

CCND BEST PRACTICES for Review/Consulting Counsel in Mediations

CCND Best Practice for Drafting Counsel in Mediations

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REVIEW/CONSULTING COUNSEL IN MEDIATION

STANDARDS:

- At the beginning of a mediation, the family mediator should inform participants to seek information and independent advice from review or consulting counsel during the mediation process. The mediator may provide a list of qualified 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:

- Provide advice about the suitability of mediation when applicable.
- 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 reasonable proposals.
- Review and explain agreements between the client and his/her spouse/co-parent.
- Respect confidentiality between his or her client and the mediator.
- Be sensitive to the underlying reasons why certain agreements were reached during mediation.
- Obtain written consent before contacting or speaking with the mediator.
- Obtain summary mediation notes, if available.
- Upon the conclusion of your professional relationship, make a written record outlining the scope of your participation in the mediation, particularly what you did NOT do, i.e. review final agreements and affidavits, if those were not provided to you.
- Be sensitive to the need for the mediator to protect their neutrality.

Review or consulting counsel should not:

- Encourage positional bargaining instead of interest-based negotiation.
- Encourage gamesmanship or posturing.
- Exaggerate legal outcomes.
- Attempt to control the mediation process.
- Insist on drafting the Separation Agreement.
- Negotiate with other review counsel without the mediator present.
- 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.
- Draft Agreements.
- Create redlined agreements from a mediator's word document. This can create confusion and can threaten the integrity of the Mediator's Agreement.

Comments:

The role of "review" or "consulting" counsel in a divorce mediation is an integral part of the facilitative divorce mediation model. 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.

Misunderstandings about the role of review counsel are common. It is critical for both client and professionals to understand the function of review counsel to prevent undermining the mediator. Professionals who accept this role should have adequate training. It is imperative that review counsel have an understanding and awareness of how their actions and advice will support their client's 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.

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STANDARDS:

Attorneys who are engaged to draft agreements at any point in the course of a non-attorney led mediation should:

- Have an Engagement Letter with participants and parties that clearly sets forth the role as drafter, specifying that they did not provide 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. OR Collaborate with the mediator(s) to address key issues and understand their importance.
- Promptly communicate with the mediator(s) regarding any legal concerns, such as jurisdictional issues, and seek permission from the participants to contact consulting/review counsel if needed.
- 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 a non-attorney led mediation should not:

- Meet independently with the Participants.
- Make changes to the draft separation agreement based on requests from consulting/review Counsel without first consulting with the mediator(s).
- Give legal advice to the participants.
- Appear in court with the participants.
- Meet independently with review counsel.

*Comment: Mental health professionals and financial professionals should not draft any portion of divorce contracts, including parenting plans. 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. Please review the unauthorized practice of law document on CCND's website.