

Collaborative Mediation - A Hybrid Solution for Complex and/or Higher Conflict Mediation Cases



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hybrid (hbrd): "An organism that is the offspring of two parents that differ in one or more inheritable characteristics, especially the offspring of two different varieties of the same species or the offspring of two parents belonging to different species... Hybrids often display hybrid vigor." *The American Heritage Dictionary*

In the ongoing discussion of mediation versus collaborative law, what is becoming more apparent is the need for a hybrid approach for certain of cases that borrows from the best of both processes to meet the needs of complex and/or higher conflict mediation cases.

In the article, I will define mediation and collaborative law, and then examine some of the similarities and differences between each process. Following that, I will define "collaborative mediation" and then explain how collaborative mediation can combine the best of both worlds. Lastly, I will illustrate some mediation cases that would benefit from a collaborative approach. Speaking of collaboration, I am grateful to my colleagues, Adam Berner, Carl Cangelosi, Ken Neumann, and Hanan Isaacs, for their input in helping shape this thesis.

Definition of Mediation (from Wikipedia): Mediation is a form of alternative dispute resolution (ADR), aims to assist two or more disputants in reaching an agreement. The key component of mediation is whether an agreement is reached, and what that agreement is determined by the parties rather than being imposed by a third party. Writers in the field of mediation normally espouse a code of conduct that mirrors the underlying principles of the mediation process. The most common aspects of mediator codes of conduct include:

- ***A commitment to inform participants as to the process of mediation.***
- ***A neutral stance towards all parties to the mediation, revealing any potential conflicts of interest.***
- ***Conduct of the mediation in an impartial manner.***
- ***Confidentiality, within the bounds of the legal framework under which the mediation is undertaken.***
- ***A concern for the psychological and physical well-being of all the mediation's participants.***
- ***Referring the mediation parties to attorneys for any legal advice they might need.***
- ***Maintaining skills by engaging in ongoing training in the mediation process.***

- ***Practicing only in those fields in which they have expertise gained by their own experience or training.***

Definition of Collaborative Law (from Wikipedia): Collaborative law was created in the early 1990's by family lawyer Stuart Webb, who saw that traditional litigation was not always helpful to families, and often was damaging. The key document in a collaborative case is the participation agreement. It is a contract signed by the participants, which sets forth the rules for the process. The parties and lawyers agree that:

- ***The lawyers will not litigate the case. If the settlement process fails, and litigation is the only recourse, the original attorneys must withdraw and the parties must retain new lawyers;***
- ***Neither party will take advantage of mistakes by the other side.***
- ***The parties will freely disclose all pertinent information and will not hide any material facts;***
- ***What is said in the settlement meetings remains confidential; and everyone will behave courteously and in good faith.***

Similarities between Mediation and Collaborative Law: Mediation and collaborative law have many similarities including:

- ***Both processes provide the potential for significant cost savings to clients.***
- ***Both processes provide a forum for the parties to have direct communication with each other.***
- ***Both processes allow the participants to control the timetable in which the agreement is reached.***
- ***Both processes also allow for solutions that differ from what a court might be able to order - such as a lump sum payment in lieu of alimony.***
- ***Both processes may not be appropriate where there is a history or pattern of family violence.***

Differences between Mediation and Collaborative Law: Collaborative law also has some differences from mediation. In collaborative law:

- ***The attorneys are involved in each meeting where the parties getting divorced meet; this can be beneficial for clients who need hand holding throughout the process, but also be a detriment to facilitating communication between the parties as the attorneys often choose to speak on behalf of their clients, taking control away from the clients and the process.***
- ***Because lawyers are disqualified if the process breaks down, there is a greater incentive for the attorneys to cooperate. On the other hand, there may be an incentive for the lawyer not to advocate for the best deal for***

their clients, as it might result in the process breaking down, and their termination.

- ***The client is hearing the other side's view of the case and the law, directly from opposing counsel. Additionally, the client gets the opportunity to question opposing counsel. In contrast, in mediation, clients usually consult with their separate attorneys between sessions, and report back on what they heard to the other party, which may be misinterpreted or inaccurately reported.***
- ***Documents prepared are usually not confidential whereas documents prepared in mediation are usually confidential. The mediation and the mediator may have privilege in certain states; this is usually not true for collaborative law.***
- ***The attorneys write the client agreement. In some states, in mediation, the mediator writes a non-binding memorandum of understanding (MOU); the MOU forms the basis for the binding agreement that is written by one of the attorneys.***
- ***The two attorneys manage the divorce process; co-chairing and co-managing; in mediation, the mediator acts as project manager, and as the neutral person focused on the parties' underlying joint interest: "Getting to Yes."***

Definition of Collaborative Mediation: In collaborative mediation, the mediator works with the clients during the divorce, but hosts periodic five-way meetings clients and their attorneys at various junctures in the mediation process. In the model that I utilize, the clients are not signing disqualification agreements with their attorneys regarding representation if the case were to go to trial.

While it is unclear who coined the term "collaborative mediation," I first heard the term used in the fall 2005 issue of the Association for Conflict Resolution's publication, Family Mediation News (<http://www.acrnet.org/pdfs/fmncall05.pdf>) in an article entitled "Collaborative Law and Mediation: Adversaries, Bedfellows or Partners?" by Barbara Landau. This article appears to be the most widely quoted article on the subject of collaborative law and mediation.

Fred Glassman, a Los Angeles attorney and mediator recently trademarked the term "Medicollab." In Medicollab, as defined by Glassman, "the role of the mediator is redefined. Either the mediator can continue as the facilitator with the consulting attorneys being bound to the process vis-a-vis the disqualification agreement; or the collaborative attorneys can be the focal point with the mediator assuming the role of case-manager. However, in the latter situation the mediator steps up to the plate to facilitate impasse" (<http://www.collaborativeattorney.com/collaborativearticles.html>).

The Argument for Collaborative Mediation: Most mediation clients who walk through the door voluntarily are able to reach a voluntary agreement; from my experience, that statistic is approximately 90% (experience shows this statistic to be lower for court ordered mediation). But, there are clients who don't choose mediation because they either want or need the security of having a legal advisor about specific issues, where they feel a lack of knowledge. Additionally, for those 10% of cases that don't settle in mediation, more closely involving the attorneys might change the result. For some cases that do settle in mediation, mediators may already be practicing collaborative mediation, without using that moniker.

Since the attorney disqualification agreement appears to be a requirement of the collaborative law process, in the off chance that the case does not settle in collaborative mediation, if there is no disqualification agreement, the parties are free to continue using their attorneys in the traditional litigation divorce process, which would not be an option with collaborative law. However, as this reality of divorce is that less than 1% of cases actually go to trial, it is my belief that this particular benefit is most often, a moot point.

Cases That Could Benefit from Collaborative Mediation: Using three typical examples from divorce mediation, I have provided some commentary regarding how each case could benefit from a collaborative mediation approach.

Case 1 - Unequal Earnings and Financial Knowledge: 20 Year Marriage with two children 12 and 15. The wife has a master's degree in business and is a mid-level executive with a Fortune 500 company earning \$250k a year, with a job that includes a pension, stock options and other non-cash benefits. The husband stayed at home with the children until the youngest child was seven, and then returned to teaching middle school history, and is making \$60k a year. The parties co-parent well together, but the husband feels very insecure about his future, and his negotiation skills, as the wife has been the primary breadwinner, has a stronger financial background, and has managed the money during the marriage.

Commentary: While the parties are cooperative, and in terms of addressing parenting issues, are very comfortable meeting together with the mediator. However, when it comes to numbers, the husband loses focus. Even though the husband could confer with his attorney outside of the mediation process, the mediation would be more productive, if he were to have the attorney present for the sessions regarding support, as well as distribution of assets, to

provide legal advice, and for the other side's attorney to hear his attorney's argument.

Case 2 - Unequal Earnings & Education, Unclear Job Prospects, And Possible Mental Health Issue: 3 year-Marriage, but the parties cohabited for 7 years prior to the marriage. They have a 3-year old son. The husband reports the wife is sleeping in great deal and cries all the time. The wife has not worked outside the home since a year after the parties met; prior to that, she worked as a flight attendant. The husband is a research scientist and inventor earning \$400,000 a year. He is leaving his wife for another woman.

Commentary: After speaking with the wife about her emotional state, having the client talk to a mental health professional, would be probably be the first step any professional would suggest, if in fact she is sleeping a great deal and cries all the time. It is not hard to understand the situation; the wife she has lost control in the marriage, has no vision of the future, and feels powerless. Actively participating in the mediation process might give her the confidence to move past her hurt. At the same time, the wife probably needs an advocate to bring up issues of childcare, job retraining, and spousal support (for a short term-marriage, but a longer-term relationship). Having the attorneys present at the start of the mediation, and moving towards meetings directly with the clients, with the attorneys then involved at critical junctures, would help both parties establish a working post-divorce relationship.

Case 3 - High Conflict: Equal Earnings, but Very Different Views on Custody: 10-Year Marriage, both parties earn similar incomes (approximately \$75,000 each) and work for the same company. There are two children - twins girls, age 9. The wife is willing to give the husband alternate weekends, and is firm about the parenting arrangement. Her mother lives in the house next door, and helps her out with the girls whenever help is needed. The husband wants to be more than a visitor to his children. The husband is thinking of fighting for custody, if the wife is unwilling to share custody. The parties are coming to mediation because their neighbor, who recently got divorced, recommended it; both parties are very skeptical.

Commentary: While there is a good chance that once these parties enter mediation, they might be able to reach an agreement, neither might want to sign a retainer with an attorney who would disqualify themselves, if the process broke down. The mediator does the clients a service by providing a list of mediation friendly attorneys, who might also be able to litigate the matter, if the issue were not to settle in mediation. Having both attorneys present at the mediation to discuss the cost/benefit of a custody battle, and its

impact on the children might help move this case towards settlement. Hopefully, once the custody issue is settled, with the assistance of the attorneys, the remaining issues do not complicated, and probably could be addressed through the traditional mediation process.

Conclusions: Many of my clients, even those with significant assets and earnings, have not consulted with an attorney at the start of the mediation process. Some are fearful of attorneys, and others seek to retain control of the process. However, for those individuals with complex and/or higher conflict situations, using a hybrid process of collaborative mediation, can result in a process that both parties might consider more comfortable and comforting than the traditional mediation approach, and result in a written product that has greater "buy-in" for the attorneys representing those clients.

As Barbara Landau stated at the end of her article in Family Mediation News on collaborative mediation - "I would welcome hearing the experiences and successful strategies of other mediators."



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