

Divorcing in California and the Use of Mediation



by

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1. Nature of Divorce

Divorce has become common but that makes it no less painful. It is one of the most difficult and traumatic processes you can go through. A relationship you expected to provide love, companionship and security for the rest of your life has fallen apart. A sense of failure is common. Fear for what the future will bring can be intense. The desire to blame your spouse can be all-consuming. The range and intensity of unpleasant emotions may be the greatest you will ever experience.



If you have minor children, they will now not have the opportunity to grow up in the "normal" family you wanted to provide for them. Yet you will have to continue to parent your children with the person who may seem to you to be largely responsible for the divorce.

In the midst of all the upset, many important decisions need to be made to allow you to separate your lives. Many decisions relate to the children but most are financial. They involve somehow getting along with less. Making these decisions is complicated by the often significant imbalances between you and your spouse as regards earning ability, knowledge of your finances and comfort in dealing with financial affairs.

How you manage the divorce may well have repercussions far into your future. For many people, the financial strain, trauma and anger weigh on them for many years. Yet for others, divorce becomes a positive learning and transformative experience that opens their life into new and refreshing possibilities. They remain on friendly terms with their former spouse after the divorce is completed.



How you come through this life crisis depends largely on how you approach it personally and the process you choose for doing so. There naturally is disappointment and resentment when a marriage ends, but that does not mean that the divorce has to be an acrimonious battle.

Try to resolve and end any blame, guilt, and resentment. You and your spouse did the best you could given your individual limitations and shortcomings. You both made mistakes and had failed expectations. Try not to focus on what your spouse did or didn't do. Instead focus on the present and the future, and how you can be fair to yourself, your children, and your spouse. If you can find some peace of mind it will be calming for all concerned and it will facilitate a peaceful resolution.

It is possible to have an amicable divorce. It takes two people who are willing and able to focus on their future instead of the past, and who want to find solutions that will work for both of them. In a healthy divorce, mutual respect and concern for the best interests

of the children prevail. If the process you choose is respectful and compassionate, it will be easier to have a healthy divorce. When communication is difficult and trust has been shaken, it can help greatly to work with an impartial mediator who can help you through all the issues, exploring options and finding common ground.

2. Legal Requirements

There are two main things you need to do to complete your divorce. For most couples, neither is easy. First, various complicated forms and documents need to be filed with and accepted by the court. Second, and more important, you need to make and document all the decisions required for your separation.

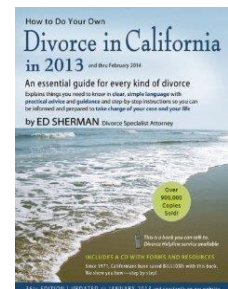
For couples with minor children these decisions include:

- a parenting plan;
- child support.

For all couples decisions are required as regards:

- division of your assets and debts;
- spousal support.

Some people figure out how to file all the required forms on their own. The court has a web site (<http://www.courts.ca.gov/selfhelp-divorce.htm>) and self-help centers at many court houses that can help with this. Other people engage legal document assistants, paralegals, online services or lawyers to fill out the forms. The requirements are exacting and the implications are significant so considerable care should be taken. If you are interested in doing as much of your divorce as possible on your own, a great book is: "How to Do Your Own Divorce in California in 2014" by Ed Sherman.



There are four basic procedural steps in filing for and obtaining a divorce:

- 1) File the petition for divorce;
- 2) Serve the petition on your spouse. Your spouse can then choose whether or not to file a response;
- 3) Disclose financial information to each other using court forms;
- 4) File a judgment package of forms or have a trial (the exact actions depend on whether your spouse filed a response and whether the two of you are able to come to agreement on all the issues).

3. Divorce Decisions

Here are many of the detailed understandings and decisions that may need to be reached to complete your divorce:

Division of Assets and Debts

1. What are all the assets that the two of you own either jointly or separately?
2. What are all the debts that the two of you have either jointly or separately?
3. Which assets and debts are jointly owned, which are separately owned and which have a mixture of ownership?
4. For those assets and debts with mixed joint and separate ownership, what is the exact mixture?
5. What is a fair and appropriate valuation for each asset and debt?
6. Should a specialist value any of your assets, such as a house, pension or business?
7. What options do you have for dividing your assets and which seem best?
8. What are the tax implications of these options?
9. What would be the likely short-term and long-term implications of these options?
10. What steps need to be taken to carry out the actual division of your assets and debts?
11. If you are going to continue to own jointly any asset after the divorce, such as real estate, what agreements are needed regarding the ongoing management of these assets?



Spousal Support

1. Will spousal support be paid? If so, how much will be paid monthly or will there be a lump sum payment?
2. How long will it be paid?
3. What events will cause termination of spousal support?
4. Will the amount paid change at any predefined intervals or events?
5. Will there be life insurance that guarantees payment of spousal support?
6. Have you structured the spousal support in such a way as to allow it to be tax deductible?
7. Do you agree that the spousal support will be tax deductible for the payer and taxable for the recipient?
8. When and how will spousal support be paid each month?
9. Will the payer's wages be garnished?
10. What is the best way to provide each of you with health insurance after the divorce?
11. Will you allow the court to modify spousal support in the future upon a significant change in circumstances or will you choose to make it non-modifiable?

Parenting Plan

1. Will legal custody be joint or sole?
2. Will physical custody be joint or sole?
3. What will be the regular schedule for each parent to have time with the children?
4. How will the schedule change during the summer and other school vacations?
5. How will time with the children be allocated for holidays and other special days?
6. How much vacation time will each parent be allowed with the children?
7. Who will be responsible for transporting the children to the other parent?
8. What communication will be allowed with the children when they are with the other parent?
9. Should there be any rules for communication between the parents to help ensure everything goes smoothly?
10. How will decisions be made as regards what special activities the children will be involved in?



Child Support

1. What is the amount of child support that would be paid according to California guidelines?
2. Do you think a different amount would be in the best interests of the children?
3. How will health insurance for the children be provided?
4. How will uninsured health care costs for the children be paid for?
5. How will child care costs that enable one or both parents to work be paid for?
6. How will extracurricular activities for the children be paid for?
7. When and how will child support be paid each month?
8. Will the payer's wages be garnished?

4. Approaches to Divorce Decision Making

There are five main ways to go about making the financial and parenting plan decisions for your divorce:

- decide everything on your own;
- mediation;
- collaborative divorce;
- negotiation through lawyers;
- litigation.

No matter which you choose, if you reach a settlement it will be honored with the same legal force by the court.

Deciding everything on your own is of course the cheapest approach. It can also be the most harmonious. Unfortunately, many couples are unable to do this for all issues and so turn to one of the other approaches.

Mediation involves both of you working with a trained mediator who will guide you through the decisions that need to be made and help you find a way through the sticking points. Representing neither party, the mediator remains impartial and works actively to address imbalances that may exist between you and your spouse, so that each party feels empowered to make informed decisions that are fair and appropriate.

Collaborative divorce is a relatively new team approach. At a minimum, each of you will have a lawyer who is fully committed to working for a negotiated settlement. In addition to the lawyers, the team often includes other specialists such as a financial expert or a family therapist. This approach gives you the benefit of maximum professional input. It is more expensive than mediation but less than litigating through to a trial. If a settlement cannot be achieved, the lawyers withdraw and each of you will need to hire a new lawyer if you want to proceed with litigation.



If each of you hires a lawyer for representation through the litigation process, the lawyers will at some point attempt to negotiate a settlement to avoid the need for trial. The negotiation will tend to be adversarial (since each lawyer is hired to advocate for their client) and you may not meet face to face with your spouse. As a result any settlement reached is likely to be less satisfying than one achieved through mediation or collaborative divorce.

If you proceed all the way to trial with a lawyer, the process is very expensive. You can litigate your own divorce without hiring a lawyer. However, you would be wading into a complicated legal process in which you probably would not know the procedural rules or

the laws the judge will rely upon in decision-making. In either case, the trial will be a public airing of your private life. Given the jammed court calendars, it may take years to complete your divorce. If none of the other approaches above are agreeable to both of you or successful, you may have no other choice. But you will have given decision-making power to the judge and the result is often far from predictable.

Benefits of Mediation

The many benefits of mediation include the following:

Likelihood of Success

Mediation generally results in conflict resolution 70-80% of the time, assuming the participants mediate voluntarily. My divorce mediation success rate for resolving all issues is higher. Even those cases that don't get resolved completely almost always have at least partial resolution.

Money Savings

The cost of a typical divorce with a lawyer for each side litigating all the way through trial often exceeds \$40,000. Cases which involve complex property, support or custody issues or high conflict can cost much more. The team approach of collaborative divorce can often cost \$20,000 or more given all the professionals often involved, including a lawyer for each party. A comprehensive divorce mediation averages between \$2,000 and \$5,000.

Time Savings

Divorce mediation usually takes three to five months from beginning to end. The main factors are the complexity of the case, the intensity of the conflict, the availability of the parties and the strength of their desire for resolution. Collaborative divorce normally takes longer due to the scheduling challenges of having more professionals involved. A litigated divorce can take much longer given the extensive legal maneuvering and today's jammed court calendars.



Convenience

Mediation proceeds according to your schedule. I have some flexibility as to where mediations are held and I customize the process to you and your spouse. I use online tools such as email and videoconferencing to make the overall mediation as efficient as possible.

Choice and Control

Except insofar as California requires divorcing parties to at least attempt mediation with a court mediator on parenting issues before allowing a judge to rule on them, divorce mediation is a voluntary process. You choose your mediator and either of you can stop at any time.

You control the scheduling of the mediation and you have some control over the mediation process itself. You can discuss all your concerns and you will be heard and taken seriously. As you proceed through the mediation clarifying and resolving issues, a sense of control should develop. Most importantly, you do not have to make any decisions regarding the matters being mediated unless and until you are ready to do so. You and your spouse therefore retain complete control over the outcomes.



Party self-determination is a foundational principle of mediation. I will provide you with pertinent information to help you make informed decisions. I can also provide you with ideas and options, but I will not pressure you or advise you as to what I think your decisions should be.

Flexibility

Mediation is an inherently flexible process. I approach each mediation session openly, allowing it to develop in its own unique way. In mediation you can explore creative parenting, financial and tax planning solutions that will benefit both parties and all concerned.

With few exceptions, a court will not second guess or overrule what you agree to in mediation. You can come up with temporary financial and parenting plan arrangements and try them out to see how well they work before finalizing them in your settlement agreement. You can also discuss and make agreements on matters over which a divorce court has no jurisdiction. For example, you might decide how the expenses of a child's college education are going to be covered, an issue that is beyond the jurisdiction of the court.

Privacy

In order to promote candor, the mediation process is totally confidential. Mediation therefore allows you to keep your divorcing process private. All discussions during mediation are confidential and cannot be revealed in a later court proceeding. The mediator's files are confidential and the mediator cannot be called as a witness in any court proceeding.

Collaboration

Research has consistently shown that the best way to resolve conflict is through collaboration. In divorce mediation you are encouraged to express your concerns, hear each other and work together to develop solutions that address everyone's needs. If you have trouble communicating with your spouse, the mediation process will include learning how to communicate with each other more effectively.



Resolving conflict collaboratively stimulates learning, growth, better communication and trust. If you and your spouse will have a continuing relationship, say through the parenting of your children, the experience of collaborating together in mediation should make it easier for you to work together effectively in the future.

Dignity and Respect

Although emotions will often flare up in divorce mediation, one of the mediator's responsibilities is to encourage and maintain a respectful atmosphere and process. Mediation is a dignified approach to divorce. You honor each other by working together to end your marriage through open communication, respect and fairness. Divorce mediation provides a greater opportunity for healing and closure than more formal approaches.

Safety and Protection

It's the mediator's job to help you feel safe, express all of your concerns, become well informed about the decisions to be made and negotiate competently. If your spouse tends to be overbearing or you have difficulty expressing yourself in the presence of your spouse, the mediator will work to balance the communication and sense of power between you. On occasion it may be best to separate the two of you for part of the mediation, with the mediator shuttling back and forth between you.

Emotional Inclusion

Often it is unavoidable or important to express yourself emotionally in divorce mediation. The expression of pent-up feelings can open doors to understanding and resolution. Divorce mediation is an intimate process and a good divorce mediator will make room for this.



Animosity is often present going into mediation, but the process is designed to reduce conflict. You can be a candidate for divorce mediation even if strong emotions are currently inhibiting or blocking constructive communication with your spouse.

Divorce mediation can be a very healing process, although this requires considerable openness from the parties. Such openness may not be there at the beginning, but it will normally increase as the mediation proceeds.

Satisfaction

For all of the reasons above, mediation is likely to provide you with a higher level of satisfaction than any other form of third-party facilitation of your divorce. Also, the informal nature of the process facilitates addressing any areas of dissatisfaction as they arise so they can be quickly resolved.

Durability

Studies have shown that when you make your own agreements in mediation, compliance rates are much higher than when decisions are imposed upon you. Divorce mediation also helps you learn to communicate more effectively with your spouse. Both of these benefits are valuable when you continue after the divorce to co-parent your minor children.



Parties who have resolved their divorce in mediation are often better able to resolve any subsequent issues on their own. If they are unable to do so, they are much more likely to return to mediation than resort to litigation.

Mediation involves building future conflict prevention into the agreements. This is done by making the agreements as unambiguous as possible and by creating guidelines for resolving disputes that may arise in the future.

Low Risk

There is little risk in trying divorce mediation for many reasons including its voluntary nature, confidentiality, low cost, and retaining control over decision making. Even if you are unable to resolve all the issues in mediation, you will normally resolve at least some of them which will move you forward in your divorce.

Selecting a Divorce Mediator

What are the most important qualities of a divorce mediator? While the qualities required vary somewhat depending on the nature of each divorce, overall I would suggest that the following qualities are most important in approximately the following order :



- excellent empathetic listening skills;
- skillful handling of conflict-laden communication processes;
- excellent organizational and problem-solving skills;
- a clear understanding of the basics of divorce law;
- a thorough understanding of the many financial aspects of divorce;
- a thorough understanding of how to help parents create durable parenting plans;
- a clear focus on being an excellent divorce mediator, as evidenced by qualifications, training, professionalism and active membership in professional mediation organizations.

Since people skills are most important, I advise meeting potential divorce mediators in person to assess their capabilities and fit.

Should the mediator also be a lawyer? Not necessarily. There are many excellent mediators who are not lawyers. Most mediators come to mediation as a second career. While some come from law, many come from other disciplines. Effective divorce mediation requires a set of skills and attitudes that is very different from those characteristic of a litigation-oriented lawyer. Lawyers who attempt to make the transition to mediation frequently have to try to relinquish approaches which made them successful litigators. In short, some lawyers are good mediators; others are not. Very few are full-time mediators. Nowadays some offer mediation alongside their main, litigation-oriented family law practice.

In practice, only 2-3% of a divorce mediation involves talking about the law because the law gives you lots of latitude to come up with your own solutions. What is important is that you have access to both legal information about divorce and legal advice tailored to your individual situation. A good divorce mediator will know basic divorce law and procedure and be able to communicate it to you. A good divorce mediator will also encourage each of you to obtain a consulting lawyer as a complement to mediation to help make sure you understand your legal rights before you finalize your agreement.

Divorce Mediation and My Approach

Divorce mediation is a confidential process in which a couple negotiates a divorce agreement with the help of a trained, impartial third party known as a mediator. The mediations take place in an informal, comfortable setting. The mediator facilitates discussions regarding spousal support, division of assets and debts and, if minor children are involved, child support and a parenting plan. Divorce mediation is an assisted negotiation process. The mediator helps you come up with ways to resolve your differences and negotiate agreements on all issues. As you reach agreements the mediator documents them for you.

The exact scope of the mediation is up to you. In a typical comprehensive divorce mediation, the mediator makes sure you understand and address all of the areas required for a divorce. You may also choose to cover topics that a divorce court would not necessarily address, such as visitation with the children by extended family, what you will do if one parent chooses to move away, or how exactly you will manage any property that you decide to continue to own jointly after the divorce.



Individual and Joint Sessions

I normally begin by having an individual session with each spouse. These sessions usually last from 60 to 90 minutes. They give you an uninterrupted opportunity to tell me in confidence whatever you want, express your concerns and let me know what is important to you. Of course I will answer any questions you have.

After these individual sessions, the remaining sessions are usually all joint. If it would be helpful at some juncture to meet with you individually we will do so, but usually only fairly briefly.

What does the Mediator actually do?

As a mediator, my role is primarily to facilitate productive discussions that will lead to resolving issues and coming up with satisfactory agreements.

While the process is never completely linear, we essentially take one subject at a time, identify the issues that need to be addressed and the decision-making that needs to be done, talk about what is of greatest concern and interest to each of you, generate ideas for solutions, evaluate them and develop agreements acceptable to both of you.

What do I actually do in a session? Following are some of the main things:

- provide a safe, comfortable, neutral, and confidential mediation environment;
- create an agenda;

- maintain a respectful process;
- listen to you carefully;
- help you understand each other;
- intervene as necessary to help you communicate more effectively with each other;
- ask questions to help ensure everything relevant is understood and carefully considered;
- provide legal, financial and other information when it is important to your decision making and your understanding of the subject being discussed;
- balance the process so neither side is disadvantaged or dominated by the other;
- try to prevent issues from becoming overly polarized;
- help you re-examine expectations that may be unrealistic;
- provide ideas for solutions if you seem to be stuck or if you would find them helpful;
- keep the process organized and moving forward productively;
- take notes of issues, key facts, agreements and actions that need to be taken.



People often feel strong emotions in mediation and sometimes feel the need to express them. This is not discouraged as long as it is done in a way that does not overly trouble the other person or inhibit progress in the mediation.

Quite often there are emotional issues that need to be expressed and addressed in order to make room for mutual understanding and agreement. Sometimes doing so provides breakthroughs that are very important in coming to terms with the end of the relationship and being able to move forward.

Divorce mediation is forward-looking rather than therapeutic in its central purpose. In general, we therefore will not spend more time going over the past than is necessary to enable us to move forward.

Including Other Specialists

The use of other specialists in conjunction with the mediation is always your choice. I recommend that each of you have a consulting lawyer you can turn to for input and advice. I highly recommend that each of you have a consulting lawyer review the final agreement before you sign it.

It may be wise during mediation to obtain input or advice from a specialist on financial matters that are complex, have major tax implications, or are difficult to value. Sometimes, especially when there are very young children, it can be helpful to bring in a child development specialist who understands how to minimize the negative effects of divorce on children.

Here are examples of specialists that it occasionally makes sense to hire to provide input for the mediation:

- real property appraiser;
- actuary to value a pension;
- business valuation expert;
- tax specialist;
- forensic accountant;
- legal expert;
- child psychologist.

As a Certified Divorce Financial Analyst, I am able to help you understand and work through most if not all financial and tax matters relating to your divorce, thereby reducing the likelihood of needing additional outside financial expertise.

Completing the Process

As individual agreements are reached, I will put them in writing. At the end of mediation



I will write up all the agreements in a "Memorandum of Understanding." Nothing is considered to be final and binding until you both decide it is. Normally the signing of this document signals that your agreements are binding.

Before signing the Memorandum of Understanding, I strongly recommend that each of you have it reviewed by your own mediation-friendly consulting lawyer. Once it has been finalized and signed, it will be incorporated into the package of documents and forms filed with the court to complete your divorce.

FAQs

Is a lawyer required to get divorced in California?

No. It is possible to do everything on your own. A lot of couples do this. A great book to read if you want to know more is "How to do Your Own Divorce in California in 2014" by Ed Sherman. However, most of these divorces are relatively simple with little or nothing in dispute. And just because it is possible to divorce without any input from a lawyer doesn't necessarily mean it is a good idea.

Can I get divorced without having to go to court?

Yes. If you are able to come to agreement on all issues (with or without the help of a mediator), the required court paperwork can be submitted and you can be divorced without ever setting foot in a courtroom.

Is mediation for you?

Couples who want a fair divorce settlement and who want to make their own decisions regarding their financial and family future are excellent candidates for divorce mediation. Some people are hesitant to try divorce mediation because of the conflict and emotional intensity frequently involved in their relationship. It's a misconception that mediation is successful only for low conflict couples. Mediators are trained and skilled in handling conflict. Often a very visible conflict is easier to work with than one that remains largely hidden.

Does the mediator protect my interests and ensure negotiations are fair?

With most couples there are imbalances. Sometimes these are simply knowledge-oriented such as when one spouse has taken care of all the financial matters in the relationship. Sometimes one spouse talks much more than the other or tries to apply pressure to get his or her way. Although the mediator is fundamentally neutral, it is part of the mediator's job to address these imbalances so that each side feels safe, confident and empowered in decision making. In an unusual case where the mediator finds it impossible to rectify an imbalance, it may be inappropriate to continue with the mediation.



When is mediation not appropriate?

Mediation is generally not appropriate when there is:

- a history of domestic violence, abuse or emotional intimidation;
- a restraining order currently in effect;
- an untreated alcohol or substance abuse or mental health issue of sufficient severity as to undermine competence;

- concealment of income, assets or debts (note that truthful and complete financial disclosure is also required in the court process for obtaining a divorce);
- a refusal to participate honestly;
- an unwillingness to make any concessions or compromises;
- a disparity in the negotiating capabilities of the parties that is too large for the mediator to be able to correct.

How long will the mediation take?

Two to four months is common. Sessions are usually scheduled two or more weeks apart to take into account busy lives, required data gathering and the time necessary to let everything sink in and make good, durable decisions. If both of you want to proceed more quickly, we can do so.

How many sessions will it take to reach agreement?

A typical comprehensive divorce mediation takes four to eight sessions of 2-3 hours each. Some of the factors determining overall mediation length are the complexity of issues, level of conflict, preparation you do between sessions and how you and your spouse communicate and make decisions.



My schedule is crazy. Can't we do this by email?

Perhaps partially. Although mediation is usually most effective in person, there are often ways we can move the process forward using email and/or videoconferencing products such as Skype. I will work with you to make the mediation as efficient as possible.

How much will it cost?

The mediator fees for a comprehensive mediated agreement generally range between \$2,000 and \$5,000. The cost of having a Legal Document Assistant prepare your court paperwork is another \$600 or so. If you make use of lawyers and other specialists, these costs are additional.

Who can attend mediation sessions?

Mediation is a very flexible process. When it makes sense to invite another specialist (legal, financial, mental health or other) to provide input, we can do so. If you have a lawyer, he or she can attend some or all mediation sessions. If you have teenage children and want to obtain their input, this can be done in a joint session or the mediator can speak privately with them. It is even possible for you to have a friend or support person present.

Whenever considering including someone in addition to you and your spouse, we would talk about this in advance and make sure this is acceptable to both of you.

If I've already filed divorce papers can I still mediate?

Yes. It's never too late to mediate, even if you have hired an attorney and/or have a scheduled court hearing.

When is the best time to begin mediation?

In general, sooner rather than later and before you incur the expense and emotional turmoil of litigation. Frequently the spouse who initiated the divorce is ready to begin mediating before the other spouse. Of course both need to be ready and willing to work out a divorce settlement.

Couples enter divorce mediation at many points along the route. A few complete mediation of their entire agreement before they file the petition for divorce. Others file the petition, mediate their agreement, and then file the necessary forms to complete the process. Others turn to mediation after becoming dissatisfied with the process and expense of litigation.

What's the best way to encourage my spouse to consider mediation?

It depends on your situation. Options include:

- discussing it directly with your spouse;
- asking me to contact your spouse in writing or by phone;
- providing information about mediation such as is on my web site and others like mediate.com;
- arranging for both of you to meet together with me for a free consultation.



Regardless, a respectful, no-pressure approach is best. If some divorce issues are very contentious and attempting to talk about them with your spouse only inflames the conflict, it may be wise to defer talking about them in order to preserve some sense of peace. This may also make it easier to work them out later in mediation.

I have more questions. What's the fastest way to get answers?

Please feel free to contact me by email or phone. My website also has more detailed information. If you and your spouse are seriously exploring mediation as a possibility, I offer a free consultation.