

Collaborative Law and Mediation: Expanding the Non-Adversarial Menu for Divorcing Couples

Dr. Barbara Landau explores three forms of alternative dispute resolution: collaborative law, collaborative divorce, and collaborative mediation.

By Barbara Landau

The past 30 years have seen enormous changes in the practice of family law, both in substantive law and, as important, in the processes available to clients going through separation and divorce. We now have a dispute-resolution cafeteria of choices, unlike the situation when I graduated from law school in 1980. At that time the choices were: "Kitchen table" negotiations between clients, negotiation between lawyers, an assessment with each side retaining his/her own hired gun, and litigation.

What excites me today is the possibility of offering clients opportunities for rational selection; that is, a wide selection of ever expanding options that can be chosen individually or creatively combined (within ethical constraints).

This session will highlight three relative newcomers to the Canadian Dispute Resolution scene; collaborative law, Collaborative Divorce and Collaborative Mediation. I will explore the advantages for clients and lawyers of these options and discuss their connection to mediation.

1. What is collaborative law?

Collaborative law is an exciting development in family law that has spread to Ontario via the U.S. and Western provinces. It is a non-adversarial option for separating or divorcing couples that blends the skills of mediation with the problem-solving skills of lawyers. It has much to offer to clients whose lawyers are adequately trained and willing to follow the Collaborative Rules of Conduct.

What is *collaborative family law*? First and foremost, it represents a paradigm shift from the traditional role of a lawyer. Fundamentally, a collaborative lawyer uses his or her skills to model and teach clients how to be effective interest-based negotiators. Collaborative lawyers act as legal advisors, respectful role models, and coaches for their clients. The clients are encouraged to take the primary role in negotiating agreements that they believe will meet their own and their children's needs. The lawyers' knowledge and creative problem-solving skills are directed at reaching an integrative solution that everyone can say "yes" to and that the parties feel committed to uphold.

The process consists of an initial meeting between a lawyer and his/her client in which a range of options are discussed for addressing the issues in a separation or divorce. The clients learn that

collaborative law is not adversarial or litigation-focused. In fact, both parties and their lawyers must sign a Collaborative Participation Agreement at the outset, agreeing *not to litigate* if an impasse is reached. What this means is 100% of the lawyers' and clients' effort is directed at finding a win-win solution. Should that not be possible, the lawyers *must* withdraw and turn the matter over to counsel from a different firm.

If *both* clients select collaborative law during a meeting with their own counsel, then a series of four-way meetings are scheduled. Prior to the first four-way meeting, the lawyers meet, preferably in person, to develop a positive working relationship, share general observations about their clients (e.g. how they are adjusting to the separation, outline the issues to be addressed, identify urgent issues, discuss whether other impartial professionals might be needed, etc.), and agree on a date, location, and agenda for the first four-way meeting, including how the initial meeting will be conducted and conflict-management strategies. It is crucial to the success of the collaborative process that the lawyers create the mindset of a "team effort" to reach a mutually acceptable settlement. While each lawyer is still in the role of an advisor and advocate for his/her client, the goal is not "winning over" the other party, but "winning with" the other party, in a way that benefits all affected family members.

Prior to the first four-way meeting, each client meets with his/her lawyer to prepare. The most important item is to ensure that there is a real understanding of the terms of the Collaborative Participation Agreement, including that both lawyers are obligated to withdraw if the matter goes to court, that full and frank disclosure is required as soon as possible, and that good-faith negotiations are essential. Then the agenda for the four-way meeting is discussed, and the issues and priorities are clarified. Unlike the traditional four-way meeting, the focus is not on the preparation of legal arguments but rather on explaining the interest-based approach to constructive problem-solving, the importance of respectful communication, and how to use the tools of active listening and "I" messages."

Also, it is important to clarify the roles of the lawyers and clients in a collaborative process. In the traditional process, lawyers usually speak on behalf of the clients and argue the merits of their client's position. In a collaborative process, the lawyers play the role of advisor, coach, communication role model, and constructive problem-solver. They encourage the clients to take the lead, with their assistance, in actively seeking a win-win outcome. Lawyers need to explain to their clients that the lawyers will address questions and make supportive or validating comments to the "other side" in an effort to build a positive working environment. Clarifying expectations in advance can prevent misunderstandings and disappointment.

At this point, each lawyer may recommend that his/her client take advantage of supportive counselling in relation to the separation or consider the use of impartial professionals for addressing some of the family law issues (e.g. a mediator for parenting issues, a business valuator or actuary to value pensions, etc.).

At the first four-way meeting, the Collaborative Participation Agreement is read, discussed, and signed by both lawyers and clients, and before substantive issues are addressed, the participants agree on guidelines for respectful communication (both within and between sessions) and a process for resolving conflicts or addressing potential impasses. They also agree to protect the children by not involving them as confidants or combatants in their disputes.

Then the issues are clarified and prioritized, and any urgent matters are addressed. Agreement is reached on the documents needed for disclosure, a reasonable time frame is set, relevant impartial professionals are added to the collaborative team with everyone's approval, and tasks are assigned to each participant to complete prior to the next four-way meeting. One of the lawyers takes notes of the agreements reached and prepares a summary, including the agenda for the next meeting. For example, it may be that the parties engage (or have already seen) a mediator to create a parenting plan, a pension valuator to determine the value of a pension, one or more real estate agents to appraise the city home and cottage, etc., so that all relevant appraisals are ready for the appropriate 4 way meeting. Clients no longer engage partisan experts who surprise the other side with values that appear "optimistic", assets do not mysteriously disappear, and insurance proceeds do not find their way to pet canaries, until both parties agree that all reasonable family responsibilities have been met.

In between meetings, the lawyers review the progress being made both with their clients and with each other, in terms of improved or deteriorated relationships, how well they handled their role, and how they might improve their supportive skills and ensure everyone is clear on expectations and time lines to move forward. Additional four-way meetings are held until an agreement satisfactory to the participants is reached (even if it is different from what the law would provide), and then one of the lawyers draws up a draft for the other to review and everyone to sign at a final four-way meeting.

While the role of the lawyer is still to represent his/her client, the expectations for zealous representation are now measured by the creation of a positive problem-solving environment. Collaborative lawyers are bound by special Rules of Conduct that encourage constructive problem-solving and discourage hostile correspondence, angry affidavits, threats of litigation, take-it-or-leave-it offers, or other intimidating or power-based tactics. They are required to withdraw if their clients do not act in good faith or if litigation is pending. Therefore, the lawyers as well as the clients have a considerable investment in a successful resolution.

2. What is a Collaborative Divorce?

A *Collaborative Divorce* involves an integrated, cross-disciplinary team model for delivering professional services to divorcing clients. It is the legal equivalent of a multidisciplinary team in the mental-health field. In cases that require a range of expertise (for example, to assist parents as a communication coach, or with developmentally appropriate parenting plans, or to value a business, or offer sophisticated tax advice), the family can benefit from the coordinated efforts of

several professionals, all acting in an impartial capacity, to resolve their outstanding issues in a cost-effective and non-adversarial manner.

While other professionals may be added to a collaborative law case, the Collaborative Divorce tends to be more of an ongoing working relationship between team members rather than an ad hoc arrangement.

A process similar to collaborative law is followed with respect to the role of the lawyers, but others assist as needed and as determined by the person who is acting as a "case coordinator". As with a collaborative law case, those professionals who are assisting the couple must agree to withdraw if the matter goes to court.

3. What is Collaborative Mediation?

Collaborative Mediation is a process that begins with clients selecting mediation as their preferred method of dispute resolution. These clients frequently have not yet seen a lawyer or have had minimal contact and not yet retained counsel. They are usually anxious about involvement with lawyers, fearing that their hopes for a non-adversarial resolution will be disappointed. They are usually worried about losing control of their decision-making and prefer a process that encourages them to design their own terms for separation.

Collaborative Mediation offers this opportunity. As mediators we are obliged to send people for independent legal advice. Now we can include the lawyers under the umbrella of a Collaborative Mediation Agreement and have the mediator, both clients, and both counsel committed to the same non-adversarial process.

In some cases, the mediator will assist the parties to mediate all issues (comprehensive mediation) and the lawyers will attend a preliminary five-way meeting to clarify roles and time lines and will not meet again unless a difficult issue arises or an impasse is reached. In other cases, the mediator may assist with the parenting plan and then transfer primary responsibility for financial issues to the collaborative lawyers. In any case, all will have signed a Collaborative Mediation Agreement at an early stage of the case in a five-way meeting.

4. What are the advantages/disadvantages for clients, lawyers, and mediators of collaborative law, Collaborative Divorce, and Collaborative Mediation?

a) Clients

What are the benefits to the client of taking a collaborative approach? First, mediation and collaborative law or Collaborative Divorce recognize that when relationships will continue, such as when there are children, the less adversarial the approach, and the more control by the parties themselves, the more likely the settlement will last. Second, collaborative law offers many of the benefits of mediation, but with the additional safeguard of the lawyers' presence for high-conflict

separations. The presence of collaborative lawyers adds an additional element of containment to potentially volatile cases. While aspects of the case -- such as the details of a parenting plan, the involvement of extended family, or new partners -- may still be worked out with a mediator, many aspects of the case can be negotiated in a four-way meeting between lawyers and clients.

Third, if special expertise is needed, such as a pension valuator, a business appraiser, or a counsellor for the parents and/or children, these can be agreed upon in a non-adversarial manner, saving the client money and minimizing any hostility caused when one parent feels excluded from important decisions. Fourth, financial disclosure completed in a collaborative manner is likely to be more efficient, accurate, and cost-effective. One of the guidelines requires that the parties make full disclosure of all relevant information at the earliest opportunity to ensure a fair and expeditious settlement. This has the effect of restoring or building trust between the parties, an important element in any successful settlement. The emphasis on constructive problem-solving is both efficient and reassuring to clients who already feel their lives are out of control.

b) Lawyers

What are the benefits of a collaborative process for lawyers? From the lawyer's perspective, the practice of family law would likely become far more appealing. Few members of the Bar experience pleasure knowing they have "won" a case and in the process done significant harm to future relationships with children, grandparents, and friends. Also, family law is very stressful for most lawyers. Clients, who are extremely unhappy and fearful about their future, often take their lawyers along on the roller coaster.

Also, an increasing number of families cannot afford the cost of litigating. The family courts are filled with unrepresented litigants who have despaired of affording legal assistance for the multitude of steps (motions, case conferences, cross examinations, settlement conferences, et cetera) they are required to take on the path to trial. If the lawyers were directing all their efforts toward reaching an agreement satisfactory to all, the process would be streamlined, much more affordable, and less emotionally draining.

What concerns are typically raised about this approach? Lawyers in particular express concern about the requirement to withdraw if a matter reaches an impasse and is headed to court. Lawyers argue that it is unfair to clients to change lawyers. Also, they point out that considerable time was spent building rapport and it would be stressful -- and expensive -- for clients to begin a relationship with someone else. The reply is that if lawyers and clients know that the lawyer must withdraw if the case goes to litigation, everyone will have a strong incentive to settle. Finally, not every client and not every case is suitable for a collaborative approach. If a case is precedent-setting or if the clients are at risk of harm, or if one or both is not acting in good faith, a traditional process will likely be preferable.

c) Mediators

Collaborative family law or *Collaborative Divorce* has many similarities to mediation; namely; it allows opportunities for the parties to gain a greater understanding of each other's needs, to build trust, and promote agreements that are fair and will last. As in mediation, the goal is to empower clients to arrive at their own creative resolutions. When agreements are reached in both processes, the hope is that there will be greater buy-in to the resolution.

Most importantly, a collaborative law or Collaborative Divorce process guarantees non-adversarial representation. A mediator's worst nightmare is that mediation clients who have managed, with difficulty, to set aside their anger and hurt feelings while working out a parenting plan, will be drawn back into an adversarial battle over financial issues by their lawyers. The fear is that there will be a shift from a concern with the family as a whole or from the parties' interests to an adversarial mindset of getting as much as possible from a fixed pie.

All mediators are subject to a Code of Conduct that requires that they make every effort to ensure that their mediation clients receive ILA, preferably at the earliest opportunity, but certainly before reaching an agreement. This need can best be met by collaborative lawyers. They can offer legal information and advice and prepare the financial disclosure, so that clients make informed decisions in mediation. They can offer helpful "reality testing" for clients taking unreasonable positions and make recommendations for safety measures when power imbalance or domestic violence renders traditional mediation inappropriate.

Collaborative lawyers stand to benefit even more from mediators. Most clients retain mediators before they have lawyers. The prime motive for seeking mediation is frequently to avoid an adversarial battle. What mediators can gladly offer to collaborative lawyers are clients, along with the promise that their case will not end up in court!

I always send clients to lawyers but am anxious about whether the lawyers' attitude and behaviour will support the goal of a non-adversarial outcome. With the advent of collaborative law, I can refer the client for legal representation from the outset, confident that we will share the same objectives. In the future, I hope to restrict my referrals to those trained as collaborative lawyers. I also plan to ask the lawyers and other impartial professionals to sign a Collaborative Mediation Agreement in those cases where the clients would like to be protected from going to court.

I can envision additional creative roles for mediators. If clients are high-conflict or in the early stages of a separation, mediators could assist by assessing and working to improve communication between the clients before they begin the collaborative process. If efforts are made in advance to build trust, reduce animosity, possibly obtain an acknowledgement or apology, or reach agreement on communication guidelines, the likely success of the collaborative process will be enhanced.

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If an impasse is reached and feelings are high, a mediator could be brought in to try to resolve the impasse and restore sufficient confidence so that the settlement process can continue.

Similarly, if counsel became caught up in the conflict, if their relationship became stressful, or if there were misunderstandings or disappointed expectations, the mediator could assist by improving their working relationship and communication strategies.

All of these roles are consistent with the goal of cooperative constructive problem-solving and all assist the clients through the efforts of a highly skilled team.