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COLLABORATIVE LAW: WHAT IS IT? WHY DO IT?

1. What is collaborative law?

Short Answer: A highly structured process in which to express and resolve conflict without going to court.

Details: A true "collaborative law" case is one where the parties have signed a detailed written agreement that contains the following commitments and agreements:

a. A commitment not to go to court to resolve any dispute between the parties. The parties can "opt out" of this commitment in the event either party becomes dissatisfied with the process or in the event of an impasse.

b. Agreements concerning conduct and behavior that create a safe atmosphere to express and resolve conflict in a civil manner.

c. A commitment to concentrate on interest based negotiations vs. purely positional bargaining.

d. Commitments requiring full disclosure of information by both the parties and the attorneys.

e. Commitments which create a structure and time-line for the resolution process. Schedules are created by agreement rather than mandated from the court.

f. An agreement that if the parties impasse or opt out, the lawyers cannot represent either party in litigation.

g. Agreements to use only mutually selected neutral experts. These experts cannot testify in future litigation between the parties unless the parties so agree.

The big difference with collaborative law is that there is a process or a road-map that guides the parties in attempting to resolve their dispute. In a nutshell that process has six basic steps.

1. Deciding whether or not to use the collaborative law process, discussing and agreeing to the ground rules and signing the detailed collaborative law agreement.

2. Developing each party's interests, concerns and goals and the shared goals of both parties.

3. Handling any temporary matters that need to decided.

4. Gathering all information necessary for the parties to develop possible settlement options, negotiate and reach agreement.

5. Developing as many possible solutions and options as possible.

6. Selecting what the parties believe is the best available option that both parties find to be acceptable.

2. How is collaborative law different from a litigation case handled on a "settlement track" or from lawyering "cooperatively"?

Short Answer: In collaborative law, there is less risk of losing control of the case because of technicalities of law or procedure or someone's "hiding the ball". There is less risk of being misinformed due to "informal" discovery and less risk of being out-prepared or unprepared for a courthouse showdown if settlement talks break down. There is a "process" to follow vs. just kind of making it up as you go.

Details: The biggest difference between cooperative/settlement track cases and collaborative law cases is a detailed written agreement that contains the "ground rules" for the process and a specific road-map that guides the parties to resolution. The structure of the ground rules and the process itself creates safety, a level playing field, and less risk of being deceived. The process and its built in problem solving tools more than the personalities involved, helps encourage the resolution of conflict.

Differences: The following are some of the basic differences between a formal collaborative law case and a litigation case being handled "cooperatively" or on a "settlement track." One big strategic difference is that in a collaborative law case you do not have to balance the strategic risk of trying to settle vs. having/wanting to litigate. In a collaborative law case 100% of the effort is spent on trying to settle. This eliminates making strategic mistakes that come from trying to settle when you should be getting ready for trial or getting ready for trial when you should be trying to settle.

a. In general, for a fire to burn it needs two things 1) a spark and 2) fuel. Collaborative law accepts the spark and aggressively tries to keep from fueling the fire. In cases where the path to the courthouse is open and there is not a structured environment to address conflict, there is a greater risk of "fueling" the fire.

b. In cooperative/settlement cases, courthouse showdowns are more imminent which can lead to stress, anger, frustration, and "us the good guys vs. them the bad guys" mentality and actions. This all creates more potential fuel for the fire.

c. In cooperative/settlement cases there is a greater risk that a battle over discovery or other pre-trial matters will lead to a hearing where the perpetual rock fight starts - more fuel for the fire.

d. In collaborative law there is no formal discovery "just in case we go to court." There is no "make work" discovery requests or responses - you just get the information you need or want.

e. Even in cooperative/settlement cases, you still need to be concerned with some trial preparation, trial strategy and posturing in the event of a later trial. This inevitable polarizes the parties and makes settlement and compromise more difficult. In collaborative law all strategies are focused on trying to encourage settlement. You're not trying to prepare for battle and trying to settle at the same time.

f. In collaborative law there is no risk of being caught short with discovery deadlines or foul-ups. In cooperative/settlement cases there is a risk of being forced to litigate without adequate discovery requests or responses.

g. In cooperative/settlement cases there is a risk of making a bad deal because of the "didn't ask, didn't tell" mentality - more risk of deception.

h. In cooperative/settlement cases most mediations and settlement conferences are either lawyers only or caucus style and communication is filtered and indirect. You usually do not have a forum to present your client's proposals directly to the other side.

i. In cooperative/settlement cases face-to-face meetings are rare. Many lawyers refuse to hold face-to-face meetings. Also, even if you have a face-to-face meeting, it is harder to keep them productive and constructive without the conduct and behavior commitments of a written collaborative law agreement.

j. In cooperative/settlement cases, there may be a substantial amount of time, energy and money spent on getting ready for trial "cooperatively." Many successful litigators believe the way to successfully settle the case is to get it ready to be tried. In collaborative law, all of the time, energy and money is spent on settlement efforts - nothing is spent on discovery procedures or litigation preparation costs.

k. In cooperative/settlements cases, it is very easy to become frustrated with the settlement efforts and out of frustration just say, "I've had it! We're going to court!" The parties in a collaborative case and their lawyers know the collaborative lawyers will have to withdraw if the process fails. The collaborative lawyers have no financial interest in the litigation. The parties know they will have to hire new counsel if the process fails. This gives both the parties and the collaborative lawyers reasons to focus on the goal of settlement. It also makes it harder for the parties to end the negotiations and creates incentives to keep everyone working hard to avoid impasse.

l. Unlike cooperative/settlement cases, the collaborative process's structure has built in "cooling off" and "time-out" tools to keep the parties and the attorneys from impasse because of anger or frustration.

3. Why use collaborative law when 96% - 98% of cases settle anyway?

If 96%-98% of cases settle anyway why do we spend so much of the parties' money, time, effort and emotions in some fashion preparing the case for a trial when more than likely the case will never be tried?

If most of the cases are being settled, why not use a process to resolve the dispute that presumes from the start that the case will settle? Why use a process that assumes from the start that the case will be tried?

In short, collaborative law recognizes the fact that the vast majority of cases settle and creates a structured settlement process to better facilitate the settlement of those cases. Clogging up the courts with cases that are going to settle is an inefficient use of the court's time and the parties' resources.

4. How is collaborative law different from mediation?

In most mediations, the main negotiator is the mediator instead of one of the attorneys or the clients. The people with the best command of the facts and their interests involved are usually not allowed to negotiate directly with the other party. As in the children's game of telephone, much is lost in translation.

In collaborative face-to-face negotiations, communication is direct and the chances for misunderstanding and mis-communication are greatly reduced. Further, the parties are allowed to negotiate directly with the decision makers.

Mediations are typically "one-time" marathon settlement efforts. Mediation is typically an event rather than a process. In collaborative law, the negotiation of the settlement is typically done over the course of several sessions instead of all at once. This allows parties and their attorneys to think things through instead of making important, binding decisions when the parties may be tired and under pressure.

Mediations are often held when trial is imminent. This means the parties may have already incurred substantial trial preparation costs and these costs can make resolving the already difficult conflict even more challenging. Trial preparation costs are not part of the collaborative process. If trial is imminent, there is also more risk of coerced concessions given because of adverse collateral issues such as missed discovery deadlines, evidentiary problems, or witness availability.

However, mediation or other methods of dispute resolution may be used by the parties to resolve issues that arise within the collaborative process.

5. If the collaborative law process breaks down, doesn't that make the dispute even more expensive?

It may. Collaborative lawyers have strategies for dealing with impasse. They may refer the matter to mediation or to arbitration of a limited issue within the collaborative process. They may jointly seek the advice of a neutral expert or another attorney. Usually even if the collaborative law process is not successful, the parties will have at least refined the issues and exchanged substantial amounts of information and documents. This will likely reduce the amount and volume of discovery that needs to be done to conclude the case by litigation.

Overall, the costs of a failed collaboration may not necessarily increase the ultimate total costs, but this is a risk that should be considered before entering into the collaborative process. There will be parties who will not be able to afford trying to collaborate, failing, and then having to litigate.

6. What if the parties have limited resources and cannot afford the legal fees incurred to both collaborate and litigate if they have to?

The parties will have to make an informed decision about how committed and realistic they are about being able to reach a settlement through the collaborative process. If the parties cannot afford both a failed collaboration and litigation and there is a significant chance of impasse, economics may dictate bypassing the formal collaborative process. One benefit of the collaborative process is that it does not begin until a written collaborative law agreement has been signed by both parties and their attorneys. Before such an agreement is signed the parties and their attorneys have ample time to evaluate whether or not they believe the formal collaborative process is appropriate for them.

After an initial face-to-face conference to evaluate the case and the parties and discuss the collaborative law process, if just one of the parties or the attorneys objects to the process, it will not be a collaborative law case.

There are approaches available within the collaborative law process that should minimize the overall fees for clients concerned about fees. Some fee saving ideas include:

- the parties' agreeing to do most of the informal information discovery themselves with a later review by a neutral expert or the attorneys as necessary

- using a neutral expert to fashion initial options and proposals instead of first draft proposals being created by both of the lawyers simultaneously

Using neutral experts to develop initial settlement options to be later approved by the parties and the attorneys should allow the parties to reduce significantly the total cost of the collaborative process while at the same time allowing the parties to customize results that best fit the parties' interests.

Another option for clients using the collaborative process is a "pay as you go" plan. Lawsuits are abated during the collaborative process. This allows the parties to schedule meetings and work to be done in the case as they are able to afford it.

7. Why should I know something about collaborative law?

Because potential clients will be asking you about it. Some clients are specifically looking for collaborative lawyers and more clients are at least asking about the process. In Dallas, Houston, Austin, and other major cities in Texas and around the United States collaborative law practice groups are forming and marketing the process to the public.

On a state-wide basis the Texas Collaborative Law Council, Inc. (civil law) and the Collaborative Law Institute of Texas (family law) are actively publicizing the process and educating and informing both attorneys and the general public about collaborative law.

Local and national television, radio and print media are running stories about the collaborative law process. The state-wide Texas Collaborative Law Council, Inc. and the Collaborative Law Institute of Texas and many local collaborative law practice groups are marketing the process to business, corporate and general civil litigation law firms, accountants, financial planners, other professionals, and members of the clergy in all religions and faiths.

The net result of the publicity and marketing of this process is that over time, more clients are going to be interested in the process and asking about it. Many clients will have decided that they want to resolve their case using collaborative law before they even go see a lawyer.

Bottom line: If you don't practice collaborative law, in the future you may lose business because a client will want something you do not offer.

Another thing to consider is the benefits to you of practicing collaborative law such as:

- The personal and professional satisfaction that comes from helping clients creatively resolve their disputes in a dignified and civil manner.

- Being able to schedule everything by agreement vs. having the court or the opposing party "schedule" things for you.

- A much less stressful practice, no worries about discovery deadlines, witness or evidence problems or the stress and anxiety of trying cases.

- Much less "crisis management" and much more constructive problem solving.

- Happier clients who feel better about the legal fees they pay and who will refer you more work.

8. Can you make a living practicing collaborative law?

Yes. Collaborative law cases still require time, preparation and investigation of the finances and facts. The face-to-face meetings and negotiations are time intensive. Collaborative law cases involve substantially lower fees than a case that is litigated to a conclusion or a case that is prepared for litigation and settled "on the courthouse steps" or just prior to trial.

The fees required for a collaborative law case may be less, about the same or potentially even higher than a case handled "cooperatively" or on a "settlement track" - the difference is that the fees are spent entirely on settlement efforts rather than on preparing and developing the case for litigation.

9. What is a "practice group"?

A "practice group" is a group of lawyers who include collaborative law as a part of their practices. The lawyers in the practice group are unaffiliated and independent from each other. Some groups are "open," meaning just about anyone who has an interest in collaborative law can join. Some groups are "closed" meaning the group has come up with training requirements, years in practice, number of collaborative cases handled or other membership requirements or dues to join the group. The primary function of a "practice group" is to identify to lawyers and their clients other who are willing to handle a case using the collaborative law process.

10. Do I have to be in a "practice group" to practice collaborative law?

No. The only advantage to being in a practice group is to have names of lawyers you believe to be competent in collaborative law to whom you may refer the other side to see if the case is appropriate for the process. Likewise, if you're in a practice group, another lawyer in the group may give your name out as someone their clients might consult with about the collaborative law process. As more and more attorneys become trained in the collaborative law process the need for practice groups will diminish. Most collaborative law attorneys believe that over the next few years as the practice of collaborative law becomes more common-place there will be fewer small practice groups and the presence of statewide or county wide practice groups will replace the small groups.

11. How do I get started if I want to develop a collaborative law practice?

A good starting place for civil collaborative law will be the Texas Collaborative Law Council, Inc.'s web site which is targeted to be in place by December, 2004 at www.collaborativelaw.us. The Texas Collaborative Law Council, Inc. is a non-profit organization founded in September, 2004 by a group of attorneys in Dallas whose goal is to expand the use of collaborative law into areas of practice other than family law.

Family collaborative law organizations, such as the Collaborative Law Institute of Texas, also provide very helpful information. The Collaborative Law Institute of Texas's web site is www.collablawtexas.org. Both of these are state wide member organizations informing the public, attorneys, and other professionals about the collaborative law process and identifying collaborative law attorneys and other professionals to the public. The web sites contain lists of collaborative lawyers and other collaborative professionals, training seminars, materials, and links to other collaborative law web sites. Members are given access to collaborative law forms.

12. What if I don't have any interest in collaborative law and want to concentrate on litigation?

You should still learn something about the collaborative law process and acquaint yourself with lawyers practicing collaborative law. If you want to concentrate on litigation your services will be needed and in demand for those cases where the people have little interest or ability to settle their cases in the collaborative law process. Further, if impasses or other breakdowns occur in the collaborative law process the parties are going to need skilled and willing litigators to resolve their cases.

If you receive a referral of a collaborative law case that has reached an impasse, in theory you will not have to spend time and energy trying to settle the case. You can simply concentrate on the trial - a rare luxury in most cases. Hopefully, all possibilities for settlement have been exhausted in the collaborative law process and the litigator will be free to concentrate on trying the case and not be distracted by settlement negotiations or demands.

Appendix "A"

Collaborative Law Process Outline

Litigation Process vs. Collaborative Process Comparisons

Litigation Process Descriptors	*Collaborative Process Descriptors*
Parties in disputes often feel intimidated, fearful, anxious, powerless, out gunned, and not in control. Litigation is not designed to calm this uneasiness and, in fact, a common successful litigation tactic is to make the other side so uncomfortable they are coerced into settling.	Collaborative process affirmatively seeks to make both parties feel safe, respected, in control, and as comfortable as possible while working towards resolution - coercion is not part of the process. The goal of the process is to allow the expression and resolution of conflict.
Process often focused on assigning blame or fault for problems.	Process focused on reaching solutions to problems.
Unpredictable and impersonal results.	Predictable and personalized results.
May get results that you do not want or agree with.	No result without your express agreement.
Parties can feel unsafe - subject to cross examination, subpoenas, and depositions.	Safe atmosphere - civil, dignified, respectful.
Public.	Private and confidential.
Inconvenient scheduling - court and other side may determine the parties' schedules.	Schedules for meetings are by agreement.
Filtered process - information often exchanged subject to discovery rules and lawyer/party discretion. Often negotiate indirectly through lawyers.	Transparent process - same information available to all parties/attorneys at same time. Parties develop options and negotiate for resolution in face-to-face meetings.
Much time, money and energy can be spent getting ready for a trial that most likely will never occur. 96% - 98%of cases settle but that same percentage of legal fees are not spent on settlement efforts.	100% of all time, money and creative energy is spent on settlement efforts - fewer wasted financial, and mental resources.
Legal expenses are not all within your control. Other side can force you to spend money on depositions, discovery and hearings that you do not want.	All legal expenses are discussed and agreed upon. Legal resources and expenses are more efficiently used.
Cannot just "try" litigation.	Can try collaboration - if it does not work, you can always litigate.