

When Mediation Is Not Mediation

When discussing mediation, most people have a tendency to focus on the clear benefits that have been proven time and again: The faster resolution, the lower cost, the less-combative atmosphere. While these are all absolutely accurate descriptions of the mediation process, they are also describing what could be termed *true* mediation – a mediation course that is focussed on finding common ground and guiding the parties to a mutually satisfactory agreement that satisfies all problem areas. Unfortunately there are attorneys – and clients – who instead view mediation as a cheaper way of litigating. They attempt to make the mediation process about each side's legal positions, and not about working together towards solutions.

The key fact to remember about mediation is that neither party is under any obligation to adhere to any aspect of the law. It is a private agreement between the two parties, and as long as the agreements and decisions they make together are not in and of themselves illegal, there is no need to follow laws covering divorce or division of assets. The mediation room is not a court room. This is often forgotten by both clients and attorneys, who will 'get stuck' on legal points and insist that a demand or request cannot be granted because a judge in the courtroom would never allow it – and this may be true, but if both parties agree peacefully to the item, that is moot.

Sometimes, the attorneys on one side will seek to subvert the mediation process this way, attempting to argue their case in front of the mediator. Inexperienced or incompetent mediation professionals may allow it, but the key thing to remember is that attorneys work for the parties involved in the divorce and can be directed in their actions. The key difference between mediation and the court system is that the mediator is *not* a judge. Where judges render final decisions – often if not *always* with some sort of bias, as true objectivity is impossible to achieve – mediators only guide. It is the divorcing parties who ultimately create and agree to a compromise. As a result they can forge any kind of agreement they wish, whether the mediator – or their own attorneys – approve or not.

If you have no interest in compromise and seek only to 'win' the divorce against your partner, mediation is not the right course. No responsible attorney should suggest mediation as a 'cheaper litigation vector.' It is recommended that a person who needs help deciding between strategies should contact an experienced professional mediation attorney to get your questions answered.