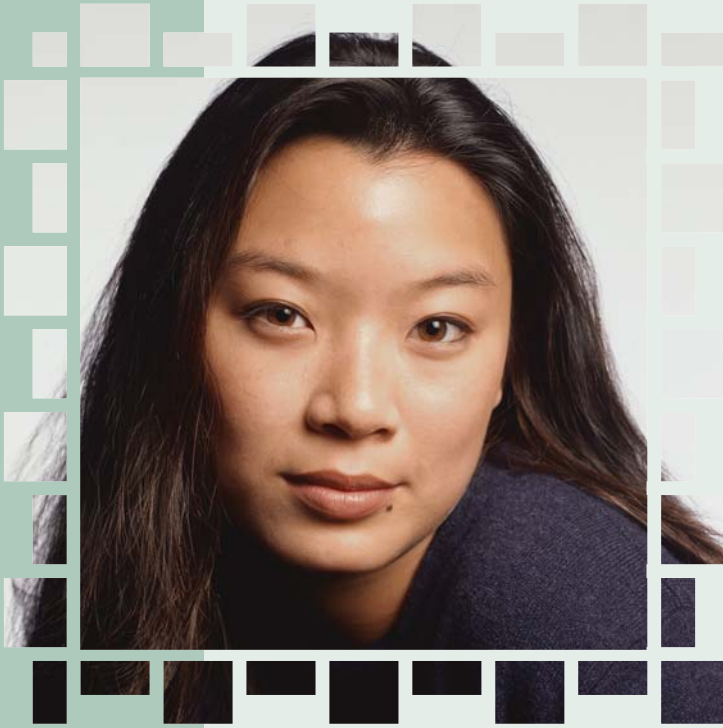


Mediation: Making the Decision Whether to Mediate Divorce or Custody Cases

A Guide for Battered Women



What is Mediation?



Mediation is a process for resolving conflicts or disagreements. A trained, neutral person facilitates problem-solving conversations between two or more persons. The mediator tries to help people figure out a solution and forge an agreement.

What does a Mediator do?

A mediator helps the disputing parties:

- ◆ Clearly describe the disagreement or the conflict to be resolved;
- ◆ Examine the reasons for the conflict;
- ◆ Identify information/documents needed to develop fair solutions;
- ◆ Think about possible solutions to the conflict;
- ◆ Reach an agreement that resolves the current conflict;
- ◆ Agree on how to work out future conflicts; and,
- ◆ Write down any agreement clearly and specifically.

What is Custody or Divorce Mediation?

In the last 15 years, mediation has become a method by which parents can develop custody or visitation plans, and divorcing couples can divide marital property or decide on alimony.



Mediation usually follows unsuccessful attempts at negotiation by the parties or their attorneys.

In some locations, divorce or custody courts require people to attend mediation to try to resolve their differences. In other places, the court refers people to mediation, suggesting that the parties try to reach an agreement during the mediation process.

Divorce or custody mediation that is ordered by a court often is scheduled for two 3-hour sessions or less. In those sessions the mediator tries to help the couple reach an agreement.

Mediation that is not court-ordered may involve more sessions and considerably more time in problem solving and trying to develop an agreement.

Costs of mediation vary. Sometimes the county or the state pays most of the costs of court-ordered mediation. Sometimes the parties pay the full fee of the mediator. Many believe that if the parties can reach an agreement in several sessions that the cost of mediation will be less than if the parties ask their attorneys to negotiate, or if the case goes to court.

Who Can Mediate Successfully?

For mediation to be fair and successful, the people participating must have a similar knowledge of the issues being discussed.

This means that each person has:

- ◆ Full information about the resources, income and property of each person;
- ◆ The ability to describe the issues that the person wants discussed during mediation;
- ◆ Similar problem-solving, planning and negotiation skills;
- ◆ The matching ability to understand finances and financial planning;
- ◆ The willingness to consider the needs and well being of the other person after separation or divorce;
- ◆ Respect for the other person and the right of the other person to privacy and self-determination;
- ◆ The capacity to protect the person's own interests in the process of mediation; and,
- ◆ Not used violence and coercive or threatening behavior in the relationship.

Participants must be able to negotiate, speak and be heard in order to develop agreements that are fair and workable. The ability to negotiate and maintain equal bargaining power is the key to a successful mediation. The list above can be used as a tool to evaluate whether a person has the capacity to mediate.

What is Domestic Violence?

The primary purpose of domestic violence is to gain, sustain or reclaim control over a spouse or intimate partner.

Domestic violence is the threat or use of physical, sexual, emotional and/or economic abuse against a spouse or intimate partner. It includes assaults, exploitation, property destruction, theft, false imprisonment, isolation, stalking, sexual coercion, arson, sleep disruption, ridicule and threats of homicide or suicide. It may also include interference with work, worship, education, healthcare, recreation and family. It often involves surveillance of the abused partner. It produces terror.

Domestic violence is intentional. It is not a loss of control. It is not driven by impulses or emotional outbursts. It is exactly the opposite. Domestic violence is behavior designed to gain control and instill fear in victims.

Most batterers create rules to bolster their control over partners. They carefully enforce those rules and the punishment for breaking them often includes violence.

Abusers do not use violence all of the time. They often merely refer to past acts of violence and promise to repeat the violence, if partners do not comply with their rules and directives.

When the partners of batterers decide to seek help or leave, there is a risk that the batterer will use more severe violence in an attempt to regain control over the abused spouse or partner.

Can Batterers Mediate Successfully?

NO. Domestic violence creates huge power imbalances between the batterer and the partner in a marriage or relationship.

Batterers typically believe they have the sole right to make important decisions in a relationship and for their partners.

They claim the right to make financial decisions. They often control bank accounts. They frequently purchase big-ticket items in their own names. They refuse to tell spouses about financial matters, debts and income. They commonly spend money on themselves at the expense of the family.

Batterers believe that their interests and needs are the ones that count; that the interests of their partners and children are less important and need only be met, if they do not interfere with their own wants.

Batterers involved in family law cases frequently are well informed about their legal rights and misinform their partner about the law.

Batterers are often skillful manipulators. They are able to mask fraud, duress and other wrongdoing. They convince battered partners and professionals that they have honest and honorable intentions, while they misrepresent their behavior, financial situations or parenting patterns.

Batterers are effective in gaining concessions from their battered partners who “give in” rather than risk their safety or that of their children.

Do Battered Women Have to Mediate?

In some places, “Yes.” In others, “No.” The law or court rules about divorce or custody mediation differ across the country. It is important to understand the law in your state.

In some states, the law requires all divorcing persons or those with custody disagreements to mediate. However, in many courts, victims of domestic violence can choose whether to mediate or not. In these courts, an abused person can “opt out” of mediation by informing the court of the domestic violence or child abuse inflicted by the other party. The case is then excused from mediation.

In some communities, the court staff screen all cases filed for divorce or custody to determine if there is a history of domestic violence. They usually look at court records to see if there are any criminal cases, protection orders or child abuse cases related to violence by one of the parties. If none exist, the court may decide to require mediation.

In other courts, a victim may choose mediation, but only with a mediator trained in domestic violence. Mediators who are trained in the dynamics of domestic violence understand the need to provide specialized settings and methods designed to safeguard the victim from violence, duress and fraud.

In some places, even if a case goes to mediation, a mediator can stop the mediation when continuing it is too dangerous or inappropriate.

Talk to a Domestic Violence (DV) Advocate

Before making any decision about filing for custody or divorce, and before deciding whether to mediate, talk to a DV advocate.

- ◆ Describe the violence, exploitation, manipulation, rule making and coercion of the batterer.
- ◆ Think about the risks of violence, especially whether the batterer is likely to be more dangerous after separation.
- ◆ Talk about protection orders and consider whether you need to get one before filing the divorce or custody case.
- ◆ Discuss safety planning and consider strategies for home, work, court and other places where the batterer might attack you, your children or other family members.
- ◆ Discuss all possible “best outcomes” from the divorce or custody case.
- ◆ Ask about mediation. Ask whether it is possible to “opt out,” whether mediators are trained specifically to mediate domestic violence cases, and whether there are specialized settings and methods for mediation of domestic violence cases.
- ◆ Ask if the DV advocate can accompany you to court or mediation and whether the advocate can support you during the process.

You can find the number for the local domestic violence program in the human services or emergency pages of your telephone book or by asking the court staff.

Talk to an Attorney

The local domestic violence program or bar association may be able to refer you to an attorney who understands domestic violence and who can help you achieve the protections and other results you need.



When you talk to an attorney:

- ◆ Find out your legal rights. Find out how the law can protect you and your children.
- ◆ Help the attorney understand the domestic violence you have suffered, the pattern of violence, the injuries, the fear, the disruptions of daily life, the limitations on your power to make decisions about your life, and the dangers of future violence.
- ◆ Ask the attorney about a protection order or other methods to protect you during a divorce or custody case.

If you are considering mediation...

- ◆ Ask the attorney to compare mediation with court process and give advice about the best method for your case.
- ◆ Talk about the costs of mediation compared to a settlement, hearings or trial.
- ◆ Ask if it is possible to mediate part of a divorce (like the property) but have the court make a decision about custody and visitation.
- ◆ Find out whether an attorney or a DV advocate can attend mediation with you. Ask whether they can speak for you.
- ◆ Find out whether you can choose your mediator and ask for recommendations if you decide to mediate.
- ◆ Find out whether the mediation process will remain confidential. Mediators should have the parties sign an agreement stating that what is said during mediation cannot be used in court. Get assurance that your mediator will not share whatever you say with your spouse or partner, or the court, without your consent.
- ◆ Ask whether you have to meet face-to-face with your spouse or partner in mediation. Ask whether you can meet with the mediator at a different time and place, or be placed in a separate room with the mediator “shuttling” between the parties.
- ◆ Inquire about security at the place of mediation.
- ◆ Ask the attorney how you can make sure that the batterer tells the truth about income, property, debts and other financial obligations during mediation.
- ◆ Find out if you can end the mediation session if you feel unsafe, believe that the batterer is not being truthful, or that the process is not working.

If you decide to mediate...

...Speak with an attorney first

- ◆ If you can afford to hire an attorney, talk with the attorney before mediation. Ask the attorney to review all forms or papers that are required by the mediator before you submit them.
- ◆ Ask the attorney to help you gather and strategically share information with the mediator. The mediator needs to have enough information to support what you want from the mediation.
- ◆ Ask the attorney to give you the case law that supports your position. Take this to the mediation to give you extra leverage or clout in pursuing your goals.
- ◆ Ask the attorney to help you think about what you absolutely need to achieve from the mediation, and what you can give up when negotiating your agreement. Make a list so that you can keep these in mind throughout the mediation process.
- ◆ Strategize with your attorney before each mediation session.
- ◆ Make sure that you do not sign any mediation agreement before your attorney has read and signed off on the agreement.

If you do not hire an attorney...

- ◆ At mediation, insist that all of the financial facts — the income, assets, debts, pensions, inheritances, savings, medical needs, educational development costs, etc. — are stated in any agreement. Do not leave any facts or decisions about finances out of the agreement.
- ◆ If you cannot afford an attorney to help you through the whole mediation process, try to get a free consultation with one to review any papers before signing them.

For help locating other services for abused adults, call:

National Domestic Violence Hotline
1-800-799-SAFE (7233)

To contact your local domestic violence program or your local bar association or legal services/aid office, look in the emergency or human services pages of your phone book.

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For more information please contact BWJP at:
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