

FAMILY MEDIATION NEWS:
MEDIATION & COLLABORATIVE LAW: A PROMISING PARTNERSHIP
Dr. Barbara Landau

I came to mediation with a passion that has not been extinguished. In the early 1970's, as Senior Psychologist at the Family Court, I couldn't understand why the courts used an adversarial approach, since cooperation between the parties was the desired end goal, especially in divorce cases. I went to law school to find out. In the early 1980's, after graduating, I opened a law and mediation practice. The first step in my mediation cases was to hold a separate meeting with counsel to create a supportive team to assist the parties through the process in a non-adversarial mode. The first step in my law cases was to invite a 4 way meeting. Court was a last resort. My biggest frustration was seeing mediated agreements undermined by adversarial lawyers who were often rude, intimidating, and unable to focus on the needs of the clients and children.

Eventually I decided to restrict my practice to mediation and, whenever possible, refer clients to "mediation friendly" lawyers, who I would involve in the mediation process. Even though the practice of family law had improved and there were many happy partnerships between lawyers and mediators, there was a fundamental divide in objectives, tactics and skills. We did not share common goals. I was trying to facilitate a unique result designed by the parties, to benefit the family as a whole, and the lawyers were trying to achieve the best possible result for their individual clients. Where I saw the law as a resource and helpful wisdom that did not have to be followed, the lawyers saw the law as the measuring rod of a "good" settlement. It often led to clients feeling pulled between wanting to reach a good faith result and not wanting to disappoint their legal protectors.

Enter Stu Webb and a major creative paradigm shift! The idea of all the participants signing a Collaborative Participation Agreement at the outset, changing the goal to a win-win outcome and providing lawyers with the training to achieve the collective goal was an awesome change. Suddenly I would have partners for my mediation practice who would be working toward the same objective, with similar skill sets!

Since learning about the CFL model I have seriously rethought my mediation practice and recognized that there is a wonderful win-win result that can emerge from the synergy of mediation and CFL. Most of my mediation clients are so anxious to avoid an adversarial process that when they come to see me, they have not yet retained lawyers, or have had only an introductory consultation that has scared them into seeking an alternative. In the past I would have strongly encouraged them to obtain ILA and had to overcome their fears about lawyers undoing the goodwill and creative outcomes of the mediation process. Now, I can assure these clients of a referral to lawyers who will support their objectives and work in sync with the mediation process.

Here is how it works. In the majority of cases, I am retained to mediate all issues, that is “comprehensive mediation”. I now recommend that all appropriate clients (the majority) consider using CFL trained counsel and retain them as early in the process as possible. I begin the mediation of parenting issues and encourage the clients to start the task of assembling financial disclosure in preparation for latter meetings. I arrange a 5 way meeting with CFL retained counsel as soon as clients select them. (Clients sign a Collaborative Retainer with their own lawyers). I speak to the lawyers in advance (in person if we have not met before, or on the phone) and create an agenda for the 5 way meeting.

During the 5 way meeting, a Collaborative Mediation Participation Agreement is reviewed and signed that includes all the principles and ethical requirements of a CFL Participation Agreement. We establish guidelines for respectful communication, clarify roles, review the progress toward a Parenting Plan if it is near completion and include the lawyers in a discussion of any sensitive legal issues (eg mobility). We then create a list of financial issues that require additional information, together discuss what needs to be valued and how that will happen and arrive at a “to do” list for everyone. When additional experts are involved (eg pension valuers), they act on behalf of both parents. The discussion is focused on each client’s objectives, the impact on their children, how an option meets or fails to meet an important goal – rarely or never do I hear “the Divorce Act requires...” or “my client’s position is...”, or “that’s our bottom line, take it or we’ll see you in court”! CFL lawyers work hard not to speak for their clients, but rather to invite their input.

The joy is that the discussion is a roundtable of constructive dialogue among clients and professionals looking for a result that will truly benefit the children and meet both clients' interests. . Using a common tool kit of asking open ended questions, restating, and coaching in the use of "I" messages, the professionals' task is to uncover the clients' underlying concerns and help them to articulate the processes or outcomes that will work for them. It is truly unlike any of the 5 way meetings I held previously where my best strategy was to meet with counsel without their clients present. That is because in front of clients, the lawyers would "posture", take aggressive positions, argue the law, threaten to go to court, and often "pull" their client from the meeting, having rarely heard the client's voice.

The lawyers follow up with their clients after the meeting as to what worked well and what could be improved and then we hold a 3 way debrief – which is extremely helpful and often uncovers unintended impacts on clients that previously would have been missed. We then plan how we can jointly improve the comfort level of clients. The clients then return to mediation to address as many of the remaining parenting and financial issues as possible, with a subsequent 5 way meeting scheduled. In this meeting we resolve together any outstanding financial issues, particularly those requiring legal advice. Again this advice is offered as a resource, one of many possibilities, and then clients are canvassed for their psychological, procedural and substantive interests, creative option generation follows and a result achieved with the professionals acting as co-facilitators and resources, not bullies or decision-makers. The agreements are signed either in the 5 way meeting or in the lawyers' offices. The Collaborative Mediation process is more cost effective than litigation or the original CFL, maximizes the expertise of all professionals, and blends the best of CFL and mediation.

The reaction has been very happy lawyers and clients who come back to "testify" at my CFL & Family Mediation courses! From my perspective this is *mediator nirvana* and a major benefit for clients who want to remain on good terms post divorce.

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Dr. Barbara Landau, President, Cooperative Solutions, is a psychologist, lawyer, and Certified Comprehensive Family Mediator. She is a former Board member of the Academy of Family Mediators (now ACR) and chaired the Domestic Violence and

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