

**The Role of Consultants:  
Dos and don'ts for attorneys hired by parties to help  
negotiate settlements of familial disputes through mediation**

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Mediation is one of the most popular alternatives to litigation for the resolution of divorce cases. As more and more potential litigants choose this option, more and more litigators are called upon to serve as consulting attorneys. However, there are significant differences between the role of the attorney as litigator and as consultant.

In order to be an efficient, effective, and economical consultant, attorneys must reevaluate professional habits of mind that have become ingrained, rethink the nature of the professional relationship, and redefine their role. This list of do's and don't's is intended to help attorneys achieve those goals.

1. **Do** define your role. Have a clear understanding with the client, and confirm that understanding in your retainer agreement or a subsequent letter, or both. What exactly does the client expect you to do? For example, if your client expects you to conduct the negotiations, it is essential for you to participate directly in the mediation process. If your client wants you to remain in the background, it is important for the client to understand that you are serving as a coach and that you are not being hired to negotiate the deal.
2. **Do** determine the client's goals. How can you help achieve those goals? Goals should be definite and specific. In all too many instances, clients set goals that are too abstract to be achieved. "I just want to feel secure" and "I just want to be fair" are examples. Security is an elusive goal. In most instances, it is unattainable. Along the same lines, both parties usually want to be fair. The problem is that the parties have different notions of fairness. The parties must understand that in Court their feelings and notions of fairness are irrelevant. They do not constitute admissible evidence. A judge will not even listen.

In addition to being definite and specific, the client's goals must be realistic. A party may believe that the laws of the State of California are unfair in various respects. In many cases, both parties believe that the laws of the State of California are unfair in various respects. But unless the parties agree otherwise, they are stuck with those laws. Thus, a party whose goal is an unequal division of the community property needs to understand that the other party must agree. A consulting attorney can help a client figure out how to motivate the other party to do that. Absent agreement, the law mandates an equal division. Unless there is a tradeoff of comparable value, it is rarely the case that one party is willing to ignore California law because the other party doesn't think it's fair.

3. **Do** protect the client and yourself. How can you help your client ensure that nothing of significance

is overlooked? One method is using a checklist. Experienced attorneys have handled hundreds or even thousands of divorce cases. Most parties are getting a divorce for the first or second time. A consulting attorney has an obligation to ensure that all issues are covered.

Another method is verifying the parties' assets and debts and income. Divorce mediation is not about trust. All of the usual methods for ensuring the integrity of the process are available to the parties. In the first instance, the parties are required to complete and exchange disclosure documents. But mediation is not inconsistent with discovery. That discovery is usually informal, although formal discovery may be justified by the circumstances of the case.

Once completed, a mediated judgment should list all assets to eliminate any doubt about which assets were divided, sold, awarded to one party or the other, or confirmed as separate property. The possibility that a community asset will be intentionally concealed or inadvertently overlooked may be a lingering concern. Section 2556 of the *California Family Code* provides that the Court retains jurisdiction over any such asset.

4. **Do** understand that the client wants to make a deal. If the client wanted to litigate, the case would not be in mediation. Unless you support the mediation, you will be hampered in helping your client to achieve his or her goals. If this isn't work you feel comfortable doing, you can't do your best. More pertinently, you may end up sabotaging the process by being too negative about the risks inherent in mediation and too positive about the protections offered by litigation. In spite of voluminous evidence to the contrary, many lawyers continue to believe that divorce cases should be resolved in an adversarial setting, with full discovery that culminates in a contested trial. This mindset is not conducive to advising a mediation client. For the most part, mediation clients represent themselves effectively, and negotiate a deal they can live with. A lawyer can rarely guarantee that a mediation client would get a better result by going to Court and letting a judge decide.
5. **Do** provide your client with a best case-worst case analysis, and also your honest opinion of the most probable result – at least within a range – if litigation is a realistic option.

Budget cuts and staff reductions will inevitably affect the availability and affordability of Court trials as a method of dispute resolution. As a practical matter, it is not an option for divorcing couples already struggling to make ends meet. In the vast majority of cases, a negotiated settlement is the only realistic option. However, there are always exceptions. Your client may inquire with respect to whether going to Court and letting a judge decide is feasible.

Making a best case analysis is easy for most attorneys to do. The arguments that can be made on a client's behalf are usually obvious. If all of those arguments are successful, the result can be quantified. Clients are understandably receptive to a best case analysis. They have a tendency to

believe that the arguments that can be made on their behalf are likely to prevail.

A best case analysis should always be balanced with a worst case analysis and, more importantly, the attorney's opinion of the most probable result of a contested trial. There are of course cases in which extensive discovery is necessary in order to make definitive predictions (and even then such predictions may turn out to be incorrect), but those cases are few and far between. Most of the time, experienced attorneys can make accurate predictions. Consulting attorneys should not adopt the view that their job is to make the arguments and that it is a judge's job to make the decisions.

Above all, clients need realistic cost estimates. The fees in litigated cases mount up rapidly. For most divorcing couples, litigation is prohibitively expensive. Along with a best case-worst case analysis, any mediation client considering litigation should be given a cost-benefit analysis.

6. **Do** require the client to accept responsibility for his or her decisions. Your role will usually be to provide legal analysis and advice; to develop and explain options; to outline the advantages and disadvantages of those options; to make recommendations; to formulate negotiating strategy; etc. *The client is responsible for making all decisions about how he or she wishes to proceed, not the consulting attorney.* In your capacity as the client's consulting attorney, you are not obligated to sign off on a stipulated Judgment. Consulting attorneys are understandably uncomfortable about signing off on a settlement that they did not negotiate, and there is no statute, case, or rule of professional conduct that requires them to do so. When it comes to a mediated prenuptial agreement, an attorney's signature is required as a practical matter. However, this is not the case when it comes to a mediated divorce settlement.
7. **Do** understand and accept the following:
  - Professional services consist of discrete tasks – not full service representation (*i.e.*, they are unbundled). The services that a consulting attorney is expected to render should be specified in the fee agreement, and all other services should be excluded from the ambit of the consulting attorney's representation. At one end of the spectrum, a consulting attorney may be asked to review a mediated settlement agreement before it is signed. In that instance, reviewing the agreement, meeting with the client, and confirming your analysis, opinion and advice in a letter would constitute the entirety of your services. At the other end of the spectrum, you may be hired to explain the client's legal rights and duties, formulate a negotiating strategy, prepare pleadings and other documents, ensure that the client is protected during the mediation, propound discovery, and participate in the negotiations. If the initial scope of the representation expands, the fee agreement should be modified accordingly.

- Cases are smaller and fees are lower. One of the parties' motivations in choosing mediation is to minimize the total cost of getting a divorce. A consulting attorney cannot expect to receive a blank check. However, these assignments offer several advantages. A consulting attorney need not be the client's attorney of record. This limits the consulting attorney's obligations to the Court and professional responsibilities to the client. Unlike a litigator, who may have to make a motion to withdraw and, depending on the circumstances, may not be able to get out of the case, a consulting attorney may terminate the attorney-client relationship at any time. Writeoffs are rare. Consulting fees are almost always paid in full.
  - Liability is nonexistent for all practical purposes. The mediation process is confidential. By statute, nothing written or said by any of the participants during the course of a mediation is discoverable or admissible into evidence in any civil proceeding. The California Supreme Court has specifically held that the principle of mediation confidentiality applies to attorney-client communications.
8. ***Don't*** try to coopt the mediator. The mediator's loyalty is to the deal. Attempts to enlist the mediator's support for one party's position run the risk of jeopardizing the mediator's credibility and raising questions about the mediator's neutrality. Most commonly, this takes the form of asking the mediator to validate one party's position (and thus invalidate the other party's contrary position). The goal is to help the parties settle, not to persuade the mediator that your client is right. Unlike a judge, a mediation is not empowered to resolve disputes; the mediator doesn't even get a vote. The mediator's opinion is thus irrelevant.
  9. ***Don't*** tell the client that he or she is making a bad deal (or undermine his or her confidence in the deal) without analyzing it in its totality. Very often the parties have made tradeoffs: They have gotten a better deal on some issues in exchange for accepting a worse deal on others. Consulting attorneys should explore what each party got in exchange for what he or she gave. The parties have a tendency to forget things like that.
  10. ***Don't*** oversell the case by forgetting the lessons of a professional lifetime of litigation. The problem is not that clients are willing to settle for too little, and that they need attorneys to get them what they are entitled to receive. The problem is that clients set their sights too high, and in the end, whether as a result of a negotiated compromise or a disappointing result at trial, they get less than they think they deserve.

As fewer cases are litigated, divorce lawyers will have to adapt. One of the opportunities will be to serve as consulting attorneys to parties in mediation. Litigators already have the skills they need to do that successfully. The challenge is to deploy those skills in the service of consensual dispute resolution.