

MEDIATION: WHY YOU NEED AN ATTORNEY©

by
Cassandra P. Hicks

My Spouse and I intend to use a mediator. Why do I need to consult with any attorney? Can't I just wait and have an attorney review the mediator's draft agreement?

I encourage clients to mediate when appropriate and like to work with clients to use mediation to keep costs down. For several reasons, it is very important that clients have attorneys prior to the time they begin mediation or, if not then, at least shortly thereafter. It is also essential that clients consult regularly (although it can be a brief consultation) with the attorney as the mediation progresses.

First, the choice of a mediator is important. An attorney can help you to choose a good mediator. You want a mediator who is not biased toward woman or men or for or against alimony, etc. A good mediator will ensure that appropriate financial documentation is exchanged. You need to be aware of all assets, liabilities, and each person's income prior to making decisions in mediation. Frequently, one spouse handled the finances during the marriage and the other spouse is in the dark as to the parties' complete financial picture. Even where both parties generally are aware of assets and liabilities, one spouse may attempt to use outdated values. Second, it is important for a client to know his or her rights in order to develop a bottom line position for settlement and to outline a position to the mediator. If you enter mediation without knowing your bottom line for settlement, you may end up giving up rights that you don't need to give up. The mediator does not represent either party and cannot give you legal advice concerning your rights in the divorce. Third, your attorney can help you in developing and considering compromise proposals as the mediation goes along. An experienced attorney can make suggestions on how to meet each parties needs that may not occur to you. For example, frequently when parties live apart their incomes may be insufficient to pay for private school tuition, a non-employee spouse may be able to utilize retirement assets without paying the liquidation penalties the employee spouse would be subject to, enabling the parties to utilize a retirement asset to pay for the tuition.

Regular consultations with your attorney can prevent you or the mediator from missing complex issues, such as tax or pension issues. Your attorney can help prevent you from spending time in mediation pursuing an approach that may not be to your advantage. Although you are free to reject the legal advice, it is better for you to be aware of it in order to make an informed decision. I usually suggest that a client call me just before and just after each mediation session for a brief conversation. In this way, you can be counseled as to the consequences of certain proposals which may prevent you from making concessions that it may be too late to undo once a final agreement has been produced by the mediator. This is particularly important when one spouse feels dominated by the other.

If a client waits to take a final (or near final) draft agreement to an attorney to review after the parties have completed their negotiations with the mediator, an unintended and unwanted consequence can result. A client may discover from the attorney at that point that there are consequences that he or she does not want; yet because the client has already revealed to his or her spouse his or her "bottom line" in the negotiations, the client may have the choice between accepting the agreement as it is or starting all over, which can markedly increase both legal and mediation fees.

Also, when a client waits to take a final (or near final) draft to an attorney, the client may expect the attorney to review it without full documentation of the client's and spouse's income, debts, assets and pensions and without suggesting substantial changes in the mediated draft agreement. These expectations usually are not realistic. The attorney cannot conduct a meaningful review without complete information as to assets, liabilities, and income. In order to give you complete advice, your attorney will need the same documentation that is exchanged at the beginning of the mediation regarding assets and current valuations, liabilities and current income from all sources. An attorney's advice is only as good as the information upon which it is based.

Finally, a mediator's goal is for the parties to reach an agreement. Mediator's may not consider all of the "what ifs" in discussing issues with the parties. Mediator's frequently don't focus on the details of carrying out an agreed upon term such as the sale of a home or the specifics of dividing a pension such as whether a spouse gets a survivor benefit and if so, who pays for it. Unfortunately, it is the details left unresolved that can lead to future disputes and expensive litigation to resolve. An attorney can ensure that the agreement is not ambiguous in its terms and that the parties' intent and the agreement's terms are enforceable by the court should one spouse later refuse to abide by the agreement's terms. The attorney can make sure that all the "t's are crossed and the i's are dotted. Such an agreement will keep you out of court in the future. Most parties enter into agreements to avoid the expense of litigation and having a judge make decisions for them. Having an attorney involved in the mediation process can insure that the final product attains your goals.