



## The Role of the Lawyer in the Family Mediation Process

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As my mediation practice grows, I have come to realize that few people, including lawyers, understand what really happens during a mediation process. Specifically, there is often a lack of understanding of the role of the lawyer within the mediation process by both lawyers and clients. What I have found is that lawyers don't necessarily recognize the importance of their role in a process that can be clearly beneficial to not only their clients but also to them.

If a couple comes to see me as a mediator after a separation but prior to seeing lawyers, I strongly recommend that parties contact their own lawyers to ensure that they get legal advice about their rights and entitlements. In some circumstances, I insist that the parties have lawyers prior to proceeding with mediation. My preference is to have lawyers involved right from the outset, where they can develop a relationship with their clients and be available to them throughout the process for specific legal advice as the need arises. I find that this provides for a seamless process - a team approach that provides the best of both worlds for clients. The lawyers do what they do best, i.e. provide legal advice regarding rights and entitlements and they do this throughout the process and not just at the end when they are reviewing the final agreement with their clients.

Mediation is a process for resolving family disputes that is cooperative, respectful and cost-efficient for the parties. The research studies tell us that children are the clear winners when their parents are able to continue to cooperatively parent even though they are separated. With respect to issues surrounding financial support and property division, a mediator who is a lawyer can provide the necessary structure and legal information to help the parties reach agreements that work for them within the framework of the law as it relates to spousal, child support and property division. Conflict is minimized through mediation and channels of communication are more likely to be open.

As a lawyer who has practised family law for almost 26 years, I see mediation as a process that provides couples with the greatest opportunity to move forward with their lives in the most positive and cooperative fashion possible. The participation and assistance of their lawyers is important to their ability to be able to arrive at a complete, equitable and appropriate resolution of their differences.

I have found that *communication* and *control* are the two greatest benefits of mediation for clients.

The ability to *communicate* with face-to-face conversations about what is important to parties is crucial. Often

there are non-legal issues that must first be dealt with i.e. relationship or emotional concerns, that are just as important to the couple as are the legal ones. The mediation process gives people a forum to deal with these issues, to voice them and "put them on the table" so that they can at least be recognized by the other party, if not completely dealt with or resolved. This dialogue often helps with the fear that people have going into a process that will deal with their separation - i.e. the fear of the unknown or of what the other person will do. They have a safe, respectful forum in which to tell their story and listen to the other person's story. Once the emotional or relationship issues are dealt with or, at least recognized, it is far easier for the couple to deal with their fears and move forward and resolve the parenting, financial or property issues.

As family law lawyers, we all are acutely aware of the impact that emotions have on a resolution process and how difficult it is to unravel or separate emotional or relationship issues once they become intertwined with the legal ones. This entanglement is the precursor to the "divorce from hell." Emotions are messy, frustrating and exceedingly difficult for all involved, including the lawyers. The mediation process gives parties the ability to have "conversations" with each other in a much more controlled and respectful fashion than through affidavits and pleadings in an adversarial court process.

The mediation process gives couples *control* over their lives and the lives of their children as they have the ability to make their own decisions. Inevitably, if there are spousal support or property issues, the parties will need advice. In order to reach their own agreements regarding those

issues, they will need to have pensions or properties appraised, income determined or businesses valued. They will need to determine values to be able to reach an agreement. They will also need to learn about what their rights are and what they are entitled to under the law – an integral piece of the puzzle. Just as they need to know what the matrimonial home or a pension is worth, they need to have an understanding of what they are entitled to ask for or what they are obligated to do. This is how a sustainable agreement is arrived at – with advice from and the assistance of all the experts, including lawyers.

### ***How Does Mediation Work?***

The mediation process is driven largely by the couple with the assistance of the mediator and typically involves:

- **Initial sessions:** where the mediator meets with each party separately. The mediator can help each person identify individual interests and look for common goals. It is at this stage that the emotional or relationship issues surface - the mediator gains an understanding of how they will potentially impact the resolution process.
- **Joint meetings:** a number of meetings are held with the mediator who is neutral and impartial, where the couple works through an agenda that they create. The mediator helps the couple negotiate with each other. How many sessions will it take? Sometimes people can come to an agreement in one session; sometimes it takes six or seven. It all depends on the number and the complexity of the issues.
- **Discussion, collaboration and creative problem solving:** during each session, both parties are given the opportunity explore their interests

and are encouraged to be aware of their spouse's needs and concerns. Mediation promotes discussion, collaboration, creative problem solving and tends to alleviate fear and uncertainty. The couple can brainstorm with the mediator to come up with solutions that are right for them. This involvement of lawyers at this stage can be extremely important in helping clients make decisions about what is right for them.

- **Legal advice:** often people wonder why they need to see lawyers if they are going to arrive at their own agreement. Clients are advised that it's wise to have lawyers on the sidelines during the mediation process to give each party legal advice on rights and entitlements. A mediator who is also a lawyer can identify legal issues about which clients should get legal advice from their lawyers prior to continuing with the mediation. Lawyers are not taken out of the mediation process – they participate in the process as a team member. Some clients are resistant to having lawyers involved. However, when it's explained to them that a lawyer will be important to not only finalize the agreement, but to provide them with assistance and advice throughout the process, they can more readily see the value in bringing in a lawyer earlier rather than later.
- **Final agreement:** after the parties have agreed on all issues, the final agreement is prepared and provided to their lawyers for final review and completion.

For lawyers who have been involved throughout the mediation process there should be no surprises when reviewing the final Separation Agreement with the client. All contentious legal issues should have been reviewed with the client during the

mediation process and legal advice given before reaching the agreement and not after. Often lawyers take a “hands-off” approach while their clients are in mediation and indicate to their clients that they will review the final agreement with them once mediation is over. This can actually create unnecessary problems and delays for clients. Clients are looking to you to help them create a process that will finalize their agreement in a cost-effective and efficient fashion – they just want to end things and move on with their lives. They want as seamless a process as is possible. Your clients will be happier and feel that they have been well represented by you if you take an active role *during* the mediation process and help them work through any difficult legal issues by providing them with ongoing legal advice.

The mediation process works exceptionally well when all the players work cooperatively i.e. the clients, the mediator and the lawyers. The clients are happy as they have reached an acceptable agreement within a process that is time and cost-efficient and respectful. They have been provided with an opportunity to speak to one another and voice their concerns, deal with their fears and raise issues within a mediation framework that provides them with the most control and self-determination of any of the processes available to them. Their lawyers should be happy as they have been given the opportunity to do what they do best i.e. give legal advice to clients regarding their rights and entitlements without the necessity of dealing with the messy emotional issues – nice and clean!

The mediation process doesn't do away with the need for a lawyer to be involved – it just changes the legal role from adversarial to cooperative.

It creates a smoother, more streamlined and defined process where each of the players can do what they do best – the result is a more satisfied client who will be more likely to refer clients to you who really do want to avoid the “divorce from hell” – wouldn’t that make you a happier family law lawyer???

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