

Deconstructing the Divorce Mediation Process - One Practitioner's Approach



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My objective in this article is to deconstruct and thereby demystify what happens behind closed doors during the divorce mediation process. I describe an approach to the divorce mediation process, with the caveat that each mediator has their own style, and that there are many right approaches. Although I have outlined an approach that assumes the couple has children, I use the same approach in a more contracted fashion, for couples without children. It is also important to note that although I have outlined a mediation process taking five sessions, many clients are able to complete the mediation in fewer sessions, and a few clients, especially those with more complex situations, may require more sessions.

The reality of divorce is that most clients have similar issues they need to address such as the house, the pension, and college education for the children. I therefore follow the tenet that mediation can be approached in fairly structured manner so as to minimize mediation fees, maximize the productivity of sessions by keeping clients focused, and expedite a resolution before the conflict is allowed to escalate. Nevertheless, I also believe that the process should also be flexible to properly address the uniqueness of each couple's situation such as different religious requirements, or the needs of a gifted child.

Initial Inquiry

One half of a couple usually phones to make an initial inquiry about mediation. In his book *The Fundamentals of Family Mediation*, John Haynes, the Founding President of the Academy of Family Mediators, states that "the mediator is presented with a classic dilemma: how to provide sufficient information so she can make an intelligent decision about the suitability of mediation while at the same time not developing a relationship with the client." While the mediator will suggest that the other party also call her so that she can speak to both parties prior to meeting with the clients together, this may or may not occur.

During this initial inquiry, the mediator will try and ascertain the following:

- ***How the prospect received their name.***
- ***The names of the parties and their attorneys.***
- ***Where the parties are in the divorce process with their attorneys.***
- ***Whether there are any domestic violence issues that would preclude the couple from mediating.***
- ***The length of the marriage and the ages of the children, if any.***

During this initial inquiry, the mediator will provide information regarding their background, an overview of the divorce mediation process, and a summary of the fee structure. They may explain that the mediator's role is to help the couple explore options, and bring knowledge and experience that provides a context for decision-making, but that ultimate decision-making authority in the process rests with the parties.

The mediator will also discuss the role of attorneys in the mediation process. Specifically, that although attorneys generally do not participate in the mediation sessions, the two spouses are encouraged to consult with their separate attorneys throughout the process. They may also use the services of attorneys to prepare their separation or divorce agreement, based on the decisions outlined in the non-binding Memorandum of Understanding prepared in mediation.

First Session

The first session serves as an introduction and overview of the mediation process. The agenda for the first session will usually encompass the following:

- ***Description of mediation, the mediator's role, number of sessions and fees.***
- ***Parties' objectives for today and for the mediation process.***
- ***Review of the mediation agreement including fee arrangements.***
- ***Legal information including the grounds for filing for divorce/separation.***
- ***Description of issues to be addressed in the mediation process.***
- ***Develop list of documents for clients to bring in for the next session.***

There may be great anxiety about the session. A number of things help to put the clients at ease during this session. Mediators may remind clients that the purpose of the first session is to provide them with information, and that they are under no pressure to make any decision until they are comfortable. The most helpful part of this session is hearing each party's objectives for the mediation, and reframing these comments so that they also hear each other. Clients often state that they don't want to spend unnecessary money, don't have the intestinal fortitude for a court battle, want to keep their conflict

private, and want to remain friendly with each other for the sake of the children.

The mediator will provide a list of documents needed for the next session. If either party has a defined benefit pension plan, the mediator will provide forms so that they can request a valuation of the pension. If there is a business or professional practice, the mediator will suggest that the parties need a business valuation by a neutral business appraiser and may provide a list of professionals. Other documents that are usually requested include:

- ***The children's school schedules with holidays.***
- ***Pay stubs.***
- ***Last year's W-2 Forms for each party (summarizing annual earnings).***
- ***Most recent federal tax return.***
- ***Copies of all banks, brokerage, and 401(k)/403(b) statements.***
- ***Most recent mortgage statement showing outstanding loan balances***
- ***A summary of all insurance policies and coverage.***
- ***A market assessment of real estate if property values are in dispute.***
- ***A list of household items to be divided, if the parties cannot agree among themselves how to divide these items.***
- ***A credit report for each party.***

With the exception of business appraisals that can be very time-consuming, it usually takes at least two for clients to collect the other requested documentation and deal with getting a market assessment on the house. The time lapse is also helpful in allowing client to process what happened in mediation and their emotional issues regarding their impending separation and divorce. That is also the reason to space out the other sessions, usually leaving at least one week, and preferably two weeks, between each session.

Second Session

The focus of this session is on developing the parenting plan and on data collection. The agenda for the second session will usually encompass the following:

- ***Sign the mediation/fee agreement.***
- ***Develop the parenting plan and address related issues.***
- ***Meet with each party alone.***
- ***Collect requested documentation.***
- ***Provide budget worksheets for completion by the next session.***

Many states require parents in divorce proceedings to file parenting plans, with the hope that the parties will be encouraged to fulfill their parenting

responsibilities through their agreements rather than rely on judiciary intervention. The parenting plan typically encompasses non-financial parenting issues, including:

- ***A specific schedule for parenting time for each party including weeknights, weekends, vacations, religious holidays, school vacations, birthdays, and special occasions, and including procedures for transferring the child.***
- ***Access to various records including educational and medical records.***
- ***Provisions or restrictions on domestic or international travel.***
- ***The impact if there is a contemplated change of residence by a parent; and***
- ***Participation in making decisions regarding the child included decisions about religious upbringing, health care and education.***

In some states, child support is based on a number of factors including the number of overnights each parent has with the child/children. By first developing the parenting plan, the mediator has an essential building block to assist the clients in structuring their financial settlement.

During this session, the mediator may meet with each party alone. Different mediators have different views on whether this meeting is confidential; the mediator should share this information, so clients can proceed accordingly. Most clients appreciate the time in caucus, as it allows them to share the emotional details of their personal situation without worrying about their spouse's reactions.

If the case appears appropriate for spousal support because, for example, one party has been out of the work force, budgeting is a necessity. The mediator may provide budget work sheets for clients to complete, outlining current and projected expenses.

Third Session

By the third session, most clients have begun to feel comfortable with mediation. The focus of this session is on data analysis for child support and distribution of assets and liabilities. The agenda for the third session will usually encompass the following:

- ***Review child support based on child support guidelines.***
- ***Discuss other financial issues related to the children.***
- ***Review inventory of assets and liabilities.***
- ***Decide how to divide assets and liabilities.***
- ***Collect budgeting information.***

Each state has its own child support guidelines and formulas, and many of the courts will require proof that parties have been provided with information regarding what child support would be by the state's child support guidelines. Clients may choose to adjust the child support -- that is also something the mediator should work through with clients. Additionally, if spousal support is also warranted, child support may be revised upward or downward depending on the amount of spousal support agreed to in Session Four.

There are frequent and recurring child expenses that must also be addressed during this session including:

- ***Work-related childcare.***
- ***Child's share of health insurance premiums.***
- ***Out-of-pocket health care expenses of the child such as for orthodontia.***
- ***Other extraordinary but forecastable expenses such as SAT preparation classes.***

Some child-related costs cannot be anticipated at the time of the divorce such as fees for summer camps or karate lessons. Parents often choose to share these costs or pay them in percentage to their incomes. The mediator may also bring up the following issues:

- ***Frequency and/or events that should trigger a child support modification.***
- ***Age of emancipation for the children as related to the child support obligation.***
- ***Any religious rites of passage and how they will be funded such as Bar Mitzvahs.***
- ***The parties' desires regarding the child's college education and costs.***

The first area discussed with respect to assets and liabilities is personal property. If the parties can decide how to divide their personal property on their own such as furniture, stereo equipment, television, computer equipment, antiques, photographs, the mediator will usually stay out of that process. If they cannot, the mediator may suggest they make an inventory of household items.

One methodology for dividing other marital assets and liabilities is to prepare a three-column spreadsheet program such as Excel. The total estate would be in Column One. Column Two would be reserved for assets and liabilities the wife is receiving, and Column Three would be reserved for assets and liabilities for husband is receiving. As an example, if the parties have a car worth \$10,000 with a \$5,000 loan, a house worth \$250,000 with a \$125,000 mortgage, and a bank account with \$130,000, the total value of their entire

estate as indicated in Column One would be \$260,000. If the parties decide the wife is keeping the car, the car loan, the house and the mortgage, those values go in Column One, it is clear that she is getting 50% of the total assets. Please note that this is a simple illustration and does not adjust for potential taxes, sales commissions and closing costs that may or not be considered in the mediation process.

Fourth Session

The focus of this session is on budgets, spousal support and other outstanding issues. The agenda for the fourth session will usually encompass the following:

- ***Review parties' current and forecasted budgets.***
- ***Discuss what is needed if there are shortfalls including spousal support.***
- ***Review other outstanding issues including incomes taxes, religious issues, cost of the divorce, etc...***

As with the balance sheet, the mediator will take data provided by the clients and create a spreadsheet with the parties' marital budget, and the projected budgets for each of the parties after the separation and divorce. There are many issues that influence the ease or difficulty of this task. It is usually easier if the parties are already living in separate residences and are employees rather than being self-employed. The parties' capacity for record keeping will influence the accuracy of the budget. For most clients the goal is to capture the 20% of expenses that account for 80% of their budget.

The budgets either provide reassurance that both parties will be self-sustaining and relatively comfortable or help identify shortfalls. The budgeting exercise provides for a more rational discussion regarding spousal support be it some type of interim support, support for a number of years, or in longer-term marriages, permanent alimony.

Outstanding issues usually addressed in this session include:

- ***Income taxes including exemptions for the children, and filing status during the separation.***
- ***Religious issues such as possibly religious annulments for Catholic clients, and Gets for Jewish clients.***
- ***Whether the wife plans to change her name following the divorce.***
- ***Social Security issues, including the ten-year rule.***
- ***How the parties plan to pay the legal costs and fees for the divorce.***

Fifth/Last Session

The focus of the fifth, and usually the last session is on reviewing the Draft Memorandum of Understanding and amending/correcting it. The Draft MOU summarizes everything the parties have agreed to in the mediation process. The MOU is not intended as a legal document and will remain unsigned by the parties. It serves the purpose of putting in writing the goals, intentions and attitudes of the couple.

If clients have not secured legal counsel, most mediators will supply a list of mediation friendly attorneys and will encourage their clients to make contact with a few attorneys so that they can inquire about fees, availability and approach. Frequently, mediators will suggest that clients also review the MOU with their accountant, tax accountant, and financial planner.

The last part of this session will be spent answering questions and addressing concerns. Most clients are comfortable with the MOU, but apprehensive about moving forward. They should be assured that the hardest part of the process is done - the decision-making. Their attorneys will review the MOU, and help them implement the agreement. The mediator will assure them that if any conflicts arise during the filing process, during the divorce, or after the divorce, they are free to come back to mediation to address those issues. A revised MOU, reflecting changes made by the clients in this session is mailed to clients, shortly after this session.



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