

Kluwer Mediation Blog

Mediation and Collaborative Law: are they not siblings?

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What is Collaborative Law and Practice?

Collaborative Law is a mode of dispute settlement, mainly used in family disputes (divorce, separation) and sometimes in civil matters (inheritance, commercial disputes), allowing the disputants to work as a team with trained professionals to resolve disputes respectfully without going to court. The Minnesota (USA) family lawyer Stu Webb developed such a model in 1990 that is at the heart of all of Collaborative Practice. Each client has the support, protection and guidance of his or her own lawyer. The lawyers and the clients together comprise the Collaborative Law component of Collaborative Practice.

While Collaborative lawyers are always a part of such a process, some models provide, on an interdisciplinary basis, the assistance of specialists (e.g. financial specialists, child specialists) and coaches (mental health professionals in divorce disputes) as part of the clients' team.

Collaborative Practice is distinguished from traditional litigation by its inviolable core elements which are set out in a contractual document defined as « Participation Agreement » among the clients and their chosen collaborative professionals to:

- negotiate a mutually acceptable settlement without using court to decide any issues for the clients;
- withdrawal of the professionals (lawyers and others) if either client goes to court («disqualification» or «withdrawal» clause);
- engage in open communication and information sharing, and
- create shared solutions that take into account the highest priorities of both clients.

Collaborative Practice is a client-centered and client-controlled process that begins with an assessment of the individual needs of each client. In response to client needs, the Collaborative Practitioners selected by the clients provide them with professional services using an integrated approach. This approach creates a supportive, problem-solving environment, where the clients can negotiate their own agreements face to face, assisted by their Collaborative Practitioners.

The Collaborative participation agreement the clients and professionals sign at the start of collaboration mandates that any Collaborative Practitioner in the case must withdraw from representing or assisting either client, if either client engages in any form of litigation about the dispute. This requirement mitigates the negative impact of the power-based procedures inherent in the adversarial court model. At the same time, it encourages continuing efforts to find creative

solutions in the face of apparent negotiation impasse.

To reach agreements that are of greatest mutual benefit, and to ensure the integrity of the process, the clients and their professional practitioners must freely disclose all relevant information. The Collaborative Practitioners help each client to make fully informed, intelligent and voluntary decisions. The commitment to full disclosure and the withdrawal requirement are essential elements of a safe process.

Does Collaborative Law and Practice substantially differ from Mediation?

Collaborative Law and Practice does not substantially differ from Mediation as a process for dispute settlement. Although there are certain differences between Mediators who are neutrals and Collaborative Practitioners, especially Attorneys, who are advocates for their clients, both Mediators and Collaborative Professionals strive to resolve conflicts and to bring about agreements. In addition, both usually utilize the same dispute resolution skills, such as interest-based negotiation, and generally strive to preserve the parties' relationships, regardless of whether the disputants are married, neighbours, business associates or others.

Family cases may include mental health professionals who serve as coaches either in a one- or two-coach model, a neutral financial professional and, if appropriate, other neutral experts such as child specialists, business evaluator, etc. In civil cases, other experts can be included, however it appears that such cases are most likely to need mediators as a resource to the Collaborative process participating in a manner designed to enhance its success.

How Mediation can be used in combination with Collaborative Law and Practice?

A mediator can help in the Collaborative process in a number of creative ways:

- Mediation can serve to initially bring the Parties together before they meet with Collaborative Professionals.
- Mediation can facilitate communication between the Parties' attorneys when barriers are recognized.
- Mediation can facilitate multi-party conferences, especially if high emotions are foreseen.

Utilizing mediation as an initial step may serve to quickly determine whether the case may be difficult or easy to resolve. This will help Collaborative Practitioners to determine the need for the possible inclusion of further « Team » members. Regardless of how well or how long two attorneys have known each other, even if they are committed to the Collaborative process, they may still be stuck in positional bargaining that prevents them from seeing each other's client point of view. Mediation can therefore help the Attorneys to come to a common ground and avoid the necessity of litigation.

The Mediator as Case Mediator/Manager/Facilitator in the Collaborative process.

A mediator in the Collaborative process can play such a role, as labelled, depending on the function that is allocated to him. Acting as a «Neutral», his role is to assist all Parties in a Collaborative case as follows:

- To determine the format or configuration of the Professionals that will be involved.
- To help professionals in determining cases goals.

- To facilitate communication among the Professionals as well as the Parties.

In particular, the Case Mediator can meet with the Attorneys for an initial triage after they have met with the Parties. The Case Mediator can also meet with the Attorneys for brainstorming options as to how best to approach the case based on the needs of the Clients and their financial situation. It may be that the Attorneys will need to explain the Case Mediator's role in their initial meeting with their respective Clients. An agreement will be signed along with the Participation Agreement that will delineate those issues, which are to be addressed with the Case Mediator.

The Case Mediator may also meet with the Parties to resolve issues in the Collaborative process:

- When the Parties have limited financial resources.
- Where the issues at stake are fairly simple and do not require input from other Professionals.
- When the Parties' communication seems to be open and free.

Mediator as Impasse Breaker.

In any conflict resolution situation impasse is always a possibility. Mediators can bring a fresh perspective to help to move the negotiations forward. This is true whether the Mediator has been part of the Collaborative process from the beginning, or is brought in to break the impasse.

Post-Collaboration Mediation.

Mediation may serve as an alternative dispute resolution process for future potential disputes that may arise after the initial matter has been finalized.

It is worth pointing out that Attorneys serve as advocates for the process and for their Clients' goals and interests in Collaborative cases. There is often a tension between process, substance and advocacy in a team model. This tension makes it difficult for the attorney to balance the competition between his role as a professional and his role as a collaborator. This is most likely to be the first opportunity to utilize a mediator in the Collaborative process. Adding another member to the team may seem to be «over kill», however, designating that professional to act solely as a case manager/facilitator can help advance the process. The Mediator, as Case manager or Case facilitator offers neutrality which can guide participants through the process and free up their Attorneys to focus on their roles as advocates.

Mediators who serve as part of a Collaborative team need to have the Clients sign a Collaborative participation agreement which allows them to withdraw from the process if the case breaks down and the Parties decide to retain litigation Attorneys.

Mediators, like any Professionals that venture into Collaborative Practice, need to be creative and to come up with ways in which they can enhance the Collaborative process and convince themselves that they have a true role to play in such a dispute management and resolution scheme.

Collaborative Attorneys in Mediation.

In the reverse situation, Mediators will also appreciate the whole benefit of having, in usual standard mediations, Attorneys that have been practising Collaborative Law, used to such methods, contrary to litigation Attorneys more used to positional bargaining.

Conclusions.

It can be seen from the above, that Mediation, in combination with Collaborative Law, can be used as useful and powerful scheme for resolving disputes, especially in circumstances where lawyers are involved as part of the process. This not only for the benefit of Mediation but also for Collaborative Practice.

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