

**LAWYERS & MEDIATION:
Their Role as Consultants
By Lynda J. Robbins**

One of the many reasons that clients are drawn to mediation is the perception that attorneys create more problems than they solve. However, while that may sometimes be true, the divorce clients will usually benefit from involvement of lawyers in their negotiations and trip to the courthouse. Attorney/mediators have an extra burden of being expected by clients to give them legal advice and further allowing them to skip the step of bringing in the "troublesome" lawyers. As we all know, attorney/mediators can inform mediation clients about general legal issues that need to be addressed by the parties, but they cannot give specific legal advice. As a result, clients are encouraged by mediators to seek advice of counsel at all points in the mediation process.

Clients often have a consultation with an attorney before beginning the mediation process. The purpose of the consultation is to learn about divorce law in Massachusetts and how it applies to his or her specific circumstances. Clients then enter mediation better prepared. They know what they need to address, the information they must produce and what to ask the other party to supply. They have a general idea of the child support they can expect to receive or to pay, suggestions for property division, an understanding of parenting plans and what issues need to be sorted through with regard to their children. Parties also learn about pension plans, health insurance issues and college cost apportionment. An informed client makes the mediation process smoother.

The clients who consult with attorneys before the mediation begins usually continue to consult with the attorney periodically throughout the process. This helps the client to evaluate proposals and formulate approaches to issue. Clients who do not have a pre-mediation consultation can, nevertheless, benefit from working with an advocate during the mediation process.

Once the parties reach an agreement of the issues and have a memorandum of understanding or draft agreement, they should review the agreement with their own attorney to be sure all issues have been addressed, the parenting plan looks workable and the money issues have been resolved equitably. One of the worst experiences for the clients, and one that reflects very badly on the mediation profession, is going to court and

having their Agreement rejected by the judge because of an oversight or lack of understanding of what Massachusetts General Laws Chapter 208, Section 34 requires.

The attorney can also assist the client in filling out the myriad of forms required by the Court and in securing a hearing date. Clients need to understand that, if only one attorney is hired to help with this part of the process, the attorney can only represent one party. Some clients have the mistaken belief that, because they have an agreement, one lawyer can represent them both. Under Massachusetts law, this is unethical. Some mediators will assist their clients in this part of the process, and some will go to court with their clients, but the advisability of attorney/mediators doing this is questionable because of the confusing perceptions the clients may have about the mediator's role. Non-attorney mediators may be perceived as participating in the unauthorized practice of law. The pros and cons of the mediator assisting clients with the actual court process are best left to another discussion.

If clients do not have an attorney when they start the mediation process, they may sometimes ask the mediator for referrals. The mediator can give several names to the clients, and/or refer them to the Massachusetts Council on Family Mediation web site to look for mediators who are also lawyers, or the mediator can refer the clients to other sources. The mediator probably has his or her own list of "mediation-friendly" attorneys. Such attorneys will still advise individual clients and advocate for them but who will try and work within the mediation process. These are attorneys who understand that "winning" is not necessarily about who gets the most, but about the quality of life for the parties and their children after the divorce.

The important point for clients to remember is that the consulting attorney still needs to review and evaluate financial materials in order to properly advise the client. This review takes time, and the clients are expected to pay for the attorney's time. When clients are motivated to spend as little as possible, the need for valuation sometimes alienates clients who do not understand the process. However, the attorney cannot give reliable advice without first reviewing the background materials. Because the client wants the reassurance of the attorney, he or she must be prepared to give the attorney the materials, time and money required to allow the attorney to give informed advice. A "free consultation" usually does not cover the depth of materials or allow for the time to do a responsible review of an individual situation. The retainer needed by the consulting

attorney will depend on the complexity of the situation and the sophistication of the client relative to the financial issues.

Through the mediation process, documents should have been exchanged voluntarily, often accompanied by spreadsheets and other explanatory materials, all of which makes the attorney's job faster, easier and more efficient than the discovery process in a litigation situation. The mediation process therefore saves the client money as well as time. If properly explained, the client should appreciate the advantages to the process, as opposed to: "why am I going to mediation if I still have to pay an attorney?"

Lawyers and mediators can work together to provide the best coverage of the clients' needs. They are not mutually exclusive. The attorney is one of many tools employed in the mediation process. Clients may need to utilize some or all of the resources available such as financial planners, counselors, pension experts, appraisers as well as attorneys. Clients should be encouraged to consult with any or all resources relevant to their particular situations. The divorce process is one that will impact the client's life forever so the client should be sure to spend the time and money necessary to be sure that the result is equitable and workable.