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The Most Common Questions Asked About Divorce Mediation

by Diane Neumann

1. Why use mediation?

There are many reasons; the primary ones are: You can:

- Save a significant amount of money.
- Reduce anger and bitterness.
- Allow the divorcing couple to make their own decisions.
- Create a cooperative atmosphere, clarify the issues between spouses, foster clear communication, and keep emotional tension separate from financial decisions.
- Acquire vital information, including legal, financial, and parenting information.
- Receive a fair settlement.

2. At what point should you use mediation?

As early as possible. It is best to start mediation before the actual physical separation rather than waiting because the mediator can help separating individuals make good decisions. For example, a mediator can help create a good temporary parenting arrangement, calculate the amount of child support, and assist in determining responsibility for the payment of rent or mortgage.

3. How much does mediation cost?

Mediation rates vary, the same as does the cost range of other professionals, and an average mediation involves approximately six to ten hours of face-to-face sessions plus the cost of the Memorandum of Understanding. If the mediator is charging a fee of \$150.00 per hour, six hours would cost \$900.00, plus approximately \$400.00 for the document, for a total cost for both people of \$1,300.00. This cost is significantly less than the cost for an adversarial divorce.

4. How long does it take?

Mediation is concerned with the negotiating phase of divorce. The mediation period generally takes six to ten weeks, though it may take more time or less because of the particulars or anger of the individuals involved. An adversarial divorce takes more in the nature of six months to three years to arrive at a settlement. There is quite a difference in the span of time required for an adversarial versus a mediated divorce. In a mediated divorce, the length of time is determined by the couple, as the court does not intervene. In a court-litigated divorce, there are extreme examples, and many of you probably know situations where the divorce has taken years to obtain.

There are several factors that influence how long it will take to reach a mediated divorce settlement. If the following factors apply, it will probably take **a little longer than usual** to work out your settlement:

One or both spouses:

- Absolutely refuses to accept the end of the marriage.
- Has a complex financial portfolio that includes such investments as limited partnerships and tax shelters.
- Is having an affair with the spouse's best friend, or an individual sure to cause more anger than usual.
- Is self-employed, while the other spouse has absolutely no knowledge of the business.
- Refuses to become informed about an important aspect of their divorce.
- Is silent and does not take part in the mediation.
- Is extremely hostile and verbally attacks the other.
- Insists on full-time physical custody of their children for the parent's own personal needs.
- Has been ordered to mediation by a court after an unsuccessful court trial.

People with the following characteristics will most likely have a **shorter mediation**:

- The couple chooses mediation voluntarily.
- Both have been emotionally healthy during their marriage and are in touch with how they feel.
- Each person can separate his or her anger from the concrete issues that must be resolved.

- Their angry feelings do not necessarily mean they seek revenge.
- They want to make their own decisions.
- Each is willing to learn new information.
- They are willing to let go of the marital relationship.
- They are parents who want what is best for their children rather than what is best for them.

It is a couple's attitudes that determine how long they will take to negotiate their settlement. Reasonable men and women will most likely have a fairly short period of negotiations. In all cases, mediated agreements are more efficiently reached than adversarial agreements.

5. Will a mediator make any decisions for us?

A mediator does not make decisions, if he does, he is actually an arbitrator or judge. Instead, a mediator does something which is more valuable—he helps the couple to make decisions that each knows is fair. This informed decision-making component is one reason why mediated agreements have a high compliance rate.

6. Won't the mediator take sides?

No, a good mediator does not take sides. Remember that therapists have long counseled couples without "taking sides." The ability to be impartial is the most important skill of the mediator, and is an important reason why people need to choose a competent mediator. A trained mediator is able to put his/her biases on hold in order to help the divorcing couple.

7. Why do you need a mediator to help?

There are two main reasons that make it close to impossible to mediate your own divorce settlement. First, the end of a significant relationship involves such intense emotional turmoil that it is difficult for two individuals to resolve issues fairly without professional assistance. Second, most individuals do not have the specific knowledge necessary for making informed decisions in divorce-related areas. For example, a couple may think that the pension in the husband's name automatically belongs to him, not realizing that the law in their state considers pensions a marital asset. Or a spouse may attempt to waive rights to an asset without even knowing its value.

I have gotten calls from separated people who tell me, "We've already divided everything up and just want it formalized." More often than not, the list was made by just one spouse, with the other spouse simply going along with the idea. In every case I have seen, the couple has left out at least one important area, such as future support modifications or real estate responsibilities. Frequently, there are serious omissions that should be included in a divorce agreement. There aren't any statistics on these types of do-it-yourself settlements, but it is safe to say that uninformed decisions generally do not have good track records.

Mediation using the help of a neutral individual is the closest process for a do-it-yourself divorce settlement as you are the ones making the decisions.

8. Does a mediator meet with the children?

Typically, the mediator does not meet with the children. Instead, the mediator meets with both parents in order to help the parents create a parenting arrangement which is in the best interests of the child. A knowledgeable mediator is invaluable in helping families create a post-divorce arrangement that will work because it takes in everyone's concerns.

9. Is there any risk in using mediation?

As with any profession, if you have an incompetent professional, you will not have a successful service. In mediation, the specific risk of an incompetent mediator is that the less financially sophisticated person will probably end up with a bad deal, i.e. get less money and less than his or her fair share of marital assets.

Unfortunately every profession has its share of practitioners who are not skilled at what they do. Mediation is a relatively new profession and the small number of current mediators are highly skilled individuals, but as this field increases, it will most likely have the same problems as other professions in guaranteeing the quality of its practitioners. Your mediator is not well-skilled if he or she:

- Acts solely as a referee for the divorcing couple.
- Makes decisions for you.
- Takes the side of one person against the other.
- Is not knowledgeable about divorce laws, federal and state taxes, pension rulings, and all other issues of your agreement. The mediator does not need to know everything concerning each area (no one professional is an expert in every area), but the mediator should know when such information is necessary and how to get it.
- Has a bias that affects all decisions.
- Makes a financial contingency fee arrangement with you. Contingency means that the cost of the mediation depends on the settlement itself, such as five percent of the settlement. Mediation fees should be based on an hourly rate and not contingency arrangements.

10. Do you still need a lawyer?

"In early Greece, republican Rome and dynastic China there were rules against paid legal advice," says Jerald Averbach, in his book *Justice Without Law*. Many separating individuals wish this was true today, fearing that lawyers will sabotage their mediated divorce settlement. Rarely does a mediator require a client to retain an attorney, however, the majority of mediators recommend that each client consult with a lawyer at some point during the mediation and certainly, prior to signing the separation agreement.

During the mediation, a lawyer may provide ongoing advice in complicated legal situations. When a client picks up erroneous information (whether from well-meaning friends or TV programs), I often suggest that he consult with a lawyer to help serve as a reality tester. A client with an extremely unrealistic idea of his or her probable legal outcome, or one who refuses to understand the consequences of the choices they are making, may be helped by hearing a lawyer's advice. Obviously, the lawyer's attitude toward mediation is critical: the lawyer should be supportive of mediation as well as experienced in divorce work.

Men and women in mediation make their own decisions; that is one of the strengths of the process. You may choose to use lawyers, but you must take responsibility for the actions that result. When you give your decision-making power to someone else, it may feel good for the moment, but in the long run, people who do not take part in their own financial and personal decisions often live to regret it. Mediation provides a method to make your own decisions.

11. Will you get a better settlement if you go to court?

Occasionally someone asks me, "Won't I get the entire house if I go to court and tell the judge what my husband did?" or "Wouldn't the judge see that I shouldn't have to pay that amount of child support to an ex-wife?" The men and women asking these questions have one characteristic in common—they have never appeared in a divorce court action. Men and women who have already been to court for a divorce know how unrealistic these questions are. They know that you rarely get a chance to tell your entire story in court and when you do get the opportunity to speak, the parts you think are essential often are not allowed into evidence. The court decision will most likely hinge on technical aspects that seem absurd to someone not versed in "the law."

Most people go to court with one idea—they believe the judge will decide in their favor. Rarely have I met anyone wanting to go to court who assumes they are destined to lose. In some ways, it is a tribute to each person's ability to convince themselves that "I will win once the judge hears what happened." Unfortunately, this naive view of the judge as a kind fatherly protector may not be what awaits you in court.

The actual goals of the judge, in fact, may differ radically from yours. Many divorce court judges share the sentiment of one judge who says, "If I see each of them walking out of court with their head down and looking sad, then I figure I made a pretty good decision." Since there is so much to lose, the court tries to see that neither side loses too badly.

The reality of a divorce court trial is that most litigants walk out of the courtroom feeling as if they have just been run over by a truck. Even the apparent winner rarely feels good. What looks like winning on the outside often doesn't feel good either because the spouse feels entitled to much more than what the court awarded or because he or she feels guilty. The winner may also find his or her enthusiasm dampened by the warning they hear from their lawyer to prepare for the next round, when their soon-to-be ex-spouse will surely appeal the judge's decision. An appeal means another trial, more money, and, of course, the emotional trauma that seems to have no end.

There is another courtroom myth that dies hard, the myth that legal fees are paid for by the party who loses. In most divorce courts, this is simply not true. Whether you win or lose, you will most likely be picking up your lawyer's tab.



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