

The Role of the Attorney in the Mediation Process

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What is Divorce Mediation?

Divorce mediation is a process in which a mediator facilitates communication and negotiation between the parties to assist them in reaching voluntary agreements. Divorce Mediation is defined under the Illinois Uniform Mediation Act. A mediator's role is to be neutral and impartial, the process is confidential and the mediator works with the couple to facilitate resolution of the issues. We discuss all of the issues that need to be resolved to get divorced in the State of Illinois.

Divorce mediation helps couples come to agreement on issues, communicate in a way that will keep them focused on their children and saves time and money in the divorce process. The couple may be represented by attorneys during the divorce mediation process and an attorney files the final mediated divorce agreement in court to make the divorce official.

Divorce Mediators do not allow a couple to make agreements which will not be viewed as fair and equitable by a judge, who will review the mediated divorce agreement before the divorce becomes final. My partner worked in the Lake County court system as a probation officer for many years before starting his private mediation practice, and I practiced commercial litigation for 15 years, and currently volunteer in the 19th Judicial Circuit Family Mediation program as a mediator for pro se litigants. Based on our experience, we have a good sense of how judges will view parenting time, holiday schedule and division of marital assets, and can guide the couple accordingly.

Divorce Mediation takes place in a comfortable environment that is much more amicable than a court room setting. We discuss the issues and help the couple come to agreements. We assist them in filling out the financial affidavit for their county and collecting all documents the court will require them to have when they present their divorce case. Instead of formal discovery, which is expensive in a litigated divorce, the required discovery is less burdensome, but still completed.

The Divorce Mediator's Role if Attorneys Are Not Involved

A divorce mediator's responsibility differs, depending on the stage of the divorce process and whether the couple has already hired attorneys to represent them in their divorce. Many of our divorce mediation clients come to us without having consulted an attorney.

In some cases, finances preclude the couple from hiring an attorney, but they want to get divorced. They believe that they can get divorced with a mediator and complete the process. We do not recommend that they get divorced in the state of Illinois without an attorney, however, divorce mediation makes the process much less expensive, and our firm offers "Co-mediation," with two divorce mediators.

Co-mediation provides many advantages in the divorce process and facilitates communication and focus on the best interests of the children, which are our goals in the divorce mediation process. We always

suggest that a couple consult with an attorney before going through mediation, but we do not require them to hire attorneys before we will take them as clients.

The Divorce Mediator's Role if Attorneys are Involved

The divorce mediator's role is to protect both parties. Divorce mediators are required by law to stay neutral. We evaluate and make a determination that each party can advocate for himself in the process and articulate positions clearly. That is really the threshold question from our perspective as to whether mediation is an appropriate divorce process for a couple.

Each spouse may be represented by an attorney, however, the attorneys are typically not in the room during mediation. We are always willing to speak to attorneys who are involved in the case but cannot promise that a client will make agreements his attorney approves. We can guide a discussion in mediation about a topic but do not give legal advice. We do not control whether a decision is reached that may not be best for a client from an attorney's perspective but would be considered equitable by a judge. When children are involved, our role is to focus on the best interests of the children, not either spouse, as we guide the parties through mediation.

The Attorney's Role in a Mediated Divorce Case

When couples mediate the parenting piece of a divorce, including custody and a visitation schedule, as well as finances, they do not need attorneys to litigate their divorce. Rather, they require an attorney who will respect and endorse the agreements made in mediation while still looking out for their best interests.

Once the divorce mediation is complete, we send our clients with the agreements made in mediation, called a Memorandum of Understanding, to "mediation-friendly" attorneys who then draft a Joint Parenting Agreement and Marital Settlement Agreement. This divorce settlement agreement mirrors the agreements made by the couple in mediation. The attorney's role is to protect the client by making sure agreements are equitable, drafting required documents, and taking them to court one time to prove-up the divorce to a judge. There is no formal discovery and no depositions or trial, and the cost is much lower than the cost of a litigated divorce. The couple may or may not have consulted with attorneys during their divorce mediation, but at this point, the attorney's role is to effectuate the agreements made by the couple.

The Attorney's Role in a Litigated Divorce Case

An attorney has the responsibility to zealously represent, protect and pursue a client's legitimate interests, within the bounds of the law. The attorney has advised his or her client on the best-case scenario for a divorce, but is only looking at the case from the client's perspective. When attorneys refer their clients to mediation, or a judge orders them to mediate, the process takes on a different slant. The clients are coming into mediation with a promise by their attorneys that things will go a certain way. That may or not be what the client really wants and usually will not be what the spouse wants in a divorce. The clients will be at different ends of the spectrum instead of focused on meeting

in the middle on issues, two very different viewpoints, as opposed to clients who come to mediation without consulting attorneys first.

As mediators, when a couple is sent by attorneys, we have to respect the wishes of the attorney if they are only interested in our mediation of certain issues in the case. For example, if they want a custody plan and visitation schedule, we try not to delve into the financial issues. However, visitation is sometimes wrapped into child support as a spouse may try to have more time with the children because he believes that may minimize his child support obligation.

Conclusion

Mediation is a cost-effective way to resolve all or some of the issues in a divorce whether or not the couple has hired attorneys. The mediator must be aware of the client's goals, the attorney's perspective if one or more have been hired and the mediator's role as a neutral and impartial facilitator at all times.