

SUCCESSFUL DIVORCE MEDIATION

No longer the "wave of the future", mediation is a viable form of conflict resolution used today to help resolve diverse matters. In the field of divorce, New Jersey attorneys are becoming familiar with mediation, either in its mandatory Court-ordered form in the Economic Pilot Program, or in the private sector. The time has come, therefore, for attorneys and mediators to work together, and not at cross-purposes. Here then are some suggestions about how these professionals can create and foster positive working relationships.

Whether divorcing spouses voluntarily choose mediation, or are Court-directed to mediate, their attorneys have considerable work ahead to help their clients through this process. If parties mediate privately, attorneys customarily do not attend the sessions. Under R. 1:40-5(e), attorneys and clients in Court-mandated cases are obligated "... to participate in the mediation process in good faith in accordance with program guidelines". The Guidelines "encourage" attorneys to attend the first mediation session with their clients and permit them to attend subsequent sessions. R. 1:40, App. XIX, Guideline 3.

Mediation usually proceeds in regularly scheduled sessions. Depending on the complexity of each case, attorneys may wish to schedule conferences with their clients both before, and after, these sessions. Attorneys can assist their clients in preparing for each session by gathering facts, organizing documents, filling out budgets and preparing other useful data. They can also debrief their clients after sessions and help to plan for the next session.

After the parties have completed and exchanged Case Information Statements and supplied relevant and necessary supporting documents, and once evaluations and appraisals have been completed, attorneys should discuss settlement options and negotiation strategies with clients. In those cases where attorneys attend mediation sessions, they can assist by keeping their clients focused on issues and being generally supportive of the process. Attorneys, not mediators, must advise their clients about their legal rights. This applies even if the mediator is an attorney. Moreover, attorneys should advise their clients about the likelihood of success at trial and also provide litigation cost analyses, should the case not resolve in mediation.

Open Communications between professionals is vital. When legal questions arise, mediators refer clients to their attorneys for advice. When attorneys have questions, they should not hesitate to contact the mediator directly.

Information exchange helps propel the mediation along toward resolution. After the parties have gathered the facts and documents and have basic understanding of the data, with the mediator's assistance they focus on issues. Attorneys can assist their clients at this stage by preparing written summaries and their client's positions regarding each issue. Attorney "position papers" can aid when parties hesitate to raise certain tough, possibly emotionally charged issues on their own. One extremely reticent client told the mediator in caucus that she had been reluctant to speak up about support in joint session, because she feared she would anger her spouse. The mediator coached her about expressing her needs. In the next joint session, the mediator suggested that, before the next session, both parties confer with attorneys, including to review the Child Support Guidelines and their legal rights. When the couple returned to mediation, the mediator's guidance and the attorney's directions (from the sidelines) clearly helped improve the wife's negotiation skills. She spoke up, quoting her attorney at length (she had his written notes); and the parties proceeded to negotiate and resolve support issues.

In another mediation, a long-term married couple each waived alimony, even though one spouse earned significantly more than the other. They also agreed to split all assets, including pensions, equally. The mediator prepared an initial draft of the settlement, i.e. a Memorandum of Understanding, and the parties returned to mediation, ostensibly to finalize the deal. At this rather late point in the process, the spouse, who earned less, stated that her lawyer had counselled her to request "compensation" for waiving alimony. The "compensation" she and her attorney had in mind was for her to retain all of her own retirement plans. Although the other spouse reasonably anticipated that the divorce issues were resolved, he remained courteous and calm and agreed to consult with his attorney before the next session. Since the couple had worked together constructively during mediation and had confidence in both the process and the mediator, there was little doubt that they could resolve this issue to their satisfaction. They did; and they moved on.

By asserting the magic words, "attorney's advice", clients may indicate their own desires (wants). In mediation, the focus will inevitably shift to their interests and needs. This process permits the parties to raise, deal with and dispose of difficult issues in the relatively safe and secure atmosphere of the mediation.

Mediators recognize the significant integral role attorneys play in the process. Couples, however, do not always appreciate this; and often, they engage a mediator without having first consulted with, much less retained, attorneys. Mediators can educate and encourage the parties to seek legal advice early on in the process. When the mediator also happens to be a lawyer, she must explain right away that she is not representing either party, and that it is not her job to advise them of their legal rights.

Mediators must promote the parties' frequent consultation with attorneys, and discourage them from waiting until the very end of the process. Mediators should avoid circulating draft Memoranda, which are incomplete, unclear and inadequate. Take a situation where, without any explanation, a couple, married for 20 years with two children, make major decisions involving the waiving of legal rights, such as alimony or an interest in the other spouse's closely held business. Perfectly logical reasons may exist for such decisions. However, the attorneys have little or no clue about the parties' motivation. Mediators can avoid such situations by assigning specific issues for the parties to explore with their individual attorneys between mediation sessions. Mediators can even assist the parties by preparing lists of questions for review and response during legal consultations.

All decisions made by the couple in mediation must be spelled out in detail in the Memorandum. Thus, where one spouse waives an interest in the other's professional practice, business or pension, the basis for such a waiver must be explained. This becomes even more crucial if the waiving spouse has chosen not even to have the presumably valuable marital asset evaluated.

To ensure that the settlement does not break down after all the time and effort that went into the mediation, the mediator **MUST** do her job thoroughly, including in the careful drafting of the Memorandum of Understanding. The Memorandum is not a contract, and is not signed by anyone. The terms do not become binding until a Property Settlement Agreement is fully executed. The Memorandum explains the terms of the settlement and why and how the parties reached these terms in a comprehensive and understandable manner.

Failure to provide a basis for reasoned decisions may lead to the collapse of the settlement at the attorney review stage. Without sufficient explanation, attorneys may conclude that

the parties did not negotiate in a balanced or fair manner and that the settlement is not only incomprehensible, but also inequitable. Upon reaching this conclusion, the attorneys will either recommend against it, or refuse to have anything to do with it.

If attorneys receive a Memorandum that fails to follow these recommendations (see also accompanying article), they should communicate their concerns to the mediator. Referring the couple back to mediation may be a way to fine-tune and preserve the settlement. In desiring to assist their clients in resolving the issues of separation and divorce, attorneys and mediators must try a collaborative cooperative approach. We owe this much to our clients.

SIDEBAR ARTICLE

What should a Memorandum of Understanding contain?

The Memorandum contains background information, usually far broader in scope than that contained in the Property Settlement Agreement. This includes information about the parties, their ages, educational backgrounds, employment and their children and any other relevant facts. Typically, the Memorandum provides detailed information about assets and liabilities. Where a party has business interests, or other assets that need appraisals, the Memorandum explicitly provides information about those interests and their values at various relevant dates. The Memorandum explains how the parties propose to divide the assets and debts, including the basis for these decisions. It also states whether the parties consulted accounting or other experts and what precisely was involved in such consultation. If a party chooses to waive an interest in an asset, the Memorandum explains the reasons for this decision.

If children are involved, the Memorandum contains comprehensive Parenting and Time-sharing plans. The mediator encourages the parents to supply information about decision-making, time sharing arrangements and even a statement about the parents' perspective on parenting. Clients may want to skimp over the details, but they are encouraged to do otherwise in order to minimize future problems.

Support and related issues contained in the Memorandum, include references to the marital standard of living, both pre and post divorce and to the Child Support Guidelines. In January 2001, the New Jersey Association of Professional Mediators ("NJAPM") endorsed recommendations for drafting Memoranda of Understanding in light of the New Jersey Supreme Court Crews decision. Mediating couples should complete Case Information Statements, or else produce pertinent financial information, such as pay stubs, balance sheets and budgets, which should be attached to the Memorandum. In addition, the NJAPM recommended that the Memorandum include information about the dependent spouse's ability to contribute to his, or her, own support. It further suggested that the couple describe (in their own words) the marital lifestyle. Finally, the NJAPM recommended that the couple state (in the Memorandum) whether the agreed upon support would enable both parties to live in a manner "reasonably comparable" to the marital standard of living. If this was not possible, the Memorandum might need to include provisions in future for an upward modification of support. In addition, the Memorandum must also address all other issues in divorce, such as college, health, life and other insurance, emancipation, income taxes and debts.

c. Bonnie Blume Goldsamt 2000