

# Family Collaborative Mediation: The New Resolution Solution

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The economic troubles of the past few years have opened up new opportunities for entrepreneurial mediators, family lawyers, clergy, and mental health, financial, and child specialists to integrate their services to create innovative family dispute resolution practices that address the needs of a largely untapped population. There are a growing number of divorcing spouses and unmarried or already-divorced parents who want to make decisions together for themselves and their children privately -- without litigation. They actively investigate and seek out efficient, forward thinking, responsive professionals who will competently provide the limited scope or unbundled services they need and want and nothing else. Collaborative mediation is one of those "think-outside-the-box" type services. With upwards of ninety-five percent of couples finding agreement on all their issues, collaborative mediation may be the new family resolution solution.

Collaborative mediation is a fresh approach that is healthy, family-centered, and affordable. It offers a sensible alternative to the adversarial, two-lawyer system for couples who want to control costs, reduce conflict, and stay in control of their family's future. In collaborative mediation, one family attorney and a licensed counseling professional co-mediate with a couple who are facing divorce, want a planned separation, or need help with post-divorce issues. The co-mediation team gets them over legal, financial, and emotional hurdles to reach early, mutually acceptable settlements.

Parties in collaborative mediation focus on resolution *from the beginning*, and do not wait until right before trial to mediate. They pledge to make court a last resort, not the place to start. They contract with each other to do their own private, informal discovery and to make a full financial disclosure *inside* the mediation process under the skilled

guidance of the mediators. Other professionals, such as a certified divorce financial planner, tax advisor, or child specialist, may offer assistance if and when needed, in session or offline, as neutrals under the mediation umbrella.

## Collaborative Mediation: The Best of Collaborative Law and Mediation

On September 27, 2013 the Texas Supreme Court in the closely watched case of *In re Stephanie Lee*<sup>1</sup> steadfastly and emphatically supported the critical importance of mediation to protect children from the emotional and psychological damage of high conflict litigated custody battles. Over the last several decades, enlightened professionals, such as lawyers, clergy, mental health, child, and financial specialists, developed mediation and collaborative law as effective, private options for divorcing couples who strive to make their own decisions, protect their families, and save money and time by avoiding divorce war.

Collaborative mediation is the next big step in the evolution of mediation.

Collaborative mediation combines the best and most successful strategies of collaborative law with the pure simplicity and cost effectiveness of mediation with outstanding success. To understand what elements collaborative mediation adopts from each process requires a quick overview of mediation and collaborative law.

## Mediation

For a very long time mediation has been the leading way couples resolve divorce, support issues, and child custody disagreements. Mediation is generally considered to be the least expensive "assisted" consensual dispute resolution process. Each spouse meets privately and confidentially, separately and/or jointly, with a neutral third party (a mediator) who has specialized

training in facilitating communications, gathering information, developing options, and negotiating agreements. The mediator's role is not to give legal advice or impose a decision, but instead to guide the parties to reach their own resolutions. Couples have the autonomy in mediation to make important decisions that fit their family and finances, rather than having a judge or arbitrator determine their fate.

In many states mediation is conducted without the parties' lawyers present. In Texas it is common for each party to have a lawyer represent him or her at the mediation, which sometimes results in a more adversarial dispute resolution process and may make compromise and settlement more elusive. Notwithstanding, the settlement rate of mediation in Texas is eighty to eighty-five percent. Parties and lawyers recognize the benefits of low cost, self-determination, and decreased long-term emotional damage in mediation. A successful mediation results in a legally binding written settlement agreement.

## Collaborative Law

Collaborative law is a novel consensual dispute resolution process. Each party is represented by a collaborative attorney. The parties sign a written "participation agreement" in which they pledge to:

- Treat each other with respect
- Consider what is most important to the other in deciding issues
- Voluntarily exchange relevant information and
- Resist going to court

With the assistance of a special team consisting of their collaborative law attorneys, and mental health, financial, and child specialists, the parties attempt to settle their disagreements in a series of private and confidential meetings. The focus in collaborative law is on

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helping the couple communicate, protecting children from being put in the middle, preserving the strength and unity of the family while facing end of marriage issues, and keeping the control of the outcome in the couple's hands. Around the country, the settlement rate of collaborative law cases is reported to be around eighty-six percent.

Although there are exceptions, generally in collaborative law all the neutral professionals attend every session along with the collaborative lawyers. Their professional services are invaluable, but it can make for high professional fees per session. Collaborative law may cost less than litigation but could be equal or more expensive depending on the complexity of the couple's situation, the level of participation of other professionals, and how many sessions it takes to reach resolution.

It is important for couples who are considering using collaborative law to be aware their collaborative attorneys will be required to withdraw from representing them if they do not settle all issues during the collaborative law process. Incomplete settlements during the collaborative process may result in substantially increased legal fees for a new set of attorneys to litigate or arbitrate the remaining issues. Those who find themselves in this situation sometimes feel they have lost time and resources in the collaborative process.

Collaborative law is certainly a better way to divorce than litigation, and it has gained popularity all over the United States and the world. There are many positive attributes, especially the goal of preserving the welfare of the family. But for those parties who cannot afford the full collaborative team, fear losing their lawyers if they do not settle, or who want to do their negotiations themselves with professional help but with very limited use of lawyers, collaborative law is not necessarily the best fit.

**Collaborative Mediation**

Collaborative mediation takes the best parts of mediation and collaborative law and combines them into one streamlined process that can be more effective and

satisfying to the parties and the professionals than either process taken alone. The integration has yielded a better than expected collaborative mediation settlement rate. Approximately ninety-five percent of collaborative mediation clients resolve all their issues at a lower cost than traditional mediation in Texas, collaborative law, or litigation. Collaborative mediation clients consistently report a high level of satisfaction.

Collaborative mediation sessions are co-conducted by two professional mediators, a neutral family law attorney and a marriage/family counselor, who ideally are also trained in collaborative law. The attorney-mediator guides the couple through the decisions they need to make for what they are trying to accomplish (divorce, planned separation, reconciliation, or post divorce conflict resolution), and educates about the law without providing legal advice or taking sides. A licensed marriage/family counselor manages emotions without doing therapy, and teaches the couple a new way to communicate which makes their negotiations far more productive both in the mediation and afterward.

The unique co-mediator collaborative team helps spouses express what is most important to each of them, gather relevant information, develop options, and negotiate mutually acceptable agreements for property and debt division, alimony, child support, custody, and shared parenting. Collaborative mediation can also be used for negotiating pre-nuptial and post-nuptial agreements. For families dealing with an addiction, collaborative mediation can provide the forum and professional assistance for parties to negotiate how to manage the marriage, finances, and parenting and to coordinate with medical and addiction professionals while one of them is in rehabilitation.

Each collaborative mediation session is two or three hours, spaced as close together or as far apart as the parties wish. This gives the couple an opportunity to "test drive" their separation, divorce, or post-divorce options before making final, binding, written agreements and parenting plans. The parties decide how many sessions they need.

In collaborative mediation any financial, tax, real estate, child, or parenting

specialists the couple chooses from the collaborative mediator's resource network may participate in one or more mediation sessions at the couple's option or meet with them offline when and if they and the mediators feel it would be beneficial. Doing it this way saves money and still makes their expertise readily available.

**Collaborative mediation retains from mediation:**

- Neutral co-mediators to facilitate parties' negotiations (an attorney-mediator with the valuable addition of a licensed marriage/family counselor to manage emotions and improve communication)
- Each party's ability to decide whether to bring a divorce lawyer or to self-represent
- Control over cost
- Efficiency and expediency

**Collaborative mediation adopts from collaborative law the goals of:**

- Positive future family relationships
- Reducing conflict between parents to ensure children's well-being
- Respectful and constructive communications and negotiations
- Preserving each party's financial and emotional health

**From a process perspective, collaborative mediation mirrors collaborative law with:**

- Full financial disclosure
- A series of short meetings
- A (shortened) participation agreement in which parties agree to avoid court
- Respectful consideration of each party's needs using interest based negotiation
- Structured negotiation steps
- A team approach - but with a smaller team of a single attorney-mediator and a marriage/family counselor present and others offline or selectively in sessions

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**Differences in Use of Lawyers between  
Collaborative Law and Collaborative  
Mediation**

A very important difference between collaborative mediation and collaborative law is how divorce attorneys participate and what happens if the couple does not resolve all the issues. As mentioned above, in collaborative law the parties have collaborative divorce lawyers present in each session. The parties must replace these lawyers if they are not successful in settling everything within the collaborative law process.

In contrast, a party in collaborative mediation has choices about the role of a divorce lawyer, including the choice not to have a lawyer at all. Because family mediated settlement agreements that meet statutory requirements are binding when signed by both spouses in Texas, it is recommended that collaborative mediators encourage each spouse to seek legal counsel on an unbundled or limited scope basis at a minimum to review the proposed mediated settlement agreement before the spouse signs it. A spouse who does have a divorce lawyer, on the lawyer's advice and using his or her own good judgment, can decide if the divorce lawyer will attend one or more collaborative mediation sessions. Or, the client may decide to ask the lawyer to assist offline to counsel him or her toward an amicable resolution, develop options, review agreements, provide legal advice, and do legal paperwork.

If they cannot resolve all the issues during collaborative mediation, the parties may continue to use the same lawyers in litigation or arbitration even if the lawyers are trained in collaborative law. It is an option for a party who chooses a collaborative lawyer to assist him or her in collaborative mediation to make a separate agreement allowing the collaborative lawyer to withdraw if all the issues are not settled in collaborative mediation. Having control in collaborative mediation over the involvement and the continued participation of lawyers significantly improves the couple's ability to control the cost and the speed of the divorce.

**Collaborative Mediation Referral**

Attorney-mediators in Texas are not permitted under a controversial 2008 Texas ethics opinion to draft divorce papers for their mediation clients.<sup>2</sup> Consequently, collaborative mediators who follow the opinion will refer each and every unrepresented client who wants legal assistance to an experienced divorce or collaborative lawyer. A busy collaborative mediator can provide a regular stream of uncontested divorce clients to those lawyers who share a commitment to facilitate amicable divorces whenever possible. The referred lawyer will explain legal issues, review the proposed settlement agreement, protect the client's interests, draft the paperwork, or any combination of those things the client wants and the needs dictate. However, any lawyer who creates unnecessary conflict, sabotages the mediated deal for the lawyer's own benefit, or refuses to cooperate with the collaborative mediator and the other spouse's lawyer will quickly find he or she is off the collaborative mediator's referral list.

Thus, not only are parties and their families benefiting from collaborative mediation, so too are legal, mental health, and financial professionals. Collaborative mediation is emerging as a new way for them to assist a whole new population of clients who seek responsible professionalism, as well as control over costs and decision-making. The educated consumer is actively seeking a divorce process that will give them control of their choices and budget as well as allowing them to transition their family in a healthy way.

In summary, collaborative mediation is a fresh innovation in cost effective, client-centered, family-friendly divorce. Collaborative mediation has proven itself to be an attractive new solution for divorcing spouses who want to focus toward positive, independent lives with emotional and financial stability - and their family relationships - still intact. For divorce and family professionals, particularly collaborative practitioners and mediators, collaborative mediation also has opened the door to a highly satisfying and remunerative practice.

<sup>1</sup> *In re Stephanie Lee*, No. 11-0732, Texas Supreme Court, September 27, 2013.

<sup>2</sup> Opinion No. 583 of the Professional Ethics Committee for the State Bar of Texas, *Texas Bar*

*Journal*, November 2008. *Contra*, Abney, Sherrie R., "Ethics Opinion Questioned," *Alternative Resolutions*, Winter 2009, Vol. 18, No. 1, p. 9.; see also ABA Section of Dispute Resolution Committee On Mediator Ethical Guidance, SODR-2010-1.

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**Expand Your Mediation Practice: Be  
a Collaborative Mediator**

Stacey H. Langenbahn and her co-mediator, Linda Miller-deBerard will be conducting an 8 hour training, "How to Be a Collaborative Mediator" on Saturday, February 1, 2014 by interactive live webinar. This is advanced mediation training, and will be open to all mediators who have already had a basic 40-hour mediation class. Ongoing personalized mentoring, assistance with marketing, and shared learning will also be available to trainees. Please contact Stacey at +1.817.283.5100 or [www.DivorceMediationTexas.com](http://www.DivorceMediationTexas.com) if you are interested in receiving information about the training.