

Divorce Mediation Primer

1. What is divorce mediation? Mediation is a voluntary settlement process in which an impartial person who is trained in dispute resolution meets with the parties to discuss the issues they wish to resolve. The mediator will facilitate the negotiation of those issues, with the goal of helping the parties reach a settlement. Participation is voluntary, and any agreement reached by the parties must be entered into voluntarily; the mediator has no power to impose a settlement. The process is ordinarily confidential, depending on laws in the location where the mediation takes place.

2. Why mediate? There are several reasons: (a) it's less adversarial than going to court; (b) it's more private; (c) you retain control of the process -- i.e., you are not bound by what the mediator thinks (indeed, most mediators see their role as helping the parties effectuate their goals, not imposing the mediator's ideas); (d) it's usually much less expensive; (e) if there are children involved, the process is less likely to embroil them in a painful conflict; and (f) mediation often gives divorcing couples a better chance of successfully negotiating issues that may come up in the future (such as child support, alimony, or custody and visitation issues). What is the downside? It's a lot of work, but then again so is going to court. If mediation is unsuccessful in bringing about an amicable settlement, one could view the expense as a waste of money. It is usually a worthwhile investment because divorce mediation almost always leads to a settlement. Even when it doesn't, it often results in focusing the issues in a case in a useful way, so that one or two narrow issues can be presented to the court, which can then provide the parties with specific guidance on those issues.

3. Is your case appropriate for mediation? If you and your spouse are comfortable talking with each other about your financial issues, child-related issues, or other issues related to the divorce process, and you have no objection to discussing them on a confidential basis with an impartial mediator, the case is probably a good candidate for mediation. Cases in which there has been a history of domestic violence are usually not good candidates for mediation. Each of the parties should have, or be willing to share, full information about individual and joint assets, liabilities, income, and expenses. Most mediators have financial statement forms that they ask the parties to fill out as part of the mediation process.

4. When is the best time to mediate? Most people mediate before any court papers have been filed. It is possible, however, to begin a mediation at any point along the way. Sometimes, if mediation is not begun at the outset, the tensions in the case become so intense that mediation is difficult. Therefore, mediation is sometimes more successful early in the divorce process. If there are

any near-term issues that need to be resolved (such as an agreement to “freeze” the marital assets while discussions are under way), those issues can be put on the front burner in the mediation and resolved before more global issues are addressed.

5. How do you select a good mediator? There are several steps to the process. Consult friends, relatives, professionals with whom you have contact, and referral lists from professional organizations. Gather information about each of the leading candidates, including references. Consider such factors as experience, training, cost, and geographic location. The most important step, however, is to interview two or three of the mediators at the top of the list. Try to determine whether the “chemistry” of your interactions with him/her feels right. The success of mediation sometimes depends on whether both parties feel comfortable with the mediator, and it is very difficult to decide that question based on paper credentials or even phone interviews.

6. What does the mediator do? That all depends on what the issues/problems in the case may be. Often the parties look to the mediator for help in identifying what issues they must address in order to get a divorce. Some divorcing couples can then resolve the issues that need to be decided at the kitchen table, and simply ask the mediator to prepare an agreement embodying those terms. If that cannot be done (and it is a rare case in which they can be), the mediator’s first job is to be a diagnostician and try to identify what the issues are that are making the process difficult. Then the primary tasks are to facilitate negotiation, help identify the parties’ underlying interests, and in some cases do some creative brainstorming/problem solving with the parties.

7. Should lawyers be involved in the mediation process? Generally lawyers do not participate in the mediation sessions, unless one or both of the parties feels unable to discuss and negotiate the issues that need to be resolved. If you and your spouse are able to negotiate and discuss the issues effectively, the presence of lawyers in the mediation room will not be needed in most cases, and often makes the process more expensive (because attorneys typically bill their time on an hourly basis). On the other hand, issues occasionally come up in a mediation that benefit from direct involvement of counsel, and therefore their participation at an occasional mediation session or their availability by phone during such sessions may be advantageous. In addition, there are substantial advantages when both parties line up counsel from the very beginning of the mediation, and counsel then participate from the “sidelines” (i.e., consulting with their clients between mediation sessions). Ordinarily counsel review any agreement before the parties sign it.

8. Who will draft the divorce agreement? If the mediator is a lawyer, s/he can draft the agreement, and that is often the best procedure if the mediator is well qualified and experienced in drafting such documents.

9. How long will the process take? What will it cost? Most mediations are conducted with sessions of 2 - 3 hours. The number of sessions depends on the number of issues and how successfully the parties are able to negotiate. It is not unusual for cases involving child-related issues to take five sessions if the parties are negotiating effectively, and somewhat fewer if there are no child-related issues. Experienced divorce mediators charge approximately \$150 - \$400/hour.

10. In what way is the court involved in the process? After the agreement is drafted and signed, it will be presented to the court with a petition for divorce. Then, at a hearing on the petition (which both parties ordinarily attend, most often with attorneys present), the court will review the agreement and decide whether is fair and reasonable. In the vast majority of cases, where the parties have counsel and a good mediator, the judge will approve the agreement with few if any questions.

11. Are there any good resources on the subject? There is a growing library of books on divorce mediation, among them: D. Neumann, Divorce Mediation: How to Cut the Cost and Stress of Divorce (1989) (description of the process); G. Friedman, A Guide to Divorce Mediation: How to Reach a Fair, Legal Settlement at a Fraction of the Cost (1993) (vignettes and accounts of real cases); J. Folberg and A. Milne, eds., Divorce Mediation: Theory and Practice (1988) (academic study of the process).

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