

## Ep #6: Your Divorce Mediation Guide: 4 Mistakes to Avoid



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**With Your Host**

**Lauren Fair**

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You're listening to *The Sensible Split* podcast, Episode 6. Today, we're talking about the mistakes people make in divorce mediation.

*The Sensible Split* is a podcast for smart but overwhelmed women in search of a roadmap to a successful separation and divorce. If you are looking for guidance in navigating the practical, legal, and emotional aspects of divorce with confidence, this is the show for you. Here's your host, Master Certified Life and Divorce Coach, Divorce Attorney, and Mediator, Lauren Fair.

Hey there, ladies, I hope you're having a great week. It's good to be back with you. I am getting ready to fly back to Pennsylvania, where I am from originally, later this week over my kids February break.

We're going to my grandmother's memorial service. Although the primary reason we're going is a somber occasion, we are still so much looking forward to seeing a family and doing some fun things in Pittsburgh. My kids are always so excited to visit their relatives and go on new adventures and things. So, we just love our trips back home. I think this time we're going to give skiing a go for the first time, which is exciting, and hopefully no one ends up in ER. That's what's going on with me.

Today, I want to talk to you about four of the biggest mistakes that people make in divorce mediation, why they're a problem, and how you can avoid them if you are going to choose mediation as a legal process option in your divorce. There are different ways to do mediation, including with and without attorneys in the room. We talked a little bit about this last time.

But what I'm primarily talking about today, is when you decide to go to mediation with your spouse without attorneys present in the mediation room. This way of doing mediation is sometimes referred to as "pro per mediation" or "pro se mediation." Just fancy Latin terms for 'you're going there on your own without counsel.'

As a review from last time, mediation is a private process in which an impartial third person, called a "mediator," facilitates the resolution of family disputes by promoting the participant's voluntary agreement. What it is, in a nutshell, is an

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alternative dispute resolution process to resolving the issues in dispute in your divorce. As we talked about last time, mediation is not right in every case. But if you decide it is right for yours, you're going to want to be aware of these pitfalls that end up causing mediation to fail, cost more, or just be extra difficult.

All of the mistakes I'm going to detail with you in a moment all fall under the umbrella of going in unprepared. And to recite a quote attributed to Benjamin Franklin, "Failing to prepare is preparing to fail." If you've chosen to invest your financial time and energy resources into the mediation process, chances are you'd like it to have the best chance of succeeding as it can.

So, you're going to want to be as prepared as you can be, so you are using those resources wisely rather than wasting them. Because if the case falls out of mediation, meaning if mediation doesn't work and you have to go another route, then you've lost that time, money, and emotional investment. And you may have just lost the opportunity you had to have some control over the outcome of the issues. So, we really want to give our best effort there.

We have to know first, what the common pitfalls are in mediation, and then you can make a plan to avoid those and set yourself up to successfully engage in the mediation process. An added bonus of being well prepared in this regard is that it can lessen some of the anxiety that precedes mediation. Because you will have a better understanding of what to expect and a plan for how to handle it.

So, the first mistake is not understanding what mediation is, what it isn't, and what each participant's role is. Having education upfront about what to expect in the mediation process is critical. Some mediators spend time on explaining the details of what mediation is, what it isn't, and what each person is expected to do in it. Some spend a significant part of their first session on this. And some of them don't cover it pretty much at all, other than maybe a reference to what mediation is in their fee agreement.

There are a lot of misconceptions about the mediation process. An example of this, is thinking that the process will result in a binding decision if you don't agree. That's actually arbitration, not mediation. The mediator is a neutral party without any decision-making authority.

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Here's another misconception about the role of the mediator in the process, and that is the mediator is not your attorney and cannot give you legal advice. Oftentimes, people think that they just show up to mediation and the mediator is going to tell them what to do with their issues. But your role as a participant in mediation includes preparing for the sessions and going in armed with the knowledge necessary to negotiate for yourself as to what you want.

That leads us to our second mistake, which is not knowing in advance what you want to propose as a settlement, or where the moving pieces in your settlement proposal are. Knowledge is power, and that could not be more true in the mediation room.

When I think of 'knowledge is power,' I just get this visual in my mind of 'the more you know,' with a little shooting star in it. It was in the television public service announcements that were, I think, back in the late 80s, or 90s. I know, I've totally just dated myself. But do any of you remember what I'm talking about?

Knowledge is power, okay? And it's so true in mediation. Without thinking it through thoroughly in advance with a knowledgeable professional, you're unlikely to know or have organized what you will want to propose as a settlement. So, you really want to have that knowledge in advance. Without the benefit of legal advice, you're unlikely to know what your best alternative is to a negotiated agreement. We call it, for short, BATNA.

That is, "Okay, if we don't reach an agreement here, then what is my next best option?" That helps you determine what your bottom line on an issue should be. And when you don't know what your bottom line should be, then that can cause one of two problems.

One could be, you insist on what may be an unreasonable resolution of that issue that you ultimately couldn't achieve, absent an agreement that isn't happening on that particular issue, and then mediation falls apart over it. Or you might give up too much because you don't know you could get better in court and be able to use that leverage in the mediation room to really hold your ground on a particular issue.

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So, the solution here is to ensure you have the documentation and the information that you need on each issue in dispute before you get into substantive mediation sessions. If you don't, knowing how to approach getting them, so if you don't have that information in advance, how to get it.

And then developing tiered settlement scenarios in advance and determining where there is flexibility in them will be important, because there will need to be some flexibility in your proposal. When you know where that flexibility is, you can be prepared to make adjustments to your proposal on the fly when you are negotiating in session.

On that note, the third mistake that comes up in divorce mediation, is not having a communication strategy to help you make your proposal hearable. So, once you have proposals to make, and you're on the receiving end of your spouse's proposals, you have to have a plan for how you are going to communicate effectively about them.

There will be conflict. Of course, there will. You're getting divorced for a reason. Oftentimes, those reasons show themselves again in mediation, in some form. Communication problems tend to play a role in the breakdown of many marriages. And if you've experienced that in your marriage, you're likely to experience it again in mediation.

Your communication in mediation needs to have some strategy behind it. That means, in practical application, you can't always say things in the way you'd like to say them, if you'd like to reach an agreement. For example, you might want to say things like, "It will be a cold day in hell when I agree to giving you 50/50 custody. You must be high if you think I'm going to pay you spousal support."

Those might be things that are totally valid to think. But think about the reaction you're likely to get to those types of statements in mediation. You're probably going to get defensive reactions that are going to escalate the conflict. What we're ultimately aiming for here is reaching an agreement that is advantageous to you. So, we've got to make your proposals hearable to your spouse.

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How do you do that? You've got to practice in advance, and it can be helpful to roleplay that out with somebody. Someone who understands how to make these proposals hearable. How to change the dynamic of the conflict that you're used to engaging in with your spouse. So that you can have some practice in discussing these difficult topics and see that modelled for you, so you're prepared for when emotions run high.

On that topic, the fourth mistake, not having a protocol for managing intense emotions in the mediation room. Mediation can be a very stressful experience. there's going to be conflict. Even in an amicable divorce there is some level of conflict.

Many of us don't like conflict and we don't deal well with it. Add, on top of that, the divorce anxiety that kind of comes from all the uncertainty about your future, that we talked about in Episode 1, and the havoc that that's wreaking on your emotions and your nervous system. And then, we've got a recipe for escalating conflict.

When you get activated, triggered, whatever you want to call it, you risk blowing up the mediation with something that you say or do. You need to have a protocol for how to manage your emotions and regulate your nervous system in order to stay at the table if you want to. And have a plan on how to ground yourself enough to be able to make a well-reasoned decision about what you're going to do next, so you can engage in reflective, logical decision making instead of reactive decision making.

If at this point, you're thinking, "Well, Lauren, I don't know. That sounds like a lot to prepare for and manage. I don't know if I can do all that." If you want to, and there are lots of reasons to want to make mediation work in many situations, I want you to know that you can. There's personal transformation available to you in the work that goes into preparing well for and engaging in divorce mediation.

You just need the right support to get you through, a commitment to giving mediation a real try, if it's the right option for you, and a willingness to learn new ways of managing conflict. If you want this for yourself, I know you can be the woman who can handle the mediation process with confidence and savvy. And

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with the right preparation, you'll either settle your case, or you'll know you did your best to avoid court intervention and all that comes along with that process.

I hope that was helpful for you, and I'll see you next time.

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