



# A Day in the Life of a Family Law Attorney: To Mediate or Not?

Every family is different, and so is every family law case. There's no one-size-fits-all resolution option. Sometimes it's best to litigate; other times it's best to mediate. Often it's a combination of the two. Astute family law attorneys who know the case characteristics that make one option better than the other can save clients and themselves abundant stress. Here is a primer and a case example that help answer the question of whether to litigate or mediate.



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# The Pros and Cons for Mediation and Litigation

## The Benefits of Mediation

While neither solution is easy, mediation helps avoid some of the intense emotional trauma that can be caused by family law litigation. It encourages discussion, brainstorming and thinking outside the box to facilitate settlement. Parties speak freely, and the process usually focuses on the needs of the parties—what they need to be the best parent or to be financially secure—not on their positions or what is right or wrong. It also protects the long-term relationships, while putting a premium on what is best for the family.

During mediation the parties retain control of the process and the timing. Additionally, no decision is set in stone until it is finalized. Many of these features disappear when the court and a room full of attorneys get involved. In summary, mediation not only addresses the legal issues in a cost-effective manner, but it also can iron out logistical details that keep the post-divorce process running smoothly.

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Mediation focuses on the needs of the parties involved not on their positions or what is right or wrong.

## The Benefits of Litigation

Mediation does have its downsides, however. A third-party mediator has no attorney-client relationship with the party. Therefore, a major benefit of the litigation track is having an advocate who actively looks out for the party and helps them make decisions.

Litigation also forces resolution in a way that mediation may not. The court imposes deadlines, and there is finality to the process. Unfortunately, it has a hefty price tag, not just in terms of attorney and legal fees but in time missed from work or from caring for the children.

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Litigation provides parties with an advocate and imposes deadlines to help provide finality to the process.



# Determining which Course to Take

Ideal mediation clients have some level of communication with the opposing party and have decent communication skills. They are aware of the situation and of their role in it. They are child-centered (assuming children are involved), wanting to do what is best for the children, even though they may disagree about those interests. Mediation clients must be willing participants; it is, after all, voluntary. If one party doesn't want a divorce, doesn't want to mediate, is dragging his or her feet or is deliberately stalling, litigation is likely the better route.

One of the traits that typically triggers litigation is an imbalance of power between the parties. When either party has a substantially higher income or greater access to the finances, it leaves the other party in a position of need. It can be more difficult for that party to have equal footing in a mediation setting. Similarly, when one party has a sophisticated business, business interests or investments, the party that is not involved in their acquisition or maintenance is at a disadvantage when dealing with very complicated valuation questions and tax consequences, now and in the future.

Underlying issues of domestic abuse or child abuse, which again indicate an unequal balance of power, bring in legal issues that usually require litigation.

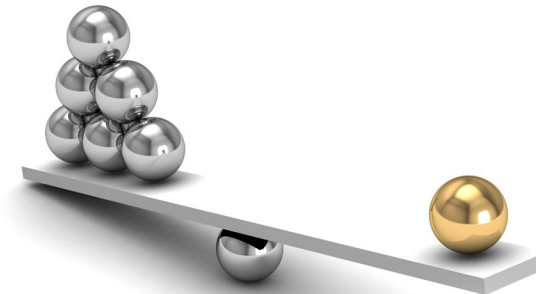
Custody issues can also be difficult to mediate, particularly if the case has high conflict. Brad Micklin of The Micklin Law Group points out that in scenarios where one side is unwilling or unable to see the situation from the other party's point of view, a judge may be needed to make the decision. That doesn't mean that people who have high conflict or all kinds of other things going on can't do mediation; their situations just make mediation more complex.

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## Quick Tip

Mediation clients must be willing participants. If one party is dragging his or her feet for whatever reason, litigation may be a better course.

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# Hypothetical Case Study: Harry & Wilma

Let's take a look at the hypothetical case of Harry and Wilma to better illustrate some of our previous points in this paper.

## The facts:

- Harry and Wilma have been married 15 years.
- Early on in their marriage, Wilma worked as a cocktail waitress earning \$65,000 to \$85,000 income, but this was underreported at \$30,000.
- After six years of marriage, Wilma stayed at home, becoming the primary caregiver to their twins.
- Harry worked as a Wall Street investment banker, earning up to \$750,000 annually, including bonuses and stock options.
- There is evidence of Harry's long-term extramarital relationship, on which he spent about \$400,000 on dinners, trips, hotels and escort fees. He also racked up more than \$75,000 in credit card debt.
- About seven years into the marriage, family services was called once following a neighbor's report of a loud argument; there also was a report of an altercation in which both parties were injured.
- Wilma joined her sister's commercial real estate business, which produces an undisclosed income that allows her to buy a Tesla.
- The couple still shares a home but not a bedroom.





# Hypothetical Case Study: Harry & Wilma

## Key issues for Harry and Wilma:

**Income—Harry.** Harry may want to keep a lot of his income. His bonus and stock options complicate equitable distribution. His \$400,000 in escort expenses dissipated the marital assets. In the mediation track, the parties might consent to a value of the assets, or they might engage in a battle of the experts on the topic. However, because the balance of power is skewed in Harry's favor, litigation might level the field.

**Income—Wilma.** There are some key income-related questions for Wilma. How will Wilma leaving her job affect alimony, and what was the economic detriment that it created after the twins were born? What is her ability to earn and the value of the real estate business?

Alimony is a significant issue, and divorcing couples don't always like to let the court decide it. Mediation lets the parties look at what is needed, based on budget and previous lifestyle. Additionally, a judge might be compelled to notify the IRS of Wilma's unreported income, making private mediation a potentially more beneficial path.

**Parenting time.** Harry seeks more time to build bonds with his children—time that he missed while at work. He also thinks Wilma's over-involvement with the children is not healthy for their development.

A mediator can look beyond the cold facts that the court sees to address parenting concerns and can possibly help both parents foster better long-term relationships with their children. However, despite its reputation, the litigation track has some flexibility. The court has the authority to take certain actions, but it is not always required to do so.

**Confidentiality.** Domestic issues, a visit from family services, and extramarital activity could impact Harry's employment if made public. That said, going the mediation route may help contain Harry's past mistakes, while litigation could provide much more exposure and documentation.

As you can see from this mini case study, litigation and mediation both have a place in family law disputes. As the case evolves and new facts surface, litigation may be more appropriate, but then at a later time you may determine mediation is the best course, and vice versa. There is not a one-size-fits-all solution to these matters, and the complexity of these cases should not be underestimated.



# Post-Divorce Life—A Smoother Transition

Mediation is a particularly useful tool when determining how the transition to post-divorce life will work. Because of expenses, many couples stay in the same home until proceedings are final. During this time, parents can agree through mediation to implement the new parenting time plan to see how well it works and to make it less stressful on the children once the parents are in separate homes.

## It's Not Over

Family situations don't always remain settled. If there is a material change of circumstances, the original agreement may be modified. Some states build in automatic cost-of-living adjustments, but modifications go beyond even that. People lose jobs, get promoted, want to move out of the state. In Harry and Wilma's case, there is a lot of potential for modification. The children's needs and interests will change as they grow, possibly requiring additional support. Wilma may initially require alimony, but she could ultimately end up owning a real estate business.



These modifications can be mediated or litigated. Sometimes, modification provisions are included in the settlement agreement, and they spell out whether they will be addressed in court or in mediation. The same characteristics that influence the decision to litigate or mediate in the first place apply in modifications. Is the relationship acrimonious? Do both parties have the best interests of the children at heart?

No matter which route is best for the case at hand, as an attorney, you have the same ethical obligations to clients. You must uphold your duty of candor and avoid conflicts of interest, and you are still subject to professional malpractice claims if you fail in your ethical duties.

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## Remember!

Family situations don't always remain settled. If there is a material change of circumstances, the original agreement may be modified. These modifications can be mediated or litigated as well.

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# Key Points

Below are some key points for mediation and litigation. It is important to remember that each case is unique with many different angles. Moreover, new facts about the case will come up, which means flexibility is essential in determining whether to mediate or litigate.

## Mediation Benefits

- Less emotionally taxing
- Open discussions
- Needs-focused
- Strengthens long-term relationships
- Control of process and timing
- Cost-effective
- Works out family logistics

## Litigation Benefits

- Parties have an advocate
- Forces resolution

## Traits of an Ideal Mediation Client

- Good communicator
- Child-centered
- Willing participant

## Traits of an Ideal Litigation Client

- Someone who is conflict-oriented
- Imbalance of finances
- Owns a business
- Has considerable tax consequences
- Deliberately drags his/her feet
- Alleges or is accused of abuse

## Common Issues to Watch for

- Income complexity
- Alimony need/qualification
- Parenting time
- Evolving relationship with children
- Confidentiality
- Transitional issues
- Potential modifications







Content of this resource guide is based on a nationally Web-streamed seminar—“A Day in the Life: Life of Family Law Attorney,” sponsored by LexisNexis and presented by Brad Micklin, Esquire of The Micklin Law Group and Rachel Alexander, Esquire, Alexander Mediation Group. Watch the recorded Webinar [here](#).

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