Should You Stay, or Should You Go? The Role of Family Law Counsel in Attending and Shaping the Divorce Mediation Process

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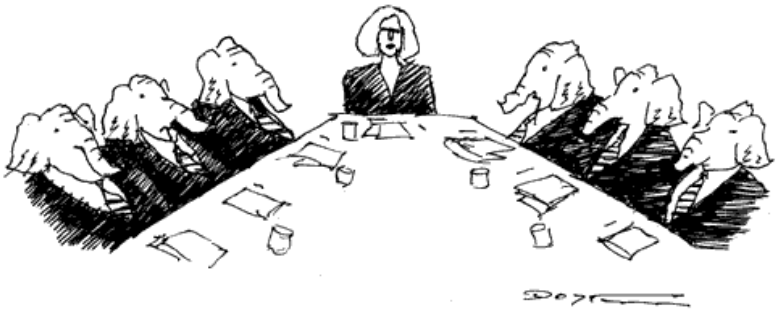

Emily could see this would be one mediation where no one would ignore the elephant in the room.

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Our years of practice as a family law mediator (Larry) and matrimonial attorney (Ann) have led us to appreciate the variety of approaches and choices lawyers have in approaching mediation with (or in consulting and support of) their clients.

We'll begin with the more abstract and then offer some practical observations relating to the role of family law counsel in attending and shaping the divorce mediation process.

I. Philosophy of Representation & the Nature of the Attorney's Engagement

Consider two important inquiries that influence views of the appropriate role lawyers play or should play in divorce and family mediation:

1. The first of two important inquiries: a **philosphical inquiry, the vision of their role** as family law counsel generally. Contrast these ends of the spectrum:

> **the responsible gladiator vision**: to manage portions of a client's life affected by the divorce, and work to secure what the client or his family can optimally achieve as rights granted or outcomes allowed them by the law; with
>
> **the empowering education vision**: to assist clients to make informed divorce-related decisions with an eye to protecting them from unforeseen consequences.

Does or should this vision affect a lawyer's approach to the mediation process itself? Do lawyers tend to adopt one of these visions?

Should the appropriate vision depend on the client's expectations/profile? Contrast these ends of the spectrum:

> **"the how are you going to fix this" client** — the client who is not able to move beyond a description of how his spouse has created a mess of his life and that of his family; he needs his lawyer to take care of it, and expects the Court to judge her conduct, exact "justice" and make things tolerable for him and his children; with
>
> **"the what are my options and what do you recommend" client** — the client may freely and emotionally display his intense pain with the whole situation, but does ask his lawyer what he can expect from the system, what rights he may have, and what his lawyer sees as the future consequences of different choices.

Certainly, the Colorado Rules of Professional Conduct allow a lawyer to adopt a role and approach in mediation (and generally) broader than a purely zealous, narrow legal rights based one. (See appended excerpts from the CRPC.)

2. The second of two important inquiries: a **practical inquiry, the nature of their engagement**. Contrast:

> **serving as advisory or consulting counsel** (as in unbundled legal services representation), with
>
> **serving as counsel of record.**

The nature of the attorney's engagement likely affects his or her approach to the mediation process. We'll consider both types of engagement.

II. Attorney's Role When Acting as Advisory Counsel: Education & Preparation

A lawyers role as advisory or consulting counsel may include:

1. Advice as to whether mediation is suitable;
2. Opinions regarding the most appropriate style of mediation and the choice of mediator;
3. Education as to legal rights and information (the legal landscape, client's legal rights and obligations, likely court approaches and outcomes);
4. Advice regarding the importance of particular data: what discovery is

meaningful and whether expertise is required for its evaluation; and

5. Strategy regarding negotiation with spouse, given dynamics and history of relationship.

That's a significant set of tasks!

III. Attorney's Role As Counsel of Record: The Choice to Attend

As Counsel of Record, lawyers have process design decisions beyond these client education and preparation functions. Foremost among these decisions is:

"SHOULD ATTORNEYS ATTEND MEDIATION WITH THEIR CLIENTS?"

As may be evident, there is no simple, stock answer to this question, and the decision may require the artful consideration of a number of factors.

In deciding whether lawyers should attend mediation, we'll consider

- the differences in how mediation typically unfolds with and without the presence of attorneys,
- the parties' limitations as they approach mediation,
- the importance of diagnosing why the parties remain at impasse, and
- the type of issues framing the mediation.

We will then suggest the role of lawyers in shaping the process, whether serving as advisory counsel or counsel of record, whether attending the mediation or choosing to allow the client to mediate directly with the other party.

A. Mediation's Look & Feel

In deciding whether lawyers should attend mediation, consider how the mediation process typically looks and feels.

The Look and Feel of Typical Attorney-present Mediation ("Shuttle")

On occasion, counsel attend mediation with their clients and the mediator — all present in the same room. (Although less common, this may be highly preferred and quite powerful in some cases, especially with more collaborative parties and their counsel.) Mediation with counsel more commonly takes place with clients and their attorneys in separate rooms and with the mediator moving between the rooms, and it is this ordinary approach of attorney-

present mediation that we focus on here.

How does the style of typical **"attorney-attended shuttle"** impact mediation?

1. Attorney-attended shuttle usually takes place in a single "make-it or break it" session, toward the end of the opportunity to negotiate, and with deadlines looming. This pressure exerts good and bad influence, and efficiencies may come about because of focus on specific issues. Attorneys tend to measure the success of mediation on whether settlement occurs, period (not necessarily whether a long lasting and binding agreement has been reached).

2. Shuttle allows clients to vent frustrations privately and permits the non-advocate neutral mediator to hear and acknowledge these.

3. Shuttle allows the mediator to weigh in directly with each party and perhaps their counsel, to consider (without "losing face") other options to their proposal/position.

4. Attorneys tend to take the lead in shuttle mediation and their positions in speaking for their client tend to displace client's voices, even with the most collaborative of counsel.

5. Shuttle tends by nature to be more evaluative in style, with counsel speaking of and inquiring of the neutral's view of likely court outcomes. Why? Because shuttle mediation often takes place later in the case, positions have hardened, legal issues have been researched and considered. And, of course, attorneys are often more comfortable with basing settlement on legal rights | court outcomes analysis.

The Look and Feel of Parties-only Mediation

Although many lawyers are surprised, increasingly mediators meet with both parties to a divorce or family law dispute, who are not accompanied by counsel. They may have counsel of record or advisory counsel, but the lawyers do not attend.

How does **"parties-only"** style impact mediation?

1. Parties-only mediation is usually a bit slower moving process taking place over several sessions. This facilitates followup sessions after homework tasks, reflection and consideration of the input of counsel and other professional advisors.

2. Parties-only mediation allows clients, in a protected way, to share disappointments and frustrations directly to the other party, and of course, it allows the other party to acknowledge these. Lawyers often underestimate how powerful an antidote to impasse this can be.

3. Parties-only mediation allows for a unique process quality, of "intimacy" — a special collaborative milieu because of trust that the parties develop with each other and the mediator in the process managed by single neutral.

4. Parties' voices and their underlying *interests* are more transparent; earlier *positions* and formal *proposals* play a lesser role in their decision-making.

5. Parties-only mediated agreements tend to be durable; the direct exchanges and process of directly negotiating tends to minimize "buyer's remorse" and changes of heart.

B. In Choosing to Attend, Consider Parties' Limitations

Counsel of record's decision whether to attend may be pretty much governed by a few realities in a particular case.

Power Imbalances

As divorce professionals, we are all keenly aware that there may be substantial **power imbalances** between marital partners. Inequities in negotiation savvy, raw intelligence, and financial sophistication, or a history of intimate partner violence and disorders of personality can strongly militate for counsel's insistence on his or her personal presence in mediation.

Dwindling Financial Resources or Limitations of Patience

Just as crippling, many parties exhaust their available **money**, or, for a variety of reasons, their **patience** to continue with litigation, or even substantial attorney involvement in their divorce.

Imposing Deadlines

Generally, the flexibility of scheduling parties-only mediation allows for **more timely conclusions** to divorce planning and agreements.

C. In Choosing to Attend, Consider Diagnosing the Impasse

In other cases, however, considering whether or why a case is "stuck" is all important.

1. Where the parties' impasse seems to have **emotional underpinnings**, the direct face-to-face acknowledgment and validation and intimacy of parties-only mediation often may be favored. (Extreme issues in this regard, of course, would favor counsel's attendance and shuttle's security.)

2. Where the impasse has its roots in **communication barriers**, the clarity of a detached envoy's information in shuttle may make the most sense. If counsel themselves have an acknowledged personality conflict with each other, for example, the distractions and distortions of their communications may be minimized by a neutral's ownership of the settlement options.

3. Where the parties' impasse stems from **gaps in divorce planning data or assumptions**, attorneys' presence and in the same room may be the best antidote. Needed discovery can be identified and facilitated and a vision for even further experts' work can be agreed on.

4. Where the parties' impasse stems from **gaps in not-so-controversial family law information** — legal principles, developmental needs in parenting time, tax implications of a settlement — counsel's attendance seems indispensable.

5. Where the parties' impasse stems from **wholly different expectations of likely court outcomes** (whether it should!), counsel's attendance may make sense, since a neutral's artfully shared insight may reorient a party or counsel to consider other settlement options consistent with a client's interest. Shuttle may be favored where evaluative judgment is desired, since it can be shared with a different emphasis in the separate rooms, respectful of the unique perspectives of each party.

6. Where the parties' impasse stems from **the influence of a non-litigant third party** (new spouse, significant other, party's parent, etc.), shuttle may be favored. Shuttle allows for the inclusion of a resented or hostile third party, whose "buy-in" is critical or determinative.

D. In Choosing to Attend, Consider the Nature of the Contested Issues

Finally, often the type of dispute may impact whether attorneys should attend mediation. By way of example, consider:

More Ordinary Parenting Plan Matters

Although there are exceptions with parents having substantial deficits or children having special needs, issues of how a couple will manage parenting decisions and share parenting time is often well-suited to parties-only mediation with a mediator with knowledge and expertise in children's developmental needs and current divorce and children research. A parenting plan is a personal extension of a parties' relationship, history and family values. The "intimacy" (as discussed previously) of mediation with a single professional neutral may uniquely promote the parties' reaching *an* agreement oriented to the children's needs. (Much research emphasizes the importance of establishing *mutual support* for a parenting plan — often, the particulars of a plan are less important than parents' unqualified embrace of a plan.)

More Complex Financial Issues

In many cases, highly unusual or more complex financial issues may benefit by attorney-attended mediation. This derives largely from the possible imbalance of power between two parties, one of whom, for example may simply be less sophisticated in such matters. (Again, there are exceptions, where both parties are astute and the mediator has a good understanding of substantive issues and access to tools or ancillary professionals' assistance — to help the parties find a balanced solution.)

IV. After the Decision to Attend: Suggestions on Counsel's Role

A. Advisory Counsel, or Non-Attending Counsel

As noted before, once the process and mediator have been selected, counsel not choosing to be present can materially assist the mediation process, by adequate **education** and effective **preparation** of his or her client, and consistent **communication**.

Effective preparation almost always requires developing a vision of the client's post-divorce needs, the data required to make good decisions in mediation, and an approach of how to evaluate such information in the mediation process, if complex. A pre-mediation client conference and even a follow-up confirming letter (see Ann's **Pre-Mediation Advisement Letter**) may be useful.

Most challenging may be co-ordinating communication with the client as he or she participates in mediation, especially when this involves several sessions taking place over a period of time.

B. Counsel of Record Attending Mediation

Lawyers formally representing a party in mediation have the obligation of education and preparation of his or her client as well.

Additionally, counsel attending divorce or family mediation can materially improve the mediation (and its chances of success) by **forwarding information** to the mediator in advance. As detailed in Larry's **Mediation Outline & Critical Checklist**, this optimally includes:

1. Background (family info [parties and children's ages, length of marriage and separation], present living and employment circumstances, court hearing status)
2. Issues for court
3. Principal legal documents
4. Latest financial statements
5. If property division is at issue, any spreadsheets or other proposed division tables.
6. If support is at issue, any child support worksheets, and for tax evaluation, house deduction information (mortgage interest and property taxes, for the home ownership as contemplated post-divorce).
7. If the parenting plan is at issue, a suggested approach and rationale and any reports from experts.

In addition to this "data" for the mediator to prepare, candid disclosure of the attorney's sense of the parties' "hot buttons", the reasons for their impasse to date, and even strategies or fall back approaches to settlement are welcomed by mediators.

Although many counsel author pre-mediation statements as confidential mediation communications, others believe pre-mediation assertions should be transparent and even shared with opposing counsel.

Finally, in attorney-attended mediation, some counsel see a final obligation to insure the agreement reached is **binding**. We'll consider options in this regard (see, e.g., Larry's **Electronic Recording of Mediated Agreement**).

V. Conclusion

A family law attorney's philosophy of representation, and the formal nature of his or her engagement and relationship with his or her client, naturally influence the role he or she will play in their client's mediation process.

Beyond the important objectives of client education and preparation tasks required of advisory counsel, counsel of record are faced with the challenging issue of whether they should attend mediation with their client. Client limitations, the reasons behind the parties' impasse and the type of issues framing the mediation all assist in answering the question of whether attorneys should stay or go to the mediation with their clients. In either case, attorneys materially assist mediators when they prepare clients and forward relevant materials and settlement objectives to the mediator in advance of the mediation.

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APPENDIX: Excerpts from the Colorado Rules of Professional Conduct

Preamble: A Lawyer's Responsibilities:

In fulfilling their professional responsibilities, lawyers necessarily assume various roles that require the performance of many difficult tasks.

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As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with the requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesman for each client.

Rule 1.2 Scope of Representation:

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.

Rule 2.1 Advisor:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

Comment of Model Rules Committee:

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.

* * * * *

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate.

* * * * *

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work.