All mediators recommend (or should recommend) that you get legal advice as part of divorce mediation. You may ask why this is necessary as you are mediating your divorce, in part, to "avoid divorce lawyers."

Although mediation is all about cooperating, each spouse has individual concerns and legal rights and responsibilities. Mediators are neutral parties who do not give legal advice. Any settlement decisions you make should be based on "informed consent."

Working with your attorney protects you and achieves your mediation goals by:
- Helping you understand the law and identify legal issues;
- Furnishing a private place to discuss your concerns and weigh your options;
- Providing a person who is on call and "in your corner";
- Helping you anticipate how much information is necessary for settlement decisions;
- Giving practical feedback on your settlement ideas and creative suggestions on difficult unresolved issues; and
- Providing a review of the final settlement agreement before you sign it.

Despite what many people believe, mediation is not just for "friendly" divorces. Most divorcing couples experience extreme emotional distress. Yet, angry, hostile, emotional people can still share common goals: to avoid the adversarial process and insulate their children from the conflict. The more grounded you are with private legal information and advice, the less likely you will be to question your final settlement no matter how friendly or hostile you and your spouse are. Consider work with your attorney as an investment in some of the most important decisions you will make in your life.

Finding an attorney
Searching for the right lawyer may seem overwhelming at first. The Yellow Pages are filled with lawyer advertisements, and your friends and relatives will have lots of recommendations—usually from their "nightmare" divorces. Many attorneys "specialize" in divorce, whereas others are general practitioners who include divorce on their "menu" of services. Not all attorneys are "mediation friendly." By excluding those who do not view mediation as a viable approach to settling a divorce, you are narrowing your field of choice. Here are some good ways to further narrow your search.

- Ask your mediator for a list of attorneys who have worked well with his or her mediation clients. Some mediators will not provide this, but most will.
- Review the list of qualified lawyer-mediators you used in choosing your mediator.
- Ask your therapist or counselor for names of attorneys other patients have used in nonadversarial divorces.
- Ask friends and acquaintances who have mediated their divorces for recommendations.

Because of the cost and time required, set up interviews with no more than three lawyers. Do not expect them to provide information over the telephone or the Internet. Your questions require more time and face-to-face attention. Do not expect divorce attorneys to have "references." Most clients are reluctant to discuss their divorce experiences with a stranger. Expect to pay a fee for this first meeting, particularly with an experienced divorce lawyer. Part of the purpose of this meeting is for both of you to see whether you can work together.

Some attorneys will mail you a brochure or direct you to their website for valuable preliminary information. Ultimately, a face-to-face initial consultation is mandatory. In addition to meeting the person you will entrust with details of your private life, you will learn important information about mediation and divorce law and procedure. The consultation will add to your storehouse of knowledge, whether you retain the attorney or not.

How do you decide whether an attorney is right for you? Much of this work is done once you select the attorneys to interview. After the face-to-face meetings, you will either feel comfortable and look forward to working with the attorney or you won't.

Pay attention during the initial consultation:
- How does this lawyer view divorce? As a legal problem or a family crisis best served by nonadversarial intervention?
- Does the attorney use the initial consultation to explain alternative dispute resolution options (mediation, collaboration, unbundled con-
sultation, etc.) so that you can select the best approach for you and your family?

- If you have children, does the attorney focus on minimizing the negative impact of the divorce on them and maximizing conditions for positive coparenting?
- Does the attorney assume that mediation and other ADR approaches are only for “friendly” spouses in “friendly” divorces? Or does he or she recognize that mediation is a nonadversarial means for couples to work out their differences—even for “high conflict” couples?
- Does the attorney view the client in control of the process or is that responsibility the exclusive province of the attorney?
- Does the attorney’s approach fit the stereotype of aggressive divorce lawyers who aggravate an already bad situation, or does he or she want to help your family in a positive way?

When should I work with my attorney

Imagine that you are the coach of a baseball team. But, instead of being in the ballpark, watching the action and working with the players, you are sitting in the parking lot on the team bus. Players run out to the bus, describe and discuss the action, get your coaching tips, and then run back to the field to tell the players what the coach said and try to act accordingly. Not only would this be incredibly inefficient, but you would have to rely on what the player told you (rather than your own observation) and trust that the player understood and could execute your recommendations. Not the best way of working with members of your team!

Your attorney may feel this way as she or he helps you mediate your divorce. Attorneys for each spouse generally are not present during mediation sessions. They rely on clients to explain what developed during each session and hope that the client can implement their advice in upcoming sessions. Although this “floating lawyer” concept can be a problem, it is not insurmountable. Too often, mediators and spouses view attorneys as enemies of the process. But, the right lawyer can be integrated into the process to preserve the control you want and to increase the efficiency of the process.

The stages of mediation

Divorce mediation includes four basic stages:

- Premediation: Before mediation begins, meet with your attorney to get a basic financial, legal, and practical education about divorce. With this information, you may be able to discuss financial and custody issues with your spouse and reach partial agreements.
- Information gathering: Work with your mediator to share and understand all relevant information and supporting documentation. At this stage, explore the various legal, financial, and practical implications of the information.
- Exploring options: With the assistance of the mediator, discuss with your spouse various settlement alternatives, weighing the pros and cons of each. From this discussion, you will almost always settle your parenting and financial issues.
- Implementation: The mediator or one of the attorneys drafts the final settlement contract. Other documents to “close” your joint accounts and make the transition to separate finances will be prepared (such as orders dividing pensions; life insurance beneficiary designations; title transfers, etc.). This stage culminates in the final divorce hearing in court.

An attorney who works with a mediating spouse commonly is called “review counsel.” This title reflects that in many situations, attorneys are not hired until implementation to review the final agreement. However, delaying the lawyer’s involvement until so late in the process can result in significant problems. By then, spouses are so financially and emotionally invested in the agreement that they
may not listen to their attorneys’ objections, sometimes resulting in the collapse of the entire agreement.

The attorney’s role should be broader than simply reviewing the agreement. Early involvement will prevent a last-minute crisis over an unraveling settlement agreement. For this reason, “consulting counsel” is a better label for the attorney, reflecting input at all stages of the mediation, and the earlier the better.

**Before mediation**

Just like medical checkups, working with an attorney before mediation may prevent difficulties during the process. Your decisions must be based on informed consent, which requires information and education. Consulting counsel is your best teacher, answering questions, addressing concerns, and providing a solid foundation before you begin.

Before you start mediation, your attorney will explain the difference between legal “information” (that you get from the mediator) and legal “advice” (that you receive from your attorney). By explaining the difference and applying the law to your case, your attorney lays out the scope of your legal position. For example, the mediator will probably discuss your state’s child support guidelines. Most mediators will use your financial information to calculate child support based on these guidelines. However, all states allow “deviation” from the guideline amount in certain limited circumstances, which results in an increase or decrease in child support. The mediator can tell you what the law is (just as you can read the law for yourself), but only your attorney can interpret that law and give you a legal opinion as to what you should do. This translation of information and the law into a recommended course of action is legal advice, the business of your attorney.

Negotiations during mediation are done “in the shadow of the law,” This means that the potential legal outcome is only one factor in how you settle. However, legal considerations are important, and your attorney is the best person to define the legal perimeters of your case.

**Gathering information**

Consulting counsel can help you gather and analyze information and documentation. In some marriages, spouses share financial information, whereas in others only one spouse manages the money.

If you are the less financially knowledgeable spouse, your consulting counsel will tell you what you need to know and make sure you understand information when you get it. Financial documents can be complex. Your attorney may even recommend hiring a financial expert, such as a certified public accountant, financial planner, or business valuator.

If you are the more knowledgeable spouse, consulting counsel can help you maximize the efficiency of information gathering. You may wonder why the mediator and your spouse are asking for so much information. Your attorney can help you sort it all out and comply with the requirement for full and complete disclosure. If you don’t provide the information informally in mediation, formal discovery in litigation will require the same amount of or more information, take longer, and cost a lot more. Likewise, consulting counsel will need the same information to evaluate the details of the marital estate and your settlement options.

If you have managed the marital money, you probably have a thorough understanding of your family’s finances. Be proactive. Rather than waiting for your spouse and/or the mediator to ask for information, put together a complete picture of family finances. An easy-to-follow notebook of financial summaries with comprehensive backup material demonstrates a commitment to full and complete informal disclosure and will jump-start the process.

**Making the deal**

Involving your attorney can be critical as you consider options and make settlement decisions. Ask your attorney about the strengths and weaknesses of your case and the range of reasonable settlement options. Your attorney can help you put together a comprehensive settlement proposal or analyze your spouse’s proposals.

 Critics of divorce mediation believe that the less empowered spouse is at a disadvantage without a lawyer and/or the protections of the adversarial system. Although mediation is not right for everyone, power imbalance can be an issue in any divorce. The adversarial process offers the protections of formal discovery, court enforcement, and legal advocacy. But the adversarial process also can involve personal intimidation, fear of the court system, a lack of control over the process, unpredictability of the outcome, and a significant drain on the family’s finances and emotions. Most adversarial cases settle, but too often those settlements are on the courthouse steps the day of the trial—a terrible position for an “unempowered” spouse.

The answer to a serious power imbalance is not necessarily to reject mediation. A competent divorce mediator specially trained to work with power-imbalance issues can be the best option for a less empowered spouse. The mediator may slow the process to give that person time to digest information and negotiate from an improved position. The success of this strategy hinges on the support and advice of consulting counsel. A solid divorce mediation process allows for reflection and supportive decision-making, maximized informed consent, interspousal communication, and control over the process.

When attorneys negotiate divorce settlements in adversarial cases, they get to know their own client firsthand and have limited understanding of the other spouse. To reach a
win/win settlement requires a more complete understanding of both spouses. By this stage, the mediator knows both spouses, their concerns, negotiation styles, etc. Through telephone conferences and/or attorney participation in the mediation, the mediator can work with counsel to better understand both spouses, the progress of the mediation, and the appropriate level of attorney involvement.

Mediation sessions are confidential, based on the parties' contract and/or state law. However, spouses can waive confidentiality to permit attorney involvement in support of the mediation.

In most divorce mediation cases, the parties reach an agreement while exploring their options. Occasionally they reach an impasse. Sometimes only a few issues remain unresolved, but these may be important ones. For instance, many couples settle the parenting plan, child support, and property division but get stuck on alimony (the amount, duration and/or modification).

Reaching an impasse rarely means that spouses call it quits and go to trial. Mediators use a variety of techniques to move on. Most involve integrating consulting counsel into the process.

- If you don't have consulting counsel at this point, you need to hire one. Straight talk from an attorney frequently will provide enough legal information, advice, and brainstorming to help you settle.
- The mediator may convene a session that includes consulting counsel. If necessary, he or she can meet with both attorneys to discuss the impasse.
- The mediator also may use "shuttle diplomacy," which involves the mediator's moving back and forth between meetings with each spouse and consulting counsel.
- The mediator may recommend an experienced divorce attorney to serve as co-mediator or expert consultant. This attorney can evaluate the unresolved issues and make settlement recommendations. Integrating consulting counsel usually makes this approach more efficient.
- If all else fails, in many states mediators can suggest that a private arbitrator (usually an experienced divorce attorney) be used. The arbitrator can decide issues causing the impasse. Once the impasse is broken, mediation can continue as before. Consulting counsel's involvement in defining the issues and presenting the information to the arbitrator will increase the efficiency of this approach.

Occasionally, an impasse cannot be overcome, and mediation comes to an end. If this happens, keep in mind that a divorce settlement is like a mosaic of lots of small agreements that build to a comprehensive settlement of all issues. Most impasses come on the heels of substantial agreement on a number of issues. Although all issues are interrelated, it is a waste of mediation resources for your trial attorneys to start over from the beginning. Even when you are headed for trial on unsettled issues, you may be able to arrive at a negotiated settlement.

Pulling it all together

Working with your attorney early in mediation may preempt a "floating lawyer" problem in the final stage. Your attorney already will have been involved in (and supportive of) settlement terms. Thus, in reviewing the written agreement, he or she will be concentrating on the agreement's correct legal form.

Most lawyer-mediators prepare the draft of the final agreement. The mediator and the spouses usually meet to go over the draft, make corrections, and discuss any remaining issues. Once the mediator incorporates these corrections and/or additions into a revised draft, the agreement is ready for consulting counsel to review. The attorneys propose revisions until everyone approves the final form for submission to the court at the final hearing. If the mediator is not a lawyer or is a lawyer who does not draft final agreements, a consulting attorney will draft the legal agreement, based on settlement terms outlined by the mediator.

Consulting counsel and the court process

The role of consulting counsel in the court process will depend on local practice. Check with your attorney and mediator. In general, consulting counsel may serve as a buffer to the court system and may file the legal divorce case with the court, if the mediator has not included that service. Some consulting counsel officially appear in the court file as the attorney of record for the client. In other cases, clients represent themselves in court. In either instance, attorneys do not engage in court action (temporary motions, formal discovery, etc.) during mediation.

After mediation is over and the agreement has been finalized, a final divorce hearing takes place in court. Decide whether your attorney will go to court with you. Remember, the benefits probably outweigh the costs. Your attorney can:

- Help prepare and present the final paperwork for court.
- Guide you through the process by locating the right room in the courthouse and having your case called according to protocol.
- Perform the "ceremony" as followed in your local court.
- Answer questions the judge has about your case and your agreement.
- Deal with problems that arise, particularly in rare cases when the judge has a problem with the agreement.

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