

## **Attorney as Mediator or Arbitrator**

### **8. Mediator**

#### **8.1 An attorney should act as a mediator only if competent to do so.**

##### **Comment**

No lawyer should act as the mediator of marital disputes without adequate education, training or experience.[94] There are many ways to acquire the necessary knowledge and skill, including law school training programs, AAML mediation training certification, continuing legal education, formal training programs, and informal training by peers. The neutral role as mediator involves different skills and orientation than the matrimonial lawyer's role in representing clients, and to act competently as mediator requires study and training.

A matrimonial lawyer may be a better mediator because the lawyer may be in the best position to understand the likely outcome of litigation and is best able to ensure the understanding and validity of a mediated agreement. Mediation involves skills that, like trial advocacy, require study and training.

#### **8.2 An attorney acting as a mediator in a marital dispute should remain impartial.**

##### **Comment**

The primary responsibility for resolution of a marital dispute rests with the participants. A neutral person trying to help people resolve disputes in an amicable way should help the parties reach an informed and voluntary settlement. At no time should a mediator coerce a participant into agreement or make a substantive decision for a participant. The mediator should remain completely impartial in assisting the participants in reaching agreement, permitting neither manipulative nor intimidating practices. If the mediator

suspects that any of the participants are not capable of participating in informed negotiations, the mediator should postpone mediation and refer those participants to appropriate resources.

Although the mediator should not have a vested interest in any particular terms of a settlement, the mediator should “be satisfied that agreements in which he or she has participated will not impugn the integrity of the process”[95] and are fundamentally fair. If the mediator is “concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the [mediator] must inform the parties of that concern. In adhering to this Standard, the [mediator] may find it advisable to educate the parties, to refer one or more of the parties for specialized advice, or to withdraw from the case.”[96] The mediator should assist the clients not only in treating each other fairly, but also in considering the interests of unrepresented parties, and in particular the interests of their children. Thus, Standard VII.B. of the Academy of Family Mediators’ Standards of Practice for Divorce and Family Mediation provides: “The mediator has a responsibility to promote the participants’ consideration of the interests of children and other persons affected by the agreement. The mediator also has a duty to assist parents to examine, apart from their own desires, the separate and individual needs of such people.”

### **8.3 An attorney acting as a mediator in a marital dispute should urge each party to obtain independent legal advice.**

#### **Comment**

At the outset, the mediator should encourage both parties to obtain independent legal advice. Doing so will help ensure that the participants have the opportunity to understand the implications and ramifications of available options. Parties in mediation who have consulting attorneys have the benefit of advice focused on their own interests and can participate with more confidence in the process. Review of a proposed mediated settlement agreement with a party's consulting attorney affords that party the opportunity to reflect on the fairness of the agreement before signing it and helps ensure that the party understands the agreement and enters into it voluntarily.

**8.4 An attorney acting as a mediator in a marital dispute should only give advice that will enable the parties to make reasonably informed decisions.**

**Comment**

The mediator should have the knowledge and experience necessary to provide relevant information and advice to help the participants make reasonable, informed decisions.[97] Participants informed about applicable legal principles are able to make thoughtful decisions to resolve their disputes. Some information, such as the tax consequences of certain transactions, legal principles about the characterization of assets, and the need for formal parenting plans, is neutral and beneficial to both parties. A mediator with sufficient experience and expertise may provide such information. Otherwise, the mediator should assist the participants in obtaining expert information when such information is necessary for an informed agreement.[98]

The extent to which a mediator should provide *advice* (as opposed to information) is a controversial issue.[99] On the one hand, it is difficult for the mediator to maintain impartiality while providing advice to one of the participants. Also, in some circumstances providing advice might be seen as constituting legal representation, which is inappropriate for a mediator and might bring into play the conflict of interest rules.[100] There is the danger that the participants will perceive advice from the mediator as a directive that they must follow. On the other hand, the participants may be unable to make informed decisions without some guidance. They may seek that guidance from a lawyer–mediator rather than obtain outside expert advice on every issue that arises. Such advice may be necessary to ensure that the rights and legitimate interests of the participants and their children have been dealt with in a fair and informed manner.

Guidelines attempting to distinguish between providing permissible information and impermissible advice appear largely semantic and virtually unenforceable. And, to the extent that they prohibit advice that would assist the participants in making informed, fair decisions, such rules are undesirable from a policy standpoint. Therefore, this Goal provides that it is permissible for a mediator to provide advice under the following guidelines.[101]

A mediator choosing to provide advice or evaluation should tell the participants they are free to reject it.[102] “Evaluations, particularly of a predictive nature, generally should be resorted to only after other more facilitative

measures have failed to break an impasse.”[103] The mediator should, if possible, offer suggestions in the guise of questions, rather than definitive statements, because doing so is less coercive.[104]

Whether a mediator should provide advice may depend on the information provided to the participants at the start of the mediation. At the outset, the mediator should explain to the parties the different roles of lawyers and mediators, the desirability of consulting independent legal advice, the risks of reaching an agreement without such advice, and the inapplicability of the lawyer-client privilege.[105] The mediator should provide in writing to all participants a statement such as the following:

1. Although I am a lawyer, I am not acting as a lawyer for either of you. You are not my clients. I do not represent either of you. I will help you reach a fair, informed agreement. I will give you advice about how the law might affect your decisions and aspects of your agreement, but I will not favor either of your interests, or provide advice that is beneficial to one of you but detrimental to other participants.
2. You should obtain independent advice from someone who is looking out only for your interests. You should consult your own attorney before signing any agreement reached during this mediation.
3. I cannot act as a lawyer for either of you during the course of the mediation, even for unrelated matters. After the mediation is completed, I will not be able to act as a lawyer for either of you as to any issues involved in the mediation.