

# Collaborative Enterprise (Part II)

By Pete Desrochers

Earlier this year, the Ethics Committee of the Colorado Bar Association found that the practice of Collaborative Law violates Rule 1.7(b) of Colorado Rules of Professional Conduct, insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful.

Part I of this article (published in the Summer 2007 FMN) proposed that the infusion of mediation into the Collaborative Process, although it may seem overly simplistic, avoids some of the potential legal quagmire. Essentially, in this role, the mediator acts as a case manager, administrator and third-party neutral, called upon only as needed. The mediator also represents an infrastructure of checks and balances against potential conflicts of interest, while preserving the integrity of the Collaborative Process.

There is little doubt the Collaborative Process could be made more accessible with the infusion of mediation and that the issues raised in Colorado are legal issues that must be resolved by the legal community through the legal systems. The floodgate that may or may not have been opened across the country is far and beyond what can be addressed here.

Stu Webb, J.D., who has been called the creator and founder of the Collaborative Law concept asked,



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“So what are the tensions between these two siblings (Collaborative Law and mediation)? Do the tensions come from fear? Fear that there’s not enough? Fear that we need to put down the other, so we’ll have more? In some ways, I think that is the case.”

Webb insightfully went beyond the suggestions of some writers, who merely promote the referring of clients to one another; he purported the idea of Collaborative Lawyers bringing in mediators in the event of an imminent impasse. Conversely, he saw a much more dynamic role for Collaborative Lawyers in becoming part of the mediation process.

Webb’s thoughts were dramatically echoed by a Canadian, Dr. Barbara Landau – a psychologist, Collaborative Lawyer and mediator. Specifically, she stated that adding mediation “...is more cost effective than litigation or the original CFL, maximizes the expertise of all professionals, and blends the best part of CFL and mediation. The reaction has been very happy lawyers and clients.”

Collaborative Law professionals

have a unified commitment to settle their clients’ issues without harmful litigation. They focus on financial realities, the well-being of any children and the best-possible emotional grounding for those involved. They endeavor to show their clients what lies beyond the bounds of traditional thinking. Perhaps it is time for mediators and Collaborative Lawyers to practice what they preach, in terms of keeping open minds. Expanding the worlds of Collaborative Law and mediation means expanded client bases for both.

So much for turf wars. Without changing a single component of the Collaborative infrastructure, it is possible to lower overall costs, provide an abbreviated service to those who are financially challenged—with all the benefits still intact—and reach new markets that have not been significantly targeted. If a situation arises in which a Collaborative Lawyer must at least consider withdrawing, reviewing this with the client and a mediator could help keep the Collaborative Process intact. This

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effectively makes a mediator the case manager, a function that is not clearly delineated. It would be immensely valuable for both lawyers and clients to know that there is a neutral administrator, if and when necessary.

The proposal for a mediation-infused Collaborative Process is not intended to compete with current outstanding services. It is simply to make the proverbial mesh smaller, so that fewer potential clients fall through the net and more receive benefits that only Collaborative Law can offer.

Rational or otherwise, possible worst-case scenarios relentlessly flash through the minds of divorcing couples. Events that will never come to fruition are already being blamed on the other party, making that person an even more heinous individual than he or she was in real life. While both parties may have engaged Collaborative Lawyers, it can still seem a confrontational process, albeit not in the courts. Once again, enter the mediator in the role of carrying the neutrality banner, along with a network of checks and balances.

Finally, does adding another player to the Collaborative team increase client costs, already viewed in some circles as being high? Absolutely not. As stated earlier, the objective is to lower overall costs. There is a variety of possible compensation scenarios for all parties on the Collaborative Team; they can include a flat, fixed percentage of the fees charged by all professionals going to the mediator in exchange for managing cases and being called in, when and if needed. Clients can engage the Collaborative Team mediator if they

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think greater progress can be made on certain issues, while reverting back to other Collaborative Professionals on sensitive or still contested issues. On impasse issues, or in cases of possible conflicts of interest between clients and lawyers, each party, as an independent client, might approach the case mediator. These are just some of numerous ways to incorporate mediators without adding costs. Each Collaborative Team is likely to engage mediators in a unique manner, consistent with the character, style and needs of that team.

One could easily argue that Collaborative Law, by its very nature, supercedes other forms of dispute management in terms of comprehensive, well-grounded and sustainable resolution for all parties. But it is still not for everyone; neither is mediation. Yet the cooperative infusion of each into the other's protected universe opens a new world of target clients who may not have considered either, but who desperately need both.

Nobody is proposing any sort of marriage between Collaborative Law and mediation, but, then again, a little dating couldn't hurt. **FMN**

## SO...WHO ARE YOU?

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howling with laughter, decades ago, and look forward to re-reading someday.

### **What are your goals and aspirations in life?**

To enjoy life with my new wife. To continue to grow, both personally and professionally. To continue to get myself into and out of difficult situations. To someday dig down to the top of my desk. To lose those 10 pounds—again! And to continue to try to pack out what I pack in.

### **If you could sit down and talk with anyone, who would it be?**

My dad, who died when I was thirteen. He was passionate about life and trying new things. Now that I'm older, I'd love to learn from his wisdom.

### **What is your favorite quote?**

Well, since we've been doing a lot of our own home renovations lately, "Measure twice, cut once." It's great advice for both carpenters and mediators. And we are ALL, in one way or another, both carpenters and mediators.

### **Final words?**

If you're reading this, you too, can get involved in helping the Family Section of ACR. **FMN**