Co-Mediation to Collaborative Mediation: A Case Study In Client-Focused Dispute Resolution

By Adam Cordover, Tampa and Rachel Moskowitz, Tampa

Introduction

We all know that it is generally better for families to resolve disputes privately and peacefully outside of court. We have tools, like collaborative practice and mediation, to help accomplish this. More recently, Licensed Mental Health Counselor Rachel Moskowitz and Attorney Adam B. Cordover have taken the best aspects of common forms of alternative dispute resolution and put them into action. They have been tailoring dispute resolution models to meet the needs of the particular family in front of them. Here is a case study of a co-mediation, which eventually turned into a collaborative mediation. Names and facts have been changed to protect the privacy of the family involved.

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The First Call

Rachel received a call one afternoon from a woman named Pamela interested in mediation for her divorce. Pamela said that she has been married to her husband Brian for 22 years, has 3 young children ages, 3, 7, and 11, and that they wanted to get divorced in the most financially conscious and amicable way.

Rachel told her that she would help her find the best way for her and her husband to get divorced. Rachel briefly explained various options including mediation and collaborative practice. She also told Pamela that she does something called co-mediation. Rachel relayed that she finds it to be most efficient because of the way the professionals tailor the process to the needs of the couple.

Rachel explained how co-mediation works. "Both Adam Cordover, an attorney I practice with, and I are neutral. I am a therapist by training, and Adam is an attorney by training; we use the legal and therapeutic skillsets to help you and your spouse reach an out-of-court agreement. With our different backgrounds, we work together to creatively come up with unique solutions for your family. Would you and your husband like to come and meet with us to learn more?"

Pamela scheduled a consultation for her and Brian to meet with Adam and Rachel.

The Consult

Adam showed up at Rachel's office shortly before the clients were scheduled to come in. This was the first time Adam had met clients at Rachel's office. Adam thought that Rachel's office was quite different than where he generally had consultations with clients. It felt like a living room rather than the conference rooms that he was used to. He did not have the conference table between himself and the client that he suddenly realized served as a safety zone for him, but which may feel like a barrier for clients. It was a bit out of his comfort zone, but he was game.

Pamela and Brian came in to the office, and Rachel invited them to sit on her couch together. Again, this was new to Adam, but he trusted Rachel to take the lead and to make the clients feel comfortable. Everyone went around the room to introduce themselves. Rachel then invited Adam to talk about process options.

He first discussed traditional litigation and how clients going through this process leave decisions important to their family in the hands of a judge. He mentioned that this tends to be the most lengthy and costly way to resolve disputes and the most destructive to the family. He also admitted that he was biased against traditional litigation, as he no longer practices it. Adam explained that he found too often that he pitted spouse versus spouse, parent versus parent, and that most people simply wanted to move on with their lives without being treated as adversaries and without harming their kids.

Adam next discussed mediation. As typically practiced in the Tampa area and from what Adam has experienced from most attorney mediators, he explained that the spouses are put in different rooms, and a neutral mediator goes back and forth with "settlement offers." The concern that many attorney mediators have is that if both spouses are in the same room, one spouse can say something provocative to the other and mediation could blow up at any time. Media-

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tion as typically practiced in Tampa Bay usually goes on for many hours until the spouses reach an agreement. The concern here is that if the parties leave a mediation conference without reaching an agreement, they will then go on to litigate against one another. Any spouse without an agreement can decide that they are done and go into the litigation process with relative ease.

Then Adam explained how, in collaborative practice, each spouse is represented by an attorney. The attorneys are retained solely to reach an out-of-court agreement. In the model normally used in Florida, the clients have the help of a neutral Facilitator with a background in communication, family dynamics, and childhood development. The clients also receive the assistance of a neutral Financial Professional. The collaborative professionals work as a team to resolve all disputes.

As another option, Adam talked about co-mediation. In Rachel and Adam's model of co-mediation, the spouses work with two neutrals: A therapist and an attorney.

The attorney co-mediator draws on his experience to aid the clients and develop options that he has seen work in other cases. If it is helpful, he can identify statutes for the clients to read that may inform them in their decisions without giving legal advice. He is also helpful in wordsmithing the Marital Settlement Agreement, providing required forms, and informing clients of legal protocols.

The therapist co-mediator, on the other hand, can help spouses identify their interests and goals. She helps create a parenting plan that is developmentally appropriate for the kids and tailored to each family's needs. Because the therapist co-mediator normally practices with couples in conflict, she is well equipped to keep discussions productive and communications effective.

Co-Mediation Meetings

Adam explained that, in co-mediation, he and Rachel set up shorter meetings focused on specific topics. They do this because they find couples are more able to stay focused and emotionally ready to make decisions when meeting for shorter periods of time.

Working together, the co-mediators create a safe environment allowing the couple to remain present in the room together even if tempers flare. Though there may be caucusing at times, the caucus lasts only for a short period, and the couple always comes back together to continue the co-mediation. Rachel and Adam find this to be valuable because it allows couples to overcome arguments and gain skills for resolving conflict for their future co-parenting relationship. Meeting face-to-face also creates efficiencies as misunderstandings can be immediately corrected, and the co-mediators do not have to go through the same information twice.

Adam described the first meeting as a 2-hour session focused on completing the parenting plan, including a time-sharing schedule. At the end of this meeting, the co-mediators will give the spouses financial affidavits to complete. They will then schedule the second meeting two weeks out.

The second meeting is typically 3 hours and focuses on the financial aspects including child support, alimony, and division of assets and debts. Because the co-mediators rely heavily on the financial affidavits to guide this discussion, Adam noted that it is imperative that the affidavits be complete and accurate.

Rachel and Adam expressed that most clients find the financial affidavit to be a complicated form. Some people get anxiety just thinking about filling it out. Accordingly, the co-mediators suggested that Pamela and Brian consider meeting separately with a neutral financial professional who can help them complete it and make the next meeting most productive.

If the 3-hour financial meeting is insufficient to address all outstanding issues, another meeting will be scheduled.

Collaborative Mediation Options

Pamela turned to Adam and asked whether he would let them know whether the agreement is good or bad. Adam confirmed that though he cannot provide legal advice, it is the clients' right to have attorneys counsel them. Because collaborative attorneys are specially trained to work as a team and help clients reach out-of-court agreements, Rachel and Adam suggested that mediation clients choose collaborative attorneys. In fact, Adam and Rachel explained that they have a provision in their co-mediation contract which states that any attorney hired must be collaboratively-trained.

If either client retains an attorney, Rachel and Adam ask, and their contract provides, that the co-mediators be notified. The co-mediators also require that, if both spouses retain attorneys, everyone sign a collaborative participation agreement that states that the attorneys can only be used for private dispute resolution and cannot be used to fight in court. Adam mentioned that the co-mediators do this to give their clients the best shot at successfully reaching a full and durable out-of-court agreement.

Moreover, Adam remarked, in collaborative mediation, clients have different options to the extent which they want to utilize their collaborative attorneys. One option is that the attorneys can be with the clients at each session. Alternatively, clients can limit the representation and just consult with the attorneys outside of

mediation sessions. A third option is that solely the clients can work with the co-mediators for one issue (such as the parenting plan,) but then bring the attorneys in when discussions get to financial matters. It is 100% the clients' choice.

Pamela and Brian decided that co-mediation would be the best option for them. They figured they did not have to start off with attorneys, but at any point they could hire attorneys. Adam and Rachel then scheduled the parenting plan mediation session.

Parenting Plan Meeting

Rachel set the first mediation session to take place in her office. When the clients came in, the co-mediators utilized a whiteboard and put an agenda up for what was going to be accomplished during this meeting. The co-mediators also provided mediation ground rules, including confidentiality, privacy, transparency, and self-determination.

Next, Rachel asked the clients to articulate their goals, and she wrote them on the whiteboard. Specifically, she asked what goals the clients had for their children. As it turns out, the goals of most clients are similar. The co-mediators point to the whiteboard and remind the clients, when discussions get heated, that everyone is here to help them achieve their goals and that the clients should not belabor the arguments that brought them to divorce.

Rachel next provided Brian and Pamela with a blank copy of the Florida Supreme Court parenting plan form. Everyone then started going through it and filling it out together.

Rachel helped the conversation remain productive and forward-focused. She also helped the clients reframe statements so that they can be best heard by one another. Additionally, Rachel modeled healthy communication for clients to begin productive co-parenting. Moreover, she took the lead when clients were in conflict or emotions were running high. Where appropriate, Rachel allowed the clients to get things off their chests so that they could move forward. Though most mediators are conflict-avoidant, Rachel's approach is that, oftentimes, conflict can be productive.

Adam was there to provide information about the law. He helped lead the discussion on topics of jurisdiction and the U.C.C.J.E.A., parental responsibility, relocation, and allocation of overnights and how they might affect presumptive child support amounts. While Rachel was facilitating the conversation, Adam also transcribed the family's agreements in a way that makes sense to the courts.

In less than two hours, the parents worked through and completed the entire parenting plan. Towards the end of the session, the co-mediators provided the clients with blank financial affidavits and asked Brian and Pamela to fill them out prior to the next meeting. Because the next mediation session is largely driven by the financial affidavits, Adam and Rachel reiterated that it may be helpful for both to see a neutral financial professional before the next session.

When Brian and Pamela began to ask questions about the amount of support they could expect, Rachel and Adam suggested they speak with attorneys. The co-mediators provided the clients with names of collaboratively-trained lawyers who offer unbundled legal services.

Pamela and Brian ultimately decided to consult with a neutral accountant to help them complete their financial affidavits prior to the meeting. They also hired attorneys and let Rachel and Adam know that the attorneys would be joining them for the financial discussions. The co-mediators reached out and provided the attorneys with a collaborative participation agreement and asked that they and the clients sign it prior to the next session.

Financial Meeting

The co-mediators set the financial meeting to take place in Adam's office. Adam has a big screen television connected to the computer so that everyone could go through different equitable distribution schedules and other scenarios together. Adam also has a conference table that allows attorneys to spread out their work.

Adam, Rachel, and the attorneys first reconfirmed that the attorneys were there to represent each client's interests, but also to work together as a team to help this family reach their best agreement. The clients expressed their feeling of security knowing that they each had an attorney to guide them and answer their questions. The collaborative mediation team then went right into the division of assets and debts, alimony, child support, and everything else.

The clients had some difficult discussions, but there was comfort amongst the professional team knowing that no one was going to threaten impasse to go to court. The fact that both attorneys and the co-mediators were working from a common set of expectations and norms also put the clients at ease and increased the likelihood of success. The disqualification clause also allowed for a broader discussion of option building because the clients were prepared with their attorneys not to give up when the going got tough.

The meeting lasted 3 hours. Brian and Pamela reached resolution on all substantive issues and the team collaborated on writing up and executing the final agreement.

Conclusion

This divorce could have taken several different turns. The clients ultimately voiced and achieved their goals for their own divorce. They had the comfort of knowing that their divorce professionals and the judicial system were not going to turn them into adversaries. They had the level of support they needed - on the issues they needed it for - when they needed it.

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Here are a few questions for us ADR professionals to think about:

- How do you create client-focused processes that meet the needs of each particular family?
- How do you handle conflict?
- Does your view of conflict help or hinder the dispute resolution process?
- Does collaborative training of professionals make a resolution more or less likely?
- What protocols can you put in place to increase the chance of helping clients reach agreements?
- Do you have attorneys who offer unbundled legal services to whom you can refer?
- Are you an attorney willing to offer unbundled legal services?
- Are you willing to get out of your comfort zone and do things differently?