MEDIATION IN COLLABORATIVE CASES - GIVE PEACE A CHANCE!

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I. INTRODUCTION

This paper will explore the many aspects of mediation in collaborative cases. Nothing in the law prohibits mediation in collaborative cases. When parties mediate a collaborative case, they retain their CL attorneys for the mediation because the law does not require the exit of the CL lawyers. Mediations in collaborative cases are highly successful.

II. THE SURVEY

We surveyed collaborative lawyers, FPs and MHPs via their respective practice groups, regarding their use of mediation in CL cases. The survey is attached to appendix of this paper. Most of the survey results were from Texas collaborative professionals, so we will focus on the Texas results. However the surveys we received from Florida, California and a few other states were consistent with the Texas survey results.

A. What We Learned

1. When you're stuck, mediate.
2. 78% of the survey respondents had mediated a CL case, representing 101 mediations.
3. 94% reached an agreement.
4. 88% mediated at the end of the case when facing impasse. 10% mediated at the midway point of the CL process and 2% at the beginning.
5. Nearly all of the respondents said yes, they would use mediation again. Two said, "Maybe".
6. 90% of the mediators were collaboratively trained.
7. Only once was the mediator a CL team member and that respondent said, "Never again." 99% of the mediators were not team members.
8. 95% of the mediations used the caucus method. 5% used both joint and caucus methods.
9. As to future CL mediations-12% prefer to use joint sessions, 16% caucus, 60% either joint or caucus, and 12% a combination of joint and caucus.
10. In 65% of the mediations a team member shadowed the mediator in the caucus secessions.

B. Successful

Overwhelmingly the CL mediations were successful and the lawyers would mediate again with a collaboratively trained mediator, who is not a team member. Mediations should take place after several stops on the Roadmap to Resolution-after determining interests and goals, gathering the needed information, and option development and brainstorming. However, mediation may be prudent at the option generating phase for even a single issue if the team has hit an "idea wall." Certainly mediation should be elected at the final impasse, when unable to negotiate an agreement.

III. WHY DID THESE CL CASES NEED MEDIATION TO BE SUCCESSFUL?

There are many answers to this question. But let's face it, cases can get bogged down and stuck in a rut. Lawyers may be tired of their clients and clients tired and frustrated with their lawyers. Team members can just get worn out with the parties and with one another. A collaboratively trained mediator offers a new set of eyes and ears, who can evaluate the quagmire from a different perspective and bring fresh energy and newly perceived neutrality into the case.

A. The Role of the Mediator

The mediator needs to talk to the lawyers, the FP, MHP and the parties and find out as much as possible about the following:

1. Where are the parties apart and why? Who is the problem, one of the parties, one of the lawyers or one of the neutrals? Is there a conflict between the team members?

2. Have the interests, needs and goals changed? Interests are not static. As situations change, goals, needs and interests change. Constant attention should be given to interests, needs and goals in order to make needed adjustments. Examine the interests from each party's point of view.

3. Is there any needed information that has not been provided?

4. What are the barriers to reaching an agreement?

5. Are there property issues?

6. Are there children issues?

7. Are there economic or non-economic, emotional issues? If the problem is economic, how does the amount involved compare to the value of the total estate? Is someone really paying $100 for a $5 hamburger? If emotional issues are the problem, how do you address the emotions and get to logical decision making?

8. Are there self-esteem issues?

9. Has one party demonized the other party? Excessive hostility and unresolved emotional issues can lead to demonization and thus all-out legal warfare. Mediation can reinforce the CL effort to preserve the relational estate and avoid warfare.

10. Which of the four divorces is the problem? "Every divorce with children involves *four different divorces*:

The Spousal Divorce: The end of intimacy-sexual, psychological, and social-between husband and wife.
The Economic Divorce: The end of an economic relationship based on a single household.
The Parental Divorce: The end of one arrangement for raising children and the beginning of another, along with a redefinition of parental roles.
The Legal Divorce: The formalization of custodial and financial arrangements that will govern after the marriage is dissolved." Robert Mnookin, *Bargaining With the Devil, When to Negotiate, When to Fight*, p. 214 (New York: Simon & Schuster, 2010).

Each of these divorces affects the others and is associated with brokenness, grief, uncertainty and insecurity. What is causing the impasse?

11. What is the BATNA (best alternative to a negotiated agreement), WATNA (worst alternative to a negotiated agreement) and RATNA (realistic alternative to a negotiated agreement) for each party?

12. What is the zone of possible agreement, ZOPA?

B. Role of Communication Skills

UCLA Professor Emeritus, Albert Mehrabian, a communications expert, found that we get most of our clues about the emotional intent behind a person's words from non-verbal sources: 38% from tone of voice and 55% from body language, and only 7% from the words. When the two are in conflict, we believe the non-verbal every time. Given the emotionality of collaborative law cases, we can quickly see the importance of the tone of voice and body language of the CL team members and the mediator. **Parties will not always remember our words, but will always remember how we made them feel.**

Barriers to listening and thus opportunities for miscommunication are the following:

1. Prejudice
2. Mistrust
3. Disinterest
4. Bias
5. Defensiveness
6. Hidden Agenda
7. Pre-judging
8. Desire to interrupt
9. Assumptions
10. Perceptions
11. Past History
12. I 'm right, you 're wrong attitude

Our communication skills need to affirm fundamental personal needs-validation, achievement, inclusion, approval, self-esteem, control and security. No one should talk down to people or use a negative or know-it-all tone of voice, but rather listen, acknowledge, affirm and then ask open ended questions.

C. Role of Building Trust

Martin Latz, expert negotiator and trainer extraordinaire, recently wrote in his *Latz Negotiation Institute*, about Rob Galford, co-author of *The Trusted Advisor,* which explains how to achieve success by earning a counterpart's trust and confidence. Latz summarizes Galford's five stages of building trust as follows:

1. **Engage**- More important than what a party wants is understanding why the party wants it by exploring the party's underlying goals, motivations and interests. You cannot build professional trust or negotiate successfully without engaging with your counterpart to learn his or her interests, needs and issues and getting them to open up to you and you to them, so that there can be an exploration of mutual interests.
2. **Listen-** Latz tells all of his training program attendees that negotiation power goes to those who ask and listen, not those who argue and persuade. Each party needs to feel heard and understood, which requires as noted in *The Trusted Advisor*, "active, incisive, conscious, involved and interactive" listening, both verbal and non-verbal. This is much like what we learned to do as we approach a railroad track, "stop, look and listen". If each party listens, feels heard and understood, trust can be built.

3. **Frame-**"That's my issue or problem exactly," is what you want your counterpart to say in the framing stage. Knowing each side's interests, goals, and needs, organizes or reorganizes the issues into an appropriate frame of reference, and sets forth a mutual basis for moving forward.
4. **Envision**-What does success look like at the end of a negotiation? What are your specific interests and achievable goals? Parties cannot get where they want to go without knowing their destination. Each party must step into their counterpart's shoes and envision their goals, and then understand that each party probably has mutual goals. This envisioning process builds trust that leads to agreements.
5. **Commit**-The final stage involves identifying and gaining each party's realistic commitment to the practical steps needed to achieve their respective goals. Negotiators gain trust by helping the each side truly understand their goals, interests and needs, their destination, and what it will take to achieve their vision and reach their destination. Likewise, the parties gain trust and achievable goals by following the five stages of building trust.

   In the absence of trust, the CL team members are aimlessly going in circles in the parking lot. The mediator needs to determine the level of trust and start building trust. Without following the five stages of trust, your negotiations will be out of control and you will feel like a flea stuck on a psychotic dog.

IV. WHY A COLLABORATIVE LAW TRAINED MEDIATOR?

The collaborative law process is stunningly different from litigation. A mediator without CL training and without having participated in a significant number of collaborative cases will probably feel as lost as Dorothy in the *Wizard of Oz.* The mediator needs to know *Collaborative Law, Start to Finish,* State Bar of Texas, 2014. A collaboratively trained and experienced collaborative lawyer/mediator knows the following:

1. How Collaborative Law is defined by the Texas CL statute.
2. How a collaborative case works in the real world.
3. About informed consent and confidentiality.
4. About the participation agreement.
5. The steps of the Road Map to Resolution, including expectations of conduct, listening skills, the parties writing down their interests and goals, the voluntary, cooperative information gathering stage, identifying issues stage, the option brainstorming, development stage, the negotiating an agreement stage, etc.
6. The team approach in CL cases.
7. The roles of the neutral MHP (mental health professional) and neutral FP (financial professional).
8. How collaborative joint sessions are held, following a written agenda.
9. The vital role of interest-based negotiation in CL cases.
10. About the statutory requirement that if the parties cannot reach an agreement, the collaborative lawyers are terminated and replaced with litigation lawyers.

The mediator needs to be a negotiation expert, who regularly hones his or her skills by attending appropriate continuing legal education classes as well as negotiation and mediation skills courses. The mediator needs to know the 25 Questions to Ask to Avoid Impasse. See Gregory Negotiation Reports, January 2013, www.gregorymediations.com.

V. SUMMARY

If you're stuck, mediate. Give peace a chance! Mediations are successfully resolving collaborative cases across the country at various stages of the process. There are many reasons why CL cases may need mediation to reach an agreement. Don't be afraid to utilize mediation as an interim or secondary option. A collaboratively trained mediator with a new set of eyes and ears, and a fresh dose of neutrality, can evaluate the quagmire from a different perspective with new energy to guide the parties and lawyers to a successful resolution.

SURVEY REGARDING USE OF MEDIATION IN THE COLLABORATIVE LAW PROCESS

Thank you in advance for taking time from your many professional and personal obligations to assist us in this effort. We sincerely appreciate your commitment to the continued evolution and improvement of the Collaborative Law movement.

1. Have you utilized mediation during the course of a Collaborative Law (CL) case?
   Yes ___ NO___
   If NO, please move to number 13 below.
   If YES, please continue.

2. In how many cases have you utilized mediation in the CL process?

For each case in which you utilized mediation:

3. What facts/events prompted the use of mediation?

4. At what point in the CL process did you implement mediation?

5. Was mediation successful?

6. Why/Why not?

7. Would you utilize mediation in a future CL case?

8. If so, would you use mediation in the same or different manner?

9. Was the mediator also trained in CL?

10. Was the mediator a team member?

11. Did you use joint session and/or caucus?

12. If the mediator was NOT a team member, did any team member shadow the mediator in caucus sessions?

Please continue

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13. What facts or events might cause you to consider using mediation during the CL process?

14. At what point in the process would you consider implementing mediation?

15. Do you believe the mediator should be trained in CL?

16. Would you expect the mediator to use joint and/or caucus sessions?

17. Would you consider asking a team member to serve as mediator?

18. Of your CL cases which have "opted out", would any have been good candidates for mediation at some point in the process? If so, why?

19. Are you an Attorney___ MHP___ FP___ ?