SJMAG

Divorce Attorneys Discuss the Benefits – and Challenges – of Mediation

The Mediation Roundtable

Presented by

NJAPM
The Right Way to Resolve Disputes

Continuing last month's discussion about divorce during the pandemic, we spoke with experienced mediators who understand what it takes to bring 2 opposing sides to the table (or Zoom call) and reach an amicable agreement. It can be challenging, they say, but most times it is doable – and cheaper than going to court. Just a few factors make for a successful mediation, and they all agree on the first: Listening.

Participants:

Marianne Aleardi, *Moderator,* Publisher, SJ Magazine

Luke Griffith,Weinberg, Kaplan & Smith

Nicole Donoian-Pody, Charny, Karpousis, Altieri & Donoian

Bruce Matez, BorgerMatez

Deena Betze, BorgerMatez

Roseann Vanella, Advanced Mediation Solutions

Michael Fioretti, Law Offices of Michael D. Fioretti

Meghan Bradley, DeLorenzo Bradley & Banfe

Maryann Rabkin, Rabkin Law Offices

Marybeth Baron, Martine, Katz Scanlon & Schimmel

Hon. Marie Lihotz, (Ret.) Archer

The basics of mediation

You're asking people to examine their positions. You're asking them to consider the other side, because a lot of times they haven't. You develop the middle ground because in mediation, it's the people who come to the resolution. I don't tell them what to do. They have to see there is a path they can follow to resolve the problem.
Marie Lihotz

The statistics on divorce say that less than 2% of cases go to trial. So if less than 2% go to trial, that means 98% or more settle. At some point they enter into an agreement. So how do they get to that agreement? Mediation is the most effective way for people to work toward an agreement or settlement.
Bruce Matez

When you get people together, what you hear is a commonality between them that they don't even see. But it's in that middle space where they listen to the other person. Sometimes it's the first time they've actually heard what one side is proposing outside all the language that we as litigating lawyers can put around it. Mediation is really trying to get them in that middle space, where they can actually hear each other.
Maryann Rabkin

Mediators help clients come up with creative solutions that are best going to meet their personal needs, and of course, the needs of the family. We explore every possibility that could help them come to an agreement.
Roseann Vanella

In mediation, the scope of what you can do is much more flexible and much more broad. You can do things that are non-traditional. For instance, I recently had a mediation where the couple had a special needs child. They decided they would sell the house years into the future and jointly maintain the house as part of an exchange. A court probably would not have done that. They would have to sell, or there would be a buyout of the house. But this worked for this particular family.
Luke Griffith

Mediation allows couples to really talk through: When should we separate? When should we list the house for sale? Sometimes children are going through a milestone, like a child is in the middle of high school, and there are reasons to consider when the parents should separate. Mediation allows the parents to explore all the pluses and minuses, and talk out what works best for the family.
Marybeth Baron

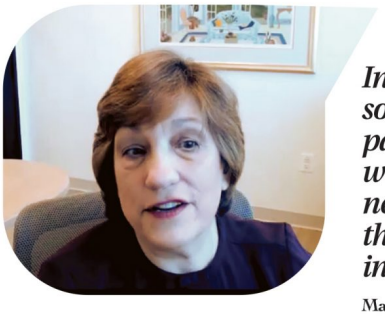
The pandemic & mediation

People have been spending a lot of time together. That's a problem for a lot of people. The lockdown caused husbands and wives to focus on every problem they had that they were ignoring because they were never together. So sooner or later, something's bound to happen.
Michael Fioretti

Initially there was a real slowdown in any kind of divorce activity, because nobody knew what was going on. But just a month or 2 into lockdown, if a couple decided to move forward with a divorce, the courts were closed. So without access to the courts, mediation became one of very few options to resolve divorces during the early pandemic.
Meghan Bradley

Parents now want to work out new issues in their parenting agreement: What if there is another pandemic? What are the rules of who the children can see and not see? What about vaccinations? The pandemic brought those issues to light.
Roseann Vanella

More parents are working from home now. So before, they might not have started their parenting time until after dinner, but now they have more flexibility. And they're saying, "I can be here for more time. I want more time."
Nicole Donoian-Pody



In mediation, the solutions are what the parties decide will work for them. It's not necessarily a result that would be ordered in a court.

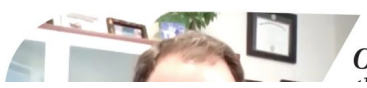
Marie Lihotz

Virtual Mediation

I think some people actually prefer mediation via Zoom because the husband and wife are more relaxed, and they don't have to drive to someone's office. They can just turn on the computer. It actually is working better than I suspected it ever would.
Marybeth Baron

I've had several clients who take a lunch break and sit in their car for the mediation. People find it efficient and cost effective. They're not driving, they're not wasting any additional time.
Meghan Bradley

You also can get access to mediators who may be farther away. If you have a case and you think a particular mediator is a good fit for that case but you don't want to drive 2 hours, you can get them – on the computer.
Marie Lihotz



Often parents, even if

they can't agree on the color of the sky, they agree on objectives for their children. We build upon that.

Luke Griffith

Deciding child custody

Most of the time, the kids want to spend time with both parents. They want to say what's going to make each parent happy. So you don't want to put a child in the position of weighing in on those serious decisions.
Meghan Bradley

Sometimes the conflict is based on a root concern: I feel like I'm not going to get enough parenting time. And really what you find is both parents have the same goal. They want their children to be happy and healthy, and in a good school system. We have the ability as mediators to talk with people about their concerns, which can help people hear that the other person isn't trying to hurt them or take more money from them or take away their children. That usually helps people move into the middle and understand, okay, we really have some differences, but we also have common goals.
Nicole Donoian-Pody

The uncertainty relating to what parenting time will look like in a divorce often creates fear, as parents anticipate the loss of time with their children. By listening carefully to the parties, you can help them create options for workable parenting time schedules. Each family is unique, and you can create a time-sharing plan that is as flexible, or specific, as their individual situation requires. A good parenting plan often includes an agreement that if the plan needs to be revisited as their children age, the parents will return to mediation before seeking assistance of the court.
Maryann Rabkin

This is the most difficult area of mediation. We can divide assets all day long, but when you're talking about somebody's children, that can be difficult because of the emotions. People change their idea as to what kind of parent the other parent is when they're going through a divorce. It is the most volatile, and the most difficult, area for us to work in. But all of the people on this panel have been able to do it, even in very difficult cases that nobody ever thought would settle. Because all of us here have the ability to bring people together.
Michael Fioretti

You want to focus on what things will look like in a year for your children, in 5 years, because we're trying to build upon something new. Whether we like it or not, the train has left the station, and we're moving on. The challenge is sometimes one person is ready to move on, and the other person is saying, "Wait, what happened? Why are we here?" You can't get stuck on the why.
Luke Griffith

In mediation, parents may realize they don't necessarily need to have all 3 kids at the same time. So say, when one child plays this sport, this parent is the one attached to that child, while the other parent is with the 2 other children. That's not typically something a judge would order. But the parents come to realize that being a parent is the most important thing.
Marie Lihotz

We try to get parents to understand they are best equipped to decide what's best for their kids, not somebody in a black robe who is listening to evidence and testimony. You get a lot of one-size-fits-all decisions in court.
Bruce Matez

I try to stress when we're at an impasse that this doesn't have to be permanent. We could try something, and come back and see how it's going.
Deena Betze

My best advice: Don't take legal advice from your about-to-be ex-spouse.

Maryann Rabkin

Mediation vs. court

In litigation, an issue can cost thousands of dollars to address: letters between attorneys, phone calls between attorneys, emails between attorneys. And then if it can't get resolved, you might need to file a motion, which costs another $5,000 or more. But if you put people in a room together, or on a Zoom call, you could resolve it in 15 minutes.
Bruce Matez

There is no relationship between what you do with a mediator and what you do at a trial. In mediation, you pay less money, and you make the decision. At a trial, you'll pay more, and somebody else is going to make the decision.
Michael Fioretti

The typical divorce retainer for each party, if they go the traditional litigated route, is $5,000 to $7,500. That is an initial outlay before you even start. I tell folks to save that money and start a college fund for your kids. That's a better use for those funds. From a cost perspective, 95% of the time, mediation costs much, much less than litigation.
Luke Griffith

There's a bit of a backlog in many of the courts. If you want to be able to move quickly and inexpensively, then mediation really is your best option.
Nicole Donoian-Pody

A judge looks at what happens today and typically does not go very far into the future. But in mediation you can plan for what you know is going to happen, like maybe a Bar Mitzvah or Sweet 16. Things can be planned, where a judge would never go near that, because it's too far into the future.
Marie Lihotz

One of the biggest differences is that this is a goal-oriented process. It's not an adversarial process. It's not a win/lose model, like litigation has to be. Mediation is a way to come to a peaceful resolution without having to go through that adversarial process.
Deena Betze

I've been mediating for 13 years, and I can count on less than 2 hands the number of couples who have not come to resolution in mediation.

Roseann Vanella

How to handle an unreasonable client

A successful mediation is teaching parties how to resolve their own disputes in a respectful way. We set the ground rules, and we have to enforce those ground rules sometimes. And sometimes you have to say, "No, you can't talk right now." We do have to control the discourse.
Deena Betze

There is a process called shuttle mediation, where you talk with each person individually. If one person is consistently interrupting or shutting the other person down, you do your best to reel them back in and get them to be respectful and polite, but you may have to say, "Ok, let's take a timeout here." And I'll talk to the husband alone for a little bit. Then I'll talk to the wife alone. If it's appropriate to bring them back together, great, but sometimes it's not. Sometimes it's better for the mediator to shuttle back and forth between the 2.
Marybeth Baron

As a mediator, we are compassionate, but we also need to be firm. We're in charge of the process. So there are ways to not allow someone to gaslight or disrespect the other person without being threatening. But that's a very delicate balance that experienced mediators have.
Roseann Vanella

What surprises people about mediation

I think many people are surprised to know I'm not doing the majority of the talking in mediation. The clients are doing most of the talking. I'm asking questions, and they're talking – hopefully to each other.
Nicole Donoian-Pody

Some people think mediation is only for "warm and fuzzy" divorces, where the issues are simple or already primarily agreed-upon. Frankly, some of the most successful mediations are those with complex and thorny issues between parties who are having difficulty communicating with each other.
Maryann Rabkin

People are surprised to know that as mediators, we don't make decisions. We don't tell people what to do. Our job is to facilitate discussion, make suggestions and come up with creative solutions for them. But we don't make decisions for them.
Bruce Matez

I've had cases that involved family pets. The kids are close to the pets, and we talk in mediation about how to share time with them, how to share their expenses. Mediation enables you to address issues of these sorts.
Meghan Bradley

Folks sometimes come into mediation thinking the mediator will have all the answers and they won't have to do any work. But mediation is hard work. Going through the process is hard work. It's asking and answering a lot of questions. You have to explore why you feel a certain way, and why the other person feels the way they do. And then come to a compromise. You take steps little by little that eventually get you to a result.
Marybeth Baron

Times when mediation won't work

Mediation is prohibited if there's an active domestic violence restraining order. Or if you recognize a significant mental health issue or some addiction issues, those cases may not be appropriate for mediation. Also, if you recognize there is a significant imbalance of power, mediation may not be appropriate.
Bruce Matez

We were trained as lawyers to trust but verify. So if we've asked for documentation or given our mediation clients homework, and they're unwilling to do that, that's a telltale sign that something may be amiss.
Luke Griffith

Both parties have to be motivated. They have to be on the same page and want to get it done. You'll have a very difficult time if both parties aren't motivated.
Michael Fioretti

Mediation depends on everybody being upfront and transparent. If somebody is playing games, hiding assets or not doing what they're supposed to do, ultimately, that will disrupt the process, and mediation just won't work.
Deena Betze

Advice for people getting a divorce

Gather information because information is power. Gather as much as possible. Consult with a lawyer or a mediator, and maybe a mental health specialist for support. Find someone you have confidence in and a sense of comfort with, because the process is difficult. So search for information, but not necessarily on the internet.
Maryann Rabkin

Divorce has a far-reaching impact on the parties and the family. There should be a path to figure out how you can minimize the trauma to the children and maximize your financial resources. You can do that through mediation. Frankly, I don't believe any case should be tried in family court.
Michael Fioretti

As long as you keep people talking and exploring ideas, you're on the right track.

Bruce Matez

Tips for settling any dispute

The simple act of repeating what the other person just said can be extremely helpful. Many times when the other party hears how that person received what they said, they'll clarify what they meant. When we are in heated discussions, we sometimes don't even realize our tones or what we are saying.
Roseann Vanella

Sometimes, you just have to take 15, 10, even 5 minutes, and take a break. Then come back and talk again. In that time while people reflect, hopefully they think about what the other side said, and they're willing to approach the problem in a different way.
Marie Lihotz

The greatest skill is listening, and that's also the biggest challenge. The other piece is to allow there to be silence. Often people think when you're talking through issues that there always has to be somebody talking. But sometimes it helps to let there be silence, so everybody can think.
Meghan Bradley