

The Mediator in Collaborative Practice

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Mediation and Collaborative Practice are ideal partners. Both share the goal of assisting clients in crafting their own resolution to disputes. Both draw on the same foundation of dispute resolution skills and both strive to preserve relationships, whether between parents, neighbors, business associates or others.

The roles of mediator and collaborative professional are different.

"Mediate" is defined by *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. 24 Feb. 2008. <Dictionary.com <http://dictionary.reference.com/browse/mediate>>, as follows:

1. to settle (disputes, strikes, etc.) as an intermediary between parties; reconcile.
2. to bring about (an agreement, accord, truce, peace, etc.) as an intermediary between parties by compromise, reconciliation, removal of misunderstanding, etc.
3. to act between parties to effect an agreement, compromise, reconciliation, etc.

While some of these descriptions could also be used for collaborative practitioners, "collaborate" is defined by the same source as: "to work, one with another." The Massachusetts Collaborative Law Council explains Collaborative Practice as: "working together to resolve differences in a constructive fashion. It is about rising above our differences to find resolutions that are fair and reasonable, satisfy all parties, and prevent the lasting acrimony so often associated with litigation." (www.massclc.org).

Seeing the overlap between these definitions makes it easy to see how clients can be confused about the differences and similarities between the processes. The recent success of the movie, *Juno*, has mixed blessings for collaborative practitioners. We are excited about the positive mention of Collaborative Practice in the popular movie but dismayed that it is described as a process wherein one attorney can represent both parties. Did the writers mean to say "mediation" or were they confused about "Collaborative Practice?"

The Collaborative process utilizes a team. There are a number of collaborative models but, at a minimum, the team consists of 2 clients and two attorneys. In some models there are also two mental health professionals serving as coaches, a neutral financial professional and, if appropriate, other neutral experts such as the child specialist, business evaluator, etc. Sometimes there is only one coach who serves as a neutral. In all these instances, the attorneys serve as advocates for the process and for their clients. The balance between those two roles is

sometimes a difficult one to maintain, professionally and ethically. And, therein lies the first opportunity to partner the mediator with the collaborative professionals. Often the mediator, by definition, a neutral, can act as the case manager or process manager guiding the participants through the process and thereby allowing the attorneys to focus on their ethical roles as advocates for their clients. The mediator who has been trained in Collaborative Practice is an ideal choice to fulfill such a role.

One of the strongest arguments often made in favor of mediation over Collaborative Practice is that, with all these professionals, CP must be much more expensive. However, often the involvement of the full range of professionals utilizing their particular areas of expertise to better serve the needs of the respective clients results in a lower overall cost to the parties than if they used attorneys alone or if each party retained their own, sometimes conflicting, experts. A financial professional can better and more efficiently analyze the tax consequences of potential resolutions than I, as an attorney, can. So, the clients save money by utilizing the best person for the job. The neutral professional has important input from both clients so is better able to analyze and evaluate. And, having a mental health professional in the room to observe the reactions and interactions of the parties (and, sometimes, the attorneys), can help identify unspoken concerns, focus discussions and prevent or address impasse. Knowing there is someone else in that role allows the attorneys to focus on their primary responsibility. This often results in fewer meetings and more appropriate results. One of the best indicators of the benefit of such teams is that more mediators are now utilizing the resources of financial professionals and divorce coaches in their mediation process, along with the traditional attorneys.

Mediators have had to balance the need to provide clients with legal information and the prohibition against giving legal advice. In some ways, this is easier for non-lawyer mediators but, in other ways, they can get in more trouble because they may be less knowledgeable about the law and where that line is. And, lawyers, trained to give advice, sometimes have to be very creative about getting parties to consult with attorneys while refraining from the natural impulse to speak up, especially if they see a perceived inequity. In the collaborative process, attorneys are integral. Most mediators recommend clients consult attorneys but can not compel them to do so. Many judges have expressed a greater comfort level with collaborative practice because they know the parties have legal counsel. But, the neutral role of the mediator gives him or her the ability to impart information in a way that might be better received by the clients, thereby promoting resolution. Again, the integration of the processes provides clients with comprehensive professional support.

Collaborative professionals often draw on mediation skills and training in dispute resolution to serve their clients. Now mediators are drawing on the success of Collaborative Practice to better serve their clients. And, when seeking referrals to attorneys, financial professionals and mental health professionals for their

mediation clients, who better for mediators to look to than their local collaborative professionals? Mediators know that collaborative professionals share their commitment to a client-centered resolution.

Sometimes, even with the best of intentions, the collaborative process is too expensive for some clients. Or, sometimes more complex than needed. In those, and other situations, when a referral to another process is appropriate, collaborative practitioners call on their mediator-colleagues. Sometimes, the collaborative process reaches impasse and a fresh perspective is needed. Mediators can help provide that perspective. A referral to a mediator to address one problem or an area of negotiation (such as the parenting plan) can help move the negotiations forward and, another benefit to the clients, often help save time and money. The mediator can be part of the collaborative process from the inception or can come in as needed. Does it matter if parties start with Collaborative Practice and go to mediation, start with mediation and go to Collaborative Practice, or integrate from the beginning? In either case, if the parties are advised of the possibilities and benefits from the beginning, the mediator will be more successful because his or her involvement will be seen as part of the process and not an indication of a problem.

If the mediator is part of the collaborative process, he or she needs to sign a collaborative participation agreement of some kind. The professionals need to resolve any ethical issues related to integrating mediation and Collaborative Practice (state statutes related to mediation and collaborative standards of practice) while also being mindful of the ethics of the mediator's profession of origin, for instance, attorney or mental health professional. Massachusetts has a statute that, if certain conditions are met, insures the confidentiality of the mediation process. However, not all states do. Most mediators address this through contracts or fee agreements but, until and unless the Uniform Mediation Act is adopted by all states, the confidentiality of the negotiation process may be better protected through Collaborative Practice. In certain high profile cases or if there are, for instance, confidentiality issues related to a business, integration of mediation and Collaborative Practice may provide a desirable and more confidential option for clients.

Keeping collaborative team members informed, when and if appropriate, while in mediation may be a new concept for the mediator and may raise ethical concerns, as well. The professionals need to address the process and ethical issues between themselves and, as appropriate, with the clients.

Collaborative practitioners are an excellent referral source for mediators and, vice-versa. Mediators can serve as one of many gatekeepers for the collaborative process. Clients often seek input from mediators when trying to decide on the best process. In a situation where one of the parties needs the comfort of having his or her advocate in the room, the collaborative process is the ideal choice. If there is a history of domestic violence, the collaborative

process, with its layers of professionals is often able to create the container of safety that would not be possible in mediation. Mediators, wanting a successful outcome for their clients now have another process to recommend so clients do not need to be subjected to the uncertainties and stresses of litigation.

As skillful as collaborative practitioners may be, they may face their own conflicts and impasses. Attorneys, especially, are trained to be advocates and the paradigm shift is an ongoing process. They are, after all, only human. Another important role for mediators is to be available to mediate between the collaborative practitioners and to facilitate if they come to impasse.

Mediation may also serve as a secondary dispute resolution process once the initial matter is finalized. For instance, the parties may include a clause in their settlement stating that they would utilize mediation in the event of a later dispute, for instance, a divorce modification. Because the issues would usually be narrower, mediation may be quicker and more accessible. And, collaborative practice can be an alternative if a mediated dispute needs to be re-opened.

Like many Collaborative Practitioners, I have been a mediator for many years. I started my professional life as an attorney but was quickly drawn to mediation. However, I never felt that mediation, by itself, offered enough to my diverse clientele for me to give up litigation entirely. Then, I was introduced to Collaborative Practice. It seemed to be the perfect compliment to mediation and I embraced it. Only later did I learn that some mediators viewed CP as a threat and as an interloper. Mediators worked hard to establish their place as a legitimate part of the dispute resolution world. When O.J. Coogler and others first promoted mediation in the early 1970's, they were met with resistance and derision from litigators. After twenty years of hard work to prove themselves, along came Stu Webb who said there was another way. Like the litigators before them, many mediators resisted and resented collaborative practitioners. And, not all collaborative practitioners recognized the value of mediation. As Collaborative Practice approaches its 20th anniversary, we, mediators and collaborative professionals alike, are appreciating the myriad of ways that we interrelate and integrate to better serve the needs of our clients. We celebrate the union of our processes as well as the differences.