

# Transparency in Divorce Mediation

By Gary Shaffer, Esq.



Transparency has been a popular word for some time now. It is one of those “good” words. People favor transparency and tend to think of it in contrast to secrecy. In government, freedom of information laws are seen as important in pulling back the curtains that could hide critical governmental decisions affecting the lives of citizens. Campaign finance laws were deemed critical both to limit the influence of money in politics and reveal who made contributions to whom. (That was before a compliant Supreme Court undid the whole thing and decided veils of secrecy were just fine and the ability of wealth to purchase power was restored for the greater good.)

Transparency is the backbone of divorce mediation. If an agreement is to be fair and lasting, it must rest upon full disclosure. Each side should know and understand financial matters, be open about their wants, needs, and what is important to them for the future. Details and issues not revealed or explored can undermine not only the ability to reach an agreement, but to reach a lasting agreement.

Couples in a divorce mediation find themselves in uncharted territory. They may be forced to have conversations they did not have during the marriage, and to reveal things long kept to themselves. These conversations can be awkward to say the least but often create the necessary dialogue that otherwise would not take place.

Some divorce mediators approach the process with the idea of “complete transparency.” All sessions are held jointly so that everything said is heard simultaneously by all in attendance. It may take a while to develop trust in

such an open setting, but once trust is attained, the couple can fully and openly explore what they want and need, and work toward a lasting agreement.

## *Caucusing as a tool to facilitate transparency*

However, while many couples mediate with good intentions, it does not mean they are comfortable saying everything in front of their spouse. One or both spouses may come to trust the mediator far more than their pending ex-partner. A good mediator is, among other things, a good listener, and listening to someone separately, unimpeded by an other’s presence can be liberating. Often one side, or both, want to unburden themselves to someone with whom they do not share an emotional past. This in turn can help the parties listen to each other in a joint session and make decisions together.

For example, passive resistance is not uncommon in a divorce mediation, especially from a less-moneyed spouse who may feel terrified at the prospect of going it alone in the future. Saying “No” to everything or “thinking things over” for months at a time or figuring out ways to change the subject may provide some comfort for someone desperately trying to avoid the inevitable. Absent a private conversation with the mediator where the mediator can explore the resistance, it may be impossible to know what in fact is going on and limits the ability of the mediator to assist in developing a strategy that works for both sides. Is there financial insecurity? A health or job issue? A desire to avoid facing the sadness of a breakup, or the anger that has been tamped down?

I always tell couples I am willing to speak with them separately, the rule being the standard one of caucusing: 1) what they tell me in private is confidential unless they give me approval to tell what we discussed to the other side; 2) I will let the other side know a private conversation was held, and 3) there may be limits to confidentiality, such as threats to the other spouse, child abuse, etc. However, I also tell couples that what they discuss with me in private often turns out to be something that can be used later in the mediation, meaning it can be relayed to the other spouse, without adverse consequences; indeed, even with positive consequences. This can be empowering to a person who may feel uneasy about having conversations in front of the other side. Many private conversations are complaints about the other spouse and not ultimately directly related to the written details of a final agreement. But the ability to unburden oneself, to know you have been listened to, heard, and understood is often critical in helping a spouse move forward and fully participate in the mediation.

### ***Transparency with lawyers in the room?***

With the increasing use of presumptive mediation in the New York State courts, mediators are often faced with couples represented by counsel. To what extent does the presence of attorneys affect transparency and the use of a caucus in a divorce mediation? Should attorneys be present during mediation and a caucus or not? Some attorneys are reluctant to have their clients speak to the mediator outside of their presence and control. Others are “mediator friendly” and work together with the mediator to ease the process along.

In the abstract, my preference is for attorneys not to be present during the mediation session or caucusing. The absence of attorneys creates an atmosphere where spouses can feel free to talk about their needs, desires, fears, etc., and not what they feel the attorney may want them to say. Additionally, it helps the mediator make that all important connection with the client, which provides a basis for transparency during mediation. But this is a decision to be made jointly by the attorney and the client.

However, sometimes having the attorney present during a caucus could be very useful in addressing client concerns. And, caucusing just with the attorney can also have benefits, since they may be able to provide a clearer picture of the various legal and factual issues. In

fact, sometimes it is the attorney who is able to be more transparent outside the presence of the client. Whatever the situation, the mediator needs to keep the focus on the goal - an agreement that works for the parties - while also being mindful of not overstepping attorney-client boundaries. Here too the mediator may need to be transparent with counsel by checking on what those boundaries are.

### ***Transparency is good, if properly used***

In the end, transparency is critical to creating an agreement that will last over time. However, sometimes getting there can depend on a few detours behind a closed door.

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