PROTOCOLS FOR MEDIATORS AND COLLABORATIVE PROFESSIONALS WORKING TOGETHER

PREAMBLE

In the 1970s with the advent of no fault divorce legislation, Mediation developed as a serious alternative to litigation for the dissolution of a marriage. Several Attorneys, the American Arbitration Association, legal scholars, and court conciliation staff were instrumental in implementing mediation programs as well as classes to train Mediators.

In the late 1980s Stu Webb, after practicing family law in the "usual way" for more than twenty years, became interested in mediation and alternate dispute resolution. Stu was particularly interested in how the particular talents of Attorneys as problem-solvers could be channeled into a "settlement only" model for family law representation. Stu envisioned a model where Attorneys could not, under any circumstances, go to court. Lacking court as a dispute-resolution option, the Attorneys and Clients would have no alternative but to rise to the challenge of solving the problem. From this vision, Collaborative Law was born.

Since then, the Collaborative Law process has developed in close alignment with the mediation process. The basic goal of Mediation and of Collaborative Law are the same: to provide a process within an environment where disputes can be resolved in a safe, respectful, honest, transparent manner and in such a way as the parties’ best interests, and those of their children, are satisfied.

Each model brings similar and complementary attributes to the dispute resolution process, attributes that may in combination provide a highly effective means for resolving disputes in many family law cases. The following protocols are designed to educate professionals about the similarities and differences between mediation and Collaborative Law, and provide direction for effective pairing of Attorneys and Mediators to aid Clients in achieving successful agreement.

Many divorcing couples retain Mediators without first having retained Attorneys and in that case these protocols assume that mediation is the primary process through which issues are resolved; Mediators encourage each party to retain counsel and enter into a Collaborative Law Participation Agreement. When parties retain Attorneys as their first step in the dissolution process, these protocols assume that Collaborative Law is the primary process through which issues are resolved; Attorneys explain to Clients that mediation can be utilized to facilitate resolution of a specific issue or a wide range of disputes in a dissolution or in post divorce matters, and that Mediators can also be case managers, conflict resolution consultants and/or serve in an evaluative role.
The following protocols are offered as a guide and are not meant to be a rigid set of rules or requirements. This document is divided into the following sections:

I. Similarities and differences in the roles of Attorneys and Mediators.

II. Skills and capabilities needed for Attorneys and Mediators to be effective.

III. Clients’ roles and responsibilities in mediation and Collaborative Law.

IV. Collaborative process involving a Mediator.

V. Mediation process with Attorneys.

VI. Withdrawal.

VII. Collaborative process involving a Mediator to provide consultation or case management services.

I. SIMILARITIES AND DIFFERENCES IN THE ROLES OF ATTORNEYS AND MEDIATORS

A. Attorneys and Mediators share common roles.

1. Attorneys and Mediators are client centered. Both professionals:

   a. Create an environment for Clients which is safe and conducive to settlement;

   b. Make an effort to understand the family dynamics and the needs of the children;

   c. Assist Clients to identify their highest prioritized needs, considering moral, economic, social and other factors relevant to each Client’s situation;

   d. Empower Clients to actively participate in the process and “find their voice”;

   e. Assist Clients with reaching agreements that satisfy each party’s interests and that are best for their children.
2. Attorneys and Mediators are process guides, committed to creating and safeguarding a process that permits the Clients to resolve their conflict in a safe and respectful manner. Both professionals:

a. Are committed to:

   • Transparency of the process
   • Full disclosure
   • Confidentiality
   • Client self-determination
   • Resolving issues out of court

b. Facilitate creative problem solving;

c. Support the Clients and the process;

d. Have no decision-making authority;

3. Attorneys and Mediators obtain the Clients’ confidence and create and maintain good relationships with all participants.

4. Attorneys and Mediators involve other professionals in a case as appropriate.

B. Attorneys and Mediators also have complementary professional roles. (The characterizations below are suggested as dominant roles for the professional described; the characterizations are not meant to necessarily imply exclusivity.)

1. In representing Clients in the Collaborative process, Attorneys serve as Advocates and Counselors to their Clients. Attorneys:

   a. Are experts in substantive legal matters;
   
   b. Educate Clients about process and law;
   
   c. Give legal and decision-making advice;
   
   d. Assist Clients in preparing for negotiations e.g. helping Clients develop an effective communication plan; and
   
   e. Give feedback and “reality checks” to Clients.
2. Mediators serve in a neutral capacity.
   a. Mediators are experts in conflict management and resolution, and not necessarily in substantive matters. Mediators:
      1. Identify barriers to communication and settlement;
      2. Use tools, techniques, interventions and strategies to assist both parties in communication, clarifying priorities, gathering information, generating and evaluating options, and reaching agreement, free from a duty to advocate or forward any particular agenda.
   b. Mediators are uniquely positioned to gain the trust of both Clients;
   c. As neutrals, Mediators:
      1. Are impartial and free from bias;
      2. Have no “agenda” or interest regarding the outcome;
      3. Translate and amplify what one party or team is communicating so that the other party understands the information, including “reality checks”;
      4. Serve as a conduit for communications that cannot yet be handled directly;
   d. Mediators can serve as neutrals in a variety of capacities within a case, such as by assuming a facilitative or evaluative role, or by acting as a case manager, consultant and/or a Mediator-arbitrator.

II. SKILLS AND CAPABILITIES NEEDED FOR ATTORNEYS AND MEDIATORS TO BE EFFECTIVE

A. Both Attorneys and Mediators have skills necessary to conduct a problem-solving dispute resolution process, including the ability to:
   1. Establish and maintain rapport with all participants;
   2. Listen well;
   3. Generate trust;
   4. Maintain flexibility, adaptability;
5. Use and model good communication skills;
6. Show and model respect for others;
7. Educate Clients without being judgmental or paternalistic;
8. Make process comments as interventions;
9. Use a “full toolbox” of possible interventions;
10. Hear non-verbal communication and sense energy and power shifts in the room;
11. Move Clients’ attention between macro concepts and micro issues as needed (big picture and details);
12. Assist Clients with identifying and prioritizing issues;
13. Help Clients engage in creative problem-solving, including developing options to resolve issues;
14. Capture and articulate agreements when they occur; and
15. Avoid impasse and overcome impasse.

B. Some capabilities and strengths relevant to conflict resolution are more prevalent in one professional than the other. Capabilities and/or strengths more dominant in or unique to Attorneys include:

1. The ability to counsel the Client in ways that would be inappropriate for an impartial Mediator;
2. The ability to help the Client sort out his or her priorities, one on one, in a context that allows him/her to be freer to speak about the other spouse;
3. The ability to develop and appropriately communicate legal advice;
4. The ability to strategize and prepare Clients for constructive negotiation;
5. The ability to make difficult/complicated judgment calls when recommendations are called for;
6. The ability to ensure the Client’s voice is heard;
7. The ability to synthesize the Client’s priorities; and
8. The ability to effectively advocate.

C. Capabilities and/or strengths more dominant in or unique to Mediators include:

1. The capability of being perceived as impartial;
2. The ability to communicate with impartiality;
3. The ability to recognize and define the effect of the “dance” between the people in the room;
4. The ability to inspire trust as a neutral and not an advocate;
5. The ability to ensure that both Clients experience “being heard”;
6. The ability to manage the case as a neutral;
7. The ability to recognize and leverage common interests;
8. The ability to see options which might not be obvious to the Clients or even the Attorneys; and
9. The ability to “translate” or coach Clients through communication barriers.

III. CLIENTS’ ROLES AND RESPONSIBILITIES IN MEDIATION AND COLLABORATIVE LAW

A. Clients in both Mediation and Collaborative Law have similar roles and responsibilities. They:

1. Gather and disclose needed information;
2. Do needed leg work and homework;
3. Use and work with neutral experts appropriately;
4. Engage in creative problem-solving;
5. Seek to settle out of court;
6. Are the ultimate decision-makers;
7. Take responsibility for their decisions and determine their priorities; and
8. Aspire to:

   a. Take a long view, recognizing and planning for maximizing their enlightened long-term self-interest;

   b. Focus and follow-through on maximizing the children’s well-being; and

   c. Consider the welfare of spouse.

IV. COLLABORATIVE PROCESS INVOLVING A MEDIATOR

A. Attorneys educate Clients about mediation early in the process, and involve a Mediator as necessary and appropriate.

1. Mediators can assist the Collaborative Process by:

   a. Providing leadership when needed;

   b. Enhancing participant’s sense of safety by maintaining a calm atmosphere;

   c. Increasing the trust level because of the Mediator’s neutrality;

   d. Providing balance;

   e. Providing a family focus;

   f. Managing emotions;

   g. Listening for and noticing communications that may not have been heard, including themes;

   h. Presenting perspectives to participants without concern about advocacy for either party;

   i. Providing case management, thus increasing the efficiency of the process;

   j. Managing the flow of communication; and

   k. Helping Clients develop options for settlement.

2. Attorneys and Clients should consider bringing in a Mediator at the beginning of a case under certain circumstances, such as in:

   • High conflict cases;
• Cases where there is a high potential for polarization;

• Cases where a Client sees the other attorney as an impediment rather than an ally to the process;

• Cases where an impartial facilitator will add safety; and

• Complex cases. In such cases a Mediator may serve as a case manager, including coordinating experts and ensuring the appearance of their impartiality, and assisting the Attorneys to plan the process. (See, VII below).

3. Attorneys and Clients should consider bringing in a Mediator later in the process under certain circumstances, including the following:

a. If Clients appear to be headed toward impasse a Mediator should be brought in before the Clients harden their positions and start to look toward litigation.

b. In the event of a pattern of interaction (between Clients, Attorneys, an Attorney and a Client) that negatively impacts the Collaborative process. Adding a Mediator changes the dynamics and allows for refocusing and deflecting the “heat” away from the two who have “hooked” into each other.

1. A Collaborative Attorney should pay attention to her/his relationship with the other Attorney and promptly attempt to resolve any conflict. If the conflict cannot be resolved within a reasonably short period of time, the attorneys should acknowledge the conflict to their Clients and consider bringing in a Mediator or consulting with a Mediator.

2. Attorneys must be mindful of how they communicate with the other Client and find ways of avoiding power struggles with them. If a pattern of reactivity gets activated between an Attorney and his/her Client’s spouse/partner, the Attorneys should consider bringing in a Mediator.

c. Whenever impediments to settlement seem to turn on communication and there is little progress in four way meetings. For example, consideration should be given to bringing in a Mediator in the following situations:

1. If the parties process information very differently and the attorneys are having trouble helping them communicate.

2. When the attorneys find themselves and/or their Clients getting stuck in “right/wrong” no matter how hard they try to disengage from it.
d. When one of the Clients has a steep learning curve regarding emotional or financial issues and there is value in having the Clients discuss those issues together. A Mediator may be of assistance in facilitating this type of communication in a way that will allow the party to “save face” and/or won’t require the other’s Attorney to be the one giving the Client a tutorial.

e. When the Attorneys and parties all feel “stuck” or cannot identify what is sabotaging the process.

B. Attorneys and Clients participate actively in designing the process that includes a Mediator by:

1. Choosing an appropriate Mediator for the situation;

2. Determining the role of the Mediator;

3. Participating in the decisions about whether or not the Mediator will work in sessions with the Attorneys and Clients or whether the Mediator will work with the Clients without the Attorneys present;

4. Identifying the issues to be mediated;

5. Determining the location and arranging for any special needs;

6. Determining the expected flow of information between sessions, including deciding which professional will write and circulate a summary of meetings involving the Mediator; and

7. Determining how the Mediator will be paid.

C. Documents To Be Signed When a Mediator is Brought into a Collaborative Case.

1. The Mediator and Clients should sign a Mediation Participation Agreement, which includes the following:

   a. A provision stating there will be full disclosure;

   b. A provision stating that the Mediator will be incompetent to testify in any way in an adversarial process;

   c. A description of the nature and scope of the Mediator’s services; and
d. A statement of the fees to be paid and the sources of funds from which the Mediator will be paid. If one Client is paying all or substantially all of the fees, the other Client should be informed that this fact will not affect the Mediator’s neutrality/impartiality in the case. As an alternative, one of the Attorneys may pay the Mediator from monies given to the Attorney by the Client(s) pursuant to arrangements made as set forth in IV.B.5. above, so that the Mediator does not know who is paying her or his fees. Fees owed should be paid promptly to avoid any perception that nonpayment of fees is impairing the Mediator’s objectivity.

2. An Authorization signed by the Clients permitting the Mediator, Attorneys and other professionals on the case to talk freely about all matters relevant to the issues being mediated if not already included in the Agreement to Mediate. (See, IV.E below).

D. Attorneys and the Mediator should consider themselves a team, working together to assist the Clients in achieving a mutually agreeable settlement.

E. In order for the Mediator and Attorneys to maximize their effectiveness, communication between the professionals about all matters relevant to the issues being mediated is important. The Mediator should obtain written authorizations at the first meeting with the Clients to communicate with both Attorneys about all matters relevant to the Mediator’s engagement. If Mental Health Professionals or Financial Professionals have been retained as part of the team, written authorizations to communicate with these professionals should ordinarily be obtained at the first meeting as well. All written communications between the Mediator and Clients should be shared with the Attorneys unless agreed otherwise.

F. If Clients are sent to a Mediator without Attorneys attending the Mediation session, each Attorney assists his/her Client and/or the process, outside of Mediation sessions by:

1. Helping the Client sort out his or her priorities;

2. Educating and advising the Client prior to, or early in, the mediation process as well as throughout the process;

3. Coaching the Client throughout the process, including preparing the Client for mediation sessions;

4. Reviewing mediation session summaries as soon as received and contacting his/her Client, or the Mediator via telephone conference including the other Attorney, to express concerns and make suggestions;

5. Assisting the Client with mediation assignments as appropriate, including:
• Obtaining relevant information and documents;

• Developing budgets;

• Determining a valuation date;

• Making appropriate referrals for valuation of assets;

• Calculating nonmarital claims or making appropriate referrals for calculation of these claims; and

• Looking into health insurance coverage.

6. Participating in telephone conferences initiated by the Mediator or either Attorney;

7. Working on issues with the other Attorney as agreed upon by the Mediator and Attorneys;

8. Keeping the Mediator informed of new developments (any written communication is copied to the other Attorney); and

9. Drafting pleadings.

G. If Attorneys and the Mediator Work with Clients in 5-way Meetings:

1. Attorneys prepare their Clients for a 5-way meeting with a Mediator by:
   a. Educating Clients about the role of a Mediator and the mediation process;
   b. Educating Clients on substantive issues;
   c. Helping Clients to consider and clarify big picture goals, interests, values, and personal metaphors;
   d. Developing priorities;
   e. Assisting Clients with gathering relevant information and documents; and
   f. Developing a communication plan, being mindful of “buttons”.

2. In 5-way sessions:
   a. Each of the professionals will utilize his/her unique professional capabilities and skills as outlined in II. above.
b. The roles of the Mediator and Attorneys are fluid and will vary with the circumstances of each case. However, the following is a broad and general characterization of the roles of the Attorneys and Mediator in 5-way sessions:

1. The Mediator serves as the primary manager;

2. The agenda is developed by all participants in the case;

3. As each topic is discussed in the 5-way session, the Attorneys participate by adding ideas, suggestions and recommendations;

4. Attorneys support their Clients by asking questions, and assisting them with expressing their needs in a respectful and effective manner;

5. Attorneys assist their Clients to engage in creative problem-solving by providing feedback, ideas and “reality checks”;

6. Throughout the mediation, the Mediator employs tools, techniques, interventions and strategies to assist both parties with abiding by the rules of mediation, communicating and reaching agreement;

7. Attorneys, like the Mediator, facilitate effective communication in mediation sessions, as suggested in relevant protocols for Attorneys, particularly those listed in III.D and III. F;

8. Attorneys may suggest breaks and individual caucuses with the Mediator as appropriate, and Attorneys otherwise assist in managing meetings as indicated in relevant protocols for Attorneys identified particularly in III.C; and

9. Attorneys participate in making referrals to experts, by educating Clients about the value an expert may bring to the process, suggesting possible experts and helping the Clients to agree on the terms of engagement, including type of report, binding or non-binding nature, admissibility, and payment of experts fees. Experts are utilized as suggested in protocols for Attorneys, particularly those listed in III.D. Agreements about who will make the initial contact with the expert are made in mediation.

3. Between 5-way sessions, Attorneys and the Mediator may debrief as needed to discuss what went well, what did not go well and to evaluate what can be done at the next meeting to make the process effective and efficient.
4. Between 5-way sessions Attorneys work with their Clients as suggested in section V. of the Protocols for Attorneys.

V. MEDIATION PROCESS WITH COLLABORATIVE LAW ATTORNEYS.

A. Mediator Suggests Retention of Attorneys at Outset of Case.

1. If Clients do not have Attorneys when they meet with the Mediator for a free orientation or first session, the Mediator suggests that Clients retain Attorneys.

2. Attorneys assist the process by:
   • Clarifying needs of Client;
   • Helping Client understand facts;
   • Providing Client education, advice and support;
   • Assisting Client with developing his/her voice
   • Serving as a reality check for over reaching Client;
   • Supporting Client ; and
   • Assisting Clients to make effective use of the mediation process.

3. If Attorneys are retained and utilized at the commencement of a mediation:
   • The Clients may be better able to confidently make foundational agreements and develop successive agreements with assurance.
   • Attorney advice and support may be more efficient and cost-effective as Attorney’s input at the beginning of a case significantly reduces the chance that foundational or successive agreements will need to be revisited at a later point or at the end of mediation.

B. Documents To Be Signed When Attorneys are Brought into Mediation Process Include the Following:

1. Participation Agreement. Attorneys review with Clients and obtain signatures on a Participation Agreement soon after being retained. It is recommended that this be done in a 4-way meeting or a 5-way mediation session, or if no 4-ways or 5-ways are anticipated, in a mediation session with Attorneys appearing by conference call.
2. Joint Petition for Dissolution of Marriage. Attorneys and Clients may wish to sign a Joint Petition for Dissolution of Marriage.

3. Authorization. Attorneys or the Mediator should have an Authorization signed by the Clients permitting the Attorneys, Mediator and other professionals on the case to talk freely about all matters relevant to the issues being mediated. (See, V.E below).

C. The Attorneys and Mediator should consider themselves a team, working together to assist the Clients in achieving a mutually agreeable settlement.

D. As in Collaborative cases involving a Mediator, effectiveness of the process is maximized if communication can occur freely between the Collaborative Professionals on the case, about all matters relevant to the issues being mediated. The Attorneys or the Mediator should obtain written authorizations from the Clients as soon as the Attorneys are retained, to communicate with all Collaborative Professionals retained about matters relevant to the Mediator’s engagement. All written communications between the Mediator and Clients should be shared with the Attorneys unless otherwise agreed.

E. Attorneys’ Involvement Between Mediation Sessions. Attorneys are involved between mediation sessions with their Clients, the Mediator and one another in a variety of ways, as outlined in IV.F above.

F. Attorneys Involvement in Mediation Sessions – When Does This Occur?

1. Attorneys participate in mediation sessions as agreed upon by the Mediator, the Attorneys and the Clients.

   a. Attorneys are more likely to attend mediation sessions from the beginning in certain types of cases, including those:

      • Where the facts and/or issues are complex;

      • The parties need additional support right from the beginning;

      • Either or both parties need ongoing, onsite realistic appraisal of legal counsel regarding the pros and cons of his or her case; and/or

      • That are high conflict; for example, one or both parties need the assistance of counsel to be effective in communication and to behave appropriately.
b. Occasionally, the Mediator may meet individually with each Client and his/her Collaborative Attorney, if it appears that this process may facilitate agreement.

c. Attorneys often attend a final mediation session or two to help “put the pieces of the puzzle” together.

G. Attorneys’ Involvement in Mediation Sessions – Roles of Mediator and Attorneys. As in five-way sessions in Collaborative cases attended by a Mediator, the roles of the Mediator and Attorneys in a Mediation case are fluid and will vary with the circumstances of each case. A broad and general characterization of these roles is outlined in IV, G, 2,b above.

H. The Structure Of Mediated Cases:

1. The structure of mediated cases will vary with the circumstances of each case. However, the skeletal process outline below generally is used in some form. (Note: this process was developed in the mediation community and is now a commonly accepted process in the Collaborative Law model – it is more fully developed in the protocols for Attorneys):

2. Prior to First Mediation Session:

a. The more common practice is for no communication to occur between the Mediator and Collaborative Attorneys prior to the first session, so as to maintain the “purity” of this model as Client driven.

b. Under certain circumstances, the Attorneys and Mediator talk prior to the first mediation session, generally by joint phone conference, such as when:

- The Clients have special needs;
- There are allegations of domestic abuse in the relationship, and therefore it is critical to have or to consider putting safeguards in place;
- The Attorneys have already started the information gathering process;
- Mediation is court ordered; and/or
- Time constraints or urgent circumstances exist.

c. Items which the Mediator and Attorneys may jointly discuss prior to a first mediation session include the following:

- Topics for mediation
• Plans for gathering information, such as:

  ▪ Whether the Mediator will gather the facts using his or her forms or the Attorneys will obtain the information and provide it to the Mediator;

  ▪ Whether the Mediator or Attorneys will create the first draft of an asset list; and

  ▪ What information will be provided to everyone in advance of the first mediation session (documents, asset list, etc.).

• Issues or matters unique to each Client which are relevant to the dissolution process, including:

  ▪ emotional issues;

  ▪ physical issues;

  ▪ learning styles; and

  ▪ process needs.

• The agenda for the first meeting.

3. At the First Mediation Session:

  a. The participants discuss process including:

     ▪ Ground rules for mediation;

     ▪ Principles of mediation and Collaborative Law, such as full disclosure, confidentiality, transparency, Client self-determination and resolution of issues out of court; and

     ▪ Effective communication techniques.

  b. The participants discuss the parties’ joint goals and objectives;

  c. The participants review topics for mediation, identify items that have been agreed upon, and decide what needs to be discussed in this session;

  d. Any urgent matters are handled, such as temporary parenting and financial arrangements;
e. If time, additional substantive topics are discussed; and

f. Homework assignments are made, including completion of fact gathering.

4. At Subsequent Mediation Sessions:
   a. The participants review, discuss and agree upon facts:
      • Attention is given to the accuracy and completeness of the information obtained;
      • The Clients ask questions and get answers; and
      • The information review proceeds at a pace such that everyone in the room comes to understand the information which has been provided.
   b. The parties identify concerns, interests, needs, values and goals:
      • Each party identifies those for himself or herself;
      • The parties identify those shared in common; and
      • The parties identify those for their children.
   c. The participants explore all reasonable options for settlement;
   d. The parties make agreements; and
   e. Throughout the process the Mediator is addressing communication and interpersonal issues affecting the Clients’ decision making processes.

5. Between Mediation Sessions. Between Mediation Sessions, Attorneys and the Mediator consult as needed, and plan for the next session.

VI. WITHDRAWAL. Mediators shall not be required to withdraw from a case if the Collaborative process terminates prior to an agreement on all issues.

VII. COLLABORATIVE PROCESS INVOLVING A MEDIATOR TO PROVIDE CONSULTATION OR CASE MANAGEMENT SERVICES.

A. Attorneys may consult with a Mediator who does not provide mediation services directly to the Clients.
1. Mediators as conflict resolution specialists may provide assistance to Attorneys:
   • in working through matters or issues that are not going well in a case; and
   • with perceived personality or style conflicts.

2. Mediators may also assist Attorneys:
   • with process design;
   • by providing an evaluative perspective; and
   • with brainstorming creative solutions to substantive issues.

3. Meetings between Attorneys and a Mediator may be most effective at the Mediator’s office or a neutral location.

B. Attorneys and Clients may wish to use a Mediator as a Case Manager.

1. A Case Manager is a Collaborative professional who agrees to maintain organization in the case by moving the process forward at a speed appropriate for the case, keeping all participants informed, and ensuring that meetings occur as needed in a timely manner.
   • Case Managers may be particularly helpful in complex cases.
   • Case Managers can provide cost and time efficiencies in a case.

2. Mediators as neutral professionals are uniquely positioned to be in charge of the organization of a case. Mediators in this role may:
   a. Take charge of gathering documents, including obtaining releases from Clients to obtain documents directly from an employer, financial institution, health care provider, etc.;
   b. Work with a party who is slow or resistant to providing information;
   c. Work with professionals to obtain appraisals and valuations;
   d. Follow up on assignments given to Clients;
e. Monitor the progress of a case and provide status reports to all participants in a case to keep the case moving; and

f. Assist with developing agendas for meetings between Collaborative professionals and Clients