

Using Advisers in Mediation

Excerpted from Using Divorce Mediation
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In addition to the mediator, you may want or need to work with one or more outside advisers, such as people in your circle of intimates, legal advisers, counselors or therapists, financial advisers, or other specialists. This chapter helps you:

- assess whether and when to use an adviser,
- understand the types of advisers,
- find various types of advisers, and
- maximize the benefits of working with an adviser while minimizing the costs.

Part 1: How and When to Use Advisers

Outside advisers are not always necessary while going through mediation. If you work with a lawyer-mediator who can explain the legal rules, prepare the divorce agreement, and help you with the other legal paperwork

for the uncontested divorce, it is quite possible to mediate your divorce with just the help of the mediator.

But there may be times when consulting an adviser is a good idea. For example if your mediator is not a lawyer, you may want a legal adviser who can fill you in on the divorce laws of your state and who will translate any agreement you reach into an acceptable court document.

In various parts of this book, we suggest that you consult an adviser if certain kinds of questions arise – such as a financial adviser who can help you to understand the tax implications of a proposed settlement. Your mediator may also suggest this if the circumstances call for it. Realize that using an adviser while you are in mediation has both potential benefits and potential costs, however. You will need to weigh these benefits and costs to decide what’s best for you.

Benefits of Using Advisers	Costs of Using Advisers
valuable advice on an issue being mediated	fees charged by the adviser
help in analyzing information or proposals	advice inconsistent with other advice
constructive settlement suggestions	advice inconsistent with goals of mediation
personalized support during the process	possible confusion

First and Last Stop: Your Mediator

Think of your mediator as a kind of adviser. He or she should be the first person you talk to when questions come up during the mediation. If you wonder whether you should consult an outside adviser, ask your mediator. If you need referrals to an adviser who understands and supports mediation, ask your mediator. If you don't know what to ask the adviser to do for you, ask your mediator. Using the mediator's help at these times ensures that involving an adviser moves things forward instead of hanging them up.

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If you decide to use an adviser, inform your mediator. And if you get inconsistent or confusing information from your adviser, ask your mediator to help you sort things out. Doing this lets the mediator coordinate what is going on outside the mediation with what is happening in the mediation.

How Mediators Can Help You Find and Work with Advisers

How can your mediator respond to your questions and requests for referrals and still be neutral? This is a question that is regularly debated among professional mediators. While mediators differ in how best to maintain neutrality while being as helpful as possible, most will agree that it is quite possible to stay neutral while helping one party or the other as long as both parties have the same access to the mediator's help and the help is about the process (the how) of the mediation and not the content (the what) of the mediation. Mediators often describe themselves as neutral on the issues but *not* on the process. The process, or how,

of the mediation, is what you pay the mediator to take care of.

When you ask the mediator to help you find a good lawyer or even what kinds of questions to ask the lawyer, that is a question about the how of mediation: how to get the advice you need from a lawyer in order to proceed with the mediation. Or if your spouse is confused about a complicated financial worksheet and the mediator suggests that your spouse work with a financial planner, this is a suggestion for how your spouse can be better informed about the financial decisions that need to be made. Don't worry about trying to tell a how question from a what question. That's your mediator's job. If you ask a question that would affect the mediator's neutrality, he or she will turn it into a how question by suggesting a way for you to get it answered by someone else.

Same Adviser – Different Hats

The kinds of advisers you are likely to use fall into certain categories. First, there are family, friends, and acquaintances. In addition, you may want the help of a legal adviser, a counselor or therapist (including, perhaps, a spiritual counselor), or a financial adviser. At some points in the mediation, you might also want to work with a negotiation coach, a parenting coach, a mediation support person, or a professional who deals with certain issues such as an appraiser, an actuary, a pension expert, or an insurance agent.

You may be thinking, "Wait a minute. What started out as a simple matter of sitting down with my spouse and a neutral person to settle our divorce is turning into a three-ring circus!"

We're not suggesting that you would use all or even most of these advisers – and especially not at the same time. But depending on your needs, you might have a

brief consultation with one or more advisers during the course of the mediation.

When and if you look for an adviser, it's possible you'll find one who can help you on more than one front. For example, you may find a legal adviser who can also act as your negotiation coach and mediation support person. Or, it may be that your counselor can also act as a parenting coach.

So that you will know what to look for and expect in your unique circumstances, we describe each type of adviser and tell you how to work with each one. Then you can ask your mediator to help you pick the best adviser for your circumstances, when and if you need one.

Don't be Penny-Wise and Pound-Foolish

A major consideration in using outside advisers is the cost. Most advisers we discuss are professionals who charge a hefty fee for their services. So you'll want to think carefully before consulting an adviser.

But don't let the cost alone deter you from getting valuable advice when you need it. The overall cost of the mediation, including the advice, will still be far less than what you'd pay in a contested court case.

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And once you make the decision to consult with an adviser, don't let the fees charged be your sole criteria in selecting an adviser. You may think you're saving money by picking a low-cost adviser instead of an experienced specialist who charges a higher hourly fee. But the high-paid specialist may spend less time – and therefore charge you less – giving you more solid advice than the

cut-rate adviser who lacks the expertise to give you the succinct help you need. So find out about a potential adviser's background, experience, and qualifications, as well as the fees charged, before plunking down your hard-earned cash for an hour or two of time and advice.

Beware of Adversarial Advisers

Mediation is non-adversarial. The mediator helps you approach the decisions to be made in mediation from a neutral, problem-solving point of view. The goal is to find solutions that are mutually satisfactory. An outcome that is great for you but terrible for your spouse might be fine in the adversarial setting of contested litigation but has no place in mediation.

Some professionals, especially ones with little or no experience with mediation, may offer you advice that is highly adversarial. Adversarial advice focuses exclusively on what is to your best advantage, regardless of the potential disadvantages to your spouse and regardless of the effect that taking such a position might have on the negotiations.

An adversarial adviser might even try to talk you out of mediating at all, warning that you are sure to be taken advantage of and implying that he or she can do better for you in an adversarial negotiation or contested court case.

Beware of these adversarial advisers. Unless you are prepared to resist their extreme approach by listening to their advice and then evaluating it from a more objective standpoint, keep looking until you find someone with a nonadversarial approach.

Part 2: Friends, Romans and Countrymen

By now, you have probably sought the advice of friends, family, and acquaintances. And, even if you haven't asked for it, you've probably been offered a ton of unsolicited advice.

While your friends and family play an important, even crucial, role in supporting you through this difficult time, you should not use them as advisers except in very limited circumstances. Why? Because you need your friends and family for listening and supporting. To paraphrase Julius Caesar, they can lend their ears.

But friends and family are rarely objective enough to give you the kind of hard-headed advice that you are going to need in order to make decisions on the important matters you face. Furthermore, unless your friends and family happen to have professional expertise in the areas of law, counseling, or finance, they won't be in a position to advise you accurately. In fact, the ones with professional expertise may decline to advise you, recognizing the inherent difficulty of being your supportive friend and giving you objective advice at the same time.

Be especially wary of advice from people who want to tell you horror stories about their own bad experiences or, worse yet, about the bad experiences of their friends, or even friends of their friends. Advice from this quarter is likely to suggest that you take aggressive or inflammatory actions that could undermine a successful mediation. Even if you listen to their advice, don't follow it without at least getting a second opinion from a more neutral adviser.

Beyond listening and supporting, there are a couple of ways your family and friends can help. First, they can often be a good source of referrals to mediators and professional advisers. Second, if you are fortunate enough to know someone who has had a positive experience in mediation, that person can give you a personal account of the process that will help you be better prepared for it.

In general, however, recognize that your friends and family are your support system. To expect them to be more than that is unfair to them and to you.

Part 3: Legal Adviser

When we use the term legal adviser, we are really talking about a special type of lawyer – one who is willing to consult with you as an integral part of the mediation process. While business lawyers have long served the role of consultant to their clients, divorce lawyers are accustomed to taking over and handling the entire case. For this reason, many lawyers who have special expertise in the divorce area are unwilling to stay on the sidelines as a consultant. As mediation is used by more and more divorcing couples, however, the need for consulting lawyers also increases. In addition, many divorce lawyers are becoming mediators as the demand for divorce mediators grows, and these lawyers are usually happy to work as consulting lawyers on cases they aren't mediating.

What About Nonlawyers as Legal Advisers?

In every state except Arizona, it is illegal for a nonlawyer to provide the type of information you would want from your legal adviser. For instance, in a number of states, independent paralegals provide divorce services directly to the public. These services are limited primarily to secretarial tasks, however. While some independent paralegals may be very knowledgeable about the law (indeed, many are former legal secretaries who have decided to branch out on their own), they aren't supposed to deliver their expertise to the public; only lawyers have that privilege.

If you do ultimately use a nonlawyer for your legal coach, be aware that the individual most likely is exceeding the limits of what's permitted by your state's law.

Why Consult a Legal Adviser?

At some point before you firm up any settlement agreement in mediation, you may want to consult with someone about your legal rights. While you can learn a lot about

your rights from doing your own legal research (see below), consulting with an actual legal adviser can help you get answers that are more specifically tailored to your case.

Your legal adviser can also help predict the range of possible legal outcomes if you were to go to court and the cost of paying a lawyer to fight for them. Knowing this can be integral to a successful negotiation. A good legal adviser can coach you in negotiating techniques and can help you think up creative solutions to propose in the mediation that are better than or at least as good as the court outcomes.

As we discuss later in this section, it is important to find a legal adviser who will give you a realistic idea of what you would get from a contested court case, including the cost of the litigation. All too often, a lawyer will describe an extreme adversarial position and lead you to believe you're entitled to something you'd probably never get in court.

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Your legal adviser can also act as a law coach on an as-needed basis during the mediation. Even before your mediation, your legal adviser law coach can help you evaluate the option of mediation, select a mediator, and persuade your spouse to mediate. Between sessions, you can consult with your law coach to clarify questions and prepare for negotiations. If you are participating in court-sponsored mediation, it is especially important to have a knowledgeable law coach guiding you through the process.

Your legal adviser can review any written agreement prepared by the mediator to make sure that what is written down says

what you want it to say and will be legally binding once signed.

Finally, your legal adviser can help you prepare the papers needed for an uncontested divorce once your settlement agreement is signed, if your mediator will not do that for you.

When to Consult a Legal Adviser

Once you find a legal adviser who understands and supports mediation, it is a good idea to have a brief consultation early on during the mediation process. Not only will this give you important information about your legal rights, but it will allow you to begin building a good working relationship with your legal adviser.

If you wait until you've already negotiated an agreement to consult a legal adviser, you may be in for some surprises about your legal rights that could undermine your commitment to the agreement you've just negotiated. Going back to mediation and trying to renegotiate the agreement at that point is often disastrous.

If you instead start out the process with solid legal information, you can negotiate an agreement that takes into account all your legal rights. This makes it much less likely that the mediation will fall apart at the last minute.

As your mediation progresses, you should feel free to consult with your legal adviser on an as-needed basis in between mediation sessions, whenever you have questions about your legal rights or the legal process.

Qualifications of a Legal Adviser

As we mention, your legal adviser will most likely be a lawyer licensed to practice law in your state. But there are some more specific qualifications that you will want to look for.

A lawyer who advises clients going through mediation is often referred to as a consulting lawyer. Just finding someone licensed to practice law is not enough. In addition, you want a lawyer with significant experience in

the area of divorce law. In some states, lawyers can obtain certification as specialists in certain fields of the law. If this is true in your state, consider looking for a certified specialist in divorce law, family law, or matrimonial law. This may sound extravagant, but many certified specialists are quite knowledgeable about mediation and experienced as consulting lawyers. Their high hourly fee is often justified by the quality and efficiency of their advice.

In addition, your consulting lawyer should have a good reputation for competence, honesty, and respectful treatment of clients. Ask your referral sources about these qualities.

It is also critical that your consulting lawyer be experienced in and supportive of mediation. A consulting lawyer who is ignorant of or hostile to mediation can undermine everything you are trying to accomplish in mediating your divorce. For example, a lawyer who doesn't approve of mediation or who thinks mediation is a good idea but doesn't know enough about it could easily advise you to take a position that is legally correct but extremely adversarial.

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What you want is advice designed to inform you of your legal rights and to help you promote a reasonable settlement. Below there are some suggested questions that may help you find the right consulting lawyer.

Fees

Most divorce lawyers charge an hourly fee. Most of them also expect to be paid an

initial large retainer (advance deposit) of several thousand dollars to cover the cost of beginning a contested case. Many consulting lawyers will charge by the hour instead of charging a large retainer, so look for a consulting lawyer who will charge you by the hour. Even so, be prepared for the hourly fee to range as high as \$350 to \$600,¹ especially in major metropolitan areas. When you do find a consulting lawyer who charges by the hour without requiring a retainer, it's good to confirm the fee arrangement in writing.

Controlling Legal Fees

Most likely, you will be paying your legal adviser by the hour. Often this means that you'll get billed for each portion of the hour that the lawyer is spending on your case, rounding upwards. For instance, if your legal adviser is charging you \$450 an hour, you may get billed at the rate of \$45 for every six minutes (that is, for each tenth of an hour) or for any part of that period that the lawyer's attention is focused on your case. So, a one-minute phone call might be rounded up to the full six minutes and cost you \$45. To keep yourself from getting billed for a full hour for a bunch of short calls that total less than an hour of the lawyer's time, carefully plan your calls to fill up the billing interval – that is, to get your money's worth.

Negotiating Legal Fees

Sometimes, lawyers agree to take certain cases pro bono – free of charge – such as when the client is referred by a low-income legal service. In addition, some lawyers agree to reduce their rates for clients who are members of prepaid legal plans with which the lawyer has a relationship. But, in general, most lawyers will expect to charge their normal hourly fee to every client.

If you want to negotiate a lower fee, ask about the availability of a free consultation, sliding scale, or other reduced-fee arrangement when you set the appointment.

¹ All dollar amounts in this article have been revised from the original to reflect current rates.

If this option is available, great. If not, you can ask if the lawyer might make an exception to the regular rate in your case. If the answer is “no,” don’t try to negotiate a special arrangement with the receptionist or legal assistant setting the appointment. He or she will have no authority to lower the fee without the lawyer’s approval.

Once you’re face to face with the lawyer, it won’t hurt to ask again if he or she will give you a reduced fee for consulting services. But don’t be surprised if you’re turned down, and do be ready to pay for whatever time you’ve spend at the previously quoted rate, unless you’ve arranged something different in advance.

Locating a Good Legal Adviser

The best way to find a good legal adviser is through referrals. Your mediator may be able to give you a list of potential consulting lawyers he or she knows. Or if you are working with a counselor, or a financial or other adviser, you may be able to get referrals that way. You may have come across the names of good consulting lawyers in your search for a mediator. Many lawyer-mediators offer their services as consulting lawyers, too. This is also where friends, family, and acquaintances can help, especially if they have been through mediation themselves and understand how helpful a good consulting lawyer can be.

In addition to referrals, you might try contacting your local bar association, professional mediation association, or mediation center. Finally, you can get listings of lawyers by geographic area in *Martindale-Hubbell*, a national directory available in many public libraries and law libraries and on the Internet at www.martindale.com.

Interviewing and Selecting a Legal Adviser

Once you have a list of names, pick the one who seems best to contact first. Or if you can afford it, consider meeting with the top two or three candidates, in order to select

the one you want to work with. It may seem like a waste of money, but considering the cost of adversarial litigation, paying a few hundred dollars to find a good consulting lawyer you’re comfortable with is a bargain.

Questions to Ask Potential Consulting Lawyers:

- How many years have you practiced divorce law?
- How much of your practice is devoted to advising clients in mediation?
- Have you had any training in divorce mediation?
- What kind of help can I expect from you while I am in mediation?
- Will you review any written agreement prepared by the mediator?
- Will you prepare a written agreement if the mediator doesn’t?
- What would you look for in a settlement agreement? (The answer should give you some idea of the adviser’s attitude toward creative approaches to settlement versus strict adherence to legal rules.)
- What do you charge for your services?
- Do you require a retainer in this situation?

If you are uncomfortable with how things went in the interview, continue looking. To make the most of the time spent with a consulting lawyer, it’s important to find someone you feel good about.

Working With a Legal Adviser

You can expect some basic things from your legal adviser. And you can take some actions to make the most of the time and money you spend on consulting with your legal adviser.

Communication

First, your legal adviser should communicate clearly and in plain English. By the same token, you’ll need to take responsibility for your end of the communications. If you don’t understand something, say so. Be

persistent. Ask questions until you are sure you get it. Your adviser should be open to your questions.

Responsiveness

Expect your legal adviser to respond to your [inquiries]...within a reasonable time...You are not your legal adviser's only client, so there will be times when you can't reach your legal adviser right away. You can and should expect to hear back within a reasonable time, however. If a special urgency or deadline arises, include that information in your message. If you don't get a [response] within the times we've suggested, call and find out the reason for the delay.

Questions

Before meeting with your legal adviser, write down your questions and concerns. Leave room to jot down your adviser's answers and note what you plan to do next.

Bring your list with you to the appointment. Tell your adviser that you have a list of questions, and double check the list at the end of the meeting. Write down notes of your adviser's answers as you go along. Go as slowly as you need to.

Support Persons

If you're having trouble focusing and find it difficult to remember your questions or the answers, consider bringing a support person – a friend or family member – with you. Be sure to clear this with your adviser ahead of time. Ask your support person to take notes for you during the meeting. Some people find it helpful to record their meetings with their legal adviser. If you think this would be useful, be sure to discuss it with your adviser in advance.

Before You Leave

Before your leave, go back over what's been discussed and ask your adviser to help you come up with a plan of action based on the advice you've been given. This might consist of getting certain information together or having a plan for things to say and questions to ask at the next mediation

session. Write down notes of your plan of action.

Using the Advice

Take seriously the advice you get. You are paying a professional to give you advice you wouldn't think of on your own. Make sure you understand the advice and the reasons for it. Consider it carefully before accepting or rejecting it.

Bear in mind that you may not always like what you hear from your legal adviser. Some legal rules may not seem fair to you. You still need to know them in order to maintain a realistic approach in the mediation.

If Problems Arise

Three kinds of problems can arise when working with a legal adviser:

- communication problems,
- unhappiness with the advice, or
- fee disputes

Communication Problems

If the problem is in the communications between you and your adviser, try letting your adviser know. Sometimes that's all it takes to get back on track. If that does not work, consider seeking the assistance of a counselor or therapist.

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Maybe the problem is something you can fix on your end. If all else fails, you may need to look for a new adviser whose style of communication is more consistent with your own.

Unhappiness with the Advice

If you are confused by the advice you're getting or if you disagree with it, talk with your adviser. Ask his or her reasons for giving you this particular advice. Ask what other options might be available to you.

Then decide for yourself whether you want to follow the advice, disregard it, get a second opinion, or ask your mediator for help in deciding what to do.

You Are in Charge of Your Life

Always remember that you are free to make decisions that make sense to you, even if they contradict the advice you are given. For example, if you will pay or receive alimony, your adviser might discourage you from agreeing to a lump sum payment instead of the more traditional arrangement of ongoing payments. Your adviser might be concerned about the risk that future developments could prove the lump sum amount to be higher (or lower) than what would have been paid in monthly alimony payments. But if you and your spouse want to avoid the unpredictability and ongoing entanglement of alimony payments, you might reasonably choose to disregard your adviser's recommendation and go ahead with the lump sum payment.

A different but related problem arises if your legal adviser tells you something about the law that seems to contradict what you've heard in mediation, or vice versa. For example, the mediator reviews the child support guidelines with you and your spouse and comes up with a child support amount. Your adviser tells you that under the guidelines, child support should be twice that much. What's going on? Perhaps the legal guidelines aren't clear and the mediator and the adviser interpret them differently. Maybe they are using different factual information in their calculations. Or one of them might be wrong about the law. Ask your adviser to help you sort out the reason for the discrepancy. If there seems to be a disagreement about the law, consider getting a second opinion.

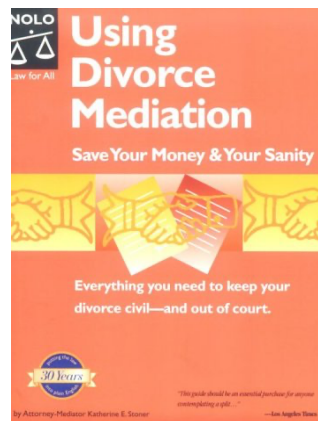
Fee Disputes

Avoid problems about fees at the outset by making sure you have a written agreement with your legal adviser concerning how fees

will be charged, when you will be billed, and other details. If you do not pay as you go, insist upon receiving a detailed monthly bill, and call any problems to your adviser's attention as soon as you are aware of them.

Keep your sense of perspective when it comes to fees. Many a great working relationship has been poisoned by disagreements over relatively minor fee amounts. If you are otherwise pleased with your adviser's performance, consider cutting your adviser some slack when it comes to the fees.

If you end up with a significant dispute about fees and if talking about it doesn't resolve the problem, you may be able to get help from your local or state bar association. Often there is a panel of volunteer lawyers available to review the situation and to give an advisory opinion about the fee dispute.



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