



## Collaborative Law and Mediation

BY BARRY BERKMAN

Collaborative law and its relationship to mediation may best be understood by putting each of these practices into some historical perspective. Prior to 1980, divorce in New York, if not less adversarial, was a simpler, less expensive process, and the laws were much less complex. Only a wife could collect alimony; if she were awarded alimony, by definition it was for life (or until remarriage), and if she were found to be "at fault" in the marriage, e.g., adultery, she lost her right to it entirely. Title ruled, so if the money or property was in your name it was yours. There were no complex charts tracing separate property, no active/passive arguments with respect to the appreciation of otherwise separate property, and no dueling experts on the value of a license, degree or dental practice. For the most part it was taken for granted that the wife would get the kids—so forensic evaluations with respect to the children were extremely rare.

In fact, the only "experts" the matrimonial lawyers worked with on a regular basis were the private detectives with their cameras and popping flash bulbs. Divorce in those days was pretty much considered a down and dirty business, the province of let's say lower, rather than higher, tone lawyers. Divorce automatically meant conflict, and conflict was resolved in the time-honored fashion of demolishing the other party.

This adversarial premise for resolving marital conflict continued almost unexamined through the early 1980s. The zero-sum approach—what your client wins my client loses, or the total sum of everything won equals the total sum of everything lost—informed most efforts at resolving family conflict.

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The enormous difference after July 1980 was that equitable distribution came into being. Practically overnight matrimonial law became big business. Law firms that prior to the new laws would not have dreamed of soiling their hands on a divorce case began to open entire matrimonial departments. And it was the application of the ages old "crush the opposition" approach to a new, complex and non-determinative set of laws which caused lawyers' fees to soar. So, instead of dealing with cigar-smoking private eyes and worrying that they would drop ashes on the floor while reviewing the 8 x 10 glossies, the lawyers found themselves working with an entirely new (and much more palatable) set of experts—business and real estate appraisers, actuaries, financial planners, forensic psychologists, men and women who wore suits and carried briefcases. And instead of worrying about ashes on the floor, the lawyers were now purchasing thick carpets so as to meet com-

fortably with these congenial professionals. All of these meetings took time, billable time—and a lot of it. At the same time the uncertainty of the substantive laws in a context of mistrust and hostility practically guaranteed disagreements between the lawyers. The reflexive response of competitive attorneys to disagreement and perceived unreasonableness was and continues to be to head toward court. Parties found themselves spending a good part of what they had worked for years to save just to be able to go on and live separate lives. Yet, for the most part, the matrimonial bar either didn't recognize or chose to ignore the growing resentment.

- Transactional costs were enormous—in terms of time/money, emotions.
- Parties discovered that as the litigation continued they were fighting over a constantly shrinking pie.
- Parties more and more felt pushed around, unheard and ignored.
- Litigation was leaving a legacy of wrecked relationships—cutting off any future dealings, fostering divisiveness, exacerbating bitterness.
- Kids often unwittingly got the worst of it.

If the bar ignored this resentment, it was picked up loud and clear in New York by an alert psychologist, John Haynes, who started to train divorce mediators. Haynes also recognized

that skill sets different from the conflict-driven ones of most attorneys were necessary to help resolve peacefully most matrimonial disputes and, wisely, he trained many non-attorneys along with those lawyers who acknowledged that the old system was not serving parties well. Slowly, a growing number of divorcing couples began to choose, with the help of a mediator, to reach their own agreements without resorting to the courts. Interest-based bargaining and a process driven by understanding rather than by power seemed to yield positive results for many.

At the same time, as the practice of mediation grew through the 1980s and 1990s, it was subject to harsh criticism from the matrimonial bar, as well as a number of women's groups. The charges were that mediation was sloppy and unfair, women got bad deals, all too often power ruled in the negotiations, the imbalances in power caused terribly unbalanced agreements.

While often the criticism was sparked by a small minority of poor agreements that caught the attention of the bar and the courts, there has been a growing recognition among responsible mediators and certainly among the matrimonial bar that not all divorcing parties are good candidates for mediation and not all power imbalances can be successfully addressed in the mediation process.

So determining whether mediation is appropriate has become a concern in at least a good part of the mediation community. Mediators and matrimonial attorneys began to recognize that the probability of success in the mediation was greatly enhanced when both parties were:

- Highly functional
- Articulate
- Good with numbers
- Emotionally mature

- Endowed with an ability to say no, and an ability to say yes.

Conversely it has become clear that chances of success, meaning a fair agreement that works for everyone, are diminished when one party is or both parties are:

- Unable to speak for themselves
- Depressed
- Wracked by guilt
- Possessed of a skewed sense of entitlement
- Systemically subordinate.

The awareness that mediation was not always the answer for all couples didn't render the adversarial alternative any more attractive to divorcing parties, however. Flash back 15 years or so to Minneapolis, Minnesota, where Stu Webb, a long time matrimonial litigator, was becoming so disenchanted with the adversarial system, with the harm he saw it causing and with his own role in it that he was considering leaving the practice of law entirely. While he saw mediation as a strong, vital, positive response to much of the needless litigation and power-based, competitive bargaining that so often led nowhere, he also recognized that many parties needed on-site representation. Why not utilize mediation skills and bring a mediation mindset into the room while retaining representation? He enlisted an equally disaffected colleague in a collaborative experiment, and, after a couple of near disastrous false starts, collaborative practice was born.

I think that a good part of the generally positive response of the bar to the growth of collaborative practice throughout the country is attributable to the vacuum both parties and attorneys were discovering when parties desperately did not want an adversarial process and yet, for one reason or another, it was clear that mediation was inappropriate. For matrimonial attorneys advising clients, collabora-

tive law offered another item to the menu of dispute resolution processes that were available. Most clients who walk into our offices still haven't heard of it; when presented with collaborative law as one possible approach, my experience is that many of them light up at the possibility.

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My disappointment is that some in the mediation community are treating collaborative law practitioners much the same way the litigators treated the early mediators. Just as litigators saw many mediators as not quite lawyers, some mediators are seeing the collaborative lawyers as not quite peacemakers—and are responding with similar negativity, writing off collaborative practice as redundant or ineffectual.

In each case it would seem that the dismissive and pejorative comments were and are colored at least in part by a concern for turf. That is, a fear of scarcity—as though somehow there will not be enough conflict to go around. In fact, a glance at what is happening would seem to indicate that there remains sufficient conflict for all. The litigators are thriving as ever. Mediation (largely, I believe, through the Family and Divorce Mediation Council of New York's quality leadership and consistent emphasis on continuing education) has clearly come into its own in New York and has gained substantial acceptance in the courts and among the members of the judiciary. Collaborative law, too, has quickly made its mark as a viable, effective alternative to adversarial proceedings. There would seem to be room for all of us, and multiple opportunities for all of us to work together.

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# Learning From One of the Icons, Woody Mosten

BY BJ MANN

On November 4th and 5th, some 60 mediators were privileged to hear one of the icons in the field, Forrest (Woody) Mosten, reflect upon how he practices the art of mediation at a two day conference in White Plains, N.Y. sponsored by CoNYSCRO, the Coalition of New York State Conflict Resolution Organizations. Based in Los Angeles, Mosten has been practicing mediation since 1979. He is also a trainer and author of several books, notably "The Complete Guide to Mediation" (1997) and "Unbundling Legal Services" (2000).

Mosten talked about the style as well as the substance of mediation. He presented a practical guide to mediating along with many tips for building a practice emphasizing the importance of cultivating and working with other

resources, especially attorneys. The following are just a sampling of Mosten's offerings:

- **Separate Intake Interviews:** "Use the private sessions to coach the parties on how to do their best," Mosten suggested. Convinced that separate intake interviews increase the success and efficiency of the process, he virtually insists that couples spend this up front time, and yes he charges for these visits.
- **Caucuses:** Unlike years past, more than half of his cases now caucus at some point. Mosten outlined the benefits of caucusing, or using shuttle mediation, explaining how he quantifies, in dollars, how much it might cost to remain stuck in a certain position.
- **Summary Notes:** Mosten offers his clients the option to receive summary notes after each session and builds the

time for preparing them into his fee structure. He asserts that these summaries not only help his clients, they also enhance his efficiency when preparing memos.

- **The Threat of Court:** Mosten advises clients who threaten to litigate to first take a field trip to Family Court where they will discover that they rarely get to speak to the judge and that most communication is written and sterile. He also uses neutral attorneys to provide perspective to his clients.
- **Children and Divorce:** Mosten highly recommended stocking two videos, *Children: The Experts of Divorce* by Elizabeth Hickey and *Children in the Middle* from the University of Ohio. He either lends them to clients or sets them up for viewing in his waiting room. □

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And, as the number of collaborative lawyers increases, and as consciousness of "alternative" means of resolving marital conflict rises, the universe of potential ADR clients expands. This in turn can create numerous opportunities for mediators, lawyers and non-lawyers alike.

Collaborative lawyers can use mediators to come in and mediate discrete issues where the process seems to have broken down or reached impasse. Collaborative lawyers can use mediators to help with specific skill-based issues such as parenting schedules.

Distributive issues don't just disappear by everyone being nice and discussing interests. Parties become locked into seemingly unresolvable positions even in collaborative cases. The lawyers sometimes find their instincts to advocate on behalf of their clients overshadow their intention to maintain a collaborative presence, and skilled mediators have shown themselves to

be of enormous value in such instances.

Collaborative lawyers can use mediators to help resolve issues the lawyers have discovered in working with each other in collaborative cases. Collaborative lawyers, I've noticed, sometimes enjoy accusing their collaborative partner (not adversary) of not behaving collaboratively. And collaborative lawyers have also fallen prey to the not uncommon dynamic of carrying one's own client's point of view, even on an emotional level. Neutral third party intervention can again be very helpful.

Mediators who recommend consulting attorneys to their clients can recommend collaborative lawyers with some confidence that the lawyers will be constructive in the process. Or, in cases where the mediation does not appear to be working, parties are frequently interested in trying collaborative law rather than resorting to litigation.

What is clear is that both collaborative law and mediation are consensual, client-centered dispute resolution processes. They both appeal to parties and professionals who have faith in the value of the private ordering of one's affairs and, I think, there are deep humanistic impulses that underlie both practices. For the clients, they both offer an opportunity to negotiate a carefully tailored and individually crafted resolution that genuinely meets their own needs and interests. And for collaborative attorneys and mediators, there is an opportunity to maximize their effectiveness as facilitators in problem solving. As practices build, there will be expanding opportunities for all of us. To quote Pauline Tessler quoting Tom Lehrer, we can all "do well by doing good."

So, I'm hoping that as mediators and collaborative lawyers we can heed Stu Webb's advice and accept our differences while embracing our common goals. □