Sometimes one of the parties' lawyers recommends mediation and suggests that the parties try it without attorneys present in order to reduce expenses. Sometimes one or both parties have already retained lawyers before they learn elsewhere of the mediation option and decide on their own to explore it. If the parties stay in mediation and settle their case, their lawyers become essentially consulting attorneys, advising their clients in the background while the parties meet and negotiate in mediation.

When you find yourself in the role of a consulting attorney to a client in mediation, what is your job?

What *not* to do:

First, do not disrupt the mediation process. The fact that the parties are in mediation means that they have for now committed themselves to trying to work out their legal issues by agreement. If the lawyers keep filing motions and sending hostile letters back and forth your intervention may be required, but that situation is rare. If an emergency does arise, try to get the parties to return to mediation to resolve it if at all possible.

Occasionally, when most of the issues have been settled in mediation, the parties will become intractable over the nitty-gritty points remaining. They may have resolved custody and who gets the house and the retirement benefits but cannot agree on who gets the couch and dining room table. It is as though these final points hold the key to winning and losing, and both are determined not to lose. A lot of emotion can get centered around what are essentially trivial issues. If the parties stick with mediation, they almost certainly will work out those final details, but sometimes one of them gets so angry at this point that he/she goes back to his/her lawyer with instructions to take action to force their spouse to give in.

When your client comes to you in this state of mind, explore with him/her what has been going on in mediation and whether it might not be a good idea to continue the process rather than run up a lot of legal fees unnecessarily. Talk to the mediator and get her impression of whether the case still can be settled here. Do not grab your sword and go into battle without first having satisfied yourself that mediation has truly failed.

Remember too that your role is not to take every legal step available to strengthen your client's position. Your role is to help your client reach a fair and reasonable settlement with as little expense and damage to the family as possible. If you achieve this goal, your client will be careful and will send you more clients. It is not necessary for each case to be a high dollar one in order for you to make a good living. Satisfied clients will create a lucrative practice.

What to do:

The consulting attorney is very important in the mediation process. The mediator cannot advise your client, so it is your job to:

- (1) determine his/her goals;
- (2) thoroughly educate him/her as to legal rights;
- (3) help him/her gather and review all documents and other information necessary for settlement;
- (4) help him/her evaluate the options before him/her;
- (5) advise him/her as to mediation strategy; and
- (6) review the legal paperwork to make sure that his/her rights are protected and that the agreement is correctly stated.

Determining your client's goals: One of the most common refrains I hear from clients at our first meeting is that they have already seen an attorney and do not want to go back because the lawyer was so insistent that the client get as much as possible of the marital spoils - whether property or children. The client did not want to view the divorce as an adversarial proceeding and was therefore offended by the lawyer's attitude.

While I understand the lawyer's concern that the client understand his/her legal rights, that information must be conveyed in the context of the client's goals. First the lawyer must ask the client what he/she wants - and listen very carefully. If the goals are less than the law would allow, the lawyer, having made certain that the client understands the difference and is freely making his/her choices, should respect the client's goals and help him/her achieve them.

Educating your client: Next, you must educate your client. Review the child-related and property issues to make sure that his/her legal rights are clear. Explain the legal guidelines, explain the gray areas and the chances of winning or losing those points, and discuss how much of the client's goals are probably achievable. Help your client to think clearly about future needs and to separate present emotions from legal realities. It is best to have this discussion with the client before mediation begins or early in the process.

The more successfully you educate your client as to his/her legal rights, the more you increase the chances of a successful mediation. When both parties come to mediation with a realistic appreciation of their legal rights, the mediator's job is much easier.

Gathering the necessary documents and information: Your client may need help in deciding what documents and information is necessary to evaluate issues in the case before negotiations can begin. Pay stubs, tax records, corporate documents, real property instruments, retirement benefit records, and other materials may be essential to clarifying your client's rights. Help him/her draw up a list of such documents to bring to mediation and review those documents with him/her when they are gathered.

Reviewing options: Once mediation begins and options and issues crystalize, you can help your client evaluate those options in terms of his/her legal rights and future needs. Your legal advice and expertise are essential in helping your client appreciate:

- (1) which options are most favorable to him/her and which are least so;
- (2) the legal strength of his/her position on various issues; and
- (3) what issues other than his/her legal rights are important to him/her and how each option might affect his/her goals;

You may think of options that did not emerge in mediation, options that your client can then bring back to the mediation table and that may be the key to settling the case.

Strategizing: You can also help in strategizing about negotiation. While you do not want to encourage gamesmanship, it is valuable to consider steps in the negotiating dance - when to give and when not to, and what to trade for what, keeping in mind, of course, what is important to your client and what is not.

Reviewing the legal documents: Finally, when the mediator drafts the final documents, your task is to review them carefully with your client, making sure that they are correct, that they represent a reasonable settlement, and that your client understands them.

Assuming that your client has been consulting with you throughout the process, this is *not* the time to rethink the agreement and make massive changes. It is the time to review the agreement for anything that you may have overlooked and for technical errors.

By performing your job well, you enable your client to mediate the divorce successfully and achieve a fair settlement without subjecting the family to the expense and destructiveness of litigation.