

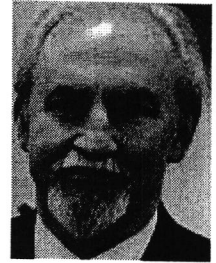
One Key Difference Between Mediation and Collaborative Law is Often Overlooked

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As a mediator and a collaborative lawyer, I often get asked: “What is the difference between mediation and collaborative law (“CL”)?” It’s hard for parties in a dispute and other non-lawyers to see the differences; in fact lawyers have trouble articulating them.



After all, both are non-adversarial processes. Both (at least in theory) are forms of interest-based negotiation. Both are voluntary and cannot be concluded unless the parties agree to a resolution and reduce it to a written agreement.

One difference is that in some types of mediation (divorce and special education for two), the parties are not usually represented by lawyers. In CL, parties must be represented by counsel. Another difference is that CL has an efficient discovery process built into its structure. Mediation does not typically have an information exchange step as part of its process. This shortcoming often relegates mediation to being used toward the end of the litigation process and viewed as a part of it.

The timing of when they are used is a third difference between the two processes. Except in divorce or special education cases, most of the time, parties don’t turn to the use of mediation until litigation is well under way and discovery has been completed. This could be a year or more into the litigation, after thousands have already been spent on legal fees and relationships between the parties have been seriously strained if not destroyed. These factors seriously limit how effective mediation can be. On the other hand, CL happens at the outset of the dispute resolution efforts, before any litigation has been commenced. So the chances of preserving relationships, saving money, achieving a quick resolution and avoiding the draining of resources and emotions are far greater.

A fourth difference is that after the first short part of a mediation, in which the parties, lawyers and mediator are all in the same room and able to hear and see each other, the parties are then almost always separated into caucus rooms and the mediator goes between them in a shuttle diplomacy way. In CL, all parties and their lawyers remain together in one conference room. There is no separation and no go-between shuttling back and forth.

We often gloss over that last difference. We shouldn’t, because it is a game changer. It is more than just a logistical difference. It is the essential difference. CL is the collective work and energy of an integrated team effort in which all parties and all lawyers are working in collaboration with each other, building upon each other, bouncing ideas around the table, getting instant feedback, having expert advice there in the room at the fingertips of the parties and lawyers. This is huge.

In mediation, the process is focused upon the efforts of one person, the mediator, to do the work, to find common ground, to reason, to suggest, to think, to convey information, to decide what to share, what to stress and what to minimize. The mediator, as a go-between, is the key to its success. The parties do not collaborate with each other; nor do their lawyers. They are all reliant on the skill, the timing, the listening skills, communications skills, the insight-fulness, perception, diplomacy and often the persuasiveness of the mediator.

In CL, the focal point is not any one person; it is the collaboration itself. It is all about the collective ability of all those involved in one discussion, one negotiation, one effort, to find the options for resolution that work best for all those involved. It is a team effort to find solutions, to feed off of each other, even off of the other side. It is a process that calls on the parties and their lawyers to listen to and to build on each other's ideas and suggestions, even when they are the ideas of his counterpart counsel on the other side. It is in this collaboration, this integrated effort, that the process can find a third way, a better way than either of the "ways" of one side or the other. To achieve that better way, everyone relies on the intelligence, the creativity and the open flow of information within the whole group's collaboration.

If mediation is one person's effort to move parties to a comfortable resting place, CL relies upon the interdependence of the whole group and the need for each side to hear, see and understand the other side's perspective. This is essential in order to mine the shared interests together and find a great solution, one that goes far above compromise. The goal is not a meeting point somewhere between the positions of the parties, but something new that creates a synergy of their ideas, so they may get beyond the limits of the positions of the parties and create the resolution that satisfies both parties' interests and needs.

When you think about it, it's a much bigger difference than it seems at a first glance.

Michael A. Zeytoonian biography and additional articles:

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