

Reviewing Attorneys: The Tightrope Walkers of Mediation

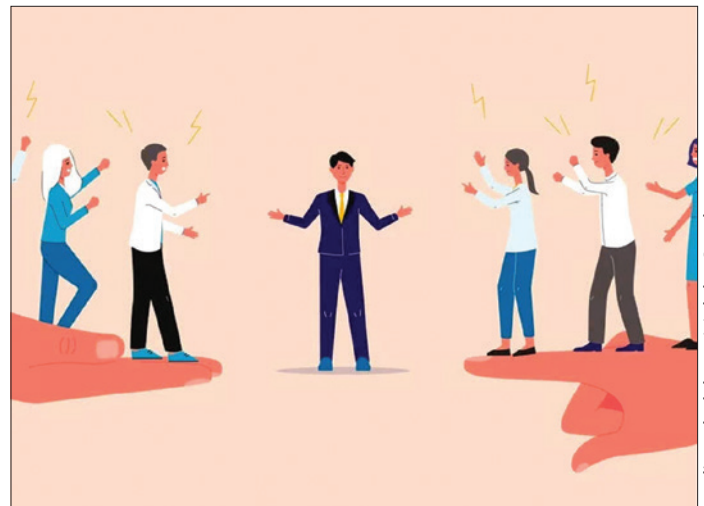
By Louisa DeRose and Sarah Hechtman

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Mediation has made its way through New York State as a mainstream, generally accepted way for couples to come to consensus about the terms of their divorce. Most matrimonial courts now encourage divorcing parties to consider mediation before moving forward with litigation. This shift has benefits for both the courts and the divorcing parties.

As a powerful form of alternative dispute resolution (ADR), mediation allows couples to chart their own course at the end of their marriage rather than having their futures decided by a stranger whose decisions are limited by law and precedent.

The mediation process is streamlined, at least relative to court-involved processes that can require extensive discovery, motion practice, the use of experts and trips to the courthouse. As a consequence, the process tends to be quicker, more cost effective, and more peaceful all while using less of the court's resources. It allows the parties to come to a nuanced agreement that they feel ownership



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of, taking their family's specific needs and preferences into account.

Generally, mediation sessions involve one neutral mediator and the parties. Sometimes the parties have lawyers who are also present at sessions. More often, the parties attend mediation sessions without counsel present, but each may hire his or her own lawyer-consultant who acts as "review counsel."

The reviewing attorney's role is to explain the broader law around the issues and how that law affects the issues that the parties are deciding. To some, the concept of a reviewing attorney can

present as a headscratcher; it is another retainer, another “voice” in the room, and another opinion to consider. Though sometimes an unexpected part of mediation, an effective reviewing attorney can improve the process for both the parties to the dispute and the mediator.

Presenting the Full Picture

When a couple uses mediation to settle their divorce, the mediator is tasked with guiding the couple through the myriad decisions they must agree upon together such as crafting a parenting schedule, determining the amount and duration of spousal maintenance, determining basic child support, defining the children’s “add-on expenses” and apportioning the responsibility for paying them, distributing the parties’ assets and liabilities, and making decisions concerning life insurance, income taxes, and estate rights.

However, mediation is not legal representation; in fact, many mediators are not attorneys. The mediator acts as a neutral third party who guides the couple through the decisions to be made, ideally creating the conditions in which the couple can hear one another’s positions, discuss the issues rationally, and work together to develop options and reach agreements. This allows the couple to leverage the process’s flexibility in creating a contract that feels tailored to, and borne of, the unique circumstances of their marriage.

The reviewing attorney not only helps his or her client to make knowing decisions, but also aids the mediator by more fully exploring issues which the mediator, as a neutral, may feel constrained to avoid.

For example, a couple with children enrolled in private school enters mediation. The wife has just recently returned to the workforce and is not earning as much as her husband. Although the law provides that each party pays their proportionate share of “add-on” expenses,

this couple decides that the husband will pay all of these, including private school tuition. He acknowledges that, given her salary, the wife is not able to pay for private school or to easily contribute to the other extras expenses of the children like camp, soccer lessons, and their insurance premiums.

Through mediation, it becomes clear that the husband is committed to the children continuing their lifestyle including the expensive schools and private lessons that they are used to. He does not want to push the wife to pay for the children’s big expenses using marital assets, therefore diluting the amount the wife will receive in equitable distribution of their liquid assets, and he recognizes that the wife will have a hard time keeping up her “share” of them. The mediator may ask the couple guiding questions, provide them with information about what the law provides, and encourage them to consider the long-term implications of their decisions.

Ultimately, if the couple indicates that this is what they would like to do, the husband’s obligation to pay all the children’s expenses becomes a part of their final agreement, which will be reduced to a court-enforceable contract. In this example, a lawyer representing the husband could advise him that a court would not likely order that to which he has agreed, or that it might cap his contribution to the amount it would cost to send their child to a New York State university, or that he might be entitled to a dollar-for-dollar credit against his child support payments for any room and board expenses he pays, whereas the mediator might feel it is overstepping to offer this sort of legal information.

The mediation process allows the couple to craft their own agreement in full understanding of their shared history, building a settlement that

considers background and nuance that the court would not evaluate in litigation.

The reviewing attorney can play a significant balancing role: they can advise their client of what the court is likely to do so that the parties understand when they are deviating from the law or legal convention and knowingly consent to doing so. With this complete picture of the divorce settlement, the client is poised to make smarter decisions through mediation, leading to a more workable settlement that both parties are comfortable with and committed to and, therefore, more likely to comply with in the future.

Mediation-Friendly

As much as reviewing attorneys must educate their clients about what rights they might be waiving, they must also respect the mediation process. If a reviewing attorney insists upon getting for their client what they are “entitled” to, that rights-based approach risks blowing up the mediation process entirely. In the payment for 100% of extra expenses example above, a reviewing attorney should advise the client that he does not believe a court would compel him to make such payments. Once the reviewing attorney knows his client understands that, he should defer to his client and the background and reasoning that led the client to make the decision.

Another example: if a wife generously provided her husband with funds from her separate property inheritance to create a business during the marriage, she may decide in mediation that she wishes to waive the return of those funds and further wishes to waive any interest she has in the value of the husband’s business. She may be willing to do this because she is aware that she is due to inherit a great deal of money in

the foreseeable future or because she knows that the husband has put immeasurable work into growing the business and she wants him to keep it. The outcome would likely be different if decided by a court applying New York’s equitable distribution law. If a reviewing attorney were to insist that the wife claw back her separate property simply because she may do so, the reviewing attorney would be undermining his client’s intent to reach an amicable resolution that she, under the circumstances, feels is fair to both parties. The reviewing attorney should advise but should not cross the line into pushing a party to forsake what she believes is a fair outcome in favor of what the court might determine as a matter of law.

The fundamental goal of mediation is to allow parties to maintain autonomy over the decisions that will govern their family. These decisions should be made in light of the reviewing attorney’s explanation and application of the law. However, the most important context for the couple is their own sense of right and wrong and how they envision their future, which may be closely tied to their ex-spouse for years to come.

While a reviewing attorney may believe that his client could make more advantageous decisions, it is imperative that the reviewing attorney strike a balance between zealous legal advocate and compassionate counselor. They must respect the mediation process and assist the client to reach an agreement that is fair and equitable but which also honors the values and motivations that led that client to choose mediation in the first place.

Louisa DeRose is a partner and **Sarah Hechtman** is of counsel at Rower LLC where they focus their practice on matrimonial and family law.