

The lawyer/mediator dance in divorce mediation

BY CYNTHIA T. RUNGE

Perhaps because of my dual legal and mediation training, I'm always curious about how mediators and attorneys function in the context of a divorce mediation, especially when they, too, are trained in both roles. I spoke with several attorneys who are also mediators to get their thoughts about how mediators and lawyers effectively (and sometimes ineffectively) interact in divorce mediations.

SELF-DETERMINATION

Like most mediators, I believe in the parties' right to self-determination. In other words, I think people have the right to make their own decisions about their own lives. Even though I tell my mediation clients that they should obtain their own respective counsel to review their agreement, I recognize that they may not. In fact, some folks simply do not want to deal with lawyers because of the perceived added conflict of bringing a lawyer into the process, and/or because of the cost. Susan DeMatteo, a divorce mediator and family and collaborative attorney with a practice in Reading, says, "The reality is that mediation is less expensive. People may not want to spend the money to hire a lawyer to review their agreement (in addition to paying for mediation). Mediation is preferable to working out the terms of a (litigated) agreement on the courthouse steps." Thus, when mediating, or acting as counsel for one of the parties, it is important to remain focused on what the client wants to do.

Maureen Reilly, a trial attorney and divorce mediator in Boston, also represents clients in mediations. "In Superior Court, lawyers make presentations to the mediator. Typically, this is not the case in a family law mediation. In fact, the divorce mediator wants to hear from the parties, so the parties can also hear each other." Letting the parties have the opportunity to talk and listen to each other is one of the key components to having an effective divorce mediation. John Fiske, an accomplished family mediator and mediation trainer in Cambridge, says his favorite definition of mediation is: "All we do is give people

a place to talk." It is not about what the lawyers argue to the divorce mediator.

GETTING THE AGREEMENT APPROVED

What do you do as a mediator if you think that a provision the parties want to include in their agreement might not be approved? Most mediators have a strong sense of obligation to ensure that the parties' agreement will be approved by the court and will raise their concern with the parties. Fiske cautions that, "Mediators should not hide behind the judge and tell the parties, 'Oh, the judge won't let you do this.'" In instances where parties want to include an unusual provision in their agreement, Fiske tells his clients, "Go to court with the agreement you want ... If the judge tells you that you will have to address the provision another way, then you might need to do so if you want to get divorced." In other words, if the parties are going to do something unusual in their agreement, it is important for them to understand what they are getting and what they are giving up, and to be able to explain the reason(s) for their decision.

Some practitioners believe that mediated agreements are scrutinized more heavily than negotiated agreements. DeMatteo disagrees and says, "I think judges use the same standard whether the agreement is mediated or not. Judges are going to look at the guidelines and be consistent under the law. They are looking for precision, and we as mediators should be doing that." DeMatteo adds, "Judges may spend more time with pro se parties, some of whom may have filed mediated agreements." Thus, the issue may not be that mediated agreements are scrutinized more; rather, it could simply be that many parties who have mediated agreements also appear in court pro se.

CAN MEDIATION-FRIENDLY ATTORNEYS ZEALOUSLY REPRESENT THEIR CLIENTS?

What does it mean to be a "mediation-friendly" attorney? For Reilly, it means "honoring the parties' right and ability to determine the best course of action for themselves." If DeMatteo has a concern about a provision in a mediated agreement, she will



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make sure her client is fully informed and that the client has made reasoned decisions, while still honoring the intent of the agreement between the parties, if possible. Being "mediationfriendly" doesn't change any of a lawyer's ethical obligations to her client.

Fiske says he learned early on from a knowledgeable family services officer that figuring out whether or not a case is going to settle has everything to do with who the lawyers are. The lawyers are the "wildcard." In some instances, a lawyer may totally derail a mediation and the agreement that the parties wanted gets lost. Fiske notes that Massachusetts Rule of Professional Conduct 1.2 states, "... A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter ..." Nevertheless, it seems that some lawyers don't follow the rule and may push the client to go with the lawyer's advice instead of trying to work with what the parties want to do.

Although a lawyer needs to be sure that a client understands what he/she may be entitled to under the law and what the client is agreeing to, lawyers must also abide by a client's decision to settle or not. Fiske also points out that the SJC rules define various functions for the lawyer: "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." (Preamble 2, Rules of Professional Conduct.) Generally speaking, a "mediation-friendly" attorney is an advisor less zealous than the litigator and more comfortable with letting the parties make their own informed choices within the general light of the law. ■