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How To Use Financial Experts In Divorce Mediation

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Massachusetts Mediator Jason V. Owens explores how financial experts can assist the mediation process for divorcing spouses.



For spouses whose divorce mediation includes complex financial issues, it is often helpful to include one or more outside financial experts in the mediation process. Financial experts can aide the mediation process in a variety of ways. For example, a jointly retained appraiser can help the parties

determine the agreed-upon value of *complex assets subject to division*, ranging from real estate to *small businesses* to artwork. Similarly, a *Certified Divorce Financial Analysts (CDFA)* can assist participants in understanding the tax implications of potential settlement proposals or help participants generate settlement proposals that balance the individual needs of each spouse based on factors such as cash flow, present and future expenses, retirement needs and future employment prospects. There are three main ways for financial experts to assist in the mediation process:

1. *Joint Financial Expert Directly Participating in Mediation.*
2. *Joint Financial Expert Assisting Outside of Mediation Sessions.*
3. *Financial Expert(s) Assisting Individual Parties.*

In the blow below, we will explore the pros and cons of each framework for using a financial expert in divorce mediation.

Joint Financial Expert Directly Participating in Mediation

One hallmark of mediation is that participants negotiate directly to reach their own settlement outcome. Unlike litigation, where the framework is dictated by judges, attorneys and the litigation process itself (i.e. discovery, mandatory hearings, etc.), mediation puts parties directly across the table from one another, often with little outside input. But what happens during mediations that involve *complex financial issues* that one or both participants struggle to grasp? Even if the parties are using a financial sophisticated mediator, there are limits to how much analysis and opinion the mediator should offer, where his or her main focus is on managing the negotiation process as a third party neutral. A better option for resolving complex financial issues in divorce mediation often includes using a jointly retained financial expert to assist the parties in identifying and addressing financial concerns and/or translating the participants' financial goals into real world transactions. The role of a joint financial expert who participates directly in mediation sessions is somewhat different from

that of the mediator. Like the mediator, such financial experts are acting as an objective neutral, rather than representing a specific spouse. However, joint financial experts tend to hold an *evaluative position in the mediation* that contrasts in important ways with the more *facilitative role of the mediator*. Put simply, a financial expert acting in an evaluative role is expected to analyze the financial records and information provided by the spouses and offer specific analysis and suggestions to participants by flagging financial concerns, suggesting specific settlement options and generating language that translates participants' individual and shared interests into specific positions within a written agreement. The financial expert's *evaluative role often contrasts with the more facilitative role* of the mediator, whose primary task is to facilitate the exchange of ideas between the parties (rather than suggesting ideas to the parties) while managing the mediation process. Direct participation of financial experts in the mediation process involves a variety of challenges, including increased costs, logistical issues and confidentiality concerns. At a very basic level, mediation participants should understand that asking a financial expert to directly participate in mediation sessions will increase costs in the form of the expert's fees and hourly rate, as well as additional planning and coordination of tasks performed by the mediator. Including an expert directly in the mediation also creates basic logistical issues in terms of scheduling sessions and increasing the need for coordination for the exchange of records, proposals, etc. Finally, the direct participation of financial experts in mediation creates some concerns about confidentiality, where the umbrella of confidentiality that covers communications within the mediation process does not necessarily extend to communications between the participants and the expert outside of mediation sessions. As in so many other areas of modern life, there are trade-offs between convenience and privacy that participants must consider when deciding whether they want to strictly limit the expert's activity to what occurs inside mediation sessions (reducing convenience) or permitting more extensive contact between the participants and expert outside of formal mediation sessions (potentially decreasing confidentiality).

Joint Financial Expert Assisting Outside of Mediation Sessions

*Many mediation participants appreciate the convenience and flexibility of jointly retaining a financial expert outside of the mediation sessions. The main drawback to retaining a joint expert outside of the mediation is that the expert's records, communications and testimony are not necessarily considered **confidential mediator work product**. In other words, if the mediation breaks down and the parties end up in litigation, the expert could be required to provide records or testimony in response to a subpoena. For many mediation participants, the absence of **total confidentiality** over the joint expert's work product represents only a limited risk. After all, most of the financial records handled by the joint expert would be discoverable in divorce litigation anyway, and any testimony offered by the expert is likely to be delivered in a professional manner. Nevertheless, divorcing spouses working with an outside financial expert should be mindful of the statements and documents provided to the expert. One spouse's offhand comment about a non-financial issue in the present of the expert (e.g. an admission of an adulterous affair or past incident of violence, etc.) could trigger future testimony by the expert. With the loss of confidentiality comes greater convenience, however. Mediation participants who work with a joint financial expert outside of the mediation process can schedule and coordinate separate sessions with the expert without needing to worry about the mediator's availability. Working outside of the mediation also reduces formality, allowing participants to provide/exchange financial records with the expert without the need to loop in the mediator. In general, using an outside expert also reduces costs by giving participants more control over the schedule, and reducing the need for coordination and logistics between the expert and mediator. Lastly, it is worth noting that it is possible for an outside financial expert to make a kind of "guest appearance" during a special mediation session if the participants and mediator agree that the expert's presence in a session would be particularly helpful. In these instances, the expert signs a simple document in which he or she acknowledges and agrees that that*

everything that transpires within the mediation session is confidential, without otherwise restricting the expert's actions outside of the "guest appearance" mediation session.

Financial Expert(s) Assisting Individual Parties

Last but not least, it is exceedingly common for mediation participants to retain individual financial experts to act as **mediation coaches** during the process. Much like a traditional mediation coach, who is generally an experienced family law attorney who advises and "coaches" the client on legal issues and negotiation tactics during the mediation, the financial expert coaches the participant on specific financial issues that arise during the mediation. In many instances, the best financial coaches for mediation are **Certified Divorce Financial Analysts (CDFA)**. Most CDFAs are financial professionals who have special training surrounding divorce issues. The CDFA's special training enables the expert to provide financial advice that is specifically tailored to issues like child support, alimony and the division of assets, as well as the "give and take" that typically surrounds a divorce negotiation. For individuals with the financial means, it is not uncommon to retain both a traditional **mediation coach** and outside financial expert to work cooperatively in support of the mediation participant. This cooperative relationship enables the mediation coach to use the financial expert in similar ways to how an attorney might use a financial expert in litigation, including reviewing and analyzing financial records, tracking down hidden assets, and acting as a forensic expert as well as an important resource for developing the participant's positions on financial issues in the mediation and preparing settlement language.



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What Costs More: Litigating a Divorce or Mediating with a Financial Expert?

Although exceptions always exist, mediation is generally *faster* and *far less expensive than litigation*. Even participants who pay 50% of the cost of a mediator, as well as the cost of separate attorneys or mediation coaches and financial experts, generally spend less than divorce litigants, where the costs of litigation-related activities like discovery, court hearings, depositions and trial preparation are simply astronomical. Of course, each professional that a mediation participant adds to his or her team generates an additional hourly rate, which eventually start to add up. A mediation participant with multiple team members generally needs to be a good manager – or at least willing to delegate the management role to single team member who can coordinate the actions of the other team members. Not every divorce mediation requires the involvement of a financial expert. For divorces featuring straight forward child support or alimony issues, and where the assets consist primarily of a single home and each party's 401K account, the input of a financial expert probably isn't necessary. However, for families with substantial or complex asset holdings, or significant compensation, a financial expert can provide a valuable role in the mediation process on behalf of spouses seeking a mutually beneficial resolution to their divorce.

Jason is a divorce mediator for South Shore Divorce Mediation, located in Hingham, Massachusetts and East Sandwich, Massachusetts. He is also a Senior Attorney and Partner at Lynch & Owens, P.C., where he specializes in divorce and family law issues. Jason is a statutory mediator under [M.G.L. Ch. 233, s. 23C](#) and a proud member of the Massachusetts Council on Family Mediation. To read more from Jason Owens, check out his content [on the Lynch & Owens Blog](#). **Disclaimer: The information you obtain at this site is not, nor is it intended to be, legal advice. You should meet with an attorney for advice regarding your individual situation. You are**

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