*[Reprinted with permission from 17 Massachusetts Family Law Journal 85 (1999)]*

# COACHING FROM THE SIDELINES: EFFECTIVE ADVOCACY IN DIVORCE MEDIATION

*By David A. Hoffman and Karen Tosh*[1]

## I. Introduction

During the last twenty years mediation has become an increasingly common method of reaching settlements in family law cases -- particularly those involving divorce. The growing use of divorce mediation is reflected in the substantial body of literature describing divorce mediation, advocating its use, explaining how to select a divorce mediator, and addressing legal and ethical issues associated with mediation practice.[2] Surprisingly little has been written, however, for divorce lawyers about mediation.[3] In particular, lawyers will find little guidance on the following critical question: what is the attorney's role when a divorce client is participating in mediation?

Lawyers are generally ill-equipped to answer this question because their training focuses on courtroom advocacy. Advocacy in the setting of mediation requires different skills, in part because lawyers seldom attend divorce mediation sessions. Some law schools have recently begun teaching advocacy in a mediation setting, but for lawyers who graduated law school many years ago the concept is foreign. And even for those law students who are learning mediation advocacy, the focus is primarily on how to participate effectively as counsel at the mediation table.

The purpose of this article is to describe a role for lawyers in divorce mediation where they do not attend or participate directly in the mediation sessions. In our view, lawyers play a vital role in divorce mediation, as counselors and advocates, even when they are seemingly relegated to the sidelines by the mediation process. This article describes the specific tasks lawyers should undertake in their representation of clients in mediation. It is our hope that this article will be useful not only for attorneys whose clients are considering mediation, but also for the clients as a guide for understanding the nature of attorney-client representation in the context of mediation.

Before addressing these tasks, however, it may be useful to define what we mean by divorce mediation.

### A. What is Divorce Mediation?

Mediation is a voluntary settlement process in which an impartial person assists the parties in reaching an agreement on the issues they wish to resolve. Participation is ordinarily voluntary, although some courts require mediation in divorce cases -- particularly where there are custody disputes. However, in either case, the mediator has no power to impose a settlement. The process is ordinarily confidential.[4]

Many divorcing couples have found divorce mediation to be advantageous because (a) it is less adversarial than litigation; (b) it is more private; (c) the parties retain control of the process; (d) mediation is usually less expensive than litigation

and often resolves a case more quickly; (e) if there are children involved, the process is less likely to embroil them in a painful conflict; and (f) mediation often gives divorcing couples a better chance of successfully negotiating issues that may come up in the future (such as child support, alimony, or custody and visitation issues). In most jurisdictions, mediations result in settlement in a large majority of cases. However, even when mediation does not produce a settlement, it often assists the parties in narrowing the issues in dispute, so that the court can then provide the parties with specific guidance on those issues.

### B. The Lawyer's Role in Divorce Mediation

The lawyer's role in divorce mediation comes at three stages in the process. First, before the mediation begins, the attorney and client must confer about whether the case is suitable for mediation and who would be an appropriate mediator. Second, once the mediation has begun, the attorney and client must confer about the issues that are being addressed in the mediation so that they can develop and assess proposals for settlement. Finally, as the mediation is concluding, the attorney must review any settlement agreement with the client and advise the client as to whether the agreement is fair and reasonable.

All of this may seem obvious to an experienced matrimonial lawyer. However, in our work as mediators and advocates, we often see lawyers taking either a "hands-off" approach to clients in mediation or becoming so overly involved in the mediation process that the advantages of mediation are lost.

Lawyers who take the hands-off approach offer little advice or guidance to the client throughout the process, and simply review the final settlement agreement, which is often drafted by the mediator. These lawyers may be distancing themselves for good reason: they may believe that attorney involvement can ruin the mediation process by stifling client autonomy and creating an adversarial climate in the mediation. However, the passive approach leaves the client vulnerable to overreaching by his or her spouse, and prevents the attorney -- who might be able to propose solutions that would make both sides better off -- from contributing to the negotiation process.

Lawyers who become overly involved in the mediation process often see themselves primarily as litigators. By playing a more active role -- including, in some instances, attending all mediation sessions -- these attorneys try to "win" the negotiation for their clients. Again, they do so for good reasons: they are typically concerned about their clients' making uninformed decisions or falling prey to spouses who may be more skilled in negotiation. However, the litigation-oriented approach is in tension with the goals that may have led the parties to consider mediation in the first place; the lawyers become so involved that the clients' autonomy is impaired, and the parties' opportunity to learn how to work together in a post-divorce setting is lost.

In most cases, lawyers must find a middle ground, in which they can protect their clients while at the same time giving the clients room to develop solutions of their own. The approach recommended in this article is a hybrid. We advocate a high level of involvement by attorneys but suggest that mediation sessions be attended -- for the most part -- solely by the clients and the mediator. Effective advocacy and counseling in this setting requires what we call "coaching from the sidelines" -- in other words, the attorney serves as coach and advisor, even "calling in the plays" on occasion by suggesting particular proposals or approaches in the mediation. Throughout the process, the attorney should also maintain a relationship with the mediator and learn to rely on the mediator's skills and expertise.

While advocating an orientation to mediation that strikes a balance between over- and under-involvement by lawyers in the process, we are mindful that every case -- like every client -- is different. Approaches suitable for one case may be unsuitable for the next. However, it is our hope that the suggestions that follow can be usefully applied in most cases in a way that enables attorneys to help clients reach solutions in mediation that serve the clients' best interests.

## II. Before Mediation Begins

### A. Client-Centered Counseling

The concept of client-centeredness in client counseling originated as a response to what many saw as an overly paternalistic style of lawyering: the lawyer called all of the shots and the client was kept in the dark. Client-centeredness evolved in an effort to pay greater attention to client decisionmaking and participation and has remained the dominant model of counseling.[5] The client-centered approach compels attorneys to allow clients to make autonomous decisions to the maximum extent possible.[6]

#### 1. Client Awareness

In most relationships, the better the parties know each other, the stronger the relationship. When people have a clear understanding of what each person expects to give to and to get out of a relationship, they have a better chance of actualizing those goals. The lawyer-client relationship is no different. As Professor Sternlight explains:

> [a]ttorneys should not assume that all clients are the same, but rather should focus on the potential differences between clients. Nor should they assume that all clients. . . have the same concerns. They should instead try to determine not only the clients' goals and interests but also the clients capabilities and even to some degree the clients' psychological makeup.[7]

Lawyers should never assume they know their clients' goals - both initially and throughout the counseling relationship. As Professor Sternlight illustrates, clients often wish to realize nonmonetary and/or psychological goals through mediation. For example, a client may desperately want an apology from the opposing side. The attorney, however, may not realize the importance of an apology.

It is also important for attorneys to recognize that clients' goals may change throughout the mediation process. For example, where a client may initially want a large amount of money in order to get revenge, the client's feelings may change during the course of mediation. If the attorney remains unaware of the change of heart, she will continue to press for a large settlement and may obstruct a potential compromise.

Communication skills -- particularly the ability to listen attentively, thoughtfully, and empathetically -- are seldom taught in law school. Many lawyers acquire active listening skills on the job. Regardless of how they are acquired, however, the essential ingredient in fostering client awareness is the ability to hear the underlying message -- not just the words, but the music as well -- in the client's discussion of the case. Effective listening is not a passive exercise; it requires sensitive inquiry, which not only provides the lawyer with insight but also communicates the lawyer's interest in the welfare of the client.

2. Attorney Awareness

Just as attorneys need to learn to know their clients, they also need to learn to know themselves. As Professor Sternlight notes:

> Differences between the psychological makeup of the client and her attorney may also create a barrier to a negotiated agreement. . . . These disparities may cause the attorney both to see things differently than the client would have seen them and also to express herself differently than the client would have expressed herself. Often these differences are desirable and are the very reason that a client may choose to be represented by an attorney. At times, however, these differences may cause an attorney to stand in the way of a settlement that the client might have approved.[8]

In order to effectively counsel clients, attorneys must explore their own biases and orientation.

For example, psychologist Kenneth Kressel, author of The Process of Divorce,[9] studied the orientation of divorce lawyers and found that they could generally be classified as either "counselors" or "advocates." The counselors are those whose preferred orientation is that of compromise. As one might imagine, the counselors are more collaborative than the advocates. Kressel notes that the advocates often portrayed the "lawyer as combatant and the client as a source of

irritation and difficulty."[10] Lawyers who are "counselors" will likely consider mediation in every case and give thoughtful consideration to whether the client's best interest will be served by participating in mediation. On the other hand, the lawyer who recognizes herself as an "advocate" may be less enthusiastic about mediation and should be careful to balance the inclination to be combative against the potential benefit to the client from mediating.

The lawyer's place in this typology may be linked to the lawyer's desire to distance herself from the emotional component of divorce. The advocate often views the case as merely another set of facts to resolve in court -- paying little attention to the client's feelings. In other words, the advocate will likely view a divorce case in the same way she would view a business litigation case. The counselor, on the other hand, is likely to be more interested in, and compassionate about, the client's feelings.

Regardless of their orientation, however, by listening to the client and appreciating the client's feelings, attorneys can better analyze whether their client will be an effective "player" in the mediation game. Thus, the lawyer who has a high-volume practice with little time for client counseling, or who simply does not wish to take the time to listen to a client's concerns, should refer to another lawyer the client who is inclined to enter into mediation. On the other hand, an advocate can be an excellent coach, notwithstanding an aversion to providing emotional support to clients. Lawyers who see themselves as "advocates" are often good at setting reasonable bottom lines for mediation. Also, the client who has an "advocate" for a coach may appreciate the fact that, if mediation fails, her attorney is very comfortable in the courtroom.

In sum, whatever the lawyer's "type," identifying and discussing with the client the lawyer's orientation is an important part of client-centered counseling.

### B. Explain the Process

A cornerstone principle of mediation is the client's informed consent not only to the final settlement but also to the process itself. Mediators play an important role in educating clients about the process. However, the attorney should not rely entirely on the mediator to educate her client. Explanatory written materials concerning divorce mediation are available from the Academy of Family Mediators, and we often give our clients those materials as well as a primer we have prepared concerning divorce mediation. Such materials, of course, are only a starting point and not a substitute for discussion with the client.

What are the critical issues that the attorney must discuss with the client? The primary issues have to do with the suitability of the client and the case for mediation. For example, a client who has been the victim of domestic violence should not participate in mediation with her abuser except in the rarest of circumstances, and never in situations where physical or psychological abuse are

ongoing. In addition, some clients are so lacking in assertiveness that they cannot effectively negotiate for themselves. In some cases, unresolved emotional issues -- such as jealousy or anger arising from marital infidelity -- may create an atmosphere so toxic that useful negotiations cannot proceed. In other cases, substance abuse by the client or the client's spouse may make mediation impossible.

Assessing the appropriateness of mediation in any given case is not easy. Even with the protection afforded by attorney-client privilege, most clients are reticent about such issues as infidelity, alcoholism, and domestic violence, which might affect the attorney's willingness to propose or encourage the use of mediation. In most cases, attorneys need to do more than describe the mediation process and then ask the client if she is interested in trying it. Some inquiry into the nature of the client's relationship with her spouse -- and, in particular, the parties' ability to discuss issues productively -- is usually necessary.

Another important area of inquiry is whether, even if the case is suitable for mediation, there might be better options for the client. Although the focus of this article is on divorce mediation, the attorney must explain to the client that mediation is only one of the alternatives for resolution of the issues in a divorce. For example, unassisted negotiation, arbitration, use of a special master or guardian ad litem, or litigation might be more suitable options. The advantages and disadvantages of these options should be discussed with the client.

### C. Select a Mediator

If the attorney and client have concluded that the case is appropriate for mediation, and that mediation is the preferred option, the next step is selecting a mediator. Here the attorney's experience as a repeat player is crucial. The attorney must play the role of match-maker, assessing the needs not only of his or her own client but those of the client's spouse as well. For example, the case may involve highly emotional child-related issues, in which case the attorney may recommend mediators who have a mental health background and a knowledge of child development. Or, the case may involve highly technical tax problems or probate issues, in which case a mediator with a legal or financial background might be best.

In addition to subject matter expertise and suitable process skills, attorneys should assess a mediator's style and orientation. Professor John Lande outlines five types of mediators: "settlors," "fixers," "protectors," "reconcilors," and "empowerors."[11] "Settlors" tend to place importance on settling their cases quickly and thus are highly directive.[12] "Fixers" emphasize finding the best possible solution for both parties but may vary in their level of directiveness.[13] "Protectors" are concerned with fairness and preventing parties from experiencing an unjust process and/or an adverse outcome.[14] "Reconcilors" look to the

relationships between the parties and try to get the participants to "come to some kind of a new and more accepting understanding of one another."[15] Lastly, "empowerors" focus on helping the parties to exercise their self-determination to resolve the dispute.[16]

To be sure, these are very generalized "types," and most mediators will combine some elements of each of these styles and orientations. However, Lande's typology is a helpful start in developing a vocabulary for describing mediators. Some other descriptive approaches categorize mediators as "facilitative vs. evaluative," "broad vs. narrow," or "transformative vs. problem solving" in their orientations.

Just as important as an understanding of a mediator's style and orientation is an assessment of the "chemistry" between the mediator and the mediation clients. In most cases, an attorney will have met only his or client and not the client's spouse when discussing the selection of a mediator. Accordingly, the attorney should inquire about the client's spouse, describe the mediator, and together with the client try to determine whether the chemistry is likely to be favorable. There is no substitute, however, for an introductory meeting in which both parties interview the mediator and come to their own conclusion about whether she is suitable.

Gender is often a factor in the client's mind when deciding what kind of mediator she would prefer. Where it is financially feasible, some clients prefer co-mediation, in which there are two mediators working together -- usually a man and a woman. A combination of two mediators -- one with a background in the mental health field and the other with a background in law -- is often desirable, at least where the mediators work well together.

### D. Design the Process

One of the principal advantages of mediation is the flexibility of the process. The attorney and client have an opportunity -- working with the mediator, the client's spouse, and opposing counsel -- to design the process in a way that best suits the needs of the parties. For example, it may be necessary to arrange for the exchange of certain kinds of information, obtaining appraisals, or making temporary arrangements regarding "front burner" issues before substantive discussion on long-term issues can begin. Issues may arise concerning the timing or pace of mediation sessions and the question of who attends the sessions. As one commentator has noted, "scheduling several short, rather than one or two marathon sessions can. . . protect the client [and]. . . . short sessions provide the lawyer an opportunity to interrupt the closure process and monitor the advisability of potential client concessions."[17]

The client needs to understand that, just as the mediation process entails negotiation of the substantive terms of a divorce settlement, the steps in the

process itself are open to negotiation. And, even if the client is uncomfortable (because of lack of experience or for other reasons) advocating for a change in the process, the attorney must not be reticent about contacting the mediator at any time to discuss the client's concerns about the process and any adjustments that may be needed.

Designing the process also means protecting the client's legal rights during the course of the mediation. For example, in Massachusetts ensuring that the mediation process is confidential may require the execution of an agreement to participate in mediation. (See G.L. c. 233, § 23C.) In addition, it may be necessary to put in place a stipulation or temporary order freezing the parties' marital assets while the mediation is proceeding. (See discussion in section III(E), below.)

### E. Equip the Client with Information

Providing the client with a clear understanding of her legal rights is one of the most important aspects of client coaching. The more knowledge the client has going into the mediation, the more likely she will be able to effectively negotiate for herself. Divorce lawyers refer to their negotiations as "bargaining in the shadow of the law,"[18] and it is essential that clients know a good deal about the shadow that the law might cast on their case. Negotiation theorists refer to this as knowing your BATNA -- i.e., the client's "best alternative to a negotiated agreement."[19]

In the setting of divorce mediation, knowing a client's BATNA means having a general understanding of how the relevant law will likely govern the outcome of the client's case. Attorneys should also discuss with their clients what they think the opposing party's objectives and strategy will be. If a client has an understanding of how the opposing side will approach the negotiation, she may be less likely to become confused or discouraged by the opposing party's view when they are articulated in the mediation.

Clients also need information about the legal procedures associated with divorce. For many clients, their divorce is their first personal involvement with courts and the legal system. Such steps as filing a complaint or joint petition for divorce, preparation of a financial disclosure statement, and the filing of stipulations or statistical forms may be so familiar to the attorney that she forgets how bewildering they are to most clients. Attorneys should explain these procedural steps to clients who are considering mediation so that they can feel well informed if procedural issues arise in the mediation.

### F. Teach the Client about Negotiation

Teaching the client about negotiation is perhaps the most important element in the attorney's preparation of the client for mediation. Some clients, of course,

are expert negotiators. For those who are not, however, attorneys should consider providing some basic instruction on principled, interest-based "win-win" negotiation (such as the methods advocated in Getting to Yes) as well as the more familiar techniques of distributive, zero-sum bargaining.[20]

For most clients, the concept of preparation for a negotiation may be foreign. Yet negotiation research suggests that preparation is vitally important. Likewise, it may seem counterintuitive to some clients that asking questions is often a more useful form of participation in negotiation than asserting positions. Yet in many negotiations, information is the most important commodity, and asking questions is the only way to obtain it.

Without instruction, it may not occur to clients that, while engaged in mediation, they are involved in what is actually a five-way negotiation. The mediator is, from this perspective, one of the parties with an agenda of her own, and the parties' lawyers likewise have interests which may be divergent from those of their clients.[21] Accordingly, clients need advice not only concerning negotiations with their spouse but also concerning the exchange of information and the mediation process itself. Perhaps one of the most useful pieces of negotiation advice for the client is that they do not have to make irrevocable commitments in the mediation room, but instead can defer until the client has the opportunity to talk with counsel.

### G. Practice Walking the Talk

An intellectual grasp of negotiation theory may be useful, but of greater importance to the client is his or her ability to execute plays on the field. One way to test the client's readiness to participate in mediation is to conduct a role play in which the client can experience a simulated mediation session. One caveat: it can be alarming for the client to see her lawyer playing the part of the mediator or -- worse still -- her spouse. In order to play the part of the spouse convincingly, it may be necessary for the lawyer (in role) to accuse the client of various high crimes and misdemeanors. In some instances, no amount of preparation will enable the client to look with equanimity on the attorney's playing such a part, and therefore it may be preferable for the attorney to find a colleague who can do so.

### H. Discuss Roles

For most clients, every aspect of the divorce process is foreign. Their knowledge of the legal system may be limited to what they saw on "Perry Mason" or "L.A. Law." Clients may know that attorneys have an ethical obligation to be zealous advocates -- indeed, they may fear that their lawyer's advocacy may be so adversarial that negotiations over the terms of the divorce will become an all-out war. On the other hand, clients want to know that their interests will be protected.

The bottom line is that the client and attorney should discuss whether the attorney is going to play the role of "counselor," "advocate," or some combination of the two in connection with the mediation. Articulating for the client the attorney's role in any engagement is important, and most attorneys use engagement letters for this purpose. In the context of mediation, such engagement letters become even more important because the clients usually do not understand what the attorney's role will be vis-a-vis the client, the mediator, and the opposing party. Of course, such a letter is no substitute for face-to-face discussion of these issues, which in most cases should precede an engagement letter.

## III. Client Coaching

Once the ground rules and role expectations of the attorney-client relationship have been established, attorneys are in a better position to coach their clients through the mediation process. This is especially important in cases where the attorney will not be attending the mediation sessions. Upon reaching an understanding of each other's goals, tasks, and roles in the mediation, attorneys will be ready to help their clients advocate for themselves. This section will consider various ways attorneys can coach their clients throughout the mediation process.

### A. Conferring Between Mediation Sessions

Most divorce mediations involve multiple sessions, each lasting from an hour to several hours. Mediators structure the mediation in this way -- as opposed to a continuous marathon session -- in order to give the parties an opportunity to assemble needed information, gather their thoughts, and consult with counsel. When negotiating with the mediator and their spouse about scheduling, clients should have information about their attorneys' availability, so that there is ample time for discussion between mediation sessions.

The intervals between mediation sessions may also be useful for other conferences. The attorneys in the case may wish to confer, with or without the mediator. An attorney may wish to have a separate conference with his or her client and the mediator. These conferences may prepare the way for progress in the next mediation session and make those sessions more productive.

### B. Gathering Information

Attorneys play an important role on the sidelines in gathering and organizing needed information for the client. The information may be specific to the client's case (e.g., a financial statement) or generic (e.g., the cost of refinancing the mortgage on the marital home). Obviously there is a cost associated with having counsel provide this information, and therefore discussion with the client is needed concerning an appropriate division of labor. What is

vital, however, is that the client should have, at the mediation, the information needed to support the perspectives and proposals she presents in the negotiation.

### C. Developing and Assessing Options and Proposals

In the mediation, the discussion of options and proposals is where the rubber meets the road. These discussions present the greatest risk for clients -- particularly those who are not well prepared for mediation -- and also the greatest opportunity for utilizing the cost-saving an time-saving features of mediation. If the client attends the mediation session without the attorney, as is usually the case, the client may be called upon at any point in the process to articulate or respond to proposals addressing the issues under discussion.

Clients need to understand that they have the right to ask for, indeed insist upon, the time they need to consider proposals. They have the right to confer with counsel about them. Part of the attorney's job, however, is to prepare the client for those moments in the mediation when options will be considered. Taking breaks in the mediation for consultation with counsel may be useful; indeed, the attorney may wish to coordinate his or her schedule with the mediation so as to be available for such calls if they are needed. However, it is also important for the attorney and client to anticipate, to the extent possible, the subjects that will be discussed in each mediation session and prepare for such discussions by considering, in advance, relevant options and proposals.

Some commentators recommend that such discussions include setting specific goals, or even "bottom lines," on particular issues -- e.g., a particular amount of child support or alimony, or a particular division of marital assets. One commentator suggests: "With this clear understanding, [clients] will be less vulnerable to manipulation. The lawyer and client carefully should develop and set firm bottom lines on each anticipated issue prior to mediation."[22] Both attorney and client should realize, however, that the limits they set may need to be flexible in order to achieve a settlement, or that there may need to be trade-offs on one issue in order to obtain a particular goal with respect to another issue. The key element in all such discussions is preparation on the part of the attorney and client, so as to make each mediation session as productive and successful as possible.

### D. Calling in the Plays vs. Taking to the Field

In some mediations, it may be appropriate for attorneys to participate directly in the negotiations, either in person or on the phone. This is often the case, for example, if one of the parties has more knowledge or experience with financial matters than the other, or if there are technical or legal issues under discussion. The participation of lawyers can disrupt the process, because lawyers often tend to be more positional in their negotiating styles and want to demonstrate to their clients that they have a zealous advocate in the process. Even lawyers

who are not confrontational can elicit defensive reactions by the opposing party, who may view the lawyer as "the enemy."

For all of these reasons, mediation often works best when lawyers remain on the sidelines but "call in the plays," as coaches do in many sports. For clients who are inexperienced or nervous about handling a difficult aspect of the negotiation, role plays or rehearsal can be useful. In most instances, however, it is sufficient to talk through with the client some of the possible scenarios that may unfold in the next mediation session.

One of the techniques that lawyers can use to bolster client confidence in these circumstances is to provide the client with the advocacy tools that the lawyers would use if they were participating directly. These may include charts, spreadsheets, articles, or other documents that illustrate or support a particular point. Such tools demonstrate a level of preparation for the mediation session -- and involvement by the lawyer in that preparation -- that may inspire fear in the opposing party and thus cause a breakdown in the trust that usually tends to grow in the informal setting of mediation. Accordingly, such tools should be used sparingly, and not in such a way as to intimidate the opposing party. On the other hand, when an impasse develops in mediation over a particular issue, bringing more information into the discussion may enable the parties to break the impasse, and advocacy tools of one kind or another may be useful for that purpose. Equipping clients with such tools often makes the clients feel more at ease in the mediation which, in turn, will help them to effectively advocate for themselves.

### E. Interim Agreements and Temporary Orders

In many mediations, the only drafting that is done is the final separation agreement that is presented to the court. In some cases, however, there may be pressing issues that need to be resolved before the entire mediation is concluded. For example, the parties may have decided that they can no longer live under one roof, even on an interim basis, but neither wishes to relinquish what their lawyers have told them may be a strategic advantage -- namely, possession of the marital home. Under these circumstances, the first order of business in the mediation may be an interim agreement permitting one party to leave the marital home without prejudice to his or her right to seek possession of it. Obviously an agreement of this kind should be reviewed, and possibly drafted, by counsel. Clients need to be prepared for the possibility that such temporary arrangements may require the filing of stipulations with the court, so as to give the client readily enforceable rights in case the mediation breaks down.

## IV. Finalizing the Agreement

If the mediation is successful (as most are), the result is usually a marital settlement agreement. In Massachusetts these are typically called separation agreements.

### A. Who Drafts the Agreement?

Perhaps the most important question regarding mediated separation agreements, from a procedural standpoint, is who prepares the initial draft. If the mediator is not a lawyer, drafting the final agreement may constitute the unauthorized practice of law.[23] Accordingly, non lawyer mediators typically draft a memorandum of understanding, which is essentially a "terms sheet" that a lawyer can use in drafting the agreement. If the mediator is a lawyer, she can draft the final agreement.[24]

For the attorney representing a client in mediation, the question of who drafts the agreement is not a simple one. There are significant advantages in having the mediator draft the agreement. A mediator-drafted agreement will likely be viewed by the opposing party and counsel with less suspicion, and therefore the process of finalizing the agreement may be more trouble-free. On the other hand, if the lawyer anticipates that she will have to propose the addition of a considerable amount of language to the agreement (e.g., a substantial amount of boilerplate), the process may become more time consuming if the lawyer has to figure out how to integrate his or her standard language into someone else's document. One solution may be to ask the mediator if she has a sample agreement that she can provide to counsel before any drafting begins. With such a sample in hand, the attorneys can propose to the mediator specific language that the mediator can then try to incorporate into the draft she prepares.

### B. Discussing the Agreement with the Client

For most divorce clients, the language of a separation agreement is arcane and unfamiliar. Many mediators will go over the agreement line by line to make sure that the clients understand it. Whether the mediator does so or not, the attorney must do it. The attorney should flag those provisions that may have tax consequences for the client. In addition, it is usually important for the attorney to review with the client how the agreement will operate over time -- e.g., to what extent the agreement may be modifiable or non-modifiable, or how inflation may affect the financial terms of the agreement.

Perhaps the most important issue is whether, after considering how the agreement will affect the client currently and in future years, the client feels that the agreement is fair. It is not enough to conclude whether a court would approve the agreement is fair, since a court may be willing to approve a wide range of resolutions in any given case. If the client is left with a feeling that the agreement is unfair in some material way, his or her dissatisfaction may lead to destabilizing and expensive controversies down the road.

### C. Who Goes to Court?

Once the separation agreement is signed, it must be filed with the court and presented at a hearing before a Probate and Family Court judge. In the vast majority of cases, mediated separation agreements are approved by the court with little discussion. The parties are asked if they have read the agreement, understand it, and have signed it voluntarily. They are asked if they received advise from counsel about the agreement and are satisfied with that advice. They are often asked if they believe the agreement is fair and reasonable. In most cases if the answer to all of those questions is "yes," the court will, after a review of the agreement and the parties' financial statements, approve the agreement.

There are circumstances, however, where the court will have a question about the agreement. Or, the court may be reluctant to approve a particular provision in the agreement -- e.g., a non-modifiable alimony provision in a long-term marriage where the recipient is in a financially weaker position than the payor. For those reasons, it is usually advisable for both attorneys (assuming each party has one) to attend the hearing. Nevertheless, for reasons of economy, the parties will sometimes forgo having counsel attend the hearing. In some cases, they may ask the mediator to attend. For ethical reasons, however, it is seldom advisable for an attorney mediator to attend (see Massachusetts Bar Association Ethics Opinion 85-3), and participation by a non-attorney mediator may be considered the unauthorized practice of law.

## V. Ethical Issues

Some attorneys reject the idea of divorce mediation for their clients because they believe that they can obtain better results for their client in court and that they have an ethical obligation to do so. Indeed, some lawyers may fear that they will be exposed to malpractice liability if, some years after the divorce, the client regrets that she did not seek the best possible result.

Rule 1.3 of the Massachusetts Rules of Professional Conduct requires an attorney to "represent a client zealously within the bounds of the law." On the other hand, the Rules do not require the attorney to obtain a particular result, especially where the client has made a fully informed decision to accept less than what might be obtainable in court. Indeed, the Commentary to Rule 1.2 states that "the terms upon which representation is undertaken may exclude specific objectives or means." Thus, as long as an attorney explains the consequences of the mediation process and the mediated agreement to the client and otherwise serves as a conscientious counselor and advocate for the client's interests, she may enter into an engagement agreement with the client that limits representation to the divorce mediation arena.

## VI. Conclusion

Divorce mediation presents important opportunities for clients -- saving time and money, and perhaps most importantly avoiding the needless acrimony of a litigated divorce. Along with those opportunities, however, come risks for the client and counsel. Effective advocacy in this setting requires a thorough understanding by both client and attorney of the divorce mediation process, the client's goals and abilities, and the orientation of the attorney. The attorney's role in preparing the client for mediation -- from helping to select the mediator to coaching the client on negotiation techniques -- is vital. The attorney plays an on-going part, even while the mediation is underway -- for example, by providing information that the client can use in the mediation sessions and consulting with the client about options and proposals that are under discussion. Once the mediation is concluded, the attorney must ensure that the mediation process produces a solid, enforceable agreement that not only reflects the terms agreed to in the mediation but also protects her client's interests.

In carrying out these functions, lawyers must accept their clients' autonomy and right to decide on solutions that may be less than what the lawyers think they could obtain in court, while at the same time making sure that their clients are making fully informed decisions and are not the victims of overreaching in the mediation. The ethical rules governing lawyers' conduct permits representation of this kind, and clients are increasingly seeking it. Engagements in which the attorney is essentially coaching from the sidelines have thus become ever more common and successful. The key ingredient, however, is a clear understanding by the attorney and client of their respective roles and responsibilities in the mediation process.

---

[1] David A. Hoffman is an attorney, mediator and arbitrator at the Boston Law Collaborative, LLC. Karen Tosh has practiced family law for more than 20 years - she is a fellow of the American Academy of Matrimonial Lawyers and a certified divorce mediator. The authors thank Astra Fryer, a summer associate at Hill & Barlow, for her assistance with this article. The authors welcome responses to this article; they can be contacted by email at DHoffman@BostonLawCollaborative.com and divorcelaw@conversent.net.

[2] See, e.g., D. Neumann, Divorce Mediation: How to Cut the Cost and Stress of Divorce (1989) (description of the process); D. Neumann, Choosing a Divorce Mediator: A Guide to Help Divorcing Couples Find a Competent Mediator (1996); G. Friedman, A Guide to Divorce Mediation: How to Reach a Fair, Legal Settlement at a Fraction of the

Cost (1993) (vignettes and accounts of real cases); J. Folberg and A. Milne, eds., Divorce Mediation: Theory and Practice (1988) (academic study of the process).

[3] See Jean R. Sternlight, Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting, 14 Ohio St. J. on Disp. Resol. at 269, 276 n.19 (1999).

[4] It is worth noting that Family Service Officers in the Massachusetts Probate and Family Court are not bound by the principle of confidentiality and often discuss with the presiding judge the substance of negotiations in which they participate.

[5] See Jacqueline M. Nolan-Haley, Lawyers, Clients, and Mediation, 73 Notre Dame L. Rev. 1369, 1379 (1998).

[6] See Alex J. Hurder, Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration, 44 Buff. L. Rev. 71 (1996).

[7] Sternlight, supra note 3, at 355.

[8] Id. at 322-23.

[9] K. Kressel, The Process of Divorce (1997).

[10] Id. at 144.

[11] John Lande, How Will Lawyering and Mediation Practices Transform Each Other?, 24 Fla. St. U. L. Rev. 839, 851 (1997) (relying on Professor Robert A. Baruch Bush's typology of mediators).

[12] Id. at 851-52.

[13] Id. at 852.

[14] Id.

[15] Id.

[16] Id.

[17] Penelope Eileen Bryan, Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation, 28 Fam. L. Q. 177, 219 (1994)..

[18] See Mnookin and Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 Yale L. J. 950 (1979).

[19] See Fisher, Ury & Patton, Getting to Yes (1998 ed.).

[20] See, e.g., Meltsner & Schrag, Negotiating Tactics for Legal Services Lawyers, 7 Clearinghouse Review 259 (1973).

[21] See R. Mnookin, A. Tulumello & S. Peppet, Beyond Winning: How Lawyers Help Clients Create Value in Negotiation (forthcoming Harvard University Press 2000).

[22] See Bryan, supra, note 17, 217-18.

[23] See C. Menkel-Meadow, "Is Mediation the Practice of Law?" __ Alternatives __ (date) [I will fill this in on Monday]

[24] See Massachusetts Bar Association Ethics Opinion 85-3.