

CCND BEST PRACTICES for Review/Consulting Counsel in Mediations

CCND Best Practice for Drafting Counsel in Mediations

ADOPTED: 2018

REVIEW/CONSULTING COUNSEL IN MEDIATION

STANDARD:

- At the start of a mediation, the family mediator should inform participants that they should seek information and independent advice from review or consulting counsel during the mediation process. The mediator may provide a list of consulting/review counsel to the participants
- Review or consulting counsel should, at a minimum, have taken a 40 hour family mediation training.
- Review or consulting counsel should provide information and advice to a client to help the client make informed choices and protect the client from unforeseen circumstances based on all information available to further the goals of the client.
- Review or consulting counsel should explain the various roles and tasks that he or she can offer the client, assist the client in choosing the scope of limited representation which will be exercised and enter into a written agreement with the client regarding the scope of representation and the fee structure.

Review or consulting counsel should:

- Give advice about the suitability of mediation
- Support the mediation process
- Advise the client with regard to the adequacy of financial disclosures
- Advise the client of the range of legal standards and realistic expectations
- Help the client prioritize interests and develop proposals
- Review and explain agreements between the client and his/her spouse/co-parent
- Respect confidentiality between his or her client and the mediator.

Review or consulting counsel should not:

- Encourage positional versus interest based negotiating
- Encourage gamesmanship or posturing
- Exaggerate legal outcomes
- Attempt to control the mediation process
- Insist on drafting the separation Agreement

- “Back channel” with other review counsel
- Encourage the client to abandon agreements already reached
- Advocate for the client’s position directly with the mediator
- Encourage adversarial positions
- Undermine the client’s confidence in the mediation process or the mediator by criticizing the process or the mediator or making purely stylistic changes to an Agreement drafted by the mediator

Comments:

The role of “review” or “consulting” counsel in a divorce mediation is an integral part of the facilitative divorce mediation model. I am using these terms interchangeably, though, many practitioners attach different breadth to the scope of each. The role is often critical for educating parties about judicial norms and shaping realistic expectations as well as fostering confidence so that parties can participate more effectively in mediation sessions. Competent review counsel can also help parties take ownership and responsibility for their concerns, questions and ultimately, their agreements in a mediation.

There is widespread misunderstanding about the role of review counsel in divorce mediation both by clients and by professionals. There is also a dearth of training on this role in the field. It is imperative that mediation professionals educate their clients about what to reasonably expect from review counsel and common practices that could undermine the mediation. It is also imperative that review counsel have an understanding and awareness of how their actions and advice will support their clients big picture goals and the mediation itself. Ultimately, before taking on the role of review counsel, a professional should decide if he/she can and will be a member of the mediation team and protect the integrity of the process. Otherwise, he/she may be inadvertently disrespecting their client’s goals in choosing mediation in the first instance.

DRAFTING ATTORNEY IN MEDIATION

STANDARD:

Attorneys who are engaged to draft agreements at any point in the course of Mediation should:

- Have an Engagement Letter with participants and parties that clearly sets forth the role as drafter, disclaiming any kind of legal representation.
- Provide to the mental health and/or financial mediator a checklist of all items to be addressed in the drafted document, as required by court and by law.
- Discuss with Mediator(s) what issues need to be addressed and the reasons why.
- Contact mediator(s) in a timely manner if there are concerns regarding any legal issue(s) with the Agreement, for example jurisdictional problems. Get permission from the participants to contact “Consulting” or “Review” counsel if necessary.

- Contact Mediator(s) in a timely manner if information is missing.
- Review draft agreement with Mediator(s) and Participants.
- Send Draft Agreement(s) to Review/Consulting counsel.

Attorneys who are engaged to draft agreements at any point in the course of Mediation should not:

- Meet independently with the Participants.
- Make changes to the DSA requested directly by Consulting/Review Counsel without clearance from the Mediator(s).
- Give legal advice to the Participants.
- Appear in court with the Participants.

Comment: Mental health professionals and financial professionals should not draft divorce contracts. Statutes, case law and the rules of professional conduct in Ct. are clear that such a practice is the unauthorized practice of law with very serious consequences.