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Feature Article

Collaborative Enterprise (Part I)

By Pete Desrochers

Any true Star Trek fan knows of the animosity that existed on the set between William Shatner, who played Captain Kirk, and James Doohan, who played Engineer Scott. In fact, had it not been for the outstanding facilitative efforts of Leonard Nimoy (who played Mr. Spock), that animosity would have compromised the latter seasons of the show.

Our dear Mr. Spock would have made a good mediator within a Collaborative process. As Nimoy was liked by everyone, including Doohan, he was quite effective in maintaining peace on the set and avoiding escalation of disputes. However, Nimoy's personal friendship with Shatner and his dedication to the show were commonplace knowledge. Years later, Doohan acknowledged that



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people could not help but take sides. There was nobody he considered completely neutral. But, the show, as a collaborative enterprise, came first, and if push came to shove between Mr. Scott and Captain Kirk, Doohan knew who would have to go. Luckily, Nimoy's mediation skills served to keep afloat the collaborative process that was this show. Without his skills and ability to mediate the disputes on the set and keep Shatner

and Doohan working together, the show might have been forced to change a star actor or to end prematurely.

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

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with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful. A perception of conflict arises between a lawyer's responsibilities to his or her client and the duty to uphold the integrity of the Collaborative Process.

In expanding the metaphor regarding the internal disputes of the actors on the Star Trek set, seeing Shatner and Doohan as collaborative lawyers, and Nimoy as a mediator, I propose the use of mediation in the Collaborative Process. While the infusion of mediation into the process may seem overly simplistic, it just might be a way out of the potential legal quagmire that arises from the dilemma of the Colorado Bar's Ethics Committee.

The Ethics Committee's ruling stated: "Loyalty to a client is...impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client." Collaborative lawyers vehemently argue that there is no conflict and that they can be true to both responsibilities. That's likely the case. However, it may be necessary to re-address the Ethics Committee finding that: "...if the process is not successful, the client may be required to litigate the dispute, which will prove more costly than immediately litigating a dispute. Depending on the scope of the representation as agreed to by the lawyer and client, the client may also be required to incur the additional cost associated with hiring trial counsel. A client's and

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lawyer's tactical decisions will also be limited."

The so-called "four-way agreement" was designed to ease the conflict between parties and encourage settlement by removing the threat of litigation. But, does it inadvertently exchange one threat for another with the fear of potentially having to find new lawyers? In short, there currently is no overall perception of neutrality for clients. They have no perceived infrastructure of checks and balances as a fallback.

Now, enter the mediator as a possible supporting actor. The Collaborative Process may simply need another place to turn within its own infrastructure. Mediation is one clear avenue for keeping the Collaborative Process alive, reducing the risk of having to withdraw and even providing alternatives to resigning. If the situation arises where a Collaborative lawyer must

at least consider withdrawing, reviewing this with the client and a mediator could help keep the Collaborative Process intact. This effectively makes a mediator the case manager, a function that has not been clearly delineated. It would be immensely valuable for both lawyers and clients to know there is a neutral administrator, if and when necessary.

But, honestly, do lawyers really need a mediator to talk to their clients? Do other team professionals require a mediator to discuss between themselves matters of which they are infinitely more knowledgeable? Of course not. Nobody answers to the mediator. Indeed, it is the mediator who is accountable to the team for overall administration and as a fallback or reference for clients with peripheral issues. As always, the mediator attempts to resolve issues and cannot make decisions, recommendations, or provide legal advice.

A client who is not totally comfortable with the Collaborative Process may be less likely to challenge potentially unfavorable conclusions reached by team experts if there is a third party neutral present. Moreover, and not withstanding the elimination of litigation, the Collaborative Process is new to many, who have not yet determined whether this engagement is confrontational or neutral. While Collaborative Law provides for the training of mediators, Collaborative Practitioners have far from embraced them. Yet, with the addition of mediators, the process

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One Size Does Not Fit All, Or, A Day in the Life

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The most important lesson that was revealed in making process comparisons of these three disparate cases was the value of caring.

With Couple Number Two, time became an ally for the facilitator. Time was the sand slipping through the hourglass of mediation. When it ran out, the clients were doomed to the cost of litigating (which they could not afford), and the destruction of their dreams (to which they could not abide). In the absence of an agreement, bankruptcy and litigation would become the Scylla and Charybdis –the two sea monsters of Greek mythology situated so closely on opposite sides of a narrow channel of water that sailors avoiding Charybdis will pass too close to Scylla and vice versa.

By stark contrast, Couple Number Three was working in sequential fashion, layering the work of the second session on the accomplishments of the first. They controlled the process, the scheduling and the progress, with a goal of maximizing their respective experiences in it.

Based on the case dynamics, time constraints and emotional incapacities in the first two cases, the range of effective intervention strategies was extremely limited. Reality-testing became a critical exercise in order to keep the parties on track while avoiding the otherwise inevitable train wreck. As

overtures of facilitative intervention consistently bounced back off emotional brick walls, “client-centered” took on a more directive and evaluative style. In the two cases with attorneys, most of the work was done in a caucus format. Notwithstanding my preference for client-direct communication, the separation of the clients in the first case was a matter of emotional necessity and in the second case, a matter of practical necessity to eliminate the chronic pattern of emotional reactivity to which the clients were addicted.

The most important lesson that was revealed in making process comparisons of these three disparate cases was the value of caring. The key ingredient for the clients, regardless of whether the intervention was at the facilitative or the evaluative end of the spectrum, was the extent to which they felt the mediator truly cared about their needs, understood their concerns, and was empathic about the need for and difficulty of letting go.

As I consider the lessons in these cases, I am reminded of the early days of family mediation, when the field was awash in pronouncements about the correct way to mediate. The consistent process thread woven through the lives of six individual clients, in three very different mediations, on one very challenging and exhausting day, was the continuing need to interpret and apply the concept of client-centeredness with the recognition that one size never will fit all. With arms as long as mine, I became disabused of that myth a long time ago. FMN

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might well be strengthened and made more appealing to hesitant clients and skeptical purveyors of the legal system.

Collaborative Law purists could credibly argue that the premises put forth in this article, 1) merely avoid the core issue and do not solve it; 2) are self-serving for mediators who are anxious to increase their own business; and 3) add more people and costs to a process already criticized in some circles for just that. The response to those concerns, in order, is “yes”, “perhaps” and “absolutely not”. All of these concerns will be dealt with in Part II, to be published in the Fall Issue of Family Mediation News.

In the meantime, let the seed be planted for consideration. The mediator acts as a case manager, administrator and a third-party neutral, called upon only as needed. The mediator also represents an infrastructure of checks and balances against potential conflicts of interest. After all, the safer and more secure that clients feel about the process, the fewer are the residual desires for continuing hostilities. FMN