Integrative Mediation: Knight in Shining Armor or Black Prince?

By Stephen H. Sulmeyer, J.D., Ph.D.

Collaborative Practice California Newsletter, 2011

This is a challenging time for many, perhaps most, collaborative practitioners in California. For many, new collaborative cases have slowed to a trickle. Many practitioners have no collaborative cases at all. Certainly the economy is partly to blame, and perhaps as well our reputation with some for being expensive or inefficient. Whatever the causes of our current state of malaise, the question cries out: what is to be done? Practice groups across the state are tackling this question in a variety of ways, as is CP-Cal, and the innovations that result from these conversations will surely end up benefitting collaborative practice as a whole. However, a number of collaborative practitioners in Marin County are trying something entirely out of the collaborative box that could have a substantial impact on the situation.

We call it Integrative Mediation. Integrative Mediation (or IM for short) is a mediation model rather than a collaborative model. It consists of *conjoint* co-mediation between a lawyer and a mental health professional ("MHP"), so far exclusively in family law cases. Actually, this model has been around for decades, but, surprisingly, is rarely used today. Nowadays when a MHP is brought into a mediation, his or her role is usually limited to mediating the parenting plan, while the "legal" and "financial" aspects are left to the lawyer. In IM, the lawyer-mediator and the MHP-mediator co-mediate the entire case together (hence the term *conjoint*), jointly attending to the legal, financial, and emotional needs of the parties. Financial neutrals & child specialists are brought in, as in collaborative, on an as-needed basis. The parties may or may not be represented by counsel in the mediation.

Why might IM be an appropriate response to the slowdown in our collaborative workload? First and foremost because it is a way to deliver the benefits of interdisciplinary practice to clients at a fraction of the price of a full collaborative team. In terms of cost, there are only two professionals' meters running at any one time (except for those times when a financial neutral or child specialist is brought in). With fewer players, there is less need for team meetings, there are fewer team dynamics to straighten out, and fewer scheduling difficulties to attend to, all of which translates into lower cost for the clients. There is also greater efficiency in that the lawyer-mediator and MHP-mediator are *neutrals* who do not represent either party, and are therefore able to avoid some of the pitfalls that arise when negotiations are undertaken by party representatives (including coaches in the two-coach model).

But perhaps the greatest cost-savings benefit arises from that aspect of IM that makes it so effective: the integrated way in which the lawyer-mediator and MHP-mediator work together. While each professional is primarily responsible for his or her own area of expertise, in practice the lines are somewhat blurred. Each mediator is intimately familiar with the area of subject matter expertise of the other, both have substantial mediation training, and the two support each other like pilot and co-pilot, alternating the lead-taking as appropriate, and are in harmony regarding the common approach to be taken.

This common approach, at least in Marin, arises from our observation that emotional issues are almost invariably present in virtually all aspects of a given case (which is why we insist on *conjoint* co-mediation). While this isn't exactly news to most collaborative practitioners, we have found that a great deal of inefficiency (and therefore higher cost) arises from the parties' *conflation* of their emotional issues with their legal and financial issues—and the failure of dispute resolution professionals to recognize this. Most of the really difficult cases, collaborative, single-mediator, IM, or otherwise, tend to be the ones where such conflation is present, meaning that the parties are either too consumed by their hurt/pain/rage to negotiate rationally, and/or they are inclined to take ostensibly "legal" positions in order to right what are really emotional wrongs. We have found that the best way to deal with this problem is to separate the legal and emotional cases, and deal with each on its own terms—and both professionals need to participate in and support this approach.

For example, in one case husband did not want to take out life insurance in an amount that felt sufficient to wife. Economic and legal arguments were useless in swaying husband to change his mind, and the case appeared to be at an impasse. Then both lawyer and MHP began asking husband about the feelings underlying his position. After listening in a way that allowed them to understand where husband was really coming from, the MHP suggested to him, "it seems it would be bitter to you if your wife was happy about your death." Husband responded almost viscerally to this articulation of what he had up to that point been unconscious of. Once he saw what was really going on behind his own position, something shifted inside him. He was then able to separate out his feelings of hurt and resentment, and work with the two mediators to make a more clear-headed decision on the financial issue, unclouded by the unseen emotional issue.

In another case, mother and father were young, had been married only a few years, and had one child, a 3 year old son. Father had had an affair, and felt very remorseful, and was willing to give mother most of what she wanted. But mother's insistence on father having no contact whatsoever with their son was something he could not agree to. The mediators asked mother why it was important to her that father have no contact with their child. Mother replied that father was a monster, and she had no choice but to protect their son from such a person. As the mediators probed deeper into mother's feelings about father being a monster, what emerged was that mother had been completely blindsided by father's affair, and could not conceive of what she could have done to lead him to stray in what seemed to her to have been an idyllic marriage. The MHP suggested to the mother that "perhaps your need to see yourself as blameless and all-good requires you to see your husband as all bad and therefore a monster." After a moment of silence mother suddenly saw the splitting she had been engaging in, and said, "oh my god, that is exactly what I've been doing. Of course he can see his son."

While this sort of approach is equally applicable in collaborative cases, there is a smoothness and a seamlessness in its application that seems to be more readily obtainable in IM cases. There may be several reasons for this. First, the lawyer-mediator and MHP-mediator are neutrals, rather than party representatives, and this can provide a certain credibility and perception of objectivity that party representatives may not be able to match. Second, the mediators' familiarity with the other's area of specialization, which we believe is greater as a general proposition in IM than in collaborative cases, increases the seamlessness of the process. Third, there is an equality between MHP and lawyer that may be lacking in collaborative cases,

and this equality can have a major impact on the parties and the process. In IM, the two mediators function absolutely as equals, free from vestigial biases between the professions that might tend to undervalue or inhibit the contributions of MHPs (whether in the view of the parties or the lawyers). The co-equal status of the lawyer-mediator and MHP-mediator makes a powerful statement to the parties about the co-equal value that the process and the mediators place on the emotional and legal aspects of the case. Gender balance among the mediators may further assist in the perception of equality, as well as impact the parties' sense of safety.

The efficiency generated by IM's integrative team approach not only reduces costs, but also tends to result in the clients feeling truly heard, seen, and supported, because the human or emotional/psychological aspects of their divorce—arguably the part many care about most—is being fully taken into consideration at every point in the case. This in turn results in more truly informed decisions by the clients, greater client satisfaction with the process and the results, and a deeper, more comprehensive level of settlement and resolution, as well as more durable, lasting agreements. A truly integrative approach can also plant the seeds of emotional closure and enhanced psychological adjustment post-divorce, as well as the establishment of a better co-parenting relationship going forward on the part of the clients. Again, all of this can be done in collaborative cases too. But it seems that it may be more easily achievable in IM for the reasons stated.

So, you may be wondering, if IM is so wonderful, why wouldn't all collaborative practitioners welcome it as knight in shining armor, come to rescue us by supplementing our practices during lean times? There may be several reasons. First, objections have been raised to including IM among our practice group's "menu of services" because IM is a mediation rather than a collaborative approach (e.g., the parties are generally self-represented, and when they are accompanied by lawyers the lawyers are not subject to disqualification in the event of litigation). There is a concern that the public's understanding of what collaborative practice is might be diluted or confused if collaborative practice groups were to include IM in what they offer. Given the amount of work and resources that have been expended to educate the public about collaborative practice, this is a very real and legitimate concern. We addressed this concern in Marin by forming our own IM practice group, Integrative Mediation Marin, that exists in parallel with our collaborative practice group, and is populated by essentially the very same individuals.

Second, there is the question of fees. Many of us in Marin feel strongly that our philosophy of equality between the mediators, and between the legal and emotional aspects of our cases, mandates equal pay for equal value, meaning each mediator will be paid the same. For the MHP to be paid less than the attorney, which seems to be universally the case in the collaborative world, sends a message that arguably undermines the principle of equality we want to practice as well as preach. Although for antitrust reasons there can be no predetermined agreement on what IM mediators will charge, we encourage practitioners to take this philosophy into consideration when setting their fees. Many attorneys object, arguing that MHPs don't have the overhead that they do. While that may be true, we respond by pointing out that MHPs *could* have attorney-style overhead if they received attorney-style fees, and that in any event even when overhead is taken into account, attorneys are still paid considerably more than MHPs. In addition, while there may be historical reasons that would explain the disparity in the fees charged by the two professions, in the IM context the MHP is acting in a very different role than

that of the typical clinician, so the usual comparisons and justifications tend to break down. What we have done in Marin to address the overhead issue is this: assuming the mediation takes place in the lawyer's conference room, and makes use of the lawyer's office staff and equipment, the two mediators reach agreement on a certain dollar amount that will be attributed to overhead, and the two professionals take this amount off the top from what they receive in fees, and pay it to the lawyer or his or her firm.

Leaving aside whatever other objections to IM may exist, there remains the bigger question of whether IM can really make a difference to collaborative practitioners by bringing in more business during these difficult economic times. Based on Marin's experience it's too soon to say, but the signs are encouraging. Although we have only just formed our practice group, we have already generated a number of cases, along with a great deal of enthusiasm on the part of our members. IM's viability over the long-term, as well as the forms which its relationship to collaborative practice will take, will ultimately depend on how vigorously interdisciplinary practitioners embrace the model, as well as how robust our marketing efforts are (e.g., such as including IM in our divorce options workshops). Whether other collaborative practice groups choose to include IM as one of the models they offer, or whether individual collaborative practitioners choose to create free-standing IM practice groups, we believe that IM is an effective, complementary dispute resolution process that interdisciplinary practitioners can and should embrace with enthusiasm.

*****

Stephen Sulmeyer is a psychologist, lawyer, mediator and collaborative coach in Marin County, California. He is the co-founder (along with Judge Verna Adams) of Marin County Superior Court's Interdisciplinary Settlement Conference Program, and founder of Integrative Mediation Marin, a practice group dedicated to the integrative mediation approach.