White Paper on Family Law

By Charles M. Newman, Clare A. Piro, Jacqueline W. Silbermann and Andrea Vacca

ADR processes have particular applicability in the field of divorce and family law. As one might guess, non-litigation resolutions are ideally suited for disputes that are so thoroughly interwoven with emotions and deeply personal histories. The ability of the parties to receive professional guidance from a mediator and counsel so that they can agree on their own arrangements—based on the unique story, needs and goals of their own family—is one of several reasons why mediation and collaborative law have received such great and growing acceptance by couples and family lawyers alike.

Collaborative Law

This article will discuss all the modes of ADR in divorce and family law. Most methods of ADR are similar across many areas of law. A relatively new form of ADR, collaborative law, could be applied in many areas of dispute or conflict, but by far its greatest development has been in the divorce and family area. Because of that overwhelming focus in divorce and family matters, collaborative law has not been highlighted in other articles of this publication. We describe it in some detail here so that it can also be included in the other sections of this article.

Collaborative law is a process that helps parties arrive at a mutually agreed upon, negotiated settlement without the threat of court. Collaborative law is based on three main principles:

1. The parties agree in writing with each other and with their attorneys that those attorneys will not go to court.
2. Both parties commit to an honest and open exchange of documents and information.
3. Each option for settlement takes into account the highest interests and goals of both parties and their children.

In collaborative law, each client has an attorney by their side throughout the negotiations, but those negotiations focus on interests and solutions rather than on positions and demands. The goal is to improve the parties' ability to communicate and understand each other during the collaborative process and, hopefully, after the matter is resolved as well.

Collaborative law is client-focused. The divorcing or separating couple remains in control of the process and of the issues to be resolved. Because the clients agree with their attorneys that those lawyers will not go to court for the clients, the process is less adversarial and more flexible to explore options and find solutions.

From the beginning of the process, a commitment is made to keep conflict to a minimum. This not only helps assure that the collaborative process will move forward as smoothly and effectively as possible, but also that a foundation may be built, allowing the parties and their children to move on positively with their lives after the divorce.

In the collaborative divorce process, each of the parties retains his and her own independent, collaboratively trained attorney. Each lawyer will gather information, provide the client with information about their rights, responsibilities and options, and help negotiate and advocate on behalf of the client.

All negotiations are conducted in highly structured, face-to-face meetings among the couple and their attorneys. Each meeting normally has a pre-agreed agenda and is followed up with minutes that reflect key discussions, items that the parties agreed upon, and tasks that need to be completed before the next meeting.

Ultimately, negotiations in the collaborative process will address all of the issues that need to be resolved, including finances, property, child custody, child support, spousal support and any other issue that is important to that particular family. If the parties are ultimately unable to arrive at an agreement on all of the issues, the collaborative attorneys will withdraw from the process and litigation attorneys can be retained to seek a resolution in the court system.

Many times, collaborative lawyers find that bringing in other collaboratively trained professionals can help the couple arrive at an agreement that best meets the immediate and long term needs of the family.

These other collaborative professionals include:

- Divorce coaches who will assist the parties to develop better communication tools so that they can better understand the spouse and be better understood when expressing their own interests and needs. Coaches also help the parties manage all of the difficult emotions that arise in the midst of divorce.
- Child specialists who give the children a "voice" in the process and work with parents to create a parenting plan that meets the children's best interests.
- Financial specialists who will collect and analyze financial information and assist the clients to make informed decisions about financial matters.

Collaborative law is not the right process for everyone. Just because clients say they want to avoid court doesn't mean they are good candidates for the collaborative process. Clients should not be encouraged to choose collaborative law because it's a cheap alternative. It isn't. While no alternative dispute resolution process will reach the expense of a full-blown litigation, collaborative law can still end up costing the parties significant sums of money. This is particularly true for high conflict couples who are unable or unwilling to stay on track and move forward in an efficient way.

Parties engaging in the collaborative process need to understand that their matter will move at the pace of the slowest party. If one person wants to delay meetings, or doesn't follow through on agreed-upon tasks, it will slow down the entire process. Because there is no judge imposing deadlines, collaborative law may not be the right process if both parties are not self-motivated to move toward resolution.

The collaborative process requires clients and attorneys who respect the premises, requirements and implications of their contract to collaborate. If trust is simply not possible or one party is not willing to be transparent, the collaborative process will fail.

The withdrawal provision, which requires both parties to retain other counsel for litigation if the collaborative process fails, can also be a concern. While any interim agreements may continue after the collaborative process ends, and while all of the financial documents gathered can easily be turned over to litigation counsel, the fact is that it can be expensive to bring a new attorney into a matter.

However, with proper screening at the beginning of the attorney-client relationship, many of these potential problems can be identified and avoided.

Difference and Similarities Within ADR Methods

Arbitration, while available in divorce and family matters, is mostly used to resolve subsidiary issues, not normally to address divorce itself or its larger aspects. Thus, it is not included in this comparison of different dispute resolution approaches.

Confidentiality

One of the first advantages of ADR that many people think of is confidentiality. It is often extremely important to people going through divorce or other family problems, particularly when children are involved.

Mediation sessions and collaborative law sessions are held in private offices. Of course, this can also be true in direct negotiations among counsel and/or the parties in a pending or contemplated divorce action, but only for so long as both sides feel that negotiations are progressing satisfactorily. In ADR, no judges, court attorneys, clerks, stenographers or other court personnel are present.

A great many couples are comforted to know that with ADR, they can pursue a resolution of their family disputes privately, without the great weight of the State watching over their shoulders every step of the way and without fear that their troubles will become grist for the fascination of others.

Speed and Duration of the Process

Obviously, all estimates of time frames are just that and are dependent upon the parties, their level of conflict, their motivation to settle, the complexity of the issues and the like. However, in general, a mediation or a collaborative process will be completed by the parties in the shortest period of time.

In a typical attorney-negotiated matter, the parties are dependent upon their attorneys to keep the matter moving along. In turn, their attorneys will move matters along according to the amount of time each has to devote to responding to correspondence and settlement proposals. Given the time constraints of an average matrimonial practice, the matter typically will take longer to settle than in mediation or collaborative practice.

In litigation, the time frame is dependent upon the Court's calendar, the need for discovery or pendente lite motions, the motivation of the parties and their attorneys to move the case along, and the point at which the matter settles. For the most part, however, litigation can be the lengthiest process to conclude.

Cost of the Process

Clearly, the exact cost of the process depends upon the fees of the professionals and the amount of time it takes to resolve the matter. In general, the cost, from least costly to most expensive, would be mediation, collaborative process, attorney-negotiated process, and lastly, litigation. Within that framework, the cost to the parties in each modality is dependent upon their commitment to the process, the complexity of the matter and their level of conflict.

The reason the fees in mediation are normally low is that clients generally choose to pay primarily for the fee of only one professional, the mediator, with review attorneys limiting their time to the review of proposals or settlements. Therefore, time with the consulting or review attorneys is reduced compared with an attorney-negotiated case. A collaborative process tends to be more expensive than mediation because, at the very least, the parties are paying for the intensive time of two attorneys (rather than one mediator) during the collaborative sessions. If it is a team or interdisciplinary collaboration, there are also fees for coaches, a financial neutral, a child specialist, etc.

The fees in attorney-negotiated matters and litigation will tend to be higher because the parties are paying for individual attorneys, and the adversarial nature of the process will result in more time spent in arguing a party's case, to say nothing of the time spent in preparation for conferences, court appearances, examinations before trial, and the like.

Voluntariness

A hallmark of mediation is that it is entirely voluntary from start to finish. (A slight exception is court-annexed mediation, where the parties may be ordered to at least start a mediation process. They are never ordered to resolve the case in mediation.) There is no mediation unless both parties want it and there is no resolution unless both parties want it. Mediation requires the consent of the parties even as to the manner of proceeding. One of the fascinating things about mediation is the way parties come to see, even as discussions can become difficult, that it is in the party's own self-interest to continue in mediation, and to work toward a resolution. When it works best, mediation is nothing more than helping both sides focus on finding "win-win" solutions, so that at every step, the parties find a resolution that *each side* sees as a good result.

In collaborative divorce and family law, the start of the process is entirely voluntary, and the collaborative professionals make a strong point of insuring that the parties clearly understand the implications of a process that, by agreement, will not end in litigation with the same lawyers. Because of the time and fees that are invested with lawyers who cannot litigate for them, the parties know that terminating the collaborative process to hire litigation counsel can be a very expensive and wrenching choice. They always retain that choice, but as time passes, there is an implicit financial pressure to remain with their initial preference.

Of course, negotiation is voluntary. Outside realities or other pressures may sometimes make it feel as though negotiation is a necessity, but normally parties and their lawyers expect that even in the most hotly contested divorce and family disputes, negotiation will go on.

To a large extent, the difference between discussing resolutions ("settling") by negotiation in a contested matter, as opposed to a mediated or collaborative case, is one of intention, attitude and approach. In the context of a contested matter, negotiations normally proceed in the context of each side wanting to maximize his or her position. Side A might want to understand what is important to side B, but only for the purpose of framing a proposal in a way designed to get the most of what side A wants. Side A feels that every concession to B is a loss to A. To reach the "best" result in negotiation, parties and counsel sometimes feel that it enhances their chances of success if they withhold as much information as possible, or at least they withhold what they consider to be strategic information, including factual information or insights into that party's true desires and preferences.

In mediation or collaborative law, on the other hand, the approach is quite different. Parties are encouraged to share as much relevant information as possible, to be as candid as possible about what is important to them, and to be open to ideas other than their own. Their goal is to mutually assess facts and to consider options together, hoping to build solutions that work best for both spouses and their children.

Parties' Control of the Process

Sometimes an experienced lawyer forgets that the only reason the processes and mechanics of a divorce or Family Court case seem to make any sense at all is that the lawyer has been handling them for years. For the parties and their children, who are already in a stressful situation, the impenetrability of what is going on in litigation (in or out of the courtroom) can range from confusing at best to bewildering to downright frightening.

A key element of ADR, and especially mediation, is that the processes and mechanics are included among the things about which the parties will agree. At the outset of mediation, for example, the mediator normally asks for the parties' expectations and desires about how to proceed. At each step of the way, the mediator will ask for agreement about how the process is working and whether the parties want to change the process.

Collaborative law can be a little more structured than mediation, especially since there tend to be several professionals supporting the parties each step of the way. There might be more of a pre-conceived structure in collaborative law than in mediation, but still, the parties are often asked if adjustments to the process might be beneficial for them.

One hopes that in attorney-negotiation cases, honesty and civility will prevail. Other than that, when lawyers negotiate, there are no rules. The negotiations take on a life of their own, often without the need for any articulated rules. It is important to note, however, that when lawyers negotiate, that process is handled between the lawyers. There is precious little opportunity for the parties to directly express their needs, preferences and desires in a way that the other party and lawyer can hear or respond to.

In litigation, of course, neither the parties nor the lawyers control the process. The processes and mechanics are governed by statutes, court rules, judges' rules, local practices, and a full panoply of traps for the unwary. Lawyers who keep at it long enough learn all the processes. Parties, on the other hand, simply have to live with the processes' demands and consequences, no matter how peculiar they seem, no matter how much needless pres-

sure they apply, and no matter how much they stand in the way of a resolution of the case that the parties would find satisfactory.

A final thought about the parties taking control and responsibility of family disputes may actually be one of the most important. When children are involved, it has enormous benefits for them to see and know that even in the face of severe discord, their parents chose not to draw swords in court, but chose instead to behave civilly and respectfully. Parental modeling of taking responsibility, continuing to care about a spouse, and keeping the children's well-being primary, is a priceless gift to children of divorce.

Parties' Control of the Outcome

In the broadest sense, it is easiest to state the level of control over the outcome of a case in one phrase: in mediation and collaborative law, if the parties don't come to an agreement with each other, there is no outcome. The parties are in complete control, and that is the antithesis of litigation. In litigation, neither party gets to decide, so both parties have lost the ultimate "control" of the outcome.

There is a flip-side to the fact that both parties have to agree to a mediated or collaborative result. Effectively, each party holds a veto. Indeed, if it is clear at the outset that one or both parties is likely to be willfully intransigent or inflexible, that family may not a good candidate for mediation or collaborative law at all. But if parties enter willingly into mediation or collaborative law and after hard work they learn that they just will not be able to come to an agreement, either party may at any time end mediation or collaborative law and submit to the normal court processes for an outcome. In the sense that either party may choose to end mediation or a collaborative process, each party retains control over the outcome *of that process* by having the power to end it at any time.

Control over the outcome of a dispute is probably one of the main reasons most people choose mediation or collaborative law rather than litigation. The responsibility for their own futures is a powerful motivator of, and powerfully contributes to, both spouses. The taking and exercising of responsibility and control tend to yield successful, sustainable results.

Drafting a Parenting Plan

No matter the process, a parenting plan must always be based upon the best interests of the children. However, mediation and collaborative law, by their very nature, tend to permit the parties to discuss a parenting plan in a manner most conducive to finding an arrangement that works best for their children and them.

In mediation and collaborative law, the basic premise is that the parents know what is best for their children, so those dispute resolution modalities are particularly well-suited to designing a plan that will work best for their family. If the parties need help beyond what the mediator or their collaborative attorneys can provide, they may seek the input of a child specialist who can help them devise a plan based upon their children's specific needs and wishes. This is done in a cooperative setting in which the parties and all professionals have as a priority to do as little harm to the children as possible. All seek to maximize each parent's relationship with the children without a concomitant cost to the other parent. The children tend to suffer the least, both during and after the divorce.

Unfortunately, the same approach is not typically used in an attorney-negotiated case, and it is even less likely to be used in full-blown litigation. Confrontational negotiation or divorce, as we know, can cause pronounced and long-term suffering in children. In an adversarial process in which the parties seek to win at all costs, the parties are much less likely to acknowledge the other spouse's good parenting. Moreover, in a setting where "winning" is the ultimate goal, the parents may refuse to even consider a parenting plan in which the parent gets "less" than what his or her attorney said was "standard," or which the parent feels is the societal norm. In that toxic atmosphere, a parenting plan is unlikely to be the best it can be, and the children are likely to witness a high level of animosity during the divorce and as the parenting plan is implemented (or not) into the future.

Balance of Power

Power imbalances exist to a greater or lesser degree in every corner of every relationship, and consequently in every divorce. These can be of minor importance, such as when the wife is more familiar with paying the bills while the husband knows more about the heavy chores. Or the imbalance can be of major importance that reaches the level of a party's inability to advocate for herself or himself.

Although a mediator does not advocate on behalf of a party, a skilled mediator can level the playing field by empowering the party who may be deemed to be less powerful in a particular discussion area, or overall in the relationship. By impartially addressing both parties as to their needs and interests and encouraging the participation of both even if one party tries or tends to dominate, the mediator helps a reticent party find his or her voice. A mediator can also ask a party who is not as financially adept as the other if he or she wants the help of a financial professional to work on a budget, or of a divorce coach if the person seems blocked in the process. Of course, a mediator can also ask the parties if it would be helpful if the financial person, coach or lawyers come to the mediation sessions themselves.

On the other hand, power imbalances may be so serious that they cannot be overcome in mediation. In such cases, collaborative law, attorney-negotiation or litiga-

tion are preferable to mediation. These can be instances where the power imbalance is due to domestic violence, substance abuse, withholding of financial resources or a refusal to participate with full disclosure.

In collaborative law, power imbalance is not as much of an issue since the attorneys advocate for their clients in the collaborative meetings. In the collaborative team approach, coaches and financial neutrals can help the party who may be less familiar with money issues to gain enough power to successfully advocate for himself or herself.

In certain cases, the parties have no choice but litigation if an Order of Protection is necessary or if the other party refuses to fully disclose financial information, pay support or pay legal fees.

A Durable Agreement

It is often said that in mediation and collaborative law, the settlement agreement is durable because the parties devised the terms themselves. The parties strive to reach an overall agreement that works well for both of them and their children. Much care is taken by the mediator and the collaborative attorneys to insure that the clients are comfortable with every aspect of the settlement; that the agreement is mutual in the sense that a benefit to one party does not necessarily need to be at the cost of the other; that the effects of the agreement are practical; and that the requirements of the agreement can be fulfilled.

Since attorney-negotiated matters and litigation are adversarial in nature, the attorneys' role is normally to seek the best possible outcome for their respective clients. This is a very different focus and tends to result in a less mutual agreement. In the event that the determination is made by a judge, it may be even more likely that one party is given a benefit at a cost to the other. Thus, the party who did not achieve the most favorable outcome may be less likely to abide by the terms of the agreement, resulting either in enforcement issues or possible future actions to try to set aside a settlement agreement.

The Role of the Attorney

Clients are drawn to divorce mediation and collaborative law as a way to resolve their divorce in a speedy, economical fashion and in a non-adversarial manner. What do you do if you are a matrimonial lawyer who does not practice mediation or collaborative law?

The fact that a client has decided to engage in mediation does not mean that his or her lawyer will be losing a client. To the contrary, a party's attorney plays a vital role in the resolution of a matrimonial matter through mediation.

Typically, the attorney's role in mediation is referred to as a "review attorney" or a "consulting attorney." Review attorneys begin their jobs at the conclusion of a mediation, after a memorandum of understanding or draft Separation Agreement is prepared. On behalf of his or her client, the attorney reviews the memo or draft agreement, consults with the client, and gives the client the kind of legal advice that a mediator is not permitted to give. Should the review and consultation result in the suggestion of any changes to the agreement, be it substantive or not, the attorney may bring up these points to the other party's attorney or to the mediator. Or, the client can return to mediation with the proposed amendments, or the client can negotiate these amendments with the spouse directly. As with all facets of mediation, the manner in which any proposed changes are addressed rests with the parties.

Consulting attorneys usually get involved earlier, well before there is a memorandum of understanding or draft Separation Agreement. In fact, it is not unusual for clients to consult with an attorney prior to beginning the mediation. Many referrals to mediation come from matrimonial attorneys who believe mediation may be an effective way for a particular couple to resolve their matrimonial issues. Or, some clients just prefer not to begin the mediation until they have a full understanding of their rights and obligations under the law, as explained by his or her own lawyer.

Furthermore, when clients come to the mediation with the knowledge of both the favorable and the unfavorable application of the law, the mediator is not placed in the position of making one party happy at the cost of the other. As set forth in other parts of this article, the parties are free to consider the application of the law as but one of the avenues toward a resolution. If parties know that a strict application of the law may not be in their favor, they can speak more in terms of why a different outcome would work best for the family.

When a spouse participating in mediation consults with his or her attorney during the mediation process, it can serve to make the mediation sessions much more productive. For example, a client may not know what he or she can propose as a possible resolution in a mediation, and the attorney can work with the client to propose a unique and creative resolution that may not be readily apparent to either the other attorney or the mediator. This frees a matrimonial attorney—who is otherwise normally constrained by the confines of the law—to propose a resolution that may not necessarily be well received in a litigation but which may be best for this couple and their children.

Mediators may also recommend that a party have a consultation with an attorney during the mediation process to clarify a misconception that the client may have as to how the law is applied, or to insure that a party is

knowingly waiving a right that he or she may have under the law. It makes much more sense to have the input of an attorney during the process if it appears that the client is agreeing to something that cannot withstand scrutiny, as opposed to waiting until the end of the process for the parties to become aware of the problem.

In certain circumstances, clients may want their attorneys to attend a mediation session. This is especially so where the issues are more complex or where a party may not feel comfortable. Having an attorney in a mediation session, albeit adding to the expense, is vital for someone who feels very uncomfortable about something or believes he or she cannot properly advocate his or her position.

Since this type of representation may not be something familiar to a litigator, it is important to understand how an attorney can effectively advocate for a client while maintaining the client's wish to resolve his or her matter through the non-adversarial process of mediation. The attorney is and remains an advocate for the client and must act according to the Rules of Professional Conduct. That said, the lawyer must also "abide by a client's decisions concerning the objectives of representation...," as set forth in Rule 1.2. In a mediation, the client's objectives are to resolve the matrimonial matter through mediation in a non-adversarial manner and to achieve a mutually beneficial agreement that works for both parties and their children. The attorney can and should advise the client of the law and the likely result in Court, as well as the length of time such a result will take, the uncertainty involved, and the monetary and emotional cost of such a course of action. However, the attorney must respect the client's wishes if the client does not necessarily want the most he or she could possibly get under the law. The role of the attorney in a mediation is not to advocate for the best possible resolution, but to provide information and advice, to listen to the client, and to respect that the client chose a process that gives husband and wife the power to determine the outcome.

The collaborative lawyer is an advocate for his or her client, but will not be advocating in an adversarial way. Advocacy in the collaborative process first means helping the client to understand and then state his or her own needs and concerns. If the client is not willing or able to communicate directly on a particular issue, the attorney can communicate for him or her. This concept can be very challenging for attorneys as they make the shift from the traditional notion of adversarial advocacy in the courtroom to collaborative advocacy in the conference room.

The collaborative lawyer attends every team meeting with the parties. Afterwards, the lawyer discusses it privately with the client. Between meetings, the collaborative lawyer speaks with the client, gathering and disseminating information, keeping the client on track with regard to tasks, and speaks with other members of the collaborative team.

The Role of Law

Surely, "the law" has a central place in resolving divorce and other family law issues. After all, marriage is a contract. The State takes a great interest in the contract, even requiring parties to be licensed to enter into it. We have all heard, before the first kiss, that a marriage is solemnized by someone "with the power vested in me by the State of...." By extensive statutes, rules and a vast, bewildering array of case law, the State stands ready to regulate, in great detail, the consequences of ending the contract, for the parties and for any children they have had. Even without divorce, many family issues, such as support and childrearing, may be litigated *if the parties can't agree themselves on how to resolve them*.

The law will provide answers to family disputes based on a set of principles that lawmakers and judges think should apply in most cases as a general rule. In that way, the law tries to provide a default answer. If parties cannot together agree on what is best for them and their children, the law will cut the knot with an all-purpose answer, no matter how appropriate it is (or is not) for that particular family.

When most participants to a dispute, any dispute, consider how they want to resolve it, they will think about how the law would resolve it. We all live under a social compact that says we trust the law to provide answers for us when we cannot arrive at our own. The law is usually a pretty good gauge of how most of society would resolve a dispute if the parties cannot do so themselves.

Yet many of us know instinctively or by our own experience that sometimes people can come up with their own resolutions to disputes; and if they do so, it frequently is better *for them* than whatever "the law" would impose as a generalized norm. Naturally, we hope judges will be able to apply general principles wisely to the facts of the cases before them. But, of course, judges have busy dockets, and no judge could possibly understand the parties' situation, needs and desires the way the parties do.

Does that mean that in mediation, the parties ignore the law and do whatever they want? Do they throw out the rule book and make it up as they go along? On the contrary. Most often in divorce and family mediations, the parties want to have a sense of "what would the law do?" An important part of the mediator's job is to be an "agent of reality." One of the most important realities facing a divorcing couple is what would happen if they could not agree and their disputes were resolved by a judge. Elsewhere in this article, we mention some of the drawbacks of the expense, delay and angst of going to trial. But it is always true that if the parties do not make their own

agreement, a court will be ready to do so, and the court will apply "the law" as best it can. When both parties can hear a knowledgeable, neutral person and both spouses' lawyers opine about the range of what "the law" would provide, both spouses gain a more realistic expectation of how their disputes might be resolved. Being aware of what the law might do, and choosing how much weight to give to that information, frees couples in mediation to more naturally focus on mutually beneficial outcomes, rather than on the fights and barriers that have come between them.

Mediation uses "the law" as one of the things the parties should consider in crafting arrangements that are best for the two of them. In some cases, the law may tell them what they are not permitted to do, such as to shirk a duty of parental support. In some cases, the law, skillfully explained by counsel during or after mediation but before any agreement is finalized, will serve as an important rubric on which the parties rely. In some cases, the parties will seek to learn enough of the law to agree to do exactly "what a court would do," to the extent anyone can ever predict that with certainty. In all those cases, the advantage is that well-informed disputants will know what the range of likely outcomes would be under a strict application of "the law," and they will be free to follow just exactly as much of it as best suits the two of them.

The law permits a great deal of flexibility in family disputes, but it does not always require or even encourage a judge to be flexible. Many times, for example, parties with professional guidance are able to take advantage of tax planning opportunities by agreement that might not be obvious or even available to a judge. Parties may be extremely creative in their solutions—for example, by making an education trust for their children—that no court could be expected to order them to do.

Deciding on the role of law is especially important in resolving divorce and family disputes, for the simple reason (among others) that in this field, "the law" is not exactly the world's most reliable determinant. Consider spousal support and equitable distribution, only two of the many things a divorce court has to determine. There are dozens of statutory factors a court must consider. Some factors even refer to other factors, so a confusing self-referential loop can be created. And one of the factors is always for the judge to do what he or she thinks is best and most appropriate under the circumstances. Experienced divorce and family practitioners know all too well that even for them, figuring out "the law" is a moving target. Figuring out how the judge in their case might see "the law" adds another layer of uncertainty. The best anyone can hope for is to understand that there is a wide range of possible outcomes if a judge tries the case, understands all the facts perfectly, and applies "the law" without error.

In the collaborative process, the law is openly discussed. For example, as in any divorce, the parties will be advised with regard to the child support and temporary maintenance statutes. Equitable distribution will be explained and the clients will be advised that custody and parenting decisions should focus on the best interests of the children. Sometimes, the attorneys may not agree on what the law would say about the clients' particular situation. In those cases, the attorneys explain to the clients the legal issues which they agree upon, and the ones upon which they differ. In the end, it is up to the parties to choose how to apply the law to their particular matter.

This section on the role of law in divorce/family mediation started with the proposition that courts are available to parties who can't themselves agree on a beneficial way to resolve disputes and conflicts. The point of mediation and other non-litigation dispute resolution methods is to help the parties come to those agreements by themselves, so they can avoid litigation. The law and lawyers are central contributors to that search.

Charles M. Newman, Esq., paladincn@att.net, is a lawyer, mediator and arbitrator. His primary concentrations are in commercial and matrimonial law.

Clare Piro, Esq., clare@mplawandmediation.com, of Markowitz & Piro, is a family law practitioner concentrating on mediation and collaborative law.

Jacqueline W. Silbermann, Esq., jsilbermann@BlankRome.com, is a former Adminsitrative Judge of the Supreme Court, Civil Division New York County and Former Deputy Chief Administrative Judge for Matrimonail Matters for the State of New York. She is presently Of Counsel at Blank Rome LLP doing family and matrimonial law including litigation, collaborative law including litigation, collaborative law, mediation and arbitration.

Andrea Vacca, Esq., avacca@vaccalaw.com, is a mediator and collaborative lawyer who works exclusively in the areas of matrimonaial and family law.