

COLLABORATIVE LAW MEDIATIONS

By Gay G. Cox

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I. ESSENTIAL ELEMENTS OF COLLABORATIVE MEDIATIONS

When mediation is included as an integral part of dispute resolution in collaborative law cases, the mediation process supports the values the clients honored when they selected the collaborative law process. The clients chose a process in which they engaged professionals—their respective collaborative lawyers and the mediator—to help them identify issues, goals and interests; analyze relevant information; develop options and understand their consequences; and ultimately reach the goal of an agreed resolution.¹ They agreed that the essential elements are: identification of goals and interests; full and complete disclosure of relevant information; efficient communications; empowerment to make decisions on a level playing field; confidentiality; and good faith negotiations. **It is highly recommended that the mediator be trained in the collaborative process and commit to adhere to its principles.**

II. THE MEDIATOR AS A COLLABORATIVE TEAM MEMBER

The mediator may be a team member from the outset of the collaborative matter. As a neutral collaborative team member, the mediator could be assigned the case manager role to convene meetings, develop information-gathering processes, track accomplishment of assignments, and generally serve as a process facilitator, long before the mediator would ever be asked to facilitate negotiations, if such is ever needed.

As a process facilitator, a mediator could be involved in helping clients through rough periods in their dealings at any stage of the process. If the clients or the collaborative lawyers have difficulties with **how**

they are engaging in the process itself, the mediator would be available to coach the clients and mentor the lawyers in the collaborative problem-solving methodology and good communication skills. By attending the joint meetings, the mediator would be able to help the clients follow ground rules, reframe ineffective communication exchanges and proceed in an orderly manner through the steps of the process.

III. PROCESS FACILITATION OF DIFFICULT CASES

If a case becomes seriously challenging because of client or professional behavior and there is frustration that expectations of the collaborative process are not being met, the mediator can intervene proactively to improve the functioning of the individuals in the process. For example, if the clients or lawyers begin to accuse one another of “not being collaborative,” the mediator can caucus with the clients individually, even without the collaborative lawyers if that is the process they choose, to review the clients’ paramount macro goals and to explore with each of them ways in which the collaborative law process as it has unfolded in their case has not met their expectations or has disappointed them in some way. In caucus sessions, questions would be asked of each client and lawyer to gain some insight into what awareness each might have of the other’s level of satisfaction with the process. Examples of questions the mediator might pose are: What has the other person and/or his or her collaborative lawyer said, done or failed to do which you think has impaired your ability to collaboratively communicate and problem-solve? What would you have preferred to have happened? What do you believe the other person thinks that you or your collaborative lawyer (or client) said, did or failed to do which they might think has impaired the collaborative communication and problem-solving? What do you believe they might have preferred to have happened? What do you think could be done now to get you back on track in your communication and collaboration? What do you think would be the next best step to take?

Once the mediator gathers information about what is driving the dissatisfaction, then the mediator would summarize each person’s concerns about the process and share the summary with that person and his or her collaborative lawyer (or client). The mediator would then revise the summary as requested by the client and lawyer. The mediator would explain to the clients that collaborative law is designed as a safe process in which basically nothing should happen to which the clients do not agree. Thus, a collaborative mediator elicits the clients’ process needs and helps them design a process that works for them and honors their right to self-determination. Accordingly, it is decided by the clients and their collaborative counsel (not the mediator)

¹ Participation Agreement, Texas Collaborative Law Council www.collaborativelaw.us/articles/TCLC_Participation_Agreement_With_Addendum.pdf

whether to 1) send the summaries pre-approved in consultation with the clients' respective collaborative lawyers to the other client and the other collaborative lawyer, allowing the others to respond (or not) with their perspective on the items addressed; or 2) maintain the confidentiality of the summaries as having been the product of confidential caucus sessions.² The latter option may be chosen by clients with a high level of distrust who are concerned that an exchange of points of dissatisfaction with the expectation of a response would be counter-productive. They might not want to escalate any differences caused by process problems as a result of being perceived as defensive or evoking defensiveness by the matters they raise.

A hybrid approach is where one client and his or her lawyer (usually the one most aggrieved about the manner in which the case has proceeded) authorize their summary to be shared with the others. The others, by prior agreement, elect to withhold their decision about whether to respond with their perspective and any concerns they might have until after they have reviewed the summary. However the clients decide to proceed, the exercise serves to inform the mediator about the source and level of dissatisfaction and the clients' process needs to enable the mediator to be more effective in attempting to remedy the process difficulties with pro-active interventions.

Once the process facilitator has made a diagnosis of some process dysfunction, he or she can deliver a "Prescription for Improved Collaborative Practice" that sets out principles that, if adhered to, would likely improve everyone's satisfaction. The prescription would be general in nature and not refer to which of the client's concerns is being addressed by which of the suggestions. Of course, either of them might see that a suggestion is a direct remedy to something he or she raised as a problem. The suggestions would be based on Collaborative Protocols of Practice³ and the process facilitator's experience as both a collaboratively trained mediator and perhaps as a collaborative lawyer. The goal is to offer the mediator's process expertise in a helpful way, while at the same time "doing no harm."

² Another alternative is for the clients to decide that the information will be shared by the process facilitator mediator only with another mediator who is engaged to mediate the substantive issues by facilitating the negotiations.

³ See Collaborative Law Institute of Texas' and Texas Collaborative Law Council's Protocols of Practice at www.collablawtexas.org or www.collaborativelaw.us respectively.

IV. THE MEDIATOR'S ROLE IN IDENTIFYING GOALS AND INTERESTS

Mediators are usually not engaged at the outset as collaborative team members, but rather are grafted onto collaborative cases in which there is some degree of failed communication or negotiation. In part, this is due to some collaborative lawyers' preference to wait until they have a clearer understanding of the particular unresolved issues so that they can select a mediator whom they can agree would best serve the clients.

The first premise of collaborative mediation is that it must support interest-based negotiation, so at whatever point the mediator is engaged, the collaborative lawyers will be looking for someone who has the skill set that this specialized form of negotiation requires. If engaged at the outset, at the first joint meeting the mediator could be the one who elicits the clients' goals and interests (values, priorities, needs, concerns, fears) and helps them determine which of them are shared. If the mediator is brought in later, the collaborative lawyers will inform the mediator which interests have been expressed and which are perceived as shared by the clients. The mediator will have the opportunity to review the list of goals and interests with the clients and have them confirm or amend them.

V. THE MEDIATOR'S ROLE IN GATHERING INFORMATION

The mediator will explore whether the clients are satisfied that there has been a full and candid exchange of relevant information. He or she will facilitate the development of a plan to share informally any information that is lacking. Then the mediator will track progress on completing the information-gathering assignments and convene meetings as milestones in the process are reached that allow productive discussion about the status of the process or the components of the issues which must be resolved. The discussion and analysis by the collaborative lawyers about whether all relevant information necessary to reach a complete settlement has been gathered can be facilitated by the mediator.

VI. THE MEDIATOR'S ROLE IN DEVELOPING OPTIONS

This is the step where interest-based mediators truly earn their pay. Collaboratively trained mediators are skilled in assisting in the brainstorming process that elicits as many options as can be conceived. They know how to steer clients away from positions; break down the controversy into topics; help clients consider options for each identifiable issue; and educate clients that ideas should be suggested without censure, judgment, criticism, attribution or ownership, regardless of how likely or unlikely the ideas would be

to solve the problems at hand. They enforce good communication guidelines as the clients express options. They help the clients see the goal posts at the end of playing field (the all or nothing options) and recognize that the agreement is going to occur within the goalposts. When the clients draw a blank, the mediators know how to engage their collaborative lawyers in expanding the pie with additional options. Finally, in order to encourage creativity when necessary, they suggest more ideas, even those the clients would reject as ridiculous.

VII. THE MEDIATOR'S ROLE IN HELPING THE CLIENTS UNDERSTAND THE CONSEQUENCES OF OPTIONS

The mediator helps the clients analyze what could be the ultimate outcome of selecting each option.⁴ Ideally, this discussion can be transparent in a joint meeting, but sometimes even in collaborative cases it is advisable to proceed in this phase in caucus sessions when the process must be adapted due to a high level of distrust. The options are evaluated by the effects they would have on the clients emotionally, relationally, financially, legally and, in faith-based mediations, spiritually. This is when the collaborative lawyers may invite some risk analysis by the mediator who could ask questions about: the probable financial cost of reaching an agreement within the process versus terminating the process; the emotional and spiritual guilt and sense of regret that a client might bear if the client feels responsible for failing to reach an acceptable agreement; the effect of a lack of forgiveness and resentment a client might harbor for concluding the other was responsible for the failure to agree; the effect that failure to reach an agreement and termination of the process might have on the clients' relationships with each other and others; the legal consequences that follow from making certain choices; the range of probable outcomes; and the likelihood of each option being accepted by the others or adopted by an adjudicatory body. The clients come to appreciate their WATNAs (their Worst Alternatives to a Negotiated Agreement). The mediator may decide to ask questions that elicit how the options stack up against objective standards and real world considerations—how legitimate and feasible the options are.⁵

⁴ At this point the collaborative lawyers may want to explore with the clients their respective BATNAs (Best Alternative to a Negotiated Agreement) and the likelihood of attaining that alternative under the circumstances. See William Ury and Roger Fisher, *Getting to YES; Negotiating Without Giving In* (Houghton Mifflin, 1981).

⁵ See *Getting to YES*.

VIII. THE MEDIATOR'S ROLE IN FACILITATING NEGOTIATION

Finally, the mediator assists in the actual negotiation of an acceptable settlement. He or she helps the clients and their collaborative lawyers: recognize how well each option does or does not meet their or the other clients' interests; narrow the options by eliminating those that do not meet important goals of any of the clients; eliminate those options which are absolutely unacceptable (non-negotiable) to any necessary party for there to be even a partial settlement of the problem; determine which options meet the most important goals of all the clients; determine which options have the best chance of being acceptable to all the clients; identify any trades they could make in order to accomplish more of what they are seeking and that could help them creatively craft a solution that would be acceptable to the others; and narrow the list to the option(s) which would maximize the outcome for all the clients,⁶ which is the goal they set for themselves in choosing the collaborative law process.

IX. CONCLUSION

The collaborative mediator has all the other skills that are used in mediations generally to overcome impasse and help clients seal the deal. It is highly likely that with the addition of a mediator any collaborative case headed to termination can be salvaged. Once an agreement is reached, the mediator uses case management skills to help the clients through the process of documenting and, if requested, implementing their collaborative agreement.

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⁶ List adapted in part from the principles set out in the Collaborative Law Institute of Texas' Road Map to Resolution Using the Collaborative Law Process and its Negotiation Workbook, available on the members' site at www.collablawtexas.org.