

# The Role of Advocate in the Mediation Process of Divorce Cases at the Religious Court of Sidrap

Wiwin Wiwin<sup>1</sup>

<sup>1</sup>Fakultas Hukum Institut Ilmu Sosial dan Bisnis Andi Sapada

Corresponding Email: [wun07121997@gmail.com](mailto:wun07121997@gmail.com)<sup>1</sup>

## Abstract

This article discusses the role of attorneys in the process of mediating divorce cases at the Sidrap Religious Court. This study aims to determine the role of attorneys in providing legal assistance in the mediation process of divorce cases so that mutually beneficial agreements are reached for both parties. This study used field research methods with descriptive qualitative through observation, interviews, and documentation studies. The results of this study indicate: First, the role of attorneys in the mediation process of divorce cases at the Sidrap Religious Court is to assist/represent and protect the interests of clients, facilitate effective communication, provide appropriate legal advice, and assist in reaching mutually beneficial agreements for both sides. Second, the factors that influence the role of legal counsel in the Mediation Process of Divorce Cases at the Sidrap Religious Court are influenced by two factors, 1). Supporting factors that can influence the role and effectiveness of legal counsel are the legal factors themselves (laws), law enforcement factors, facilities or facilities that support law enforcement, community factors, and cultural factors. 2). Inhibiting factors that influence attorneys mediating divorce cases at the Sidrap Religious Court, namely community factors or the client itself. Third, the role of attorneys in the mediation process of divorce cases at the Islamic Religious Courts is based on the principles of Islamic family law, namely by understanding and applying the principles of Islamic family law in the mediation process.

**Keywords** : The Role of Legal Counsel, Mediation, and Divorce

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## Introduction

Marriage is a divine decree by Allah SWT that creates men and women to become husband and wife, ensuring a peaceful and happy life for humanity. Marriage holds a sacred position as a relationship that should not be toyed with or destroyed.<sup>1</sup> This is stipulated in Article 1 of Law No. 1 of 1974 concerning Marriage, which states that 'Marriage is the physical and spiritual bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on the belief in the Almighty God.'<sup>2</sup>

However, in practice, marriages are always confronted with divorce issues. Whether liked or disliked, divorce is a fact that occurs between husband and wife due to irreconcilable differences in principles, which escalate trivial problems into significant issues that ultimately lead to divorce.<sup>3</sup> The problem of divorce can be minimized through the presence of the state. The presence of the state, in this case, is related to the implementing organs such as the judicial institutions. One of the tasks of the judicial institutions is to resolve divorce

<sup>1</sup> Wiwin, W., Darwis, M., & Syam, E. Z. (2023). Telaah Kritis Pemberian Izin Poligami dengan Alasan Sering Ditinggal Istri (Studi Putusan Nomor 28/Pdt. G/2021/PA. Ek). *Hukamaa: Jurnal Hukum Keluarga Islam*, 1(2), 1-10.

<sup>2</sup> Wiwin, W. (2023). Analisis Mashlahah Terhadap Putusan Mahkamah Konstitusi Nomor 22/PUU-XV/2017. *Jurnal Litigasi Amsir*, 10(2), 131-139.

<sup>3</sup> Luthfia, N., Zahara, F., & Aminah, S. (2023). Analisis Peran Advokat Dalam Menangani Perkara Perceraian. *As-Syar'i: Jurnal Bimbingan & Konseling Keluarga*, 5(3), 685-705.

disputes through peaceful means, namely mediation. Mediation is a mechanism for resolving disputes by involving a third party (mediator) as a facilitator to reach an agreement between the two parties. According to Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Courts, every case brought to the court of first instance must be resolved through mediation, including divorce cases.<sup>4</sup>

Since the issuance of Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Courts, law enforcement has played a crucial role in resolving divorce cases through the mediation process. The role of legal counsel in the implementation of the mediation process is mentioned in the same regulation through several provisions, namely Article 3, paragraph (1), stating that 'Every Judge, Mediator, Parties, and Legal Counsel must follow the procedure for resolving disputes through mediation,' and Article 7, paragraph (1), stating that 'The parties and/or their legal counsel must pursue mediation in good faith.'<sup>5</sup>

Based on the above provisions, it can be concluded that legal counsel plays a significant role in the implementation of the mediation process (including in divorce cases).<sup>6</sup> Legal counsel must provide legal assistance to the parties at every stage of the mediation process. In other words, the success or failure of the mediation process is also determined by the legal counsel representing the parties. Moreover, divorce proceedings are legally sensitive matters that require professional and proportional actions from legal counsel during the mediation process.

However, based on empirical facts and initial observations conducted by the researcher regarding the settlement of divorce disputes through mediation at the Religious Court of Sidrap, the success rate is still

relatively low. From the observation that out of 94 mediated cases, only 18 cases were successfully mediated, it is evident that there are factors influencing the effectiveness of mediation in resolving divorce cases. The low success rate of the mediation process at the Religious Court of Sidrap is undoubtedly influenced by the involvement of law enforcement officials. The legal counsel providing legal assistance to the parties involved in the mediation process also contributes to the aforementioned data, making their role worthy of examination in the implementation of the mediation process.

Based on the above background, the main problem is: What is the Role of Legal Counsel in the Mediation Process of Divorce Cases at the Religious Court of Sidrap?

### Research Methods

This type of research is field research, which means that data collection is conducted in the field. It is a qualitative study aimed at explaining social phenomena or events. This aligns with the definition of qualitative research, which generates descriptive data in the form of written words and observable behaviours.<sup>7</sup> Paradigm refers to a worldview for understanding the complexity of the real world.<sup>8</sup> It is also normative, indicating what should be done without the need for lengthy existential or epistemological considerations. The paradigm in this research is the Role of Legal Counsel in the Mediation Process of Divorce Cases at the Religious Court of Sidrap.

The data sources for this research consist of primary and secondary data: (1) Primary data is obtained directly from the primary sources related to the issues under investigation. In this study, the primary data is collected from fieldwork through

<sup>4</sup> *Vide* Peraturan Mahkamah Agung Republik Indonesia Nomor 1 Tahun 2016 Tentang Prosedur Mediasi di Pengadilan.

<sup>5</sup> Aziz, A., & Hakim, L. (2022). Pelaksanaan Mediasi Perceraian Di Peradilan Agama Dalam Perspektif Hukum Islam. *AL-ASHLAH: Jurnal Hukum Keluarga dan Hukum Islam*, 1(2), 103-115.

<sup>6</sup> Hasmawati, H., & Syahril, M. A. F. (2020). The Effectiveness of Mediation Process to Press Divorce Rates. *Amsir Law Journal*, 1(2), 78-84.

<sup>7</sup> Ali, Z. (2021). *Metode penelitian hukum*. Sinar Grafika.

<sup>8</sup> Juliardi, B., Runtunuwu, Y. B., Musthofa, M. H., TL, A. D., Asriyani, A., Hazmi, R. M., ... & Samara, M. R. (2023). *Metode penelitian hukum*. CV. Gita Lentera.

interviews with legal counsel and mediator judges. (2) Secondary data refers to supplementary data obtained from literature, including documents, books, research reports, and other sources. The secondary data for this research is derived from scientific books, accredited journals, theses, and relevant documents.

## Analysis and Discussion

### The Role of Legal Counsel in the Mediation Process of Divorce Cases at the Religious Court of Sidrap

Legal counsel is a term used to refer to an individual or a group of people who are authorized and empowered to represent or defend someone's legal interests or a group's legal interests in the legal process. Legal counsel can be a lawyer or a group of professionally trained lawyers in the field of law. The role of legal counsel in the divorce process can vary depending on the situation and the client's needs. The goal is to provide legal assistance to clients, protect their interests, and ensure that the divorce process proceeds by applicable laws. Divorce can generally be defined as the formal termination of a legally recognized marriage between two individuals.<sup>9</sup> Divorce can occur when a married couple is no longer able to live together harmoniously and decides to end their marital relationship.

Soejono Soekanto also stated that social roles have characteristics that can be divided into three categories:

#### 1. Prescriptive Role

It refers to the expectations and rules imposed by society on individuals occupying a certain position. In the context of mediation in divorce cases at the Religious Court of Sidrap, the prescriptive role plays an important role in the role of legal counsel involved in the mediation process. The prescriptive role refers to the expectations and rules imposed by society on individuals occupying a certain position. In this case, individuals in the role of legal

counsel have expectations and rules governing their behaviour in the mediation process.

In the mediation process of divorce cases, understanding and applying the prescriptive role to the role of legal counsel is crucial to achieving an effective mediation process and a fair resolution for the divorcing couple. By understanding and applying the prescriptive role effectively, legal counsel can play a constructive role in divorce case mediation. This can help create an environment that supports effective communication, mutual understanding, and the attainment of adequate agreements for both parties. Therefore, understanding and applying the prescriptive role to the role of legal counsel in the mediation of divorce cases helps ensure that the mediation process is effective, considers the interests of all parties involved, and achieves a fair resolution for the divorcing couple.

#### 2. Descriptive Role

It refers to the actual behaviour displayed by individuals in their roles. In divorce case mediation, legal counsel can exhibit various descriptive roles depending on the style, approach, and strategies they use to help the divorcing couple reach a fair resolution. For example, a legal counsel can show empathy and active listening towards the concerns and needs of their clients, clearly communicate legal options and consequences, and facilitate constructive dialogue between the divorcing parties.<sup>10</sup>

The descriptive role of legal counsel in the mediation process of divorce cases at the Religious Court of Sidrap encompasses the actual behaviours displayed by legal counsel based on their interpretation of

<sup>9</sup>Putri, D. A. (2022). Edukasi Dasar tentang Sebab Kebolehan Mewakulkan Proses Perceraian Kepada Kuasa Hukum. *CENDEKIA*, 14(01), 74-86.

<sup>10</sup> *Vide* Peraturan Mahkamah Agung Republik Indonesia Nomor 1 Tahun 2016 Tentang Prosedur Mediasi di Pengadilan.

existing expectations and rules. Legal counsel can exhibit various descriptive roles depending on the style, approach, and strategies they choose. In conclusion, the descriptive role displayed by legal counsel in the mediation process of divorce cases at the Religious Court of Sidrap has a significant impact on the mediation process and its outcomes. Through behaviours that reflect existing expectations and rules, legal counsel can build trust, facilitate effective communication, encourage mutual understanding, avoid conflicts and biases, and enhance the chances of a fair resolution for the divorcing couple.

### 3. Expectation Role

It refers to an individual's perception of how others expect them to behave in a particular role. The expectation role towards the role of legal counsel in the mediation process of divorce cases relates to an individual's perception of how others expect them to behave in that role.<sup>11</sup> This includes individuals' views on societal expectations and their efforts to meet those expectations. The role of legal counsel in the mediation process of divorce cases at the Religious Court of Sidrap is to accompany/represent and protect the interests of clients, and facilitate effective communication.

### **Factors that Influence Legal Counsel in the Mediation Process of Divorce Cases at the Religious Court in Sidrap**

The success or failure of a mediation process in a divorce case can vary depending on various factors that can influence the course of mediation and the outcomes achieved. Each divorce case has its own dynamics and specific factors that can affect the mediation

process. It is important to acknowledge and consider these factors to maximize the chances of reaching a constructive resolution for both parties.<sup>12</sup> Supporting Factors that Influence Legal Counsel in the Mediation Process of Divorce Cases at the Religious Court in Sidrap. Some important factors that can influence legal counsel in the mediation process of divorce cases are:

#### 1. Legal Factors (Laws and Regulations)

The effectiveness of a mediation process in a divorce case at the Religious Court is influenced by legal factors, most notably the laws and regulations governing the mediation process in divorce cases. As mentioned above, based on Supreme Court Regulation No. 1 of 2016 regarding Mediation Procedures in Courts, every case brought to the first-instance court must be resolved through mediation efforts, including divorce cases. Mediation is a mandatory process in the judicial system, as stipulated by the regulation.<sup>13</sup> One of the objectives of this regulation is to require parties involved in litigation to attempt mediation first, especially in divorce cases filed with the Court. The effectiveness of legal counsel in mediating divorce cases is important because the law should provide a clear and comprehensive foundation while considering principles of justice, equality, and active participation. Therefore, legal counsel can play an effective role in ensuring that mediation proceeds smoothly and achieves satisfactory outcomes for their clients.

#### 2. Law Enforcement Factors

Law enforcement factors refer to the elements involved in upholding and

<sup>11</sup> Al Faridzi, H. I. S. Y. A. M. *Tinjauan Kode Etik Profesi Terhadap Peran Pengacara Dalam Kasus Perceraian*.

<sup>12</sup> Sururie, R. W. (2012). Implementasi mediasi dalam sistem peradilan agama. *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan*, 12(2), 145-164.

<sup>13</sup> Pujiana, I. M., & Fathoni, M. Y., yang berjudul "Peran Hakim Mediator dalam Proses Mediasi pada Kasus Perceraian" (*Private Law*, 1(3), 2021), p. 94.

ensuring compliance with legal rules. These factors include institutions and individuals responsible for enforcing the law effectively. The presence of judicial institutions aims to resolve legal cases through the role of law enforcement agencies, including legal counsel. Legal counsel assists parties in the mediation process, and thus, the effectiveness of the mediation process is also influenced by legal counsel. The role of legal counsel in the mediation process of divorce cases is crucial because they possess in-depth knowledge of the laws and regulations related to divorce. Legal counsel can help clients understand their legal rights and obligations and provide accurate legal guidance during the mediation process. With strong legal knowledge, legal counsel can assist clients in making informed decisions.

### 3. Facilities or Resources that Support Law Enforcement

Legal counsel involved in the mediation of divorce cases must have easy access to relevant legal information. This may include access to laws, court judgments related to similar cases, practical guidelines, or other resources that can help them understand and refer to applicable legal principles.

### 4. Community Factors

Community factors can influence the effectiveness of the law in various ways. The understanding of the community regarding applicable laws is an important factor in determining the effectiveness of the law. In the mediation process of divorce cases, community factors that can support legal counsel include awareness of the importance of mediating divorce cases. This awareness includes an understanding that mediation can help reduce conflicts, save time and costs, and enable parties to reach mutually beneficial agreements.

### 5. Cultural Factors

Cultural factors can influence the effectiveness of the law within a society. Culture refers to the values, norms, beliefs, and practices held by a group of people. In the mediation process of divorce cases, cultural factors that support legal counsel include cultural norms or customs of peacefully resolving conflicts. Failure in a mediation process can occur in divorce cases at the Religious Court due to various factors. A law is considered to have failed if it is unable to achieve its intended goals. For example, if a law is enacted to reduce divorce rates, but the divorce rate at the Religious Court remains high or even increases, then the law is considered ineffective.

### **The Role of Legal Counsel in the Mediation Process of Divorce Cases Based on Islamic Family Law Principles**

In carrying out their role, legal counsel needs to understand and adhere to the principles of Islamic family law, including justice, balance, and the well-being of the family. Legal counsel respects the religious and cultural values underlying divorce cases and strives to achieve the best resolution for all parties involved.<sup>14</sup> The principles of Islamic family law, also known as Sharia family law, are based on Islamic teachings and apply to family matters, including marriage, divorce, inheritance, and other family rights. Some key principles in Islamic family law include the principle of tawhid (oneness of God), justice, balance, the well-being of the family, equality and obligations, inheritance, as well as the principle of unity and preservation of the family. These principles ensure that the mediation process is conducted fairly, and equitably, and respects the interests and beliefs of the clients in reaching a fair and mutually beneficial resolution for both parties.

The mediation process of divorce cases at the Religious Court in Sidrap is

<sup>14</sup> Sayyaf, R. T. F. (2020). Harmonisasi Mediasi. *Al-Adalah: Jurnal Syariah dan Hukum Islam*, 5(1), 46-62.



voluntary, and the final decision-making remains the right of the parties involved in the process. Legal counsel cannot enforce Islamic family law principles unconditionally, but they can act as facilitators in reaching agreements that consider these principles. The primary goal of mediation is to achieve a resolution desired by the parties involved while considering their interests and common good.

Researchers concluded that all legal counsel and mediator judges at the Religious Court in Sidrap have adhered to the procedures outlined in Supreme Court Regulation No. 1 of 2016 regarding Mediation Procedures in Courts for the implementation of divorce mediation.<sup>15</sup> However, the success of mediation is not solely determined by legal counsel and mediator judges or the existing procedures. The most crucial factor is the good faith of the parties themselves because legal counsel and mediator judges cannot act beyond the desires of their clients, as ultimately, the parties themselves determine the outcome of the decision.

### Kesimpulan

The role of legal counsel in the mediation process of divorce cases at the Religious Court in Sidrap is to accompany/represent and protect the interests of clients, facilitate effective communication, provide appropriate legal advice, and assist in reaching mutually beneficial agreements for both parties.

Factors influencing legal counsel in the mediation process of divorce cases at the Religious Court in Sidrap are influenced by the legal factors themselves (laws), law enforcement factors, factors related to supporting facilities or resources for law enforcement, societal factors, and cultural factors. The failure of a mediation process in divorce cases can refer to situations where the parties involved fail to reach a satisfactory agreement or resolution through mediation.

The role of legal counsel in the mediation process of divorce cases at the

Islamic Religious Court, based on the principles of Islamic family law, includes understanding and applying the principles of Islamic family law, such as the principle of tawhid (oneness of God), justice, balance, the well-being of the family, equality and obligations, inheritance, as well as the principle of unity and preservation of the family. This ensures that the mediation process is conducted fairly, and equally, and respects the interests and beliefs of the clients in reaching a fair and mutually beneficial resolution for both parties.

### References

- Al Faridzi, H. I. S. Y. A. M. Tinjauan Kode Etik Profesi Terhadap Peran Pengacara Dalam Kasus Perceraian.
- Ali, Z. (2021). Metode penelitian hukum. Sinar Grafika.
- Aziz, A., & Hakim, L. (2022). Pelaksanaan Mediasi Perceraian Di Peradilan Agama Dalam Perspektif Hukum Islam. *AL-ASHLAH: Jurnal Hukum Keluarga dan Hukum Islam*, 1(2), 103-115.
- Handayani, F., & Syaflawar, S. (2017). Implementasi Mediasi dalam Penyelesaian Perkara Perceraian di Pengadilan Agama. *Jurnal Al Himayah*, 1(2), 227-250.
- Hasmawati, H., & Syahril, M. A. F. (2020). The Effectiveness of Mediation Process to Press Divorce Rates. *Amsir Law Journal*, 1(2), 78-84.
- Juliardi, B., Runtunuwu, Y. B., Musthofa, M. H., TL, A. D., Asriyani, A., Hazmi, R. M., ... & Samara, M. R. (2023). Metode penelitian hukum. CV. Gita Lentera.
- Luthfia, N., Zahara, F., & Aminah, S. (2023). Analisis Peran Advokat Dalam Menangani Perkara Perceraian. *As-Syar'i: Jurnal Bimbingan & Konseling Keluarga*, 5(3), 685-705.
- Pujiana, I. M., & Fathoni, M. Y., yang berjudul "Peran Hakim Mediator dalam Proses Mediasi pada Kasus Perceraian" (*Private Law*, 1(3), 2021),

<sup>15</sup> Handayani, F., & Syaflawar, S. (2017). Implementasi Mediasi dalam Penyelesaian Perkara Perceraian di Pengadilan Agama. *Jurnal Al Himayah*, 1(2), 227-250.

- p. 94.
- Putri, D. A. (2022). Edukasi Dasar tentang Sebab Kebolehan Mewakikan Proses Perceraian Kepada Kuasa Hukum. *CENDEKIA*, 14(01), 74-86.
- Sayyaf, R. T. F. (2020). Harmonisasi Mediasi. *Al-'Adalah: Jurnal Syariah dan Hukum Islam*, 5(1), 46-62.
- Sururie, R. W. (2012). Implementasi mediasi dalam sistem peradilan agama. *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan*, 12(2), 145-164.
- Wiwin, W. (2023). Analisis Mashlahah Terhadap Putusan Mahkamah Konstitusi Nomor 22/PUU-XV/2017. *Jurnal Litigasi Amsir*, 10(2), 131-139.
- Wiwin, W., Darwis, M., & Syam, E. Z. (2023). Telaah Kritis Pemberian Izin Poligami dengan Alasan Sering Ditinggal Istri (Studi Putusan Nomor 28/Pdt. G/2021/PA. Ek). *Hukamaa: Jurnal Hukum Keluarga Islam*, 1(2), 1-10.
- Peraturan Mahkamah Agung Republik Indonesia Nomor 1 Tahun 2016 Tentang Prosedur Mediasi di Pengadilan.

#### Conflict of Interest Statement:

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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