

How Do I Decide Whether to Mediate?

By Alison L. Patton

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Wondering if mediation is right for you? Here's what you need to know.

In A Nutshell:

1. Many divorce cases are suitable for mediation (even when there is ongoing conflict; even when trust is damaged from an affair).
2. Mediation can involve just one mediator and be low-cost, or can involve outside experts (such as an accountant, a financial advisor, consulting attorneys). You decide what you need and what you can afford.
3. Other than doing your divorce yourself, mediation is often the least expensive and fastest way to get divorced. It is the most "hands-on" and you control the process.

As a divorce attorney who has done both litigation and mediation, I find mediation to be an ideal option for many divorces. Mediation calms down cases that would explode in the adversarial court system. A successful mediation can ultimately change the tone of the divorce in both the short run and the long run.

The fact that your spouse had an affair or there is conflict doesn't mean you can't be successful in mediation. Despite the hurt feelings and anger, the end product can be a settlement agreement and a cooperative custody plan for the kids. I tell the couple, "You may still not like each other when we're done, but you will figure out how to treat your divorce as a business rather than a reality TV show." And they do.

Whereas the court system tends to bring out the worst in people, mediation has the opposite effect. I've seen people become their best selves in mediation, which is one reason I love this part of my job. Divorce is a terrible life crisis, and people ask me how I can work in this field and not get depressed. I find my mediation clients inspiring.

My clients start the process with the same mental and emotional state everyone has during divorce. They are on an emotional roller coaster. They never expected to be there; they feel overwhelmed and afraid. They argue, cry and take potshots at each other. But gradually as

they sit at the table, they start communicating and making constructive decisions — they surprise themselves.

There is a moment in every successful mediation that reminds me of when the Grinch's heart grows three sizes — when both people are able to transcend their own pain and start thinking about what would work in the big picture for both of them (and what would work best for their family, if they have children). Mediation is not perfect and compromise is involved, but isn't that always the case, whether you divorce sanely or through expensive lawyers.

In my experience, couples don't regret trying mediation, even in cases that don't resolve 100%. For one thing, mediation costs so much less than retaining two lawyers — and you have so much more control of the process — that the gamble is worth it. Once you start down the litigation path, attorneys' fees quickly skyrocket.

So your real task, when considering mediation, is to check for any compelling reason NOT to mediate — the “red flags.” If any of these factors exist in your situation, mediation may not be right for you.

**The following red flags are likely to result in failed mediation
or an agreement you'll regret:**

- There's a significant imbalance of power. You feel you can't advocate for yourself or stand up at all to your spouse in a negotiation, or if you know you will “cave” under pressure. (Note that one solution is to have a consulting attorney participate in the mediation, or set the ground rule that you won't finalize/implement any mediation agreements until your consulting attorney has “signed off.”)
- In the extreme, one or both of you truly doesn't care what happens to the other person — or one or both of you is completely unable to understand the other's needs and perspective. Likewise, if your spouse has a personality disorder, mediation may not work. (Note: I know two attorney-mediators in San Diego who are specialists in mediating cases involving personality disorders. I can refer you to these mediators if this is your situation.)
- There is emotional or physical abuse in the relationship and you fear standing up to your spouse.
- You have good reason to believe your spouse is about to take or dispose of assets. (In this case, you need immediate legal help from an attorney representing you, not a mediator.)
- Your child is at risk of being taken out of the area or state by the other parent without your permission, or there is any other urgent matter involving your child that reeks of foul play. (Consult an attorney immediately to see whether you need formal restraining

orders. You may be able to mediate once the restraints are in place, but again your first stop is your lawyer's office, not a mediator.)

- You have a serious lack of trust in your spouse or you believe that your spouse lacks goodwill and will try to use mediation to get a legal advantage.

For example: You think your spouse is hiding assets or lying and will continue to lie even if confronted in mediation. In this situation, you may need legal tools that cannot be offered in mediation, such as court orders, depositions, formal discovery and disclosure procedures.

Another example: You think your spouse will use mediation to pick and choose what he/she wants to resolve first to his/her advantage (for example, custody), but won't reciprocate or compromise when it comes time to resolve the other matters (such as finances). This is something to discuss with the mediator before you start the process.

If one or more of these red flags apply to your case, feel free to contact me to assess whether your case is suitable for mediation.

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