

3 Key Roles of Attorneys in Divorce Mediation

A recurring phenomenon among mediation clients is the belief that this divorce process option can be pursued effectively with minimal or no assistance from legal counsel. Attorneys, however, fulfill a number of valuable roles in mediation. These include advising the client, participating in mediation sessions, and finalizing the agreement reached in mediation. Clients who believe otherwise endanger the mediation process itself, and risk serious harm to their own interests. The cost savings from eschewing competent legal counsel during divorce mediation seldom are worth the added risks.

Attorney advice before and during mediation is essential for the client to fully benefit from the process. The attorney can help the client understand the mediation process, and the alternatives to mediation. The attorney can help the client examine the different options to solutions proposed in mediation. Often, the attorney can suggest new or different solutions that the mediator may have overlooked. The attorney can ensure that the client understands the full range of consequences from various options proposed in mediation. The attorney can confirm that the mediation covers all issues important to the client. And the attorney can act as a counselor, based on experience guiding other clients in similar situations.

Attorney participation in mediation sessions also serves many purposes. It can reassure the client who feels overwhelmed, disadvantaged, or confused. It can provide real-time response to questions and concerns the client may have. It can model appropriate and civil dispute resolution techniques. And it can provide a timely intervention from a trusted source when the client reacts negatively during a session. Some mediators prefer for attorneys to remain outside of sessions, and this often is appropriate. Others prefer to have the attorneys present almost every time, and this too can work well. The attitude and demeanor of the attorneys is important, as is the behavior of the clients. Attorneys trained in mediation techniques and attuned to the unique dynamics of the mediation process can add great value from their participation in the sessions.

Finalization of the mediation agreement is a phase particularly well-suited to the attorney's skills, experience and training. After all, this phase consists of crafting a contract that covers all issues and maximizes the odds that clients will respect and follow their agreement. It requires an understanding of the purpose for each of the terms agreed to by the parties. It requires knowledge of the interrelationship between issues, and the legal norms applied to contracts. It requires experience seeing various situations work – and others fail, including the cost and options for fixing failed agreements. It requires the lawyer's "what if" thinking applied to potential enforcement issues. And, of course, it requires precise legal draftsmanship.

Attorneys dread the situation where a client wants to hire them just to review a mediated agreement. Sometimes it has already been drafted by the mediator or even one of the mediation clients, after the mediation is supposedly over. This assignment can be an invitation for the attorney to become the devil

who wrecked the mediation process. If the attorney discovers that issues, options, or client goals were overlooked, it is either too late, or the “deal” must be redone. If the attorney finds that the client gave up too much, it often is too late. If the attorney finds unenforceable promises or other unintended legal consequences, it often is too late. And if the attorney finds serious flaws in the agreement wording, it often is more difficult and costly to repair than drafting the agreement correctly in the first place. Clients who hear any of these messages sometimes blame the attorney for the consequences. No wonder attorneys advise clients to consult them early in the mediation process.

As these points show, attorneys are an integral part of the mediation process. Clients who ignore this put at risk the many benefits this wonderful dispute resolution process offers.

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