

Representing parties in private divorce mediation

This field requires skills quite different from those you use in litigation.

Michael Becker

As private mediation becomes an accepted method of resolving divorce disputes, increasing numbers of clients are asking lawyers to provide a new kind of service as “consulting counsel” for them in mediation. Since most clients in mediation choose to confer with legal counsel at some point, significant questions have arisen concerning how to practice in this new field. This article is intended to help family

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lawyers define their new role.

Clients now seek the services of lawyers who understand and support mediation, and who possess the skills and knowledge to work effectively as consulting counsel. Lawyers often play a proactive role in mediation. Stated broadly, the consulting counsel offers information, assistance, and advice to ensure that a party makes good decisions, based on a full understanding of the law and possible outcomes.

A lawyer serving as consulting counsel in private divorce mediation has to address several issues:

- How should one define, with the client, the scope of counsel's work, including the bounds of discovery?
- How does the advice that counsel gives, as well as his or her demeanor and

views concerning possible negotiating strategies and settlements, differ from those in an adversarial representation?

- Should counsel file an appearance with the court, and, if so, at what point?
- What kind of retainer letter is required for consulting-counsel engagements, and how should it differ from the usual retainer letter?
- How does a lawyer cope with having less control over the case, in terms of process and settlements, as this relates to malpractice liability?
- How should counsel handle the “business end” of consulting engagements, such as billing?

Lawyers are trained primarily to be effective representatives in an adversary system. Though more schools now offer

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courses in alternative dispute resolution, and many offer clinical courses in mediation, American legal education still focuses mainly on honing adversary skills through reading, discussing litigated cases, and clinical work.

I intend to provide family lawyers with answers to these questions by laying out a basic outline of practice for attorneys who represent clients using private mediation—when counsel does not attend or participate directly in most mediation meetings. A secondary purpose is to clarify clients' expectations for consulting counsel's important role in this process.

Private divorce mediation

There is no single model of mediation. Basically, private divorce mediation is a voluntary process in which a neutral professional helps the parties resolve their issues.

While in some jurisdictions divorcing spouses are required to attend mediation meetings—especially when custody issues remain unresolved—this article focuses on the majority of situations, in which the parties use private mediation voluntarily. It can be used to develop a complete divorce settlement or to resolve just one or a few issues such as custody, property division, or alimony.

The meetings most often occur at the mediator's office because it is a neutral site. Ordinarily, most discussions are conducted in joint session, with both clients in the room at the same time. However, sometimes the mediator may choose to talk briefly with each party in separate meetings, called "caucuses." Whether to caucus, and, if so, how often, will depend on the situation.

Consulting counsel usually works with his or her client in between mediation meetings, and is most often not present at the actual mediation sessions. This is not to say that counsel is per se excluded from meetings. There are times when the presence of one or both attorneys is useful, especially at the end of the mediation, when agreements are being finalized or specific options evaluated.

The mediator is a neutral professional, which means that he or she does not actually take the side of either party, such

as by strategizing with one against the other, or helping one to get a better deal. Equally important, mediators, unlike arbitrators, do not have the authority to impose a settlement. Instead, the mediator's purpose is to help the parties develop a settlement that works well for them and their children. Only in some cases will the parties give the mediator the power to make recommendations.

When the mediator is licensed to practice law in the jurisdiction, and when permitted (this is a disputed norm), he or she may draft the legal agreement encompassing the parties' understandings (for example, a separation agreement). This is done for at least two reasons, both client-driven. First, clients often ask attorney mediators to draft settlement agreements because they want the professional who sat at the mediation table—and presumably best understands the nuances of the settlement—to do the drafting. This way, the drafter can capture the parties' specific desires and priorities. Equally important, clients believe that the mediating attorney has an obligation to draft neutrally.

A nonattorney mediator usually compiles a "memorandum of understanding" outlining the parties' tentative agreements. In almost every state, to avoid charges of unauthorized practice of law, this document will be a nonbinding rendition of the mediator's best understanding of the parties' intentions, and is often written in the form of a letter to the parties. The memo-

randum of understanding should not be anything that a reasonable person would confuse with a legally binding agreement. The legal separation agreement is then drafted—based on the memorandum—by a licensed attorney who is either affiliated with the mediator or is one of the parties' consulting counsel.

Quite often parties themselves don't agree with each other as to exactly why they have chosen private divorce mediation—but they do agree to come to the table. Parties generally choose mediation because it leaves them feeling more in control of the decision-making, is less expensive, moves quickly, and is private. Most everyone using the process also does so because it avoids the nasty tone of adversarial divorce; mediation provides greater peace for the family and helps to shield children from explosive conflict.

Consulting counsel's role

Consulting counsel's responsibility is very different from the zealous adversarial representation lawyers are used to providing. The key is to help the client, from the sidelines, to successfully conclude a settlement that meets as many of his or her needs as possible and that the client believes is fair overall.

In the vast majority of cases, the job is not to help the client negotiate down to the last penny or to crush the other spouse. Many clients will say that leaving something on the table for the other spouse is acceptable to them if doing so moves the settlement process along—and if the overall settlement meets their financial needs or some other need such as a desire for finality, peace, or retention of privacy. As in all negotiations, different clients will have different priorities, which is important given the control mediation clients often have to develop settlements customized to their needs.

While some clients choose to dispense with using attorneys of their own, in the majority of cases it is a good idea for them to have consulting counsel, and in my experience the better mediators strongly encourage each client to do so. Most do opt to use consulting counsel at some point in the process.

Consulting counsel need to take a more global view of the case than they do in the typical adversarial approach of helping clients focus exclusively on their own best interests.

If the mediator is not an attorney, each party should definitely retain an adviser who can fill in his or her client on the relevant laws, how they might apply in the case, and what might occur at trial. Also, the parties will need someone to draft a legally binding agreement at the conclusion of the mediation. Even if the mediator is an attorney, clients often value the individualized advice and strategy that mediators, as neutrals, usually will not provide.

Each mediation client will want a slightly different level of service from consulting counsel, and the two should come to an understanding on that issue. Most clients do not want their consulting counsel to call all the shots or take over the mediation. In some respects, mediation is a response to the lack of control over decision-making that clients sometimes report feeling in litigation.

In most cases, counsel's function will be to facilitate the client's own decision-making. This includes, except in special circumstances, leaving the client in charge of the mediation process itself. Lawyers who attempt to "take over" the mediation—by insisting on attending all meetings or being in constant contact with the mediator—rob their clients of the autonomy that often attracted them to mediation in the first place. These attorneys will often end up losing the representation or making the client dissatisfied.

But this does not mean that consulting counsel must remain passive throughout the case. Lawyers who do this leave their clients vulnerable to possible overreaching by the other party and, more important, without the crucial advice most clients need or want. Finding the specific balance that meets each client's needs and personality is critical and requires some practice. This is not a role all lawyers wish to take; I know of at least one attorney who will not accept it.

Consulting counsel should keep in mind the following specific points when defining their role with clients:

Support the mediation and take a global view of the case. Clients usually contact consulting counsel after having chosen to use private mediation, sometimes after having begun the process. This means that

the parties have for the moment committed themselves to resolving issues by agreement and through mediation.

However, it is often a good idea to at least ask if the client is comfortable with the choice of mediation. For example, cases involving substance abuse or domestic violence can require special care and may not be appropriate mediation cases. But this is different from second-guessing the client at the outset. Unless you discover substantial evidence that your client has made a serious mistake by choosing mediation, you should help your client and never disrupt or undermine the process. Remember that all attorneys have had clients who have made decisions with which they personally disagree.

In my experience, lawyers who file barages of motions and send hostile letters can easily destroy the mediation, often to the consternation of their own clients. However, if you truly object to the mediation or believe that you cannot help in the way the client wants, discuss this with your client. In extreme cases, you can usually discontinue your involvement.

Lawyers who serve as consulting counsel need to take a more global view of the case than in the typical adversarial approach of helping clients focus exclusively on their best interests, regardless of the potential disadvantages to the other spouse or the explosive effect that taking an extreme position might have on the negotiations. Parties often choose mediation because it is a less adversarial, problem-solving approach. The goal is to arrive at balanced agreements that work for everyone.

This kind of result usually increases the parties' satisfaction with the deal (and with the counsel's services), decreases "deadbeat" problems, and can substantially reduce the need for postdivorce interven-

tion, as clients learn how to deal with each other in a businesslike fashion. An outcome that is great for one party but terrible for the other might be fine in an adversarial setting but ordinarily has no place in mediation.

Clients usually want advice from consulting counsel that is consistent with this objective. Helping your client develop solutions that will work well for all parties will help move the negotiations toward a successful resolution.

Define the scope of your work. Though the concept of divorce itself is not by any means foreign to Americans, very few people know much about the divorce process itself, and what people think they know or have heard from others is often wrong.

So you should not assume that your clients have any specific ideas concerning possible roles you might take as consulting counsel or, if they do, that these notions are consistent with yours. It's your job to outline the possible roles you might take and then to write the specifics in your engagement letter.

Since the mediation process is so flexible, there are many different ways to use consulting counsel, and it is important to agree on this early on. Also, in some areas mediation is only beginning to see widespread use, and clients may be less familiar with the possible roles consulting counsel might take.

You will probably find that given the adaptable nature of mediation, your role as consulting counsel will differ from case to case. This is different from adversary litigation, in which counsel's role is usually consistent.

Some clients who use mediation will negotiate their whole agreement and work with consulting counsel only to produce a written settlement agreement. Others want their lawyer to be involved

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from the outset in each step of the case. And still others want counsel to perform discrete tasks such as strategizing about the negotiations, reviewing underlying financial information, or helping clients understand applicable law or a judge's possible action. Consulting counsel must remain flexible in delivering services to meet each particular client's needs and circumstances.

Once counsel and client have agreed on the scope of the representation, putting it in writing as an engagement letter is extremely important. It prevents misunderstandings and can provide important protection for consulting counsel in the future, since in most cases the scope of the work will be less encompassing than in a full-service representation.

Being consulting counsel is as much about what you will not do for the client as what you will do. In general, clients want your counsel, knowledge, expertise, and advice—but without the zealous adversarial representation.

It is useful to outline specifically in the engagement letter what you have been asked not to do. That way, you make absolutely certain that the client understands the elements of full-service representation you will not perform.

Remember that the client is ultimately in charge of the scope of the representation. However, you have the right to advise the client about the dangers of unduly restricting your work. These dangers, if present, should be addressed in your engagement letter.

Crystallize goals. Probably the most important thing any lawyer does with any client, whether in mediation or not, is help to discern and prioritize his or her goals. Discuss the difference between the client's "needs" and "wants." It's often helpful to list with the client on a chart or board every possible goal or interest either of you can

articulate, no matter how great or small. Probe to discover the real underlying needs, versus positions the client has developed to protect these interests, by asking lots of "why" questions.

For example, a wife may tell you that she wants to keep her house. Look at this as a position created to protect an underlying need. Ask her why she wants to keep the house. Possible answers are to keep the children in the same schools, to preserve overall stability, or to live in a home she knows she can afford. *These* are the underlying goals and interests, which can ordinarily be met in a variety of ways. A house down the block or across town might possibly accomplish the goal of keeping the kids in the same school.

When she thinks in these terms, the wife can be a much more flexible negotiator, because she is not locked into an inflexible position. She can now offer a different way to achieve the same goal, which costs her less and may protect her more.

While this process may involve "soft" skills, it is actually a critical strategic step in helping clients get more and part with less by staying flexible about how their interests are met.

Once you and your client have the underlying interests articulated and listed, you should prioritize them, which separates the things the client really needs from the things he or she would like if possible. (This technique is derived from the interest-based approach outlined in the now-classic book by Roger Fisher and William Ury, *Getting to Yes* (1981).) Then, help the client develop proposals that protect as many needs as possible (if not all), sacrificing some wants if necessary. As the negotiations move along, you will probably need to meet again to re-prioritize or adjust strategy.

The skillful negotiator must know not only his or her own mind, but also the

other party's. That is why it is equally important to address with the client his or her spouse's underlying goals, needs, and wants—in essence, to do the same exercise outlined above, but from the spouse's point of view. This will enable your client to develop solutions that meet his or her interests first but are also acceptable to the other party, and it will result in more durable agreements that require less post-divorce intervention.

This approach dispenses with much of the positioning and jockeying that the spouses sought to avoid in the first place by choosing mediation. Parties who use this approach usually get better deals for themselves, since it allows them to frame agreements with which the other can concur, but in a way that better meets their own needs and wants.

Let your client know if his or her goals are less than the law might allow. Note that the adversary system usually values one form of compensation above all others—money. Most attorneys, because they are trained primarily to use the adversary system, tend to share this view.

However, be aware that your client might have different interests. Nonmonetary or psychological compensation may be just as important to him or her as money, especially given the emotionally charged nature of divorce.

This might have factored into the client's decision to use mediation, which many believe is a forum where this type of value is more easily recognized and delivered. For example, receiving an apology or getting a peaceful outcome may outweigh negotiating down to the last dime. The reverse may be true, too—getting revenge may be more important than striking a fair deal. Ask your clients whether there is anything besides money that they want out of negotiation. Of course, this is not to say that a client should capitulate entirely on

financial issues just to create a peaceful outcome.

Remember, in strategizing about the negotiation, to avoid encouraging gamesmanship. Your client has come to you for help resolving the issues, not ratcheting up the conflict. 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 grateful and refer other clients to you.

Educate the client. Consulting counsel should play a major role in ensuring that the client has full information concerning the process of mediation itself, its suitability for his or her case, and the underlying law that applies.

Mediation is a flexible, adaptable process, which distinguishes it from most other forms of dispute resolution. But this versatility also means that no two people in a given situation—including the mediator, the client or consulting counsel—are likely to share the same notion of how mediation will be used. While many mediators will educate clients about the process and how they usually practice mediation, consulting counsel should take an active role in helping the client understand some of the key variables and in ensuring that the client, the mediator, and the other party agree on the process before going forward.

Probably most important, counsel should discuss with the mediator and the other party whether the mediator will follow a facilitative model—acting solely as intermediary without commenting on the substance of proposals—or take a more evaluative role, helping the parties understand whether their proposals fall within legal and community norms. Also, all concerned parties should agree, basically, on whether mediation is to be used to settle all issues or selected ones, such as custody, alimony, or asset distribution.

All should agree on whether the mediator will ordinarily meet with both clients in joint meetings or with each separately in a “shuttle diplomacy” format, which can greatly influence the quality and content of the negotiations. Finally, there should be a basic understanding con-

cerning whether consulting counsel will work primarily from the outside or will be expected to attend some or all mediation meetings.

Mediation may be an inappropriate settlement method in certain situations. For instance, clients who have been victims of domestic violence ordinarily should not participate in mediation when it would impair their ability to advocate for themselves. This is especially true when the mediation will consist primarily of joint meetings.

Also, some clients who are so unassertive that they can't formulate their needs at all, or convincingly articulate their point of view, should probably avoid choosing mediation. Consulting counsel should help clients considering mediation understand what will be expected of them.

In educating the client concerning the underlying law, your job is similar to full-service legal representation: Identify the legal issues, advise your client on the current state of the law, and help him or her formulate a point of view. In making your client's legal rights clear, be sure to explain gray areas as well as the chances for prevailing. Make sure to be pragmatic. A mediation client wants a realistic estimation of his or her position. Ultimately, your client will appreciate your honesty.

Some counsel give their clients brief memorandums or outlines of the legal issues, relevant legal information, strategy, and possible outcomes. In some cases, these letters can be very useful in mediation when shared with an unrepresented spouse or the mediator, especially when the mediator is not an attorney. Naturally, do not share strategy.

Many outsiders whisper things into divorcing spouses' ears, such as what they're absolutely entitled to or what happens in court. Clients who have extremely unrealistic understandings of the probable legal outcome of their case can pose substantial hurdles to the completion of an agreement.

In my experience, this information is most effectively delivered by counsel, because clients are more apt to believe their own attorney—who presumably has their best interests in mind. Counsel

must serve as a reality tester, helping a client to be realistic about his or her expectations.

Get, produce, and digest the documentation. Your client will need sufficient financial information to make proper decisions concerning support and division of property. Be certain that each client knows what documentation is adequate to get a full understanding of the family finances in each situation—and that no financial decisions are finalized until the necessary information has been received and digested. Help the client list the needed documents, such as pay stubs, tax returns, and bank statements, and then carefully review the financial information with the client.

Remember that each case is different, and what will suffice in one may not be enough in another. The key is to gauge for the client when there is enough information, without turning over every stone. This may differ somewhat from litigation, where broad interrogatories are served and then argued over. Mediation clients often choose mediation to dispense with unnecessary and time- and money-consuming discovery.

Some clients think that by not disclosing an item they can keep it “off the table,” beyond discussion in the settlement. Suggest that they're far better off providing full disclosure and then arguing why they should keep the item in question, for at least two reasons.

First, most states require that, in all divorces—mediated or not—true, correct, and complete financial information be produced and disclosed to the court on a financial affidavit, a sworn statement to the court concerning assets, liabilities, income, and expenses. Lying materially on a financial affidavit is extremely dangerous: It could become grounds for reopening the case years later.

Second, the client can buy lots of good will in the mediation by making early and full disclosure, which demonstrates a commitment to play fairly. Refusing to disclose information, or dribbling it out extremely slowly, will only make the other party even more suspicious and twice as determined to get the information. In

extreme cases, it could undermine the integrity and viability of the mediation.

A word about billing

Many mediators work on a pay-as-you-go basis, presenting a bill at the end of each mediation meeting and requiring settlement at the same time. Since many of the mediation charges are for time spent solving problems face to face, many mediators alert clients when they will perform substantial out-of-meeting work for which they will charge. Clients seem to like this approach, as it spreads out the cost, avoids unforeseen charges, and seems to provide them with a sense of control over the financial expenditures of the case.

Clients choosing mediation may request a similar billing process from consulting counsel, and you should be prepared to respond. When a client wants a very limited representation, a pay-as-you-go arrangement may be fine, whereas a more complete representation might require a traditional retainer. Be careful in gauging the case, as a client can be quickly turned off when, in a fairly limited engagement, consulting counsel asks for an unduly high retainer. This suggests that counsel probably does not understand the client's needs and may make more of the case than the client wants. Your engagement agreement might provide clues to the appropriate fee structure.

Filing appearances

In most states, it isn't necessary for consulting counsel to file a formal appearance with the court. In states where parties must go to court in order to obtain a judgment of divorce, many mediation clients prefer to appear before the court as pro se parties, where feasible.

However, should your client want representation in court, even if just to file the necessary court papers in a representational capacity, you will probably need to file an appearance. In this instance, it is probably a good idea to state on the record the more limited nature of your role, which can prevent potential problems later. If you do this, mention it to your client in advance. As always, filing an appearance has its potential downside: Once involved

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in a case on the record, counsel may need the court's permission to withdraw.

Keeping control of the case

By giving clients more direct control of their settlements, mediation appears to give lawyers less control. This worries some attorneys who are used to being in the center of the case in litigation. However, what seems like less daily control is often more control over what really matters for both you and your client. In mediation, you rarely find yourself frustrated by endless motions, nor in most cases do you end up submitting to a binding decision-maker who can never know the case as well as you and your client do. Rather, the consulting attorney has the freedom, with the client, to focus exclusively on reaching a satisfactory settlement.

It is true that you will have to develop a means of staying "in the loop" in mediation cases, since it is the client who is the hub of information and decision-making. Some lawyers make sure to stay apprised of the mediation progress, and to chat briefly with their client between each meeting. Others leave it to the client to call them as needed. You should be clear with your client about how much regular information you will need so that you can give relevant and effective advice when asked.

Settlement disagreements

Whether in mediation or not, lawyers and clients often disagree about whether a settlement is fair under the circumstances. It is the perceived loss of control that discourages some lawyers from taking these engagements. That should not discourage you from expanding your practice to include consulting-counsel services. There are many ways to handle disagreement between you and your mediation client about the settlement.

You can always send the client a letter stating that you approve of the agreement in form only. This means that you are comfortable with the actual written form of the agreement, but reserve judgment on the substance of the specific settlement.

In more egregious cases, some attorneys send clients a letter of nonconcurrence, which specifically says that consulting counsel's concerns are so grave that he or she cannot concur with the result.

In one mediation, I struck a middle ground. First I discussed my substantial concerns over the settlement terms with my client, then sent her a four-page letter reprising our conversation, which I asked her to sign. Doing so relieved me of my own liability concerns and let me better help the client achieve her goals on her terms, though they differed from my advice.

One final option, where permitted and appropriate, is to file an appearance with the court and state on the record your concerns, as well as your understanding of the scope of the representation. Some attorneys will question their own client on the record as to these points, to be certain that counsel, the client, and the court share the same understanding.

Satisfied clients

Family lawyers who work as consulting counsel in private mediation tell me how satisfying they find the work. Many report their relief at not having to endure the endless grind and hassle of adversarial, contentious cases.

In my experience, mediation clients are usually satisfied with the process, including the work of consulting counsel. They like having increased control over the process and outcome, and they appreciate the civility and dignity that a more consensual approach fosters. □