



# New Frontiers

EARLY COLLABORATIVE (TEAM) MEDIATION

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# New Frontiers: Early Collaborative (Team) Mediation

By

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# I. Introduction

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**The economic troubles of the past few years have opened up new opportunities for entrepreneurial mediators to serve families and expand their repertoires. Collaborative Mediation<sup>1</sup> is the next big step in the evolution of professional family mediation.**

Legal, mental health, financial, and child specialists have teamed up to integrate their talents to create an innovative, cost-effective family mediation practice that addresses the needs of a largely untapped population. There are a growing number of divorcing couples, unmarried parents, or already divorced parents who want to make decisions privately together for their children, without litigation. They are not like the clients of the past. They do not call family lawyers as a first step when they are divorcing, separating, trying to reconcile their marriage, or working on other custody and post-divorce issues. They fear that using lawyers to fight in court will cause emotional and financial damage, and inhibit their ability to co-parent their children cooperatively.

Instead, they want to begin the process amicably. They start with either with a neutral Collaborative mediator, or a team of neutral professionals who have targeted expertise and can help them find the right resolution from the beginning. These clients are cost conscious, whether or not they are affluent. Fair outcomes are important to them. They actively seek out efficient, forward thinking, responsive professionals who will support, not thwart, their mutual desire for resolution. They want professionals who will competently provide the limited scope or unbundled services they need and want, and nothing else.<sup>2</sup>

To respond, groups of professional family mediators are emerging, many with extensive training in Collaborative Law. They are forming core interdisciplinary Collaborative co-mediator teams of a legal and mental health professional. If the parties need expertise beyond the core team, such as from a child or parenting specialist, a financial or tax professional, a business valuator, or an estate or special needs lawyer, then those professionals may join the team as *neutrals* under the mediation umbrella. The parties choose for themselves whether or not they want attorney representation. If they have attorneys, Collaborative Mediation clients expect them to work as allies, not enemies.

This chapter gives the Top Ten list of Collaborative Mediation benefits for families and mediators; outlines the process of Collaborative Mediation; and provides information that can resolve common

concerns about the use of Collaborative Law in Texas. Collaborative Mediation combines the simplicity and cost effectiveness of mediation with the best, most successful strategies of Collaborative Law for think-outside-the-box mediators and clients on the new frontier.

## II. Top Ten Benefits of Collaborative Mediation

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### **Collaborative Mediation is positive for families and for the professionals who serve them.**

Collaborative Mediation is also a fresh approach that is healthy and affordable. It offers a sensible alternative to the adversarial system for parents who want to reduce costs, minimize conflict, stay in control of their family's future, and maximize their co-parenting relationship.

Peacemaking divorce professionals have found Collaborative Mediation to be a rewarding, remunerative new field. Collaborative Mediation affords peacemaking divorce professionals the opportunity to practice in a way that closely reflects their personal values. It also allows them to provide a truly meaningful and effective alternative to litigation for families in crisis. The collegiality and cooperation within the Collaborative Mediation team results in a more complete service for clients than litigation or evaluative mediation can provide. The Collaborative team addresses all aspects of a family issue—legal, financial, and emotional

### **A. BENEFIT #1: Early Resolution Without Litigation**

Parties in Collaborative Mediation self-select the process because they are mutually focused on resolution from the beginning, even if there is substantial conflict. Everyone's efforts are toward resolution from the start, making Collaborative Mediation efficient. The parties want to avoid adversarial lawyers. Typically their game plan does not include waiting until right before trial to mediate, or paying lawyers thousands of dollars on each side for discovery before mediation. The parties pledge to make court a last resort and to work together to gather information, develop options, and make mutually acceptable agreements. Most often, clients want help and support so they can negotiate directly with the other; this sets the stage for a workable co-parenting relationship.

### **B. BENEFIT #2: Functional Core Co-Mediator Team**

A family attorney and a licensed counseling professional form a core professional Collaborative Mediation team. Together they co-mediate with a couple who either is facing divorce, wants a planned separation to reconcile a marriage, or needs help with parenting plans, support, or post-divorce issues.<sup>3</sup>

The advantage for the parties in Collaborative Mediation is the attorney-mediator has made a true commitment to peacemaking, educating clients, and encouraging the parties' self-determination. Parties to Collaborative Mediation consistently express their need to find a neutral legal professional. They want to share a legal professional who has substantive knowledge of their issues, and will

- **explain the law without representing either party, giving legal advice, or taking sides,**
- **provide information about how to navigate the legal system, and**
- **help them negotiate all the necessary decisions to meet the legal requirements of their goals.**

They do not want or expect the Collaborative attorney-mediator to advise them what they should do.

To accomplish this goal within ethical mediation boundaries, the Collaborative attorney-mediator must explain the applicable law to the clients with no spin. She needs to provide legal information, but must not provide legal advice, impose her judgment on the parties, or make decisions for them. Their own attorneys may answer specific legal issues. The attorney-mediator helps them gather information in a thorough, structured, but informal discovery process (see below). From here, the attorney-mediator helps the parties develop a range of options to meet their goals and needs, negotiate using interest-based negotiation, and find the best solution that works for everyone.

Many couples are drawn to the co-mediation team because they recognize they need the help of a family counselor co-mediator to get them through the emotionally charged financial and parenting discussions. Couples facing the end of marriage often express frustration with their out-of-control emotions. Those emotions sometimes make it impossible for them to make important decisions, even though they want to.

The family counselor's ability to manage emotions and open lines of communication without full-blown therapy is essential to the couple's success in finding resolutions. Most attorney-mediators are not trained to deal effectively with the kind of anger, fear, and resentment that spawn these emotions and prevent resolution. This is precisely why the family counselor is so valuable in the Collaborative Mediation.

**Simply stated, couples are empowered to reach early resolution when they:**

- 1) know what decisions they have to make;**
- 2) understand the law; and**
- 3) are able to talk to each other without letting emotions derail them.**

The co-mediator Collaborative team facilitates that success.

### **C. BENEFIT #3: Confidentiality of Information**

Mediation offers couples an avenue to talk about and resolve whatever is causing conflict, without the fear that it will be revealed or used against them. Except under limited circumstances, mediators in Texas are bound by law to keep confidential the information that they learn in the course of mediation, absent express permission to disclose the information.<sup>4</sup>

This rule of confidentiality can be critical to couples who are trying to save or amicably end their marriages when faced with addiction, mental or physical health issues, or serious debt they wish to keep private. Damaging information that is revealed in divorce litigation can destroy careers, ruin reputations, and permanently endanger family relationships. Couples who have issues in their marriage or parenting relationship that they do not want revealed should think twice before starting divorce litigation. Early collaborative mediation provides a viable alternative.

### **D. BENEFIT #4: Efficient Informal Discovery**

The parties understand the advantage of doing their own informal discovery in the mediation process, rather than hiring lawyers for expensive formal discovery. In Collaborative Mediation, the parties contract with each other to make full disclosure of relevant information during the mediation sessions.<sup>5</sup>

Under the skilled guidance of the Collaborative attorney-mediator, couples fill out and verify a comprehensive joint community inventory. In addition, they complete income and expense worksheets. It is the mediator's job not only to assist them in gathering financial information, but also to explain the law as it applies to support the allocation of assets and debts. The mediator guides the parties through the discussions of:

- what they own and what they owe,
- how their property is characterized (community or separate),
- what the values are (also factoring in taxes),



- how much money they have, and
- how much they will need during the pendency of a divorce and afterward and what creative options they have for dividing their property and debts.

The Collaborative mediator monitors the parties to be certain each of them understands the law and the information they receive. Importantly, the mediator asks the parties what their goals are for themselves and their family financially, and helps the parties reach those goals. All of this information, along with tax considerations, shapes constructive discussions in Collaborative mediation. It leads to well-informed decisions in mediation about living arrangements, child and spousal support, and division of retirement, investments, debts, tax liabilities, expenses, and attorneys' fees.

The Collaborative mediators also guide the parties through tough conversations, such as which parent makes medical decisions; and which parent chooses where the children's primary residence will be and where they go to school. The parties work together with the mediators, through informal discovery, about their work schedules and the children's physical, emotional, and educational needs to craft an effective, customized, and workable parenting plan.

## **E. BENEFIT #5: Cost Effectiveness**

One of the biggest advantages for clients in Collaborative mediation is they control the cost. The clients decide how much time they need to complete the sessions depending on their goals, and how quickly they accomplish them. The mediation will take only as long as the parties need to reach an agreement and for the mediator to write the agreement.

Collaborative mediation clients receive a lot of preparation materials before each session. Clients and mediators are very time efficient when the clients have done their homework and come in ready to roll up their sleeves.

Each Collaborative mediation session is two or three hours, spaced as closely together or as far apart as the parties wish. Doing mediation in a series of sessions gives the couple an opportunity to think about their decisions, and to "test drive" their separation, divorce, or post-divorce options before signing final written agreements and binding parenting plans. This helps to prevent the clients from making hasty decisions that might cost them time and money to fix down the road.

## **F. BENEFIT #6: Expertise of Additional Optional Neutral Professionals**

The Collaborative mediation team is made up of only the professionals the clients need and want for their particular situation and budget. There is no set team requirement for every Collaborative mediation, beyond the core Collaborative co-mediator team of an attorney-mediator and a family counselor.<sup>6</sup>

The clients may not appreciate the depth or complexity of the issues they face, so the mediators will guide them on the decision as to whether to hire additional neutral experts. Other professionals, such as a certified divorce financial analysts, tax advisors, or child specialists, may offer assistance as neutrals, if and when needed, in session or in the professional's office. Clients in an initial consultation with the mediators will sometimes visibly and audibly breathe a sigh of relief when they learn they do not have to worry about the professionals' taking sides.

## **G. BENEFIT #7: Fair Outcomes**

Many couples seek out Collaborative Mediation because they believe it offers the best way to achieve fair outcomes. The mediator gives them a road map of the decisions to be made, depending on what they are trying to accomplish. Together with the mediators, they craft a plan to tackle each step at their own pace and in the order that suits their needs and goals. They feel more comfortable knowing the mediator will keep them from jumping ahead to negotiating important agreements until they have all the financial, practical, and tax information they need to make decisions that are mutually acceptable. The attorney-mediator manages the process. The clients manage the outcome. That way the parties remain in charge of their own decision-making and destinies.

## **H. BENEFIT #8: Client Skills Tool Box**

There are several take-aways from the Collaborative Mediation process that clients add to their tool-boxes. The couple learns how to do interest-based negotiation in a structure that they can apply to future negotiations with each other (and new love interests) after they leave the safety of mediation. They also experience a new way to communicate, so they can avoid conflict and ably co-parent. The practice they get in mediation provides them with skills that will last a lifetime.

When they are able to actually talk through their decisions together, most couples are successful at finding mutually acceptable decisions on all of their issues or, at the very least, a partial settlement in mediation.

## **I. BENEFIT #9: A Legally Binding Agreement**

Clients who want an early and amicable process also want assurances that their decisions will stick, especially if there is any delay before the judge signs an order. In Texas, a mediated settlement agreement that has the proper language and meets statutory requirements is legally binding when both clients sign (and attorneys, if they are present).<sup>7</sup>

For that reason, a Collaborative mediator should recommend, verbally and in writing, that each and every client have their own attorney and a tax professional review the settlement before they sign. The attorney-mediator may refer each of the clients to an attorney who will capably represent the client's interests on a limited scope basis, and who also has shown himself to be committed to supporting a couple's desire for an amicable separation.

## **J. BENEFIT #10: Customized Use of Lawyers**

All services are tailored to the client's needs and interests in Collaborative Mediation, including how they use lawyers. Couples in Collaborative Mediation can forego outside lawyers altogether, and complete court paperwork themselves in appropriate cases. If the parties have lawyers, the parties may bring them into the sessions.

Alternatively, the parties may choose to use lawyers outside the mediation setting for any number of discrete tasks. The mediator and the parties may seek a lawyer's assistance for "unbundled" or "limited scope" representation:

- to help offer opinions on a legal issue,
- to coordinate or conduct additional informal discovery (or formal discovery by agreement),
- to develop and weigh options,
- to review the mediated settlement agreement and give legal advice before the client signs,
- to draft the court paperwork, and
- to secure an order, decree, or judgment.

The mediator must initially screen for domestic violence, abuse, mental health issues, and lack of trustworthiness to determine whether mediation is the appropriate avenue for the couple, especially if the clients are *pro se*. Importantly, for the client's and the mediator's protection, the core team should include in their client contract the ability of a mediator, in their sole discretion, to suspend mediation

until an unrepresented client retains his or her own counsel if needed. This provision provides a safety net in the event the mediator encounters an unsophisticated client, or a client who is incapable of adequately comprehending the issues or representing himself. The attorney-mediator also can, and should, advise the couple whether the couple's situation is too complex for them to adequately represent themselves, whether their agreements are in significant variance of the law, and if they will need a customized decree rather than use state approved forms.

### III. Collaborative Mediation the Process: The Best of Mediation and Collaborative Law

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**Over the last several decades, enlightened professionals developed mediation<sup>8</sup> and Collaborative Law<sup>9</sup> as effective, private options for couples who want to make their own decisions, reduce conflict, and save money by avoiding divorce war.**

In 2013, the Texas Supreme Court in *In re Stephanie Lee* steadfastly and emphatically supported the critical importance of family mediation to protect children from the emotional and psychological damage of high conflict, litigated custody battles.<sup>10</sup>

Collaborative mediation is a giant step in the right direction. It takes the best parts of mediation and Collaborative Law and combines them into one streamlined process. That process can be more effective and satisfying for the parties and the professionals than either process alone.

#### A. What Collaborative Mediation Retains From Mediation

- Neutral third-party mediators facilitate parties' negotiations (an attorney-mediator with the valuable addition of a licensed marriage/family counselor to manage emotions and improve communication)
- Each party's ability to decide whether to use a divorce lawyer or to self-represent
- Control over cost
- Privacy and confidentiality
- Efficiency and expediency
- Client self-determination
- A legally binding written settlement agreement that can be incorporated into a divorce decree or other order

## **B. The Goals Collaborative Mediation Shares with Collaborative Law**

- Positive future family relationships
- Reducing conflict between parents to ensure children's well-being
- Respectful and constructive communications and negotiations
- Preserving each party's financial and emotional health
- Using lawyers as peacemakers

## **C. Collaborative Mediation Mirrors Collaborative Law Process**

- An interdisciplinary team approach—but with a smaller core team of a single attorney-mediator and a marriage/family counselor present. Other neutral professionals meet outside of the mediation sessions, or selectively in sessions.
- Informal discovery with a voluntary exchange of relevant information, including full financial disclosure.
- A series of short meetings.
- A (shortened) participation agreement in which parties pledge to avoid court.
- Respectful consideration of each party's needs, using interest-based negotiation.
- Structured negotiation steps.

The integration of mediation and Collaborative Law strategies has yielded a better-than-expected Collaborative mediation settlement rate.<sup>11</sup> Of course Collaborative mediation is not perfect; there is no guarantee the parties will resolve all issues. Collaborative mediations terminate early for many of the same reasons that Collaborative Law and other kinds of mediation do: a legal issue emerges that a court must decide; one or both parties are untrustworthy; a party has a mental or physical health issue; a party has a personality disorder that makes it hard to make good decisions; a party has an addiction; a party lacks personal judgment; a party commits mental or physical abuse that endangers someone's health and safety; or the parties' longstanding frustration or estrangement prevents cooperation.

Although Texas mediation rules do not require informed consent provisions, it is recommended the Collaborative mediator include them in the mediator's engagement contract. The informed consent provision advises the parties if they do not reach agreement on all their issues in Collaborative mediation, they will need to resolve the remaining issues through another resolution process, such as Collaborative Law, evaluative mediation, arbitration, or litigation. It also advises that if they find themselves in that situation, they will likely have to hire divorce lawyers and incur additional expense and delay.

## D. Collaborative Mediation Addresses Mediation and Collaborative Law Process Concerns

The vast majority of spouses and parents will resolve their disputes to avoid a court verdict. All kinds of mediation—Collaborative Law, kitchen table negotiations, or even litigation—have relatively high rates of settlement. What separates them is what the clients have to go through to get there.

Each process has its positives and negatives. Kitchen table negotiations are the least expensive, but the most dangerous, because typically one or both spouses do not have enough information to make well-informed decisions. Litigation is costly in nearly every way, but sometimes it is necessary. Collaborative mediation answers many of the most commonly expressed concerns about evaluative mediation and Collaborative Law.

## IV. Concerns about Evaluative Mediation in Texas

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The usual custom in Texas over the last several decades has been for each party in litigation to have a lawyer represent them at mediation. Sometimes the parties need lawyers at mediation. But often the lawyers' presence makes compromise and settlement more elusive.

Lawyers tend to use positional bargaining as their negotiation strategy, which in most cases results in an adversarial mediation. Far more often than not, the lawyers discourage, or even prevent, the parties from talking directly to each other or sitting in the same room. Being separated and unable to speak for themselves can be incredibly frustrating for the parties.

Adding to the discord, many mediators in Texas are lawyers or retired judges who practice an evaluative style of mediation. An evaluative mediator usually assesses the damaging evidence each party's lawyer developed against the other party in the course of litigation, and offers an analysis or opinion about what effect it may have on the party's outcome at trial. Frequently, an evaluative mediator exposes each party's own weaknesses and touts the strengths of the other party. Theoretically, and often in reality, a mediator who uses this evaluative method creates so much fear of losing at trial that both parties feel compelled to settle.<sup>12</sup> Parties and their lawyers sometimes need this reality check, but it is hardly empowering.

Even though the cost of the mediator may be reasonable, the overall expense for each party in late stage mediation in Texas can be staggering. Historically, Texas mediation happens close to the time of trial. There is often little or no time for the lawyers to prepare for trial if the mediation fails. That means each party, from practical necessity, pays their lawyer to conduct full discovery, prepare for and attend mediation, and be fully ready to go to trial *whether they settle at mediation or not*.

Texas mediations are typically scheduled for a half day or full day, but they can turn into all-night marathons. With well-prepared lawyers and skilled mediators, the vast majority of mediations will result in settlement. Most will settle on equitable terms, but not all. Sometimes the mediation blows up or it concludes with an ill-conceived settlement, simply because everyone is too exhausted to go on. Unfortunately, fatigue can cause parties to abandon the negotiations entirely, or to make binding agreements they cannot undo and might regret later “just to get it over with.”

There can be a much deeper cost to waiting until right before trial to attempt mediation in Texas. Grueling, unrelenting litigation causes immense personal, professional, and societal consequences. Expensive litigation can lead to anger, worry, fear, sleeplessness, and incessant financial stress. These can manifest as mental and physical illness, and emotional distress. Any one of these can result in:

- **countless hours of lost time from work;**
- **bankruptcy;**
- **inability to contribute to school, church, and charitable activities; and**
- **parental unavailability to their children and families.**

Everyone suffers.

Litigators are not spared from the stress of representing these clients, either. Many family lawyer litigators feel trapped in a broken system. Texas’s evaluative mediation is not easy on mediators either. Too many good family mediators burn out too soon.

## V. Concerns About Collaborative Law

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**Collaborative Law also has its detractors. Although there are exceptions, generally in Collaborative Law all the neutral professionals attend every session, along with the Collaborative Lawyers. Collectively, their professional services are invaluable if each of them is needed.**

However, it can make for high professional fees per session when they are all there at once. Collaborative Law may cost less than litigation, but it could be equal to or more expensive than litigation. It depends on the complexity of the couple's situation, the level of participation of other professionals, and how many sessions it takes to reach resolution.

Resolution can be harder to achieve if the lawyers or the other professionals have different levels of experience and competence in Collaborative Law. The simple fact of not getting along well can also prevent resolution. Collaborative Law does have a relatively high rate of success. But when it does not work out, couples need to be aware their Collaborative attorneys cannot represent them in litigation if the Collaborative Law process does not settle all the issues.<sup>13</sup>

Incomplete settlements in Collaborative Law may result in substantially increased legal fees for a new set of attorneys to litigate or arbitrate the remaining issues. Those who find themselves both without an agreement in Collaborative Law, and without their attorneys, often feel they have lost valuable time and resources in the Collaborative Law process.

Collaborative Law is a better way to divorce than litigation, and it has gained popularity all over the United States and the world. There are many positive attributes, especially the goal of preserving the welfare of the family.

**Yet it's important to keep in mind that Collaborative Law is not necessarily the best fit for everyone.**

Those who:

- cannot afford the full Collaborative team;
- fear losing their lawyers if they do not settle; or
- want to negotiate themselves with professional help, but with very limited use of lawyers; may well do better to pursue the Collaborative Mediation route.



## **A. Clients Choose the Timing and the Mediator**

Clients choose the timing of Collaborative mediation. Most start Collaborative mediation right from the beginning, before they have even filed any papers or consulted with lawyers. But they may enter at any time in the course of their dispute. Sometimes clients start Collaborative mediation to avoid a temporary orders hearing, or they start just after one. Most clients, but not all, mutually agree to suspend litigation while they work through informal discovery and resolution in Collaborative mediation.

Occasionally, clients will seek out Collaborative mediation on their own when they are close to trial. Clients often catch their litigation lawyers off guard when they find a Collaborative mediator and mutually decide they want to replace the lawyers' favorite local evaluative mediator. Litigation lawyers need to be aware of the benefits as well as the limitations of Collaborative mediation, so they may have an informed discussion with clients about their choices.<sup>14</sup> It is ultimately the client's decision which way to go.<sup>15</sup>

## **B. Clients Control the Size of the Team and the Cost**

For most clients, the unique two-member Collaborative professional team is enough.<sup>16</sup> Any financial, tax, real estate, child, or parenting specialists the couple chooses from the Collaborative mediators' resource network may participate in one or more mediation sessions at the couple's option. They can also meet with the resource professional separately, when and if they and the mediators feel it would be beneficial. Doing it this way makes the use of other professionals optional for the client, saves money, and still makes their expertise readily available.

## **C. No Loss of Lawyers/Control over Use**

In Collaborative mediation, clients do not have to be concerned that they will lose their lawyers if there is no settlement, or only a partial settlement. Unlike Collaborative Law, mediation in Texas does not require the withdrawal of clients' lawyers if the clients cannot reach agreement on everything.<sup>17</sup>

A party in Collaborative mediation has choices about the role of an individual divorce lawyer, including the choice not to have a lawyer at all. This choice differs from evaluative mediation in Texas, where lawyers typically represent the clients in mediation. Many mediators in Texas will not mediate with a party who is unrepresented.

## VI. Collaborative Mediation Referral

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Under a controversial 2008 Texas ethics opinion, attorney-mediators in Texas are not permitted to draft divorce papers for their mediation clients.<sup>18</sup> Consequently, Collaborative mediators who follow the opinion are advised to find referral attorneys who will respect the client's goals while completing the procedural process. The Collaborative Mediator may best meet the client's needs by referring attorneys who are trained in Collaborative Law. The Collaborative Mediator can easily expand their attorney referral network by asking the Collaborative lawyer with whom they like to work.

A busy Collaborative mediator can provide a regular stream of uncontested divorce and custody clients to those lawyers who also want to facilitate amicable divorces whenever possible. The referred lawyer will:

- **explain legal issues,**
- **review the proposed settlement agreement,**
- **protect the client's interests,**
- **draft the paperwork, or**
- **any combination of those things the client wants and the needs dictate.**

However, any lawyer who creates unnecessary conflict, sabotages the mediated deal for the lawyer's own benefit, or refuses to cooperate with the Collaborative mediator and the other spouse's lawyer will quickly find they are off the Collaborative mediator's referral list.

Collaborative mediation is also a good referral solution for an amicable couple who is looking for one lawyer to sit down with both spouses, answer their questions, draft their paperwork, and get the order signed. Those couples present a dilemma. Obviously, a lawyer can only represent one of the parties because they technically oppose each other. It puts the lawyer in the difficult position of deciding whether or not to negotiate with the unrepresented party if one of them hires the lawyer.

Instead of sending both parties out the door, the lawyer has another option that is likely to work for everyone. The lawyer can refer both of them to a Collaborative mediator to work out their agreements. But before they leave the office, the lawyer can offer to represent one or the other to provide legal advice, suggest options for settlement, review agreements, and draft the order from the mediated settlement agreement. The lawyer can come into the Collaborative mediation sessions, or pass offers

through the mediator to negotiate with the other party indirectly. Therefore, a lawyer may use Collaborative mediation as a way to represent one party with limited scope<sup>19</sup> services, meet ethical rules, and still assist a couple to have a friendlier divorce.

Collaborative mediation is emerging as a new way for each of those professionals to assist a whole new population of clients who seek responsible professionalism, as well as control over costs and decision-making. The educated consumer is actively seeking a divorce process that will give them control of their choices and budget, as well as allowing them to transition their family in a healthy way.

## VII. Summary

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In summary, Collaborative mediation is a fresh innovation for families and professionals. It is cost effective, client-centered, and family-friendly. Collaborative mediation has proven itself to be an attractive new resolution solution for spouses and parents who want positive, independent lives, emotional and financial stability, and intact family relationships.

For divorce and family professionals, particularly Collaborative practitioners and mediators, Collaborative mediation also has opened the door to a highly satisfying and remunerative practice that answers many of the concerns about evaluative mediation and Collaborative Law. Divorce lawyers have a new referral source for business, and a great new way to service clients whom they might have lost otherwise. All in all, Collaborative mediation satisfies many needs and is certainly on the cutting edge of a new frontier.

# Endnotes

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- <sup>1</sup> “Collaborative mediation” is a term the author uses to describe the “hybrid” mediation process she began developing in Texas in 2006 and has been actively practicing since 2010 with her co-mediator Linda Miller-deBerard, L.C.S.W. The process is a melding of neutral third party mediation with certain methods and strategies of Collaborative Law, but without the mandatory withdrawal of legal counsel that Collaborative Law requires if there is no settlement. Collaborative mediation is not Collaborative Law; or “Little ‘c’ collaborative”; or Collaborative “lite”; or “cooperative” law. The author is careful not to create confusion for consumers between mediation and Collaborative Law, or to dilute or compete with Collaborative Law. Rather, the goal of the author in this chapter is to provide an introduction for consumers, legal, mental health, and parenting and financial specialists to an innovative new mediation option to resolve family disputes.
- <sup>2</sup> Collaborative mediation is in its infancy in Texas. To date, the author has not submitted data to a researcher for formalized study or statistical analysis. Thus, the information the author provides about Collaborative mediation, the satisfaction of the clients, their motivations to choose this process, their rate of settlement, and other information is anecdotal from her experience developing and practicing the model.
- <sup>3</sup> A core co-mediator team of a family counseling professional and an attorney-mediator with substantive expertise could adapt the Collaborative mediation model for other family cases such as same sex, probate, elder, pre-and post-nuptial agreements, adoption, and family business succession. For families dealing with an addiction, Collaborative mediators can provide the forum and professional assistance to negotiate how to manage the marriage, finances, and parenting while a party is in active addiction, rehabilitation, or recovery. The co-mediators, with a release from the parties, may also coordinate their services with a party’s mental health, medical, and addiction professionals.
- <sup>4</sup> Tex. Civ. Prac. & Rem. Code Ann. § 154.053 (West 2011).
- <sup>5</sup> The contract the author presents to her clients in Collaborative mediation is adapted from the “Cooperative Law Dispute Resolution Agreement” (the “Agreement”) that the Court of Appeals in Houston upheld in *In re Mabray*. In *In re Mabray*, divorcing spouses and their lawyers signed an Agreement to “effectively and honestly communicate with each other with the goal of efficiently and economically settling the terms of the dissolution of the marriage.” *In re Mabray*, 355 S.W.3d 16, 20 (Tex. App.—Houston [1st Dist.] 2010, no pet.). The Agreement prohibited formal discovery and allowed “good faith” informal discovery. *Id.* It stated:
- We acknowledge that, by using informal discovery, we are giving up certain investigative procedures and methods that would be available to us in the litigation process. We give up these measures with the specific understanding that the parties will make to each other a complete and accurate disclosure of all assets, income, debts, and other information necessary for us to reach a fair settlement. Participation in this process is based on the assumptions that we have acted in good faith and that the parties have provided complete and accurate information to the best of their ability. *Id.*
- <sup>6</sup> Even the core co-mediator team is not an absolute requirement. The author prefers to co-mediate. However she has performed Collaborative mediations as the sole attorney-mediator. She has done this when the couple in pre-screening are amicable and are communicating well, and there is no family violence, or mental health or substance abuse issues. She always informs the couple that the family counselor co-mediator is available and can be brought in to assist any time. She also makes sure they understand the family counselor does not do therapy in mediation.
- <sup>7</sup> Tex. Fam. Code Ann. § 6.602 (Vernon 2006). In contrast, an Agreement Incident to Divorce is not legally binding until a judge signs an order incorporating the agreements, which opens a window for a party to unilaterally withdraw consent, and for a lawyer, or judge to question its terms. See Fam. § 7.006 (Vernon 2006).
- <sup>8</sup> Mediation is generally considered to be the least expensive “assisted” consensual dispute resolution process across the nation and the world. In divorce mediation, each spouse meets privately and confidentially, separately and/or jointly, with a neutral third party (a mediator) who has specialized training in facilitating communications, gathering information, developing options, and negotiating agreements. The mediator’s role is not to give legal advice or impose a decision, but instead to guide the parties to reach their own resolutions. Couples generally have the autonomy in mediation to decide whether or not to have attorneys represent them. The parties make important decisions that fit their family and finances, rather than having a judge or arbitrator determine their fate.

<sup>9</sup> Collaborative Law is a consensual dispute resolution process that is distinct from mediation. A Collaborative attorney represents each party. There is rarely a third party neutral mediator involved. The parties attempt to settle their disagreements in a series of private and confidential meetings with the assistance of a special team consisting of their Collaborative Law attorneys, and mental health, financial, and child specialists. Although there are exceptions, generally in Collaborative Law all the neutral professionals attend every session along with the Collaborative Lawyers. The parties and their Collaborative Lawyers sign a written “participation agreement” in which they pledge to try to settle outside of court; use interest based negotiation; and exchange relevant information through informal discovery. If the parties do not settle in Collaborative Law, their attorneys must withdraw and the parties must find new attorneys and another process to resolve their disputes. Around the country, the settlement rate of Collaborative Law cases is reported to be around eighty-six percent. Settlement data are based on the International Academy of Collaborative Professionals Research conducted October 16, 2006 – July 6, 2012. Linda K. Wray, IACP Research Regarding Collaborative Practice (Basic Findings), 12.1 Collaborative Rev. 1, 1 –10 (2012), [https://www.collaborativepractice.com/media/2794/2011\\_08\\_26\\_CollaborativePracticeReport\\_shortversion.pdf](https://www.collaborativepractice.com/media/2794/2011_08_26_CollaborativePracticeReport_shortversion.pdf); see also IACP Practice Survey PowerPoint, [www.collaborativepractice.com](http://www.collaborativepractice.com).

<sup>10</sup> The Texas Supreme Court in the case of *In re Stephanie Lee* stated:

Encouragement of mediation as an alternative form of dispute resolution is critically important to the emotional and psychological well-being of children involved in high-conflict custody disputes. Indeed, the Texas Legislature has recognized that it is “the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.” Tex. Civ. Prac. & Rem. Code § 154.002 (emphasis added). This policy is well-supported by, *inter alia*, literature discussing the enormous emotional and financial costs of high-conflict custody litigation, including its harmful effect on children. Children involved in these disputes—tellingly, referred to as “custody battles”—can face perpetual emotional turmoil, alienation from one or both parents, and increased risk of developing psychological problems. All the while, most of these families have two adequate parents who merely act out of fear of losing their child. For the children themselves, the conflict associated with the litigation itself is often much greater than the conflict that led to a divorce or custody dispute. The Legislature has thus recognized that, because children suffer needlessly from traditional litigation, the amicable resolution of child-related disputes should be promoted forcefully. *In Re Lee*, 411 S.W.3d 445, 449 –450 (Tex. 2013).

<sup>11</sup> Anecdotally, the author finds that approximately ninety-five percent of Collaborative mediation clients resolve all their issues. One hundred percent of clients have reached at least partial agreements. The author’s Collaborative mediation clients consistently report a high level of satisfaction.

<sup>12</sup> Unfortunately, sometimes lawyers and/or parties abuse mediation for their own gain rather than using it as a tool to find mutually acceptable agreements. Provided the client has means to pay, a lawyer can make a significant amount of money when he or she bills hourly fees to prepare for and to attend mediation with the client. The lawyer generally makes even more money if the case does not settle at mediation and it goes to trial. Therefore, a lawyer may be incentivized to discourage a well-paying client from settling in a late stage mediation so as to ensure the need for the lawyer’s future services. Clients have also been known to use late stage mediation as a strategic tactic to force a spouse to settle who cannot afford a trial.

<sup>13</sup> Tex. Fam. Code Ann. § 15.106 (Vernon 2014).

<sup>14</sup> Clients who enter Collaborative mediation from litigation frequently report litigation was not what they expected. They felt the lawyers were too busy to listen to either of them, and were more interested in stirring up conflict to make money than in trying to get the couple to come together for resolution. Clients realize doing mediation late after paying their lawyers to do discovery will cost far more than doing mediation early and completing informal discovery themselves in Collaborative mediation. The Collaborative mediation clients who have been through litigation find the interest based negotiation techniques a refreshing relief, preferable to the more adversarial evaluative style of the mediators their lawyers may choose for them.

- <sup>15</sup> [A] lawyer shall abide by a client's decisions ... concerning the objectives and general methods of representation. Tex. Disciplinary R. Prof'l Conduct 1.02.
- <sup>16</sup> Only about ten to fifteen percent of the author's Collaborative mediation clients seek the assistance of other professionals beyond the core co-mediator team of an attorney-mediator and a family counselor. Clients in Collaborative mediation choose their team, and some only need the assistance of the attorney-mediator.
- <sup>17</sup> It is an option for a party who chooses a Collaborative Lawyer to assist him or her in Collaborative mediation to make a separate agreement allowing the Collaborative Lawyer to withdraw if all the issues are not settled in Collaborative mediation.
- <sup>18</sup> See Opinion 583, Tex. Center for Legal Ethics (Sept. 2008), <https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-583.aspx>; Sherrie R. Abney, Ethics Opinion Questioned, 18.1 Alternative Resolutions, Winter 2009, at 9; see also A.B.A. Comm. On Mediator Ethical Guidance, Advisory Response SODR-2010-1.
- <sup>19</sup> A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation. Tex. Disciplinary R. Prof'l Conduct 1.02(b).