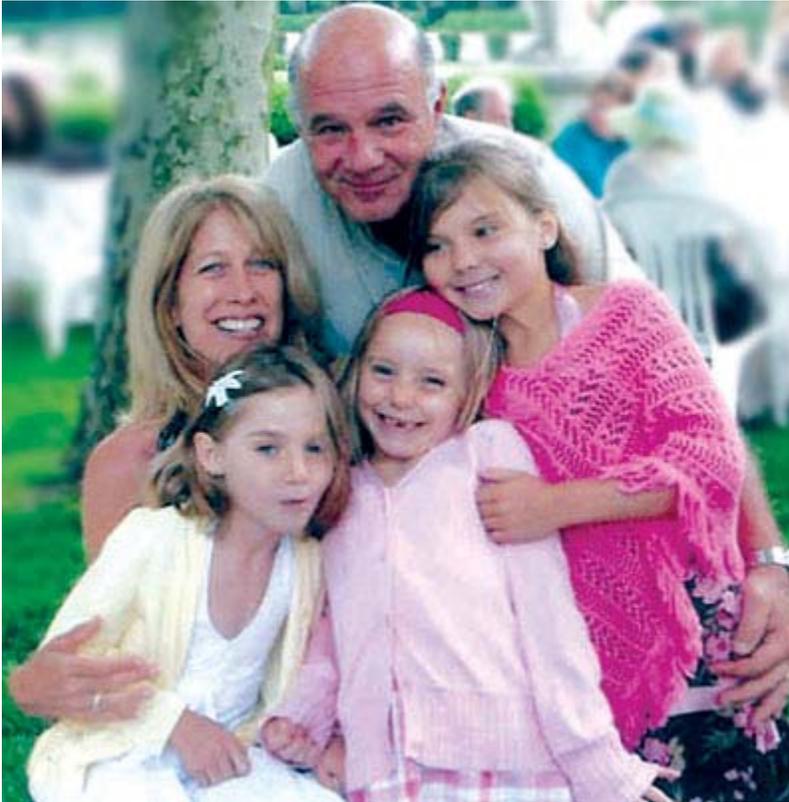


WHAT IS MEDIATION? WHAT IS DIVORCE MEDIATION?

By Carolyn Zenk, Attorney at Law, Certified Mediator Touro Law School

DIRECTOR EAST END MEDIATION CENTER 631-723-2341



Mediation saves thousands of dollars and helps former couples successfully raise their children in peace to become happy and well-adjusted individuals.

GOAL OF DIVORCE MEDIATION: The goal of divorce mediation is to peacefully prepare a separation agreement for a couple with all the terms that would be in a divorce. The couple usually retains a divorce mediator/attorney together and splits the expenses.

EXPECTATIONS OF THE MEDIATOR: The couple is usually expected to pay a retainer, which may range from a few hundred dollars to several thousand dollars, depending on the complexity of the case, and to sign a retainer agreement when the couple initially meets with the Attorney/Mediator. This is standard practice. In fact, a retainer is required by the Lawyer's Code of Ethics. You are entitled to fully understand the retainer agreement and ask your Mediator about it before you sign it.

PROCEDURE/SETTING: The couple usually meets together at the Attorney's office and avoids the stressful atmosphere of the courtroom. The divorce mediator will usually explain the rules of engagement at the first meeting. The Mediator will explain her hourly rate and what that rate includes.

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HOURLY RATES FOR ATTORNEY/MEDIATORS: The hourly rates for Attorney/Mediators range from \$250 an hour to \$450 an hour. My firm charges \$250 an hour at the time of this writing and sets a cap on the overall price for the mediation, which is never exceeded even when hours and hours of additional work are required. Be careful, New York State allows lay people to mediate so long as they do not advise clients on the law. This would be the unauthorized practice of law. Lay mediators are not advisable because expensive mistakes can be made.

THE FIRST MEETING: I usually explain the mediation process to my clients at the first meeting. I go over the law with respect to divorce, child custody, child support, visitation, and maintenance with them. I acquaint my clients with the statutes that the judges themselves would use. I always give my clients a copy of the applicable statutes so that they can study the rules for themselves. This gives them a great edge in understanding their own mediation process and rights. I generally send the couple home with the statutes and ask them to assemble important financial information for our next meeting. If they have children, I ask them to work out an acceptable visitation schedule, after being briefed on how courts usually handle this issue. This usually involves looking at their schedules and a calendar for the school year, which sets forth the various school holidays.

SECOND MEETING: At the second meeting, I usually ask the clients about their circumstances, for example their current employment and work history and health. We talk about the number of children they have, the custody arrangement they would like to see, and a possible visitation schedule. The issues the mediation generally covers include: the division of marital property, i.e. equitable or fair distribution in New York and what property is considered "separate" property and need not be shared with the other spouse. We discuss the test for child custody in New York (Test: The best interest of the child) and the factors courts consider to determine residential custody. We discuss visitation preferences and the couple's schedule. We talk about health and life insurance. We

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discuss the respective circumstances of the couple to determine whether either spouse would be a candidate for spousal support (maintenance, once known as alimony).

The couple usually has a lot of questions, which I answer. If I do not know the answer to a legal question, the couple can commission a legal memo to get an idea of how the courts are currently handling the issue that concerns them. In this way, they have a context to determine whether or not a proposed solution to a problem is fair.

PROCEDURES IN GENERAL. Each member of the couple is given an equal chance to speak. I usually allocate a specific amount of time for each spouse. During that time, the other spouse is directed not to interrupt their partner. If it is in the couple's interest, and they agree, I talk to each member of the couple separately. If one spouse is given private phone time, the other spouse is usually given equal time.

THE MEDIATOR'S ETHICAL OBLIGATION. A mediator must act neutrally and cannot favor either side when mediating a separation agreement unless both spouses, fully understanding their rights, wish to favor one spouse over another. Even in such a case, the separation agreement cannot be "unconscionable" i.e. so unfair that it would "shock the conscience of the court." The separation agreement cannot be grossly unfair or it can be stricken down by a court. Since this is the rule of law, couples can be confident that a given mediation agreement cannot be lopsided. If one member of the couple decides not to continue to mediate, the mediator cannot represent either side in a divorce. since this would be a conflict of interest.

HOW LONG DOES THE MEDIATION PROCESS TAKE?: The mediation itself usually takes about two hours a session. Several sessions are usually required. I often ask the couple to fill out a "net worth statement" when they go home after the first or second meeting to get a basic idea of the assets involved in the marriage and their appropriate distribution. This statement sets forth the respective financial circumstances of each party. The courts require this during divorces. I also often ask the couple to provide independent proof of salary, bank account, and pension information just as a Court

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would. In this way, both partners can be assured that financial figures have a basis in reality.

ARE THERE SEPARATE COSTS OR APPRAISALS? It may be necessary to appraise certain marital property during mediation. For example, the marital home may have to be appraised. Pensions may have to be appraised. These charges are separate and not included in the mediation costs. These appraisals are conducted by independent experts. Sometimes couples choose to place a value on their assets themselves. The mediator can help oversee this process to make sure it is fair. The couple may also be asked to pay for filing costs, which are not very expensive. To ensure fairness and avoid unnecessary expense, I usually recommend that the couple jointly hire appraisers to value houses, pensions, businesses, and degrees.

DRAFTING A SEPARATION AGREEMENT. Once the mediation is complete, the Mediator drafts the separation agreement. I always send it out to the couple. The couple reviews it to make sure it reflects their wishes. The Mediator may identify additional issues that need additional explanation and call the couple to discuss these issues over the phone or ask that they return for another session.

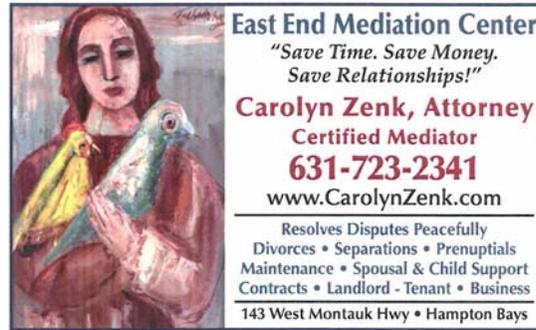
USE OF YOUR OWN LEGAL COUNSEL DURING MEDIATION. Each member of the couple can seek independent legal advice before signing the separation agreement. In fact, Mediators often encourage this. Your counsel can also advise you as you are going through the mediation process. He or she may write or call the Mediator to discuss matters, which are important to you. Once each party signs the separation agreement it is binding contract upon him or her.

HOW LONG MUST A COUPLE REMAIN SEPARATED BEFORE THEY CAN DIVORCE? New York law requires that the couple live pursuant to a separation agreement for a minimum of one year. It is New York State's policy to encourage reconciliation by requiring that spouses live separate and apart pursuant to a separation agreement for a minimum of one year. At the end of the year, the separation agreement can be converted into a divorce if and only if the couple has abided by it for the full year.

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ARE YOU DIVORCED ONCE YOU SIGN A SEPARATION AGREEMENT? For most practical purposes, you are as good as divorced once both sides sign a separation agreement. A separation agreement essentially is a contract, which contains what a divorce will ultimately contain, including division of marital assets, division of debts, where each spouse will live, determinations of what is separate property, custody of the children, visitation schedule, maintenance (if applicable), and child support.

However, there are a few exceptions to this rule. For example, you obviously cannot remarry during the year of separation. Some couples prefer to remain in a separated status because they can continue to take advantage of health insurance benefits offered by one spouse's employer.

ISSUES HANDLED DURING A MEDIATION: The separation agreement handles the following issues: child custody, child support, custody, visitation, health insurance, life insurance, a determination of property, which does not have to be shared (separate property), division of marital assets and debts, and possibly, but not necessarily, spousal support. The couple can mediate any issue that concerns them. The issue of who is to pay for college may be mediated, for example.

ADVANTAGES OF MEDIATED DIVORCES OVER LITIGATED DIVORCES: A mediated divorce has tremendous advantages over other approaches to divorce, such as a litigated divorce, which tends to be much more expensive and contentious. See my article on this web site concerning, "Ways to Divorce in New York." Where spouses are not willing to be reasonable or are dishonest about their income or assets, a litigated divorce may be necessary.

The above article represents my opinion only and should not be construed as legal advice. A couple should still seek the skills of an Attorney to determine how the law will apply to them given their individual circumstances.