

Mediation or Collaborative Practice - Which Is for You?

*By Victoria Smith**

Mediation and Collaborative Practice are processes available to family law clients who wish to resolve their issues, with professional assistance, out of court. How do you decide which process is for you? It is important to understand how mediation and collaborative practice are similar, how they are different and the benefits and limitations of each.

Mediation and collaborative practice share similar values and beliefs about conflict and the best way to resolve it. Both processes share a commitment to providing the support and environment necessary to empower clients to communicate effectively, to obtain and understand the information relevant to the issues, and to negotiate a settlement acceptable to both parties.

Both processes assume that most people are capable of resolving issues on their own, with appropriate guidance, support and information, and don't need a judge to decide their lives for them. Both value a customized settlement that suits the needs of each particular couple or family, rather than the more limited, standardized options available through the courts. Both recognize that agreements the parties create themselves are more durable than agreements imposed on one or both.

Both processes value maintaining or rebuilding a working relationship between the parties, while understanding the damage that is caused to children who are placed in the middle of ongoing parental conflict.

Mediators and collaborative practitioners model and teach clients strategies for effective listening, non-defensive questioning and speaking without judgment or blame. Both attempt to manage emotional dynamics by actively listening to and acknowledging each client, while encouraging the use of effective communication techniques and by offering breaks and caucuses when needed. Both move the process forward with the use of agendas for each meeting, including homework items and to do lists. Collaborative lawyers and most mediators provide participants with progress notes summarizing the work done at each meeting.

Both processes are attractive to people who seek an efficient, cost-effective way to work out their agreement and resolve the future issues concerning parenting arrangements and support that inevitably arise.

There are also significant differences between mediation and collaborative practice. A mediator is neutral and must maintain a balanced approach, while helping the clients make their own decisions. A mediator may make suggestions, but may not advocate for either party. A mediator may work for the welfare of the children by helping clients to distinguish their own needs from those of their children. A mediator may provide general

legal information to both parties but cannot provide a legal opinion as to the likely outcome should the matter proceed to court. Mediation is suited to clients who feel that they can advocate for their own interests, understand the issues sufficiently well, and are prepared to sit face-to-face with a neutral third party to conduct their negotiations. A mediator will work to create an atmosphere of safety and to ensure that both client voices are heard in the process. Mediation works best with parties with a reasonable level of trust between them, a manageable level of conflict and emotion, and some history of or capacity to work together to make decisions.

Collaborative lawyers, on the other hand, are not neutral but are rather advocates for their clients' interests. While collaborative lawyers work together as a team to help the parties find mutually a satisfactory settlement, each collaborative lawyer has a primary duty to his or her client. Collaborative lawyers provide their clients with whatever support is needed to ensure that the client has a safe, effective negotiation environment.

Collaborative lawyers advocate for an agreement that will satisfy the client's interests and goals, while providing their clients with a reality check to help them take reasoned and reasonable approaches to the issues. Collaborative lawyers ensure their clients understand the issues and information, have the time and support they need to manage their emotions and make good choices, help the clients consider and articulate their goals and interests and hear those of their spouse.

Collaborative Practice is appropriate for a wide range of clients who wish to resolve their issues out of court, but want legal advice and negotiation coaching every step of the way. Collaborative practice attracts couples with goodwill toward each other who seek an efficient, respectful process and who want legal wisdom throughout their negotiations to ensure they make smart choices. They may also wish the assistance of a family professional to provide education regarding their children's needs and to help them craft a parenting agreement.

As the process offers individual support to each client and specialized support from family and financial professionals when needed, collaborative practice can also successfully assist couples who have low trust, high conflict, serious limitations in their capacity to communicate, complex issues, or an imbalance in understanding of their finances. In these challenging situations, the professional team is expanded to include family professionals and/or financial professionals.

The family professional helps when there are personality issues, substantial differences in negotiation and information processing styles, significant challenges in the capacity to communicate, and overwhelming emotions such as grief, anger or guilt that may derail the process. The family professional can act as a facilitator in the meetings to help the parties manage their emotions and stay focused on good decision-making. While not providing therapy, the family professional can also provide individual support to clients in separate meetings as needed.

The financial professional can help one or both parties gather financial information cost-effectively, create budgets, understand complex financial issues and appreciate the long-term consequences of various settlement options before a settlement is chosen. Collaborative practice can therefore assist parties who might otherwise fail in a mediation process to resolve their issues successfully out of court

Mediation is often conducted without lawyers present although on occasion lawyers may attend. Mediation clients generally obtain legal advice away from the mediation table. In mediation, clients are often unaware of the specific legal advice their spouse is receiving. Collaborative lawyers, on the other hand, provide legal information throughout the process, both with clients individually and together in settlement meetings. Both collaborative clients will understand each lawyer's perspective on the law and how it might apply to their situation.

When agreement is reached in the mediation process, the mediator will either prepare a summary of the settlement and provide it to the lawyers to draft the agreement or the mediator will prepare a memorandum of understanding. In either case, the agreement reached in mediation will not be binding upon the parties until it has been drafted and/or finalized by the party's lawyers and after each has received independent legal advice about the mediated agreement. Sometimes mediated agreements break down because advising lawyers have not participated in the mediation process and do not fully understand the reasons for the settlement reached, or because the client did not have sufficient legal information to fully appreciate the consequences of the decisions made.

In the collaborative process, clients reach settlement fully aware of their legal entitlements and the trades each has made to arrive at resolution. When agreement is reached, the collaborative lawyers draft the separation agreement together and provide it to the parties by for review. A final collaborative meeting is held to review the draft agreement, resolve any outstanding issues and sign the separation agreement. While there may be loose ends to resolve at the final meeting, the agreement rarely breaks down at the drafting stage.

Mediators adopt many styles and approaches to their work. Some conduct mediation with the clients only, refrain from providing legal opinions and follow a facilitative, or interest-based approach which helps parties create an agreement to satisfy their interests after exploring various options. Some mediators have expertise in child related issues and can be helpful in assisting clients to create a parenting plan that best meets the needs of their children. Some mediators may also use other neutral professionals such as a business valuator or tax expert in the mediation process when needed. Other mediators prefer lawyers to attend mediation sessions with the clients, provide legal opinions and recommendations and follow a more rights based approach that guides the parties to an agreement that is in line with their legal rights and obligations. It is critically important that clients inquire about and understand the mediator's style and approach.

Collaborative lawyers will always attempt to follow a process of interest-based negotiation as much as possible. All collaborative lawyers take similar basic training in

the collaborative process and negotiation and communication skills. Some collaborative lawyers specialize in collaborative work and take extensive additional training while other collaborative lawyers handle collaborative cases along with their litigation caseload. While experience and skill levels will vary among collaborative lawyers, clients can anticipate that any collaborative lawyer will follow a similar collaborative process.

When the parties are appropriate candidates, mediation can be less costly than the collaborative process as the parties share the cost of the neutral mediator. However, if the parties cannot resolve their issues in the mediation process or require extensive input from their lawyers, mediation may break down or become more costly. The collaborative process may be more expensive than an efficient and successful mediation as each party pays his or her own lawyer, but is usually far cheaper than a litigated proceeding. The parties share the cost of neutral financial professionals and family professionals who usually provide their services at a lower rate than the lawyers, helping to manage the costs of the collaborative process.

One of the key differences between mediation and a collaborative approach is the extent to which professionals work together. While mediators may encourage the parties to jointly retain other professionals when needed, the mediator and other professionals will usually work separately with the parties. In a collaborative approach, all professionals including lawyers, family professionals and financial professionals are trained together, pool information and work together in meetings and away from the table.

In summary, parties with reasonable levels of goodwill, capacity to communicate, manageable trust levels, the ability to understand the issues and the willingness and ability to advocate for themselves, will be suitable candidates for mediation.

Parties who wish legal advice and support throughout the process, and who wish to work with a professional team of lawyers, and when appropriate, family and financial professionals, will choose collaborative practice. Collaborative practice can also provide sufficient support and structure for clients with challenging emotional and communication dynamics, low trust levels, and/or complex issues to resolve their issues successfully out of court.

* Ramler, Jackie (2009) *The Joy of an Ex*, Divorce Choices Inc., Barrie, ON, Chapter 4, p.68