

A User's Guide to the Mediator's Role in Collaborative Practice

Lynda J. Robbins, JD

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; both strive to preserve relationships, whether between parents, neighbors, business associates or others. Although the roles of mediator and Collaborative professional are different, there is mutuality of skills and interests. Taking advantage of the similarities and differences, the mediator can serve many roles in the Collaborative process.

"Mediate" is defined by *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. 24 Feb. 2008, 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 definitions could also be used to describe Collaborative practitioners, "collaborate" is defined by the same source as: "1. 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) Mediators are more neutrals; Collaborative practitioners are advocates – yet both by definition work with others to resolve conflicts and bring about agreements.

Seeing the overlap among these definitions makes it easy to see how clients can be confused about the differences and similarities between the two 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 two clients and two attorneys. The team can also include mental health professionals serving as coaches either in a one- or two-coach model, a neutral financial professional and, if appropriate, other neutral experts such as the child specialist, business evaluator, etc. Just as we "normalize" the inclusion of these "tra-

ditional" Collaborative professionals in the process, we can add the mediator to the resources available to clients and by doing so make them a part of the process whether by integrating them as part of the team or using them as an adjunct to the process.

Mediator as Case Manager

In Collaborative cases, the attorneys serve as advocates for the process and for their clients' goals and interests. However, there is a tension between process, substance and advocacy in a team model. The tension between being an advocate for the process, and advocating client needs and interests, is sometimes a difficult balance both 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 roles as advocates for their clients.

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The mediator who has been trained in Collaborative Practice is an ideal choice to fulfill such a role. Collaborative practitioners in Michigan, Georgia, New York, and other jurisdictions routinely include mediators in their Collaborative cases as case manager and facilitator. While the "traditional" Collaborative mental health professionals sometimes serve in this capacity in addition to their role as child specialist or coach, the dual roles may be confusing to all and difficult to execute.

Although it may seem counter-intuitive, adding another professional to the mix and designating that professional to act solely as a case manager/facilitator can help advance the process. In

In addition, 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 through the use of a mediator in the Collaborative process, or the referral out to a mediator during the Collaborative process, provides clients with comprehensive professional support and allows the professionals involved to focus on their primary functions.

Educating clients about mediation from the outset, even if it is not clear when and if a mediator will be needed, informs clients that mediation is a valuable resource available to them should they need it during the Collaborative process or even beyond the Collaborative process.

Mediator as Impasse Breaker

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 a specific issue, or an entire realm of issues such as the parenting plan, can help move the negotiations forward. The mediator can be part of the Collaborative process from the inception in the role of case manager and facilitator, or can be a resource to whom clients are referred as an adjunct to the process.

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 any of these scenarios, if the parties are advised of the possibilities and benefits of mediation from the beginning, the introduction of 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. Educating clients about mediation from the outset, even if it is not clear when and if a mediator will be needed, informs clients that mediation is a valuable resource available to them

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Post-Collaboration Mediation

Mediation may serve as an alternative dispute resolution process once the initial matter is finalized. For instance, the parties may include a clause in their settlement stating that they will attempt to settle through mediation in the event of a later dispute like a modification of their parenting plan. Because the issues would usually be narrower, mediation may be quicker and more accessible than litigation. And, Collaborative Practice can be an alternative if a mediated dispute needs to be re-opened.

In a case in Massachusetts, the parties and counsel included mediation in their final divorce agreement as one of the dispute resolution mechanisms along with Collaborative Practice, recognizing that both were viable options. In a post-divorce issue in that same case, the parties and counsel determined that in fact mediation rather than Collaborative Practice was the better choice for the parties' particular issue and the problem was resolved in one mediation session with a neutral. The ability to inform clients about mediation at the beginning of the Collaborative process, as well as following the Collaborative process, can be a powerful tool for clients and their attorneys.

Integrating Processes

Sometimes, even with the best of intentions, the Collaborative process is too expensive for some clients or is a more complex process than is required. When a referral to another dispute resolution process other than Collaborative Practice is appropriate, Collaborative practitioners can call on their mediator-colleagues; mediators might also find that their clients require advocacy on one or more issues such that their clients can be referred to Collaborative practitioners, either as an integrated or as an adjunct process, as well.

One of the strongest arguments often made in favor of mediation over Collaborative Practice is that, with all these professionals, Collaborative Practice must be much more expensive. Experience has taught us, however, that 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 an attorney can, for instance. So, the clients save money by using the best person for the job. The neutral financial professional has important input from both clients so is better able to analyze and evaluate than if each party had separate experts.

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. For example, just as in the Collaborative process, having a mental health professional as a coach in a mediation can help identify unspoken concerns, focus discussions and prevent or address impasse. Knowing there is someone else in that role allows the mediator to focus on his or her primary responsibility. This often results in fewer meetings and more appropriate results. While using the team in a mediation setting may serve to blur the distinctions between the processes, the overriding motivation is, again, to better serve the needs of our clients. This is just one illustration of the ways the practitioners and the clients benefit from integrating aspects of one process into another to best meet the needs of particular clients.

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Mediators have always had to balance the need to provide clients with legal information and the prohibition against giving legal advice. In some ways, avoiding giving legal advice is easier for non-lawyer mediators, but in other ways, non-lawyer mediators can get in more trouble because they may be less knowledgeable about the law and where that “uncrossable” line is. And lawyer mediators, 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. Although most mediators recommend that clients consult attorneys, they can not compel them to do so. Mediators, working within the Collaborative process, provide the most comprehensive support to the clients since attorneys are integral, thereby eliminating the concern that parties may not have legal advice to assist them in making informed decisions.

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. Mediators now have an expanded

base of professional resources trained in client-centered dispute resolution to integrate into the mediation process. 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-focused resolution. Collaborative practitioners are an excellent referral source for mediators, and vice-versa.

Ethical Considerations

On a practical note, if the mediator is part of the Collaborative process, he or she needs to sign a Collaborative participation agreement of some kind. The parameters of that agreement might vary depending on the role of the mediator, e.g., case manager, facilitator, etc., and the standards, rules and statutes of the specific jurisdiction. 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. It states in part... “Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or *other person* (italics added) shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding...” (Massachusetts General Laws, Chapter 233: Section 23C) If the mediator is acting as a case manager, this statute may not confer confidentiality, but if the mediator is acting as a mediator/facilitator, the statute may apply.

These questions must be addressed in advance by the professionals in such a manner that they and the clients are comfortable. In states that have no statute at all, mediators presently 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 in jurisdictions without such statutory protection may be better safeguarded through Collaborative Practice and the comprehensive participation agreements that are integral to its application. 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 through the confidentiality imparted by the various professions involved as well as the participation agreement and, in some jurisdictions, by statute. The Uniform Collaborative Law Act, if adopted and based on its present

draft, would appear to cover mediators under the umbrella of the Collaborative process.

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 among themselves and, as appropriate, with the clients. Depending on the jurisdiction, participation agreements, fee agreements and other contractual arrangements can provide the maximum protection for the parties and the professionals involved.

Mediator as Gatekeeper

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, may be able to create a 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 or among the Collaborative practitioners and to facilitate resolution if there is discord within the team.

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.



Lynda J. Robbins has practiced law for over 25 years in Chelmsford, Massachusetts. She presently has a family law settlement practice which includes Collaborative Family Law and mediation. Lynda is President of the Massachusetts Council on Family Mediation and former President and founding member of the Massachusetts Collaborative Law Council in addition to presently serving as Clerk. She is a founding member of the Merrimack Valley Mediators Group. Ms. Robbins is a member of the Board of Directors of IACP and is chair of its Civil Committee. She is also a member of ACR and AFCC. Contact Lynda at ljrobbinesq@verizon.net or through her website, www.robbinsresolves.com.

Help Clients Plan for the Future by Looking at Credit Issues Early

Kevin Kowalke

Divorce is a time in one's life filled with multiple layers of stress, anxiety and doubt. These layers are magnified as one looks to transition from living on household income to making ends meet on an income status.

There are a number of key areas that need to be addressed to provide the best opportunity for financial success and continued home ownership during the Collaborative Divorce process. In this article we will be addressing the most important aspect of clients' personal financial situation: credit rating.

It is imperative that a credit bureau report be obtained and reviewed in great detail as soon as possible when parties are considering divorce.

Your client's credit situation must be carefully reviewed. In today's economic climate, credit has become more important than ever before. Your client's credit rating will determine whether he or she can qualify to purchase or refinance a home. In addition, credit scores and credit history will impact the interest rates that can be obtained for any type of financing (home, auto, student loans, credit cards etc.), as well as homeowner's insurance rates.

It is imperative that a credit bureau report be obtained and reviewed in great detail as soon as possible when parties are considering divorce. Not only will this provide the information needed to analyze and structure debt distribution, it will immediately identify the strengths and weaknesses in your client's credit profile. In particular, it will determine whether a client will qualify for mortgage financing. Clients should consider getting a "Tri-Merge" credit report that combines the scores reported by Fair Isaac (FICO), Transunion (Emperica) and the Beacon score provided by Equifax, because the credit scores can vary among the reporting companies. A lender will likely look at the middle number and throw out the other two, which can work to a client's advantage.

Factors Affecting Credit Profile and Credit Score

There are five key factors that make up your client's credit profile: Payment history (35% impact); outstanding credit balances