

## **Anatomy of a Divorce Mediation**

By Steven R. Sugarman, Esq.

*The following fictitious divorce mediation is intended to inform readers about this process.*

### **Our Introductory Session**

I met Hank and Cindy in my waiting room, where Hank boldly stepped in front of his wife, eager to introduce himself and shake my hand. I warmly shook his hand and then, ever conscious of my role as an impartial mediator, extended my own to Cindy, along with a friendly greeting.

This was our first meeting to talk about mediating a divorce agreement between them. I began by gathering some background history: the couple has been married 16 years. Hank earned his dental degree just before the marriage and operates a successful dental practice. Cindy dropped out of college after becoming pregnant with their first of three children. As the children grew, Cindy returned to school, eventually earning a master's degree in geology. She works part-time as a college instructor.

I explained what mediation is, its confidential nature and how it compares to other forms of dispute resolution. My goal would be to facilitate communication in an impartial manner and to arm the couple with enough financial and legal information to help them arrive at an informed agreement. I cautioned that I would act only as their mediator, not their lawyer. I would not give them legal advice, but would educate them about the law. I encouraged them to obtain legal advice from their own attorneys between our sessions.

Like most divorce mediation clients, as a cost savings measure, Hank and Cindy elected not to bring attorneys to their mediation sessions. I informed them that as we neared the end of the mediation, I would *require* them to each review any draft agreement we reached with their own lawyers. By getting independent advice, each party is better assured of making an informed agreement. As for fees, I requested payment of a retainer and would charge them hourly for my services against that retainer.

Hank and Cindy were eager to begin and seemed to understand the process. They agreed to the terms I laid out. But was I ready to mediate a divorce between this couple? I observed their interaction, assessing the balance and dynamics of power between them. Mediation may be inappropriate for a couple when one spouse is intimidated or easily manipulated by the other. And a relationship characterized by domestic violence is certainly ill-suited for mediation. Mediation may be quite workable, however, if one spouse is simply more knowledgeable, articulate or outgoing than the other spouse. As a mediator, I am trained to use strategies, without showing bias, to balance the power between parties. During our session, Hank and Cindy appeared to exercise fairly equal power in their relationship, although Hank knew a little more about their finances; Cindy, then, would have to be armed with comparable knowledge in the process.

Hank and Cindy reviewed and signed the mediation fee agreement that I had sent to them and agreed to pay my fees out of a marital savings account. The fee agreement provided that I could terminate the mediation if the participants insisted on entering an agreement that is

clearly unconscionable or not in the children's best interest or if either party concealed relevant financial information. They understood that, as a prerequisite to addressing the financial issues, they would each need to complete a sworn financial affidavit and bring in all back-up documentation regarding income, assets and debts.

## Session Two

At our second meeting, we established an agenda of issues and began the mediation. I asked the couple why they were splitting up. Hank said that their lives had simply taken different directions. Cindy nodded, but her eyes filled with tears. She volunteered that Hank had been having an affair with another dentist for the last six months. Hank became agitated, asking Cindy why she revealed this. I interceded, assuring them that although mediation is quite distinct from counseling, I can more effectively facilitate communication when I have a sense of the parties' emotional dynamics. This became especially evident when our discussion turned to the first issue they wished to discuss: the marital residence.

Hank wanted to remain in the house and proposed buying out Cindy's share. He offered to pay her one-half of the couple's equity in the home. Cindy refused, even after Hank tried to sweeten the pot with an additional \$20,000 in cash. Cindy wanted to sell the house – no ifs, ands or buts. What was this about? Certainly not money! I probed the issue and learned that Cindy was plagued by the image of Hank sneaking into their home with his girlfriend (as he admittedly had done). She wouldn't accept the idea of Hank living in *their* home with the other woman. In her view, Hank was selfish, deceptive and had caused her extraordinary pain. All of this came out and Hank truly heard it for the first time.

Hank came to understand Cindy's true feelings not only about the house, but also about his betrayal. I gave them the legal information that a judge has the discretion to award an asset to the party who wishes to keep it and then award other assets to the other party to effectuate an overall equitable distribution. Hank decided that the cost of fighting for the house through litigation would be too high. He recognized that he might end up with the house if he went to court, but that Cindy's anger and resentment could jeopardize his chance to have a positive co-parenting relationship with her. He yielded to her wish to sell the house.

With the help of a mediator, Hank came to empathize with Cindy and had a deeper understanding of her needs. I had used the mediator's tools in promoting this understanding, helping them to express their thoughts and restate what they said to each other. I asked them how they felt about what they were hearing. For the first time, Hank tearfully apologized and took responsibility for doing something wrong; he called her a great mother and a wonderful person. Though he wanted to be divorced, he had no wish to cause her more pain. Although Cindy greeted his words with an element of sarcasm, the tone in the room changed. Hank's acknowledgment of his responsibility and of Cindy's pain seemed to be cathartic to Cindy. She began to talk about the issues without so much anger. She was better able to hear Hank's point of view and move toward solutions, rather than getting bogged down in emotion.

At the close of this long and draining session, I reflected that if they had chosen to litigate their divorce, Cindy's anger and Hank's quest to live in the marital home could have been the driving force behind an expensive, lengthy court battle which could have consumed them both emotionally and financially, and destroyed any hope of a meaningful co-parenting relationship. This type of discussion, which here culminated in Hank's apology and its positive aftermath, has little or no place in litigation, but is a natural and inherent part of mediation. And it is through this

face-to-face discussion that the parties can shake off some baggage, confront issues head on, come to understand the other's perspective and usually come to an agreement.

### **Session Three**

We discussed a parenting plan for the children. I gave Hank and Cindy a primer on the law as to custody, visitation and other child-related issues. As they talked, I encouraged them to come up with solutions, only interjecting other ideas if they asked me for help. They easily agreed to joint custody, with the children primarily residing with Cindy and being with Hank every Wednesday evening. We came to an impasse, however, when Hank insisted on being with the children on alternate weekends from Friday evening until Monday morning while Cindy only wanted his custodial access to be on Saturdays. Neither of them would budge. They asked me what I thought was fair. I declined to answer, reminding them that in mediation, it was only their view of fairness that mattered.

I tried to help them identify their true interests — that is, the needs and concerns underlying their entrenched positions. After I gently posed some pointed questions, Cindy reluctantly acknowledged being worried that Hank's girlfriend would accompany their daughter to her gymnastics class and would co-opt Cindy's role as mother. She was also concerned that Hank would not take the children to church, citing Hank's irreverent mutterings about religion during their marriage. And, Friday night dinners were special times that she cherished. Hank wanted to have enough extended time to enjoy the children in a relaxed, unhurried way and to remain a hands-on parent (cooking meals, homework guidance, bedtime routines, etc.).

With the interests underlying their positions on the table, I helped the couple brainstorm multiple solutions that met both of their interests. They agreed that Hank would have custodial access from Saturday morning until Monday morning; Hank's girlfriend would not accompany the children to any of their activities for one year; and Hank would take the children to church on Sundays. With this issue resolved, the session continued with Hank and Cindy coming to an agreement on a full schedule of custodial access and a co-parenting plan.

### **Session Four**

Hank and Cindy began today's session unusually quiet and I asked how things were going at home. Cindy confessed her doubts about whether mediation was going to work. They had been arguing about support, and Cindy was worried about Hank's unwillingness to pay her maintenance (alimony). She did not know how she was going to survive without going to court for relief. Frustrated, Hank responded that he did not know how he would stay above water if he paid Cindy both child support and maintenance. I asked them if they were still committed to one of the goals they agreed to in the first session: that the final terms of any Agreement results in a reasonable amount of financial stability and a decent lifestyle for *both* of them as well as the children. They each stated that they were still committed to this common goal. I encouraged the parties to give the mediation process a chance.

I next proceeded to educate the parties on the laws of child support and maintenance. I then explained that following such legal standards was one way to resolve issues, but that mediation allows parties to find solutions that may be more appropriate for their particular situation rather than the "one size fits all" approach that law tends to provide. I then tried to focus them on their future needs. As homework I had assigned for this session, Cindy and Hank had prepared detailed budgets projecting their itemized, comprehensive, monthly living costs if they lived a lifestyle they believed was fair to them *once they lived apart*.

I helped them negotiate revisions in each other's budgets so that they felt that (with some exceptions) the other party's budget was fairly reasonable. Since Cindy's income fell significantly short of meeting her projected needs, she wanted Hank to pay her enough child support and maintenance to meet her monthly shortfall plus give her a cushion for savings. Hank agreed to pay something, but countered it was time for Cindy to work full-time to increase her income. Cindy responded she needed to be part-time to care for their children, "as we had agreed before you made your selfish decision to leave the family." After a pause, Hank quietly responded that paying what she was requesting would not leave him enough income to meet his own needs given his budget. Cindy asked me how a court would rule on this issue. I told them that as a facilitative mediator, except for my explaining the law in detail as I had done earlier, I cannot predict how a judge would interpret or apply that law in their situation. I suggested they could consult their own attorneys to get their predictions and advice, noting that different lawyers might reasonably predict different outcomes. I also warned that the courts are unpredictable and the unexpected happens frequently.

To break the impasse on the child support/maintenance issues, I recommended that Cindy and Hank hire a qualified accountant as part of the mediation process. I explained that a CPA could analyze their circumstances and propose options for "expanding the pie" by structuring the child support and maintenance mix so as to provide the parties additional tax savings that they could use to meet both of their needs. I added that we might need an independent accountant in any event to determine the value of Hank's dental practice. To this, Hank recoiled, suggesting that I was taking sides by proposing this valuation. I explained that part of my job is to give both parties the option of putting all of the relevant information on the table so they can make an informed, "eyes opened" agreement. I viewed a valuation of the dental practice as a way to provide the parties with this information. *How* they use this information in the settlement discussions, however, is totally up to them. I also explained that any enhanced earning capacity from the Master's degree that Cindy earned during the marriage would be considered marital property under New York State law and that this could also be valued by the CPA as well. The parties talked and agreed to the valuations.

### **Session Five**

We used this session to meet with the CPA. He proposed "tax impacting" the parties' support options by strategically shifting the normal mix between child support and maintenance into a mix that would save the parties more in income taxes (maintenance is tax deductible by Hank and taxable to Cindy) and using the children's tax exemptions and credits. Thanks to the CPA's expertise, we were able to develop a support package that allowed for significant income tax savings and therefore greater combined after-tax income. Using this approach, there would now be enough net income to provide a support package that provided both parties enough money to meet their own budgets.

The CPA left the session requesting various documents from each party about the dental practice and the Masters degree, as well as permission to speak and possibly meet with the accountant of the Hank's dental practice. The CPA promised valuations of the dental practice and Master's degree within three weeks of his gathering of this information.

### **Session Six**

We now had the practice and degree valuations from the CPA. I had already given Hank and Cindy a detailed lesson on the Equitable Distribution Law. They had also chosen to meet with attorneys for the first time before today's session to review the CPA's work and to get legal advice. I was pleased to know that they each hired excellent matrimonial attorneys who were "mediation

friendly” and knew how to coach and advise Hank and Cindy through the process *without* infringing on their right to self-determination, which is the cornerstone of mediation.

I helped Hank and Cindy work out a settlement: They would immediately sell the house and give Cindy all of the sale proceeds (with additional details about if it sold for more or less than a certain amount). Cindy would waive on Hank’s dental practice in exchange for Hank paying her a cash distributive award which was reduced by the value of his claim on her degree, his share of the house equity and compensation for her getting more than half of the retirement assets.

To help Hank with his cash-flow issues, the accountant helped develop a creative, tax-saving option of delaying Hank’s payment of the cash distributive award by having it accrue interest and then paying it out monthly to Cindy as “stage two maintenance” once regular maintenance ended (the total award would be increased for the extra taxes that Cindy would pay on it and this maintenance would not end upon Cindy’s remarriage).

We then worked through additional, required details about child support and other final issues.

### **Sessions Seven**

With all of the issues tentatively settled, we then utilized the entire next session to draft all of the specific financial terms into a written Agreement. Together, we had already drafted the custodial and other parenting terms. I then drafted a rough draft of this portion of the Agreement with the parties present (as I do all portions of the Agreement). In this way, I am able to ask them clarifying questions as I draft, help them negotiate smaller issues about details if they arise and give them direct input into the wording where appropriate. I find this to be a more cost efficient way of drafting the Agreement and also empowering to the parties.

At the end of the session, I told Hank and Cindy that I would provide them with two copies of the draft Agreement in a few weeks and they would need to meet with their attorneys to obtain legal advice on it. I again reminded them that I cannot give legal advice as the mediator, and that after receiving legal advice, they will be better prepared to make an informed agreement. Whether or not they utilize the legal advice to initiate further negotiations in mediation or to request further financial disclosure is up to each party.

### **The Last Session**

Having met with their lawyers, Cindy and Hank each wanted several small or moderate changes to the agreement and no further financial disclosure. After negotiating these remaining loose ends for an hour, I made what I thought were the final changes to the agreement. However, Cindy then raised the issue of what would happen after the Agreement was signed as to the status of their marriage. She proposed staying legally separated for a year or two so that she could stay on Hank’s health insurance and not have to spend money on a single policy. Hank wanted to be divorced but after coming so far in the mediation and not wanting to damage their sometimes tenuous parenting relationship, he did not want to force it immediately if Cindy would be strongly opposed. Cindy acknowledged that her main underlying interest to delay the divorce was the health insurance cost savings. To this, Hank suddenly offered to write a further term into the Agreement—that he would cover the cost of Cindy’s health insurance by keeping her on his family policy until there was a divorce and then paying for her single policy after the divorce, for a maximum of two years from the signing of the Agreement. After adding this further provision, and with the understanding that Cindy would immediately sue Hank for divorce, the parties executed the Agreement.

Hank and Cindy were both pleased that the process was over and proud that they could actually settle their divorce without “going to war.” “None of our friends believed we would get through this successfully,” Hank said smiling. The process took less than four months. The total bill for mediation including the CPA and advising attorneys was \$4,800. They realized that the cost of hiring two litigating attorneys and possibly multiple experts would have been much more. Hank and Cindy were satisfied with the fairness of the agreement and, having authored its terms, would be unlikely to be running back to court to modify it in the near future. And, if changes were needed or breaches occurred, they had agreed to first attempt mediation before resorting to the courts. Although Cindy remained hurt by Hank’s conduct, the mediation process allowed the parties to leave the marriage with dignity. The process also set a precedent for productive future communications and problem solving between Hank and Cindy, which was necessary to provide the children a strong, positive parenting team. As they left, they thanked me. I felt a wonderful sense of accomplishment.