

Mediation Myths and Realities

Wondering if mediation will work for you? Here, a divorce attorney/mediator explains what it's all about.

By Karen Covy, J.D.

MEDIATION is a dispute resolution technique in which a trained mediator sits down with the parties to a conflict and tries to help those parties work out a deal. Mediation is typically voluntary (although courts in some jurisdictions require it) and not binding. If the parties fail to reach an agreement in mediation, they simply return to court. The mediator can not force them to agree to anything.

A mediator is trained in helping people resolve their issues and settle their differences themselves. In the context of divorce or family law issues, the mediator is most often a family lawyer or some type of counselor — either a psychologist or a social worker. The mediator is supposed to be an independent, neutral third party. He or she is supposed to help both parties settle their case themselves. The mediator acts as a facilitator and tries to guide the parties into coming up with creative solutions for resolving their differences. He or she is not supposed to take sides with either party, although during the mediation, it might seem to one of the parties from time to time that the mediator is doing just that to get them to think of both sides of the issue. Often, if the parties can see both sides, they start to see their issues in a new light, and find a way to resolve those issues that leaves everyone as satisfied as possible under the circumstances. (Of course, no one is ever totally happy or completely satisfied with any divorce settlement. A good settlement is not one that makes everyone happy — it's the one that makes everyone the least unhappy.)

A mediator does not — and cannot — decide any of the issues in your case. He or she has no authority to order you or your spouse to do, or not to do, anything. A mediator's only job is to help you and your spouse settle your issues yourselves. If you can't do that, then the mediation fails and you go back to fighting in court. This means that in order for mediation to work, both you and your spouse have to want to participate and must fully cooperate in the mediation process.

Cooperation in mediation means, first and foremost, that you and your spouse need to honestly disclose all of your income, expenses, assets, and liabilities, both to each other and to the mediator. A mediator can't help you divide up your property if he or she doesn't know what you own. A mediator can't help you figure out if both you and your spouse will have enough income to survive after the divorce if he or she doesn't know what each of you earns and spends. A mediator also won't be able to help you calculate the proper amount of child support you should pay or receive without knowing how much money you and your spouse make and what your children need in order to survive. If you or your spouse is reluctant to come clean with accurate financial information, mediation isn't going to work.

Cooperation in mediation also means that both you and your spouse must come to the mediation with the intention of negotiating fairly. Both of you must be prepared to give and take.

The idea that the mediation occurs between two equal parties is also important. If you are in a marriage that involved any sort of domestic violence, mediation is not a good choice for you. That applies not just in cases of physical violence, but in marriages where there was verbal abuse as well. You will be far better off, and considerably less stressed-out, if you let your lawyer negotiate a settlement on your behalf.

Finally, in order for mediation to work, both you and your spouse have to want to go to mediation, and you have to want to make a deal with each other. Your attitude in the mediation process is

key. You can't mediate with a heart full of hate. You either have to change your attitude or find a different way to resolve your case.

Mediation is not for everyone. Unless both you and your spouse are willing to provide the necessary financial information and openly participate in the process, it won't work. What's more, while mediation typically saves you money in the long run, it usually costs more up front, because the same person cannot be both your mediator and your lawyer. If you and your spouse have anything worth fighting about — children, property, retirement accounts — you're both going to need your own lawyers. The mediator is extra. Now you find you're paying three professionals instead of just two. What you need to understand, however, is that the savings you will reap from a mediated settlement will show up in the long run, and those savings will far outweigh what you pay the mediator to help you negotiate a settlement in the short term.

The reason you save money by using a mediator is that, in mediation, you and your spouse can create a much more flexible agreement — and one that meets more of each of your needs — than anything a judge would ever have ordered. Staying out of court saves you money.

Mediation can also save you money because the mediator may be able to help you find ways in which both you and your spouse can maximize your incomes or minimize your expenses simply by working together rather than against each other. The mediator may be able to point out tax advantages that both you and your spouse will benefit from if you agree to divide up your income or assets a certain way. The mediator may also force you and your spouse to deal with issues during your divorce that you would have preferred to sweep under the rug until after the divorce. While that might cause you to go through more emotional trauma as you fight out issues you would rather not have discussed, resolving those issues now keeps you from fighting with your spouse about them later. Again, that keeps you from having to go back to court to fight about those issues in yet another long and drawn-out court battle, which in turn saves you money. Finally, just having an agreement that you helped create makes it more likely that you (and your spouse) will abide by the terms of that agreement, rather than treat it like a useless piece of paper.

Mediated agreements tend to last longer than agreements reached after a long, drawn-out court battle in which both parties end up agreeing only because they're too tired (or too broke) to keep fighting. People don't normally need to redo mediated agreements every year or every other year. When they do need to redo them, they can usually work something out amicably with their ex, because mediation tends to preserve, rather than destroy, relationships. Mediation is not adversarial. Going through mediation actually helps to set the stage for your future relationship with your spouse. It helps you find a way to start working together as unmarried partners, rather than as spouses. All in all, even though you may think that you're spending more money on your divorce if you use a mediator, chances are, in the long run, you will really spend less.

In order to succeed in mediation, the most important thing you need to do is find the right mediator. Most of the time, that means finding a trained professional. While your parents, friends, or in-laws may have the best intentions when they offer to try to help you and your spouse work out a deal, using any of these people as your mediator is almost always a bad choice.

Whether you should choose a mediator who is a lawyer or one who has a background in psychology or social work depends upon your personal style and what you want to achieve in the mediation process. Typically, a lawyer will write a better settlement agreement — one that both your lawyer and your spouse's lawyer will be more willing to accept — than a social worker would write. However, a lawyer will also not have the same background in dealing with relationship issues that a counselor would have. If you're not good at standing up for yourself, or if you feel intimidated or overwhelmed by your divorce, you may be better off mediating your case with a social worker or psychologist. If you have trouble expressing yourself freely or aren't comfortable asking for what you want in a deal, you may be better off mediating your case with a social

worker or psychologist. On the other hand, if you are concerned that you don't know your rights, or you need an agreement that covers all of your bases and is very explicit and well-written, you may be better off mediating your case with a lawyer. No matter what type of professional you choose, the most important thing is to find someone you are comfortable with, and who is qualified and certified to mediate your divorce.

The best mediators, of course, are the ones who have successfully mediated agreements for others in the past. When you are looking for a mediator, don't just open the Yellow Pages or go online. Talk to your friends and talk to divorce lawyers. Contact your local bar association or the Association for Conflict Resolution (www.acrnet.org). Do your homework. It will pay off immeasurably in the end.

This article was excerpted with permission from the book [When Happily Ever After Ends: How to Survive Your Divorce Emotionally, Financially and Legally](#) by author, divorce attorney, and mediator, [Karen A. Covy, J.D.](#) In the book, she offers practical, down-to-earth advice about how manage every aspect of your divorce, from custody, managing your finances, and helping your family adjust to navigating the court process, finding the right attorney, and mastering the seven principles of negotiation. The author also details the eight games people play during divorce, and how to stop yourself and your spouse from playing them. View for [Divorce Magazine](#) online profile.
