

*What issues face divorce mediators today?*

## *A Practicing Mediator Answers the Questions Most Often Asked About Divorce Mediation*

*Stephen K. Erickson*

A quiet revolution is occurring. At present, it is most noticeable in the lives of couples who are settling their own divorce issues with the aid of a professional third party. This quiet revolution is called divorce mediation.

In many ways, the growing public use of divorce mediation is similar to recent changes in the health care field. The past decade has seen the public demand a greater role in decision making concerning medical care and treatment. Not only is the use of second opinions becoming more frequent, but many consumers are resorting to self-help methods of prevention, such as diet, exercise, home delivery, and other methods of consumer control. Skeptical at first, most doctors now support this development as a welcome sign that patients are becoming more concerned about their health and that attention has begun to focus on prevention rather than on treatment of disease.

In the care and treatment of divorce, the public is demanding greater control over the outcome. The proliferation of do-it-yourself divorce kits, the uncontested divorce packages offered by legal clinics,

and the increasing use of divorce mediation signal that the consumer of legal services is also demanding greater control and involvement in preventing the “disease” of litigation. Just as patients wish to avoid the drastic event of surgery when under treatment by doctors, divorce clients almost always wish to avoid the drastic procedure of acrimonious court battles.

Through the increasing use of divorce mediation, the public is now finding that it can take more control of family problems and eliminate the excesses of the adversarial divorce system.

The purpose of this chapter is to examine some of the questions most commonly asked about divorce mediation. The author is a practicing mediator who has been involved in mediating property, support, and children’s issues in a private family mediation practice since 1977. A lawyer, he received a Bush Foundation Fellowship in 1979 to study divorce mediation. He used this fellowship to work with Jim Coogler in the Broward County Family Court and to enroll in a master’s degree program offered by the University of Minnesota Family Social Science division. A founding member of the Academy of Family Mediators, he has been training other lawyers and mental health professionals in divorce mediation since 1980, and he is co-author of the Mediation Training Institute’s training program manual.

### **I’m Skeptical About Anything New, What’s So Different About Divorce Mediation?**

On first hearing of divorce mediation, many attorneys are skeptical and perhaps even openly opposed to the concept. The public in general is not knowledgeable about divorce mediation, and divorcing spouses who hear about it lack detailed understanding of the process.

Divorce mediation is a process just like the adversarial system. The two processes have the same goal of ending the marital relationship by requiring a couple to accept enforcement of a judgment and decree of dissolution that defines certain obligations between the two parties. The similarities stop at this point, however, and almost every other comparison shows radical differences. The basic difference is that divorce mediation is based on theories of cooperative conflict resolution. The adversarial system says that conflict over property, children, and financial support is best resolved by engaging the parties in conflict in a system that views them and that expects them to act as if they are adverse to each other. This basic assumption of the adversarial system creates other assumptions that in almost every case relate back to the competitive view of problem solving. Divorce mediation takes the posi-

tion that, while a husband and wife in the midst of divorce may think that they are adverse to each other, they must learn that a system which encourages their differences is contrary to the best interest of their children, that it is contrary to accepted principles of mental health treatment, and that it will certainly hinder their efforts to rebuild their lives as single persons. Thus, the basic assumption underlying divorce mediation is that conflict is best resolved by encouraging mutuality and commonality in a process where cooperative bargaining and negotiations are monitored and managed by a skilled, neutral professional.

Rather than asking the couple to get the meanest, toughest attorney in town to fight the other side, divorce mediation asks the couple to use attorneys in a different manner. Rather than viewing the attorneys as gladiators to protect the two parties, the couple is asked to use the attorneys in an advisory capacity. Rather than blaming the other for all their own problems, the spouses are urged to attack the problem, not each other. Rather than viewing a fair outcome as one that allows one party to gain at the expense of the other, both spouses are encouraged to see that a fair solution requires that both have mutual gain.

### **What Is Divorce Mediation?**

When divorce mediation is conducted properly by a trained mediator with a background in one of the mental health professions or in law, it is a mutual problem-solving process whereby couples attempt to reach agreement on all the issues raised by their decision to separate or divorce. Said another way, when the spouses find that they cannot talk with each other at the kitchen table because the talk always turns into an argument, they go to a divorce mediator, who helps them to reach a settlement in a safe, controlled environment. It is not therapy, because the divorce mediator focuses on the task of bringing the couple to an agreement about the children, support, and property division. It is not the practice of law, because the mediator does not counsel or advise the spouses on what they must or should do, nor does the mediator speculate about what the outcome in court would be. Rather, the mediator manages the discussions in a way that requires full discussion of the issues, that examines the consequences of various choices, and that sets a time limit on the sessions so as to require either closure or the reaching of impasse within a reasonable time period.

A therapeutic background is helpful, because a mediator occasionally needs to address emotional issues when the decision-making process is inhibited by an emotional problem or by an issue that pre-

vents one or both spouses from making decisions. A legal background is helpful, because a lawyer's training allows for a task-oriented, concrete approach to problem solving. Both approaches are merged in the various models of divorce mediation, which are giving rise to a new, separate profession.

### **When Did It Start?**

Divorce mediation began in the mid-1970s, when several people around the country began to experiment with the idea that a neutral third party could help divorcing couples to reach settlement better than the traditional method, which uses two attorneys to negotiate and advocate on behalf of each party. In 1980, the Broward County Conciliation Court became the first court system in the nation to use mediation for all divorce issues. Several courts already sponsored custody mediation, but they did not permit the mediators to mediate property and support issues. In 1980, those few who had been practicing mediation since the mid-1970s began to train others in mediation procedures. Some research on earlier mediation efforts was also started. In the past two and one half years, approximately 1,500 attorneys and mental health professionals have received training, and new divorce mediation services are being started each week around the country. Two books have been published, and others are in the process.

### **What About Their Legal Rights?**

Divorce mediation takes the position that divorce is essentially a family problem, and couples are encouraged to make family decisions, which then may have some legal impact. It assumes that intelligent adults are capable of developing their own standards or laws of fairness and that they do not have to be told what a judge or court might do in their own situation. In fact, the concept of divorce mediation flatly says that it is virtually impossible for any attorney to predict with any degree of certainty what the outcome in court will be, because too many variables affect the outcome. Even the use of support tables to calculate the ballpark figure of child support or alimony has little use in a mediation session, because the fairness of those tables breaks down when applied to the individual circumstances of each couple.

Divorce mediation is based on a completely different set of assumptions from the adversarial method of solving conflict. In divorce mediation, couples are asked to make their own law of fairness, not to rely on legal principles or case law and precedent that must be applied

to their own particular case. A mutual or cooperative problem-solving process is created and managed by the divorce mediator.

### **How Is It Possible to Mediate Clients Who Are Weak and Powerless and Who Cannot Negotiate for Themselves, Let Alone Determine What Is Fair?**

One of the strengths of the mediation process is that it prohibits either spouse from victimizing the other. The mediator has an obligation to ensure that the negotiations are conducted in an open atmosphere with full disclosure, full examination of all issues and options, and full examination of the consequences of each decision. While some clients may find that the mediation process requires more work than they would have to do if they simply turned their case over to an attorney, those who complete the process find that the rewards far outweigh the burden of self-negotiation. One technique that many experienced mediators are using is to suggest at the beginning of mediation that both parties retain an attorney so that the party who appears weak and confused has an opportunity to feel secure about his or her own efforts. Of course, this requires the couple to choose attorneys who will respect the mediation process.

If we assume that the so-called weaker party will eventually have to manage his or her share of marital assets and his or her own finances without continuing assistance, it makes sense to ask that party to begin the process of gaining independence at the earliest possible time. Mediation says that this process should begin to occur not after the divorce trial is finished but at the moment when the couple decides to enter mediation.

Experienced mediators have developed several intervention techniques for dealing with power imbalances in the mediation sessions. This is why it is important for beginning mediators to receive adequate training and ongoing supervision when beginning a mediation practice.

### **How Will Divorce Mediation Affect the Private Attorney?**

At present, the number of couples choosing divorce mediation is not large enough to affect the pocketbooks of practicing attorneys in any significant way. Even if one third of all divorcing couples in the United States were to choose mediation, it is doubtful that attorneys would lose business. In fact, the model that most responsible divorce mediators follow requires each party to retain an attorney to review

and implement the mediated decisions. Moreover, since the mediator does not give legal advice or representation, the number of couples who consult attorneys could actually increase when more couples turn to mediation as an alternative to the adversarial process. The reason for the increase is that most divorces in the United States today occur with representation for only one party (Cavanaugh and Rhode, 1976).

It is true that, if significant numbers of couples began to use mediation, the number of hours spent by attorneys negotiating settlements on behalf of their clients would decrease. However, the amount of time that attorneys would spend performing truly legal services, such as drafting the mediated decisions into proper legal form, providing quality tax-structuring advice, and in general performing the strictly legal skills that attorneys can best do, would increase.

Most attorneys try to avoid handling divorces. The reason is that divorce negotiations are conducted on the messy level of human emotions, with intensely conflicted values and in an atmosphere of competitiveness and hostility. The trained mediator with a background in behavioral science or law is skilled in channeling the emotions of divorce into a productive outcome. Attorneys who represent couples on completion of mediation report that both the husband and the wife have a better grasp of the issues and that they are much more sure about their options. The intense conflict that so often occurs in divorce is managed and resolved in mediation, leaving the attorney to perform the important legal function of review, adjustment, and implementation of the mediated decisions. Mediation does, however, require the attorney to join with the couple in making commitment to search for a negotiated outcome rather than taking the position that he or she can get the client a better deal in court. Since the attorney who represents a client in a mediated divorce must still retain an independent posture, mediation assumes that some attorneys will occasionally not approve of the decisions made by their client in divorce mediation. In that case, the parties would return to mediation to work further on the negotiations, provided that the attorney's client agreed with the attorney's opinion not to approve the agreement. Just as many medical patients choose not to follow their doctor's recommendation, so are there occasions on which a mediated couple chooses not to follow their attorneys' advice. This outcome also happens with some regularity in the case of nonmediated divorces, and it can be expected to continue where mediation is used.

For the attorney who prefers not to practice divorce law because of the nature of the conflict, mediation presents an opportunity to serve the client without having to refer the whole case to another attorney.

For example, a corporate attorney may be asked by a good client to handle his or her divorce. Many corporate firms have a policy of not getting involved in their client's divorce problems. This is unfortunate, because the attorney in question may be the best one to help the client with the complicated tax structuring of a divorce settlement, thanks to the attorney's long-standing relationship with the client and to the attorney's familiarity with the client's financial affairs. A referral to a divorce mediator allows the attorney to avoid the intense conflict of divorce battles and still to retain control over the file. Referral also allows the client to continue the same attorney-client relationship that he or she so values without feeling abandoned because he or she has been referred to an attorney whom he or she does not know.

Even divorce specialists find that referral to a mediator can be useful. Unfortunately, it is only the successful specialist who comprehends the benefit. The marginal practitioner usually wants to hang on to anything that comes through the door. More likely than not, this is the attorney who says, "I like the concept of divorce mediation, but I don't think it will work for you." Most successful matrimonial lawyers have their hands full, and they welcome the opportunity to receive a case back from mediation where the broad general issues of support, custody, and property division have been resolved, so they can attend to the fine-tuning of tax structuring, drafting, and further review and processing. In the more complicated divorce cases, it is not unusual for a couple to spend fifteen hours in mediation and double or triple that amount of time with their attorneys. An analogous situation occurs in the field of real estate: A couple decides to buy a house. They determine together, usually without consulting an attorney, the location, type, and price range that suits them. They then negotiate a price, and at that point they consult an attorney to represent them in the remainder of the purchase. Essentially, this is the concept of divorce mediation. It encourages the couple to decide support, custody, and property division, then to consult the attorney for representation. The process should be flexible enough to allow the attorney to give an independent judgment while still respecting the spouses' right to make what appears to them to be correct choices on their own. In addition, the mediator's position requires balanced neutrality with respect to their choices—something that is lacking in the real estate profession.

### **How Will Divorce Mediation Affect the Mental Health Profession?**

Most therapists and marriage counselors are finding that they now can refer couples to mediation after a decision to divorce has been

made in counseling. Such referral allows the divorcing spouses to carry on the type of communication skills that they used in the therapy process, and it also ensures that intelligent decision making can occur in a healthy fashion. At present, more mental health professionals than attorneys are entering the field of divorce mediation.

### **Where Do Divorce Mediators Get Their Training?**

The people who began to mediate in the early 1970s are now helping to train other lawyers and mental health professionals. The Mediation Training Institute and the American Arbitration Association both offer introductory courses in mediation training. Many law schools are offering courses in mediation and negotiation, and the field of education and training is rapidly developing as more mediators gain an experience base on which they can draw when teaching others.

### **Conclusion**

My interest in divorce mediation began in 1976, the year I lost my first divorce client to gunshot wounds from an unbalanced husband. I started private practice in 1974, and I concentrated primarily on matrimonial law. Like many attorneys I have met around the country while training, I was frustrated not only with the excesses of the adversarial approach to divorce law but also with the cumbersome nature of the divorce settlement process. After hearing about divorce mediation in 1976, I began to correspond with O. J. Coogler, and in 1977 I incorporated Family Mediation Services in Minneapolis. I expected two things to occur: first, that divorce mediation would be appropriate for perhaps no more than 25 percent of the clients who sought the service and, second, that I would be criticized or disciplined by the organized bar. Neither expectation has been realized. I now know that divorce mediation is an appropriate starting point for all couples experiencing divorce or separation, and the organized bar in Minneapolis has embraced the concept of mediation by establishing and funding a mediation center to train attorneys in mediation and to offer several types of mediation services to the public.

Divorce attorneys seldom get the satisfaction of winning a litigated case, because there are so very few clear-cut victories in family court. Yet, as a divorce mediator, I frequently receive warm compliments from a successful couple. For three years, I tried to combine a matrimonial law practice with a separate divorce mediation practice, but I found it impossible to do both, because they are philosophically



inconsistent. I now refuse to accept divorce clients as an attorney. As a trainer of family mediators, I have talked to scores of attorneys around the country whose comments often resemble that of an Ohio attorney who said; "I've practiced primarily family law for thirty years, and I'm burned out. Mediation is the answer. Send me information about your program and where I can get trained, so I don't have to reinvent the wheel." Most family law attorneys who invest the time in learning conflict resolution skills and who then start a mediation practice in addition to their adversarial caseload have the same experience I did. They soon wish that they could earn a living from mediating full-time. Attorneys who become trained divorce mediators find satisfaction from the mediator's role for a number of reasons. First, they report that clients do not become so dependent on them for advice. This tends to eliminate the frantic calls for help that so often plague the divorce attorney. Second, attorney mediators find that they are able to help both the husband and the wife to structure a settlement that is advantageous from the point of view of tax planning, shared custody, and other issues that can only be worked out in a mutual setting where each searches for the best result, rather than to be victorious over the other. Third, they know that they are doing the right thing, because they have seen firsthand the damage that acrimonious divorce litigation can inflict on all parties. After mediating a few cases, they have the opportunity to see firsthand the benefits to clients who are able to arrive at fair results through their own efforts based on their own standards of fairness.

## Reference

Cavanaugh, R., and Rhode, D. "The Unauthorized Practice of Law and Pro Se Divorce." *Yale Law Journal*, 1976, 86, 104-184.

*Stephen K. Erickson is director of Family Mediation Services in Minneapolis, Minnesota.*