

Mediators in Collaborative Practice

Conceived in 1990 by attorney Stuart G. Webb, Collaborative Practice was a “new wrinkle” in dispute resolution developed in response to a perceived shortcoming of mediation (the missing element of the “lawyer-client relationship”) and the drawbacks of the traditional court-based system. His idea, born of mediation processes but set within a legal paradigm, was to deliberately create a climate for settlement by removing the trial aspects of the legal process. Attorneys would commit to withdrawing from a case if adversarial court proceedings were likely or required. In Collaborative circles, this is referred to as the “Collaborative commitment.”

The advantages of the Collaborative model as described by Stu Webb in 1990 were:

- Each party is represented by an attorney of his/her choice (this did not always occur in mediation).
- Lawyers are focused on settlement without the threat of going to court.
- There is continuity between settlement and processing the final dissolution, preventing mediated agreements from being torn apart by attorneys who do not like the mediated settlement.
- Lawyers and clients are motivated to learn what works to achieve settlement; how to problem-solve.
- Lawyers are free to use their “lawyering” skills: analysis, problem solving, creative alternatives, tax and estate planning and looking at the overall picture of what is fair.
- Parties and lawyers work collaboratively generating positive and creative energy.
- Clients and potential clients get an orientation in which they are advised of the advantages, including cost savings.

Admittedly, these ideas were formulated in 1990, and Collaborative Practice has evolved over the years, attributable in part to Stu Webb’s openness. Yet, while some experienced practitioners encourage “out of the box” ideas and moving beyond law centered outcomes, for many, Collaborative Practice continues to be law-driven.

Many Collaborative practitioners acknowledge the benefits of an approach to divorce that includes legal, mental health and financial professionals, yet curiously, mediators have, until recently, been mostly overlooked-- perhaps because many Collaborative attorneys have trained as mediators. Mediation is, however, a distinct area of practice with its own body of knowledge, guiding principles, values and standards. Mediators may draw upon the knowledge and practices of other disciplines, yet acting in the neutral capacity, mediators are not operating as practitioners of other professions.¹ Similarly, when practicing law, Collaborative or otherwise, lawyers are not operating in the capacity of mediator.

While it has been acknowledged that mediation skills are valuable to Collaborative practitioners, and that neutrals can be helpful working along side the Collaborative process on specific issues or assisting when the process has reached an impasse, skilled neutrals have a distinct and valuable role to play at the Collaborative table, particularly in complex or high-conflict

¹ 2004 proposed policy statement of the Association for Conflict Resolution on the Authorized Practice of Mediation: When acting in the “capacity of mediator, practitioners should not engage in the practice of law, whether or not they are lawyers. Nor should mediators, when mediating, act in the capacity of any other profession.”

cases. Integrating skilled mediators in the process and acknowledging conflict resolution as a contributing discipline will support the evolution of Collaborative Practice toward an increasingly client-centered and effective practice.

Client-Centered Process

Certainly complex changes or conflicts benefit from consultation with and assistance from experts if parties are to have the benefit of substantially informed decision-making. Yet, when engaging experts, the clients' own sense of what is best is at risk of being lost. A client-centered process keeps the decisions about the process and its outcome in the hands of the parties. Guided by the principle of client self-determination, mediators use their skill and influence to support clients in making their own fully informed and conscious choices.

A client-centered process increases the likelihood that when settlements are reached, they will be settlements that serve the parties' interests (rather than those of participating professionals). Such settlements are more likely to be sustained by the parties. A wholly client-centered process goes beyond simply creating out of court settlements and empowers the parties to decide consciously whether or not and on what terms to settle. This results in mutually satisfying settlements whenever they are really possible.

Including Mediators to Increase Effectiveness

Various models of Collaborative Practice are developing, yet legitimized models of interdisciplinary practice assume that Collaborative practitioners come from three streams of professionals: legal, financial and mental health. Certainly legal, financial and mental health professionals are valuable resources for families in transition. While mediators often draw knowledge and practices from these and other disciplines, mediators add a unique and valuable element.

When conflict occurs (as it likely will) among any of the members of the Collaborative team it can impede the process. In many cases the conflict is manageable, and issues are resolved as they arise. In some cases, however, a professional who is knowledgeable and experienced in handling conflict, and who has no partiality or prejudice toward any of the participants, is a valuable asset to the team. A skilled mediator serves several functions:

“Neutral”

A “neutral”, having no decision-making authority, creates a safe “container” of non-judgment and balanced regard for all participants where professionals and clients can address difficult and sensitive issues. Having alignment with none, the neutral has the privilege to connect genuinely to all parties, helping them to see themselves in relation to a larger context. In this way, mediators support clients and professionals in identifying, articulating and addressing needs and interests in a collaborative manner.

Providing for neutrality as well as advocacy in the process provides the strongest of containers for high conflict or complex cases. Clients engage advocates to ascertain and promote their needs, interests and perspectives. In the Collaborative process, clients often count on their attorneys and their individual coaches (if they have them) to “be in their corner” supporting them as loyal, encouraging, sympathetic and experienced guides. If one client's advocate expresses sympathy or understanding for the other client, this may feel threatening. The neutral can provide reassurance for each and for all. While clients look to their “experts” for knowledge and direction, the neutral complements this individual support with genuine curiosity about and concern for all.

Benefit: Strengthens the process container for clients to work through difficult and sensitive legal, financial, emotional, and spiritual issues. One client in a Collaborative case spoke of the mediator as a “calm center” when things got heated.

“Facilitator”

Managing the dynamics of the interaction at the Collaborative table, a facilitator maximizes the effectiveness of the process. Process focused, the facilitator observes and supports all participants in increasing effectiveness. With attention on the interaction and communications of the whole, the facilitator helps parties change their interactions from negative and destructive to positive and constructive while exploring possibilities for resolution.

Benefit: Ease and Effectiveness-- A professional guiding the process can reduce anxiety of all participants and increase ease and effectiveness of the process. Attention is given not only to what decisions will be made, but also how decisions will be made. Both distributive and procedural justice can be accomplished.

“Process Coach”

As process coach, one helps to integrate the perspectives of the various disciplines and professionals. Because each discipline approaches its work from a set of assumptions according to its theoretical principles and paradigms, each paradigm provides focus, AND each is limited. Each point of view both creates and constricts the space from which solutions emerge.

A Collaborative process coach encourages the dynamic shift from an either/or conflict dyad to a more constructive both/and whole. From a system’s perspective, focusing on specific elements of a system, to the exclusion of all others, misses the interconnections between system elements. The Collaborative process coach directs attention away from the individual parts and toward the relationships between the parts. Collaborative teams, like families, are complex systems of interconnected relationships that influence each other. Rather than asking which professional(s) are best suited to help divorcing clients, a systems approach might ask who and what will contribute to the systems’ sustainability (both the family system and the Collaborative team) while acknowledging that the form of the system may necessarily change.

Benefit: Integration and Flexibility-- The process coach helps to integrate the information the system is receiving to adapt the process to meet the needs of all participants.

“Conflict Resolution Coach” to Individual Participants

When changes are major or conflict is high, negotiations take on an increased seriousness as the consequences become apparent and more emotional responses emerge. The conflict resolution coach contributes to the change process by helping each participant consider his/her attitudes and beliefs. In the role of coach to each and to all, the mediator supports parties in increasing understanding of their own needs and being alive to the needs of others. Attentive to all parties’ needs, the conflict resolution coach helps manage the conflict between participants and acts as adhesive to help safely contain the process.

Benefit: Managing conflict and emotion. During Collaborative meetings and in between, the conflict resolution coach brings a unique perspective and fluidity to an often constrained situation.

“Translator”

In the role of “translator,” the mediator helps participants understand and articulate their needs in a way that invites others’ responsiveness. Our thoughts, feelings, hopes and fears are created in language. Language that attributes responsibility to another and discourages self responsibility skews perspective and can cause a conflict to take on a life of its own.

Narrative mediation holds that conflicts are socially constructed through the use of language. The mediator supports the parties and the process, encouraging constructive communication and resolution of conflict between any and all of the parties, and building ways in which future differences can be handled.

Benefit: Supports effective communication between all parties and manage conflict that results from unclear or flawed communication.

Summary

Mediators in Collaborative Practice benefit the process and all participants. The “neutral” creates a process that transcends the either/or polarity. Rather than expertise inhibiting client self-determination, *both* expertise *and* client self-determination are incorporated in support of the clients. Rather than attention primarily paid to substantive issues or process issues, *both* are addressed. Neutrality in addition to advocacy, offers participants the safest container for working through difficult decisions. A Collaborative model that incorporates both advocacy and neutrality also enables the professionals to experience themselves as more competent, and better manage what is going on while increasing the quality of the result.

With the inclusion of a skilled mediator, Collaborative Practice becomes increasingly client-centered as professionals move toward empowering the clients, sharing their experience as a means of supporting the clients in making for themselves the best decisions they can make. Mediators can support a heightened awareness of socially constructed assumptions about entitlements and allow for those assumptions to be questioned.

Finally, literature from the field of conflict resolution has much to offer the Collaborative dialogue about theory, ethics and practice. A dialogue continues about the mosaic of models, while acknowledging that practice is also influenced by the practitioner’s theory of conflict, training, experience, values and beliefs. The field of conflict resolution has much to contribute to the evolution of Collaborative practice. Additionally, mediators’ presence at the Collaborative table can contribute to the effectiveness and value of the process.