

IACP Institute: Collaborative Mediation

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What is Collaborative Mediation?

The requirements for a Collaborative Mediation are:

- Two Parties.
- One, two or three mediators (lawyer, MHP, and/or financial in any combination as appropriate).
- Each Party Represented by a collaborative attorney from the outset.
- A signed participation agreement that includes a disqualification provision for the attorneys (and possibly the mediator).

Attorney Participation

NOTE that the degree of attorney participation can vary significantly, anywhere from simply reviewing an MSA at the end to attending all the sessions.

This of course needs to be clarified at the outset, and can change mid-stream.



Different Configurations of Collaborative Mediation

- Solo mediator and
 - two clients, two collaborative lawyers
 - two clients, two collaborative lawyers, one financial neutral
 - two clients, two collaborative lawyers, one neutral coach
 - two clients, two collaborative lawyers, two coaches
 - two clients, two collaborative lawyers, one child specialist
 - two clients, two collaborative lawyers, and any combination of the above
- Interdisciplinary mediation team (lawyer/mediator plus MHP/mediator and/or financial neutral/mediator) and
 - any combination as listed above.

What Makes a Collaborative Mediation “Collaborative”?

- Adherence to collaborative values.
- Use of collaboratively trained professionals who are members of a CP practice group
- Disqualification clause (for attorneys and possibly mediator).
- Team approach regardless of configuration



Overview of Collaborative Values

- Client focus – self determination
- Importance of all members of the family (child-centered)
- Interest based negotiation and beyond
- Creative problem solving
- Transparency
- Out of court process
- Interdisciplinary teamwork, even when only lawyers involved, including
 - Mutual care for all team members
 - Equal attention to the emotional, legal and financial aspects of the case

Differentiating Collaborative Mediation From Collaborative Practice

- Neutral facilitation model vs. negotiation model.
- The central difference between Collaborative Mediation and Collaborative Divorce is that in the mediation process the mediator takes responsibility for moving the case to completion, including taking the lead in facilitating the discussions.
- In a true collaborative divorce process, although each professional is a trained mediator, there is no mediator. In theory there is no hierarchy among team members.
 - Exception: Sometimes when the parties are unable to reach a resolution sometimes a mediator is brought in to the case to assist.

Bringing in a Mediator to an Existing Collaborative Practice Case

- Usually happens when things get stuck.
 - What other circumstances would point in the direction of this approach?
- NOTE that this is not what I mean when I talk about collaborative mediation. But still something to think about and use as appropriate.
- How is this form of “collaborative mediation” different than what I’m calling Collaborative Mediation?

Collaborative Mediator vs. Neutral Process Facilitator

- In some Collaborative Practice cases teams are including a “neutral process facilitator,” usually either the neutral financial specialist or a neutral coach.
- How is the role of the neutral process facilitator different from the role of the collaborative mediator?

15-Minute Break



Teamwork in Collaborative Mediation and Collaborative Practice

- In theory there is no hierarchy among team members in a CP case.
 - In practice it is often the lawyers who run the show and to whom the other professionals defer.
- In Collaborative Mediation there is still a team with full equality of members and no hierarchy, even though the mediator's job is to take the lead in certain ways.
 - Although the mediator guides the process and in some sense takes “ownership” of the case, that needn't mean that the professionals are not a team.
 - There are plenty of teams where there is a designated team leader. So one big difference is that in CP there is no team leader and in CM there is. The presence of a “team leader” may feel different to the team members.
 - Be clear from the outset *with the team* how things might be different and how they might be similar or the same as CP.

What is Collaborative Mediation? -- Discussion

- One of the comments I've gotten in previous programs is that people are not always clear what Collaborative Mediation IS.

- Are you clear?

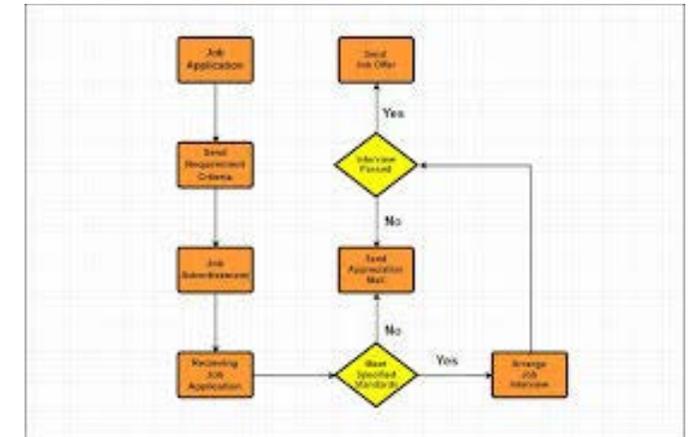
- Break into small groups and discuss (20 min).

- Return to large group for group discussion (15 min).



Collaborative Mediation Process Overview

- Initial process phone call – discuss process options.
 - Complementary 30-minute consultation or paid session?
 - Benefit of complementary initial consultation, including having MHP, lawyer and financial neutral all describe what they do and how they bring value (“joint education meeting”)?
 - Help clients determine right process for them; includes various configurations within each process and possible cost.
- If mediator(s) retained:
 - Initial 2-way meetings between mediator(s) and each client.
 - Initial 2-way meetings between each client and their collaborative lawyer.
 - Initial joint session. Create multi-dimensional roadmap.
 - Goals and concerns (the “why”).
 - Substantive agenda (the “what”).
 - Process values (the “how”).
 - Timing issues (the “when”).
 - Interim agreements, if any.
- Dual-track approach: clients work simultaneously with financial neutral on disclosures and with MHP on parenting plan.
- Once parenting plan completed and disclosures exchanged attention switches to financial negotiations.
 - Information gathering, option generation, negotiation, resolution



Collaborative Mediation: Advantages and Disadvantages

- Advantages:

- Less cumbersome, clunky.
- More efficient.
- Easier to schedule.
- Less expensive.
- Benefits of team leader.

- Disadvantages:

- Lacks the maximal holding that a full CP team provides.
- May not feel as egalitarian as CP due to mediator's leadership.

- Your thoughts?



End of Day One



How Decide Between CP and CM?

- Bring together the professionals the parties need.
 - How do the professionals serve the parties? That's the key question.
 - What are the functions that are most useful?
 - What's the purpose of having these people?
- Weigh the relative advantages and disadvantages.
 - Affordability?
 - Efficiency?



Collaborative Mediation: Issues and Questions

- Issue #1: Should the Mediator Sign a Disqualification Agreement?
 - Should the mediator be disqualified as well so that the mediator cannot be re-employed if litigation counsel come on? Why or why not?
- On the one hand, it makes sense for the same mediator to be used if the litigation lawyers want to litigate, or if the couple wants to go back to the mediator, as they are familiar with the case, and there is a cost-benefit advantage.
- On the other hand, one could argue that the mediator staying on too closely pierces the confidentiality veil of collaborative practice, and for those places that have a formal Collaborative Privilege through the UCLA or other statute, how would that be impacted if it is the same mediator with litigation lawyers?
- Your thoughts?



Collaborative Mediation: Issues and Questions

- Issue #2: Will the adoption of CM “dilute” the CP “trademark”?
 - We have spent an enormous amount of time, energy and money trying to educate professionals, judges, legislators and the public about what Collaborative Practice is.
 - I.e., public awareness and understanding of what Collaborative Practice is, what its advantages are, and what distinguishes it from other forms of ADR.
 - If we add mediation to our “List of Services,” won’t that cause confusion?
 - How effective have we been at establishing establish “brand recognition” for CP?
 - How does the answer to that question affect your answer?
 - Your thoughts?



Collaborative Mediation: Issues and Questions

- Issue #3: Can we truly say that CM is “collaborative” given the “hierarchical” role of the mediator?
 - How easily can CP professionals switch from “leaderless” teams to a team lead by a leader?
 - Most CP professionals are used to doing things a certain way, and without guidance and/or communication they will likely continue to do things in that same way.
 - What are everyone’s expectations? What are the mediator’s expectations?
 - How effective will team meetings be at addressing this issue?
 - Your thoughts?



Should Our Collaborative Practice Groups Offer CM as Part of Our Menu of Services?

- *Why* might collaborative mediation be a good idea?
- What are the trends we're seeing in practice?
- Collaborative skills translate easily to mediation. Lots of overlap.
- Many of us are mediating on the side anyway—why or why not keep separate?
- What are the different ways in which collaborative practitioners might do interdisciplinary mediation?
- Are we ready as the collaborative movement to start offering interdisciplinary co-mediation, and what would that look like (e.g., webinars, trainings, IACP website, sample content for local practice group websites)?



Rigidity and Orthodoxy in Collaborative Practice?

- Ron Ousky, one of the founders of CP along with Stu Webb, said that
 - In the early days CP was quite flexible.
 - Later there was a "rush to orthodoxy," and a rigidity set in at the time CP started creating teams.
- When I suggested to him that bringing mediation into the Collaborative tent might be as significant as when CP first became interdisciplinary, he said
 - "Yes, I think this type of thinking will lead to the next great wave."



Should Our CP Practice Groups Offer CM? -- Discussion

- There seems to be quite a difference of opinion as to whether we should offer CM on our practice group websites.
- Has the pendulum swung in the CM direction?
- Should we or shouldn't we?
- What is the impact of *not* offering CM?
 - Do we want to risk losing this business? Why or why not?
- Break into small groups and discuss (20 min.).
- Return to large group for group discussion (15 min.).



HOW Should Our Collaborative Practice Groups Offer CM as Part of Our Menu of Services?

- How would we market traditional CP and mediation within the same practice groups?
 - Different pages on website?
 - Explain differences?
 - Have Divorce Options workshops to explain differences?
- Do we need to further educate our members about the differences and how to discuss them?
- Your thoughts?



15-Minute Break



Interdisciplinary Collaborative Mediation

- One of the truly great values of Collaborative Practice is the commitment to interdisciplinary work.
- What might interdisciplinary Collaborative Mediation look like?
 - E.g., solo mediator plus one or two coaches and one financial neutral.
 - E.g., MHP and lawyer co-mediators plus other allied professionals.
 - Co-mediation offers a good opportunity for gender balance.



Interdisciplinary Collaborative Mediation: Two Variations on a Theme

- “In conjoint mediation, the mediators consistently function as a two-person team. They appear at all sessions together, often require that phone calls and e-mail communications involve both mediators and address all issues fluidly without subject-area role distribution. In collaborative mediation, mediators may start the process as a two-person team, but then switch off, delegating issue or sessions based on expertise and scheduling.”

- Mosten & Traum, “Interdisciplinary Teamwork in Family Law Practice, 56(3) Fam. Ct. Rev. 437-60 (2018) at 451.

Explaining to Potential Clients the Benefits of Interdisciplinary Collaborative Mediation

- Presumably many of the potential clients who will contact you about Collaborative Mediation will be familiar with mainstream, solo mediation.
- How will you describe what interdisciplinary CM is?
- How will you differentiate CM from solo mediation?
- How will you describe its benefits?



Differentiating Solo Mediation From Interdisciplinary Collaborative Mediation

- “Where a sole mediator might struggle with internal biases, co-mediators can keep one another in check if any biases start to come through in the mediation.”

- Mosten & Traum, “Interdisciplinary Teamwork in Family Law Practice, 56 (3) Fam. Ct. Rev. 437-60 (2018) at 451.

- High quality individualized expertise – legal, financial, mental health.
- Diverse professional perspectives to assure family focus and informed decision making.

Describing What Interdisciplinary Collaborative Mediation Is

- The most effective way I've found to do this is to explain to potential clients that in every divorce there are *two* divorces:

- The legal divorce
- The emotional divorce



- I explain that the legal divorce requires skilled use of rational intelligence, while the emotional divorce requires skilled use of emotional intelligence.

- The two forms of intelligence have different languages, different logic, different epistemologies.

- I further explain that while lawyers are skilled at handling the legal divorce, a mental health professional is needed to assist with the emotional divorce.

- Everyone gets this!

The “Legal Case”

The legal case is the sum of the legal issues, principles and concerns of the parties (financial issues are included as part of the “legal case”). It also includes the facts as understood by the parties.



The “Emotional Case”

- The emotional case is the “real” dispute, often hidden underneath the putative or surface-level dispute.
- It’s what really matters to the clients, and hence often holds the key to resolution of the overall case.



More on the Legal and Emotional Cases

- The legal case is informed by material interests, the emotional case by non-material interests.
 - Material interests are usually zero-sum; non-material interests are not.
- In practice the two cases are usually conflated and co-mingled.
- Conflation of the two cases is one of the primary causes of impasse.
- When conflated, parties are often inclined to use legal positions to correct past injustices, rather than to assess future needs and goals.
- Resolution of the emotional case looks different from resolution of the legal case.

Two Cases, Two Approaches

- The language of the legal case is *transactional*; the language of the emotional case is *relational*.
 - Transactional approaches typically employ a problem-solving methodology and utilize our rational/analytical intelligence.
 - Risk analysis
 - Application of legal principles to facts
 - Generation of options and solutions
 - Relational approaches typically employ a methodology of empathy and compassion.
 - There is no legal solution to an emotional problem
- The legal case requires *conceptual* knowing, whereas the emotional case requires *experiential* knowing.
- We have to move seamlessly between the transactional and the relational.

The Role of the Mental Health Professional Mediator

- Differentiate clinical skills from psychologically-related mediation skills.
- Provide developmental, parenting and other MHP-related information.
- Facilitate communication.
- Provide emotional support.
- Work with parties' dynamics.
- Observe professionals' dynamics.



The Role of the Attorney Mediator

- Differentiate litigation skills and collaborative skills from acting as an attorney-mediator.
- Focus on legal (and financial, if no CDFA) issues.
- Manage financial disclosures (if no CDFA).
- Responsible for moving case along at desired pace.
- Provide legal information.
- Provide legal reality checks.
- Formalize agreements.
- Manage court-related requirements.



The Role of the Financial Mediator

- Differentiate representing one side from acting as financial neutral.
- Gather financial information, prepare financial disclosures.
- Ensure clarity/cognizance re tax consequences.
- Prepare all needed reports (e.g. property division, cash flow projections).
- Provide clarity as to all financial issues.
- Do relevant calculations (e.g., vesting schedules, present value).
- Suggest creative financial options.



Describing the Benefits of Interdisciplinary Collaborative Mediation

- Greater client satisfaction with process as well as outcome.
- Most clients want emotional as well as financial/legal divorce.
- Deeper, more durable resolutions b/c get to heart of the matter.
- Includes understanding different levels of dispute resolution.
- Can be more cost-efficient due to increased efficiency.
- Once emotional issues have been addressed the parties are more able to give attention to the legal aspects of the case in a rational, dispassionate and practical way.
- Stronger foundation for future (e.g., co-parenting) relationship.



Is Interdisciplinary Collaborative Mediation a Good Idea?

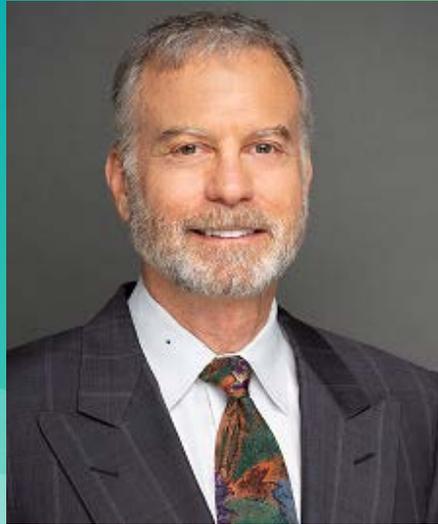
- Is interdisciplinary CM a good idea? Why or why not?
- Your thoughts?
- If time, break into small groups. If not, stay in large group.



End of Day Two



Thank you!



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