6

Mediation and Negotiation

If your marriage is difficult, you probably expect your divorce to be difficult. You picture yourself retaining a lawyer with a reputation as a "barracuda" because you have an angry spouse and there is increasing animosity between the two of you. You wonder if there is any way out of this nightmare.

Alternatively, perhaps you and your spouse are parting ways amicably. Although you don't necessarily agree on all the terms and conditions of your divorce, each of you is hopeful that the divorce will be a reasonable and respectful process. You want to spend your hard-earned money moving forward rather than paying high attorney fees, expert-witness fees, and other costs.

In either case, trial before a judge is not the only option available to you. In fact, most Wisconsin divorce cases settle without a trial. Mediation and/or settlement negotiations may help resolve any disputed issues without the necessity of trial before a judge.

Resolving your divorce through mediation or a negotiated settlement has many advantages. You have the ability to achieve a mutually determined agreement with a known and predictable outcome, reduced attorney fees, and little, if any, risk of appeal. Despite the circumstances that led to the end of your marriage, it may be possible for your divorce to conclude on a cooperative note through the use of mediation or other settlement options.

6.1 What is the difference between *mediation* and *negotiation*?

Both mediation and negotiation are methods used to avoid contentious litigation and to give you and your spouse the ability to make decisions about your divorce and about your future without the intervention of a judge.

Mediation utilizes the skills of a trained mediator who acts as an independent, neutral third party who assists you and your spouse in the settlement process. Mediation is often referred to as *alternative dispute resolution* or *ADR. Mediation* is defined as a cooperative process involving the parties and a mediator, the purpose of which is to help the parties resolve their disagreements by applying communication and dispute resolution skills.

Negotiation is a fact of life in any divorce and involves the attorneys and parties working toward a final resolution of all divorce issues without the necessity of court intervention.

6.2 What types of issues may be mediated or negotiated?

Any issue in your case can be mediated or negotiated. However, you may also decide that certain issues are nonnegotiable, although it is always best to keep an open mind. In advance of mediation or negotiation, determine if any issue is nonnegotiable so you can advise your spouse of that fact before or at the commencement of negotiations. For example, a nonnegotiable issue may be the children's attendance in the same school district where they currently reside. By advising all parties of this position, you can move forward within that parameter rather than wasting time on alternative proposals. If there is no agreement and the parties remain entrenched in different positions, trial is the answer.

6.3 Are there different types of mediation? How does mediation work?

Generally, in a Wisconsin divorce there are two times when mediation is implemented. Initially, if custody or placement is in dispute, the court will order the parties to mediation. In custody/placement mediation, you and your spouse will meet with a trained mediator to attempt to resolve non-

financial issues involving your children. Your attorney is not present during custody/placement mediation.

Mediation is also used to resolve other divorce issues, such as property division and support. In this type of mediation, you and your spouse, as well as your attorneys, meet with the mediator to attempt to reach resolution. It is your responsibility to participate in mediation with an open mind.

There is no hard-and-fast procedure for mediation. Generally, in final divorce mediation, the parties convene together and the mediator advises the parties of his or her role. The facts are reviewed jointly to make sure there is an agreement to the facts of the marriage and the issues in dispute. At that point, each party and his or her attorney generally sit in a separate room and the mediator participates in shuttle diplomacy from one room to the other, exchanging proposals and information, as necessary, until resolution or impasse is reached.

How long the process of mediation continues depends on many of the same factors that affect how long your divorce will take. These include how many issues are in disagreement, the complexity of these issues, and the willingness of each of you to work toward an agreement. Your case could settle after one mediation session or it might require a series of meetings. Mediation may last an hour or may last the entire day into the night. If resolution is reached, the agreement is immediately reduced to writing by one of the attorneys. If mediation fails, the court is advised so that the case can proceed to trial.

6.4 My lawyer said that mediation and negotiation may reduce delays in completing my divorce. Is this accurate?

When the issues in your divorce are decided by a judge there are many opportunities for delay. Reasons for adjournment and delay may be:

- Waiting for the trial date
- Having to return to court on a later, second date if your trial is not completed on the day it is scheduled
- Waiting for the judge's ruling on your case
- Scheduling additional court hearings after your trial to resolve disputes about the intention of your judge's

rulings, issues that were overlooked, or issues disputing the language of the judgment of divorce

Each one of these factors could delay your divorce by days, weeks, or even months. Mediating or negotiating the terms of your divorce judgment can help eliminate these delays.

6.5 How will mediation and negotiation lower the costs of my divorce?

If your case is not settled by agreement, you will go to trial. If there are many issues in your divorce and these issues are complex, such as custody, placement, and valuation issues, your attorney's fees and costs have the potential of skyrocketing.

By settling your case without the necessity of trial, you may be able to save thousands of dollars in legal fees and much emotional distress. You should know in advance the potential cost of divorce litigation so you can balance the costs of litigation with any negotiated settlement.

6.6 Are there other benefits to mediating or negotiating a settlement?

Yes. A divorce resolved by a mediated or negotiated agreement may have these additional benefits:

- *Allow for brainstorming.* Mediation and negotiating settlement allow brainstorming between the parties and lawyers. Looking at all possible options invites creative solutions to common goals.
- *Find solutions unique to you.* Rather than using a one-size-fits-all approach, a negotiated settlement allows you and your spouse to consider the unique circumstances of your situation to reach a positive outcome.
- *Open communication.* Mediation and negotiation provide each party an opportunity to be heard.
- *Take control of decisions impacting your children.* Your children will be better served if you and your spouse jointly determine your children's placement schedule rather than letting the judge decide. The

judge does not know, love, or understand your children.

- *Eliminate risk.* If a judge decides the outcome of your divorce, you give up control over the terms of the settlement. The decisions are left in the hands of the judge. If you and your spouse reach agreement, however, you have the power to eliminate the risk of an uncertain outcome.
- *Decrease conflict.* If your case goes to trial, it is likely that you and your spouse will give testimony that will be upsetting to the other. As the conflict increases, the relationship between you and your spouse deteriorates. This may be harmful to your children and family. Contrast this with mediation or settlement negotiations, in which you open communication. It is not unusual for the relationship between parents to improve after mediation and resolution of the divorce by a negotiated settlement.
- *Utilize experts.* Using trained professionals, such as mediators, retired judges, and lawyers, may help you reach a settlement that at one time seemed impossible. These professionals have skills to help you focus on what is most important to you and shifts your attention away from irrelevant facts. Mediators and attorneys can help you understand the legal implications of any decision and can project the outcome if your case goes to trial.
- *Focus on resolution.* The process of trial is stressful. Your energy is better spent focusing on your children, your finances, and the emotions of resolving your divorce rather than litigating it.
- *Move forward.* When you are going through a divorce, the process may feel like it's taking an eternity. By reaching an agreement, you and your spouse are better able to put the divorce in the past and move forward to a better future.

6.7 Is mediation mandatory in custody and placement disputes?

With few exceptions, mediation is mandatory if custody or placement is an issue. Wisconsin law provides that in any case in which it appears that legal custody or physical placement is contested, the parties shall attend at least one session with a mediator. If the parties and the mediator determine that continued mediation is appropriate, no Wisconsin court may hold a trial or a final hearing on legal custody or physical placement until after mediation is completed or terminated.

Prior to mediation, if you and your spouse are able to reach an agreement regarding custody and placement, that agreement can be reduced to writing and incorporated into the judgment of divorce without the necessity of mediation. Without such an agreement, however, mediation is mandatory.

6.8 My spouse abused me, and I am afraid to participate in mediation. Should I participate anyway?

You may be able to participate in mediation by the use of separate rooms, different locations, different times, or mediation via Skype or phone. Talk to your attorney about your mediation concerns. The mediator must be advised of the specific circumstances of your case in order to make appropriate arrangements in exceptional circumstances.

In addition, the court may waive mediation in some limited situations. A court may waive mediation if it finds that attending mediation will cause undue hardship or will endanger the health or safety of one of the parties. In reaching its decision, the court considers whether one of the parties engaged in abuse of the child or other party and whether either party has a significant problem with alcohol or drug abuse. Additional criteria may be considered if the requesting party can prove that a party's health or safety will be endangered by attending the session.

Prior to starting mediation, the mediator will ask you to complete forms that address the issue of domestic abuse and drug or alcohol abuse, among other factors. Accurate completion of this information is essential in order for the mediator to assess safety issues and to evaluate the balance of power between the parties if mediation in fact occurs.

Talk with your attorney if you have experienced domestic violence or if you feel threatened or intimidated by your spouse. Even if mediation is not waived, you will likely be assigned an experienced mediator trained in high-conflict situations.

6.9 What training and credentials do mediators have?

The background of mediators varies. Some are attorneys. Many are retired judges. Many come from other backgrounds such as social work or psychology. Some mediators received their training through the state of Wisconsin, others were trained out of state. Any custody and placement mediator in Wisconsin must have twenty-five hours of mediation training or three years of professional experience in dispute resolution. Every mediator must have training in the dynamics of domestic violence and the effects of domestic violence on victims of domestic violence and on children.

Your attorney can check the credentials of your mediator. In Wisconsin, mediation is generally provided through family court services that supervise and perform mediation and any legal custody and physical placement study services. Mediation is provided in every county in the state. In addition, the parties to any action affecting the family may, at their own expense, receive services from a private mediator.

6.10 How do I prepare for mediation?

Prior to attending a mediation session with your spouse, discuss with your attorney what issues remain on the table for resolution in mediation. Know your settlement range and prioritize the issues of most significance. It is sometimes a good idea to have a specific, written proposal to take to mediation so that you can make your position known and you have a specific proposal at your fingertips. Oftentimes a mediator will ask for proposals and other relevant documents in advance of mediation so that the mediator can be fully prepared to assist the parties in reaching settlement.

6.11 Do children attend the mediation sessions?

No.

6.12 I want my attorney to look over the agreements my spouse and I discussed in mediation before I give my final approval. Is this possible?

Yes. Not only is this possible, it is unconditionally recommended. Before giving your written or final approval to any agreements reached in mediation, it is critical that your attorney review the agreements. This is necessary to make sure that you understand the terms of the mediated settlement and that its terms are correctly incorporated into the final judgment. It is important that the terms of the final judgment and the terms of the mediated agreement do not in any way conflict.

6.13 Who pays for mediation?

The cost of mediation must be paid by you and/or your spouse. Often it is a shared expense. Expect your mediator to address the matter of fees in advance of mediation.

6.14 What if mediation fails?

Mediation is not always successful. Sometimes it takes a number of attempts. Sometimes issues must be left to determination by the court. Sometimes mediation provides insight and cause for reflection, enabling a negotiated settlement at a later date. Mediation can be used to educate either party, so its value is not only measured by whether an agreement is signed on the day of mediation.

6.15 What is a *settlement conference*?

A *settlement conference* may be a powerful tool for the resolution of your case. It is often called a *four-way meeting* because it includes you and your attorney, as well as your spouse and his or her attorney. Sometimes the guardian *ad litem*, social worker, financial advisor, or other experts may be included in the settlement conference. That is a determination made by the attorneys involved. The goal is to negotiate a resolution of your case without the necessity of trial. Settlement conferences are most effective when both parties and their attorneys see the potential for a negotiated resolution and are fully prepared at the settlement conference to negotiate.

6.16 Why should I consider a settlement conference when the attorneys are able to negotiate through letters, e-mails, and phone calls?

A settlement conference may eliminate the delays that often occur when negotiations take place through correspondence, e-mails, and calls between the attorneys. Rather than waiting days or weeks for a response, you may receive a response on a proposal in a matter of minutes because you are together in the same location with the same priority of settlement.

A settlement conference also enables you and your spouse, if you choose, to fully explain to the other the exact reasoning behind any request or proposal. Supporting documents can be immediately provided. A settlement conference is an opportunity for eye-to-eye contact to resolve issues then and there with the assistance of attorneys and other professionals.

6.17 How do I prepare for my settlement conference?

Being well prepared for the settlement conference will help you make the most of this opportunity to resolve your case without the necessity of trial. To prepare for any settlement conference, talk to your attorney about what you should bring to the conference. In most instances, the information will already be accessible at your attorney's office because of prior discovery and informal exchange of information. Here are some additional ideas that will make your settlement conference more productive:

- Provide in advance any additional, requested information. This will generally include updated payroll stubs, most recent tax returns, updated debt amounts, most recent asset valuations, or other documentation.
- Know in advance the issues to be addressed at the settlement conference.
- Go with a positive attitude, a listening ear, and an open mind to any settlement conference. Go with the attitude that your case will settle. Be willing to listen to your spouse and his or her attorney. Be willing to share and explain your position. Resist the urge to

interrupt. Ask to talk to your attorney in private if you believe misinformation has been provided or if you want to update your lawyer on any significant issues.

Few cases settle without each side demonstrating some flexibility and a willingness to compromise.

6.18 What will happen at my settlement conference?

Typically the conference will be held at the office of one of the attorneys, with both parties and lawyers present. If there are a number of issues to be discussed, an agenda may be used to keep the focus on relevant topics. From time to time throughout the conference, you and your attorney may meet alone to consult as needed. If additional information is needed to reach agreement, some issues may be set aside for later discussion.

The length of the conference depends on the number of issues to be resolved, the complexity of the issues, and the willingness of the parties and lawyers to communicate effectively. An effort is made to confirm in writing which issues have been resolved and which issues remain disputed. A second settlement conference may be necessary, or the parties may decide to draft a *partial marital settlement agreement* setting forth any issues resolved at the settlement conference for submission to the court. This limits the number of issues to be decided at trial.

6.19 What is the role of my attorney in the settlement conference?

Your attorney is your advocate during the settlement conference. You may count on him or her to support you throughout the process, to make sure that all issues are addressed, and to counsel you privately outside the presence of your spouse and his or her lawyer.

6.20 Why is my lawyer appearing so friendly with my spouse's attorney?

Successful negotiations rely on building trust between the parties working toward agreement. Your lawyer may be respectful or pleasant toward your spouse or your spouse's lawyer to promote a good outcome for you. In addition, opposing lawyers often work together on a regular basis and see

each other at the courthouse or attorney functions. It is a positive thing if your attorney has a good relationship with other attorneys, judges, and court staff. That can only work to your advantage.

6.21 If my spouse and I reach an agreement, how long will it take before it is finalized?

If a settlement is reached on all issues through negotiation or mediation, one of the attorneys will draft a marital settlement agreement that must be reviewed and signed by you, your spouse, and the guardian *ad litem,* if applicable. That document is then filed with the court and a final divorce date is set before the judge assigned to your case or the family court commissioner. Wisconsin has a 120-day waiting period, so the divorce date cannot be set prior to the expiration of 120 days from the date of service or signing of the admission of service. Timing of the divorce date is also dependent on the court and the attorneys' schedules.