The First Option: Collaboration

A Revolution in Dispute Resolution Processes

Lawrence R. Maxwell, Jr.
Attorney - Mediator - Arbitrator
Practitioner of Collaborative Law
8226 Douglas Avenue, Suite 550
Dallas, Texas 75225

214-265-9668 Fax 214-265-8343
lmaxwell@adr-attorney.com
www.adr-attorney.com

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I. Introduction

The collaborative process is a new and exciting tool in the ADR toolbox. The process is a structured, voluntary, non-adversarial approach to resolving disputes. The process is based on cooperation and team work, full disclosure, honesty and integrity, respect and civility, and parity of costs.

The collaborative process enables individuals, families, businesses and organizations to maintain control over their relationships with others by empowering them with the ability to ***peaceably*** resolve their dispute.

II. Why Collaboration? Are the learned lawyers trying to tell us something?

The idea of resolving disputes through negotiation and dialogue is certainly not new to lawyers:

> "*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be enough business."*
>
> **Abraham Lincoln**

But, lawyers will be lawyers.

> *"Lawyers are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties."*
>
> **Justice Oliver Wendell Holmes**

As lawyers, we too often assume a vested interest in our legal system, and rebel to basic change more so than any other group of professionals.

> *"Lawyers' faces are turned to the past and precedents. The bar is apt to see grave dangers in the alteration of any of the so-called 'absolutes.' That is natural, since none likes to have the rules changed - especially when the change requires re-education."*
>
> **Justice William O. Douglas**

Several years ago Chief Justice Warren Burger, in his not so subtle criticism of our litigation system which is operated by lawyers and judges, reminded us that lawyers need to return to their role as healers of conflict:

> "*Our litigation system is too costly, too painful, too destructive, too inefficient for civilized people."*

Justice Sandra Day O'Connor correctly sets forth the dispute resolution time line:

> *"The courts of this country should not be the place where the resolution of conflict begins. They should be places where disputes end, after alternate methods of resolving disputes have been considered and tried."*

Justice Felix Frankfurter, who was one of the Supreme Court's headier writers, once threw a rope of aphorism to judges who reverse themselves:

> *"Wisdom too often never comes, so one ought not to reject it simply because it has come late."*

The Justice's terse formulation of a truth is equally appropriate to new and creative ideas in the legal profession.

As leaders of thought and keepers of the rule of law, lawyers need to think and act creatively. Precedent is important, to be sure. But, our vocation is more than tutoring clients in ways of using the law against other parties. A lawyers primary task should not be to protect our clients from other lawyers.

Lawyers are problem solvers. A dispute is a problem to be solved, not a battle to be won. A lawyers primary task should be to assist clients in meeting their goals and interests, resolving disputes ethically, with civility and professionalism as quickly, peacefully and economically as possible.

The collaborative process can be used as the first option for resolving many disputes, reversing the traditional dispute resolution time line. Litigation becomes the last option, rather than the first.

III. Essential Elements of the Collaborative Process

A. Identification of the goals and interests of the parties;

B. Full and complete disclosure of relevant information;

C. Efficient communications;

D. Parties empowerment to make decisions on a level playing field;

E. Confidentiality; and

F. Good faith negotiations.

IV. How the Process Works

A. Written Agreement to Collaborate in Good Faith

The parties and their lawyers sign an agreement (Participation Agreement) to negotiate face to face in good faith to resolve their dispute without resort to a court imposed resolution, to disclose all relevant information and to engage neutral experts, as needed, for assistance in resolving issues. The written agreement must provide that the lawyers shall withdraw if the process is terminated.

Good faith means an honest commitment not to take advantage of a party through technicalities of law and to remain faithful to one's obligations under the collaborative participation agreement.

The process is completely voluntary, and choosing the collaborative process for resolving a dispute is the client's prerogative. The process is not appropriate for resolving all disputes, nor are all lawyers appropriate for the process.

Once a client has chosen to use the process, the collaborative lawyer will diligently and zealously represent the client in pursuit of the client's stated interests and goals. The parties and lawyers understand the process will involve vigorous good faith negotiations in face to face meetings, and the negotiations will be interest-based as opposed to positional bargaining.

B. Confidentiality

All participants in the collaborative process agree to maintain the confidentiality of any oral or written communications relating to the subject matter of the dispute made by the parties, their lawyers or other participants in the collaborative process, and all communications constitute compromise negotiations under Rules 408 of the Texas and Federal Rules of Evidence.

C. Suspension of Court Intervention

Court intervention shall be suspended during the collaborative process. No documents are to be filed which would initiate court intervention, except if necessary, to preserve causes of action, defenses, or to maintain some extraordinary relief. All participants should endeavor to reach agreement to eliminate the necessity for any such filings. No hearings shall be set, other than to submit agreed orders to the court.

D. Full Disclosure of the Good and the Not So Good

The collaborative process is not to be used as a subterfuge by clients with ulterior motives. A hallmark of the process is honest and voluntary full disclosure of relevant documents and information, which is the antithesis of litigation practice. Such communications are discoverable or admissible in an adversary proceeding only if they would have been discoverable or admissible independent of the collaborative process.

Further, the collaborative lawyer is not to take advantage of known mistakes, errors of fact or law, miscalculations and other inconsistencies. Such errors must be disclosed and corrected. Overcoming the win-lose, one-upmanship mentality of litigation, requires the greatest paradigm shift for lawyers.

Collaborative lawyers must in good faith believe their clients are acting in a manner consistent with the objectives of the collaborative dispute

resolution process; otherwise, the collaborative lawyer must terminate the process.

E. Face to Face Meetings

A hallmark of the process is face to face meetings of the parties and lawyers. Such meetings are the key to achieving a successful outcome. At the first meeting, the clients will define their goals and interests, recognizing and acknowledging other parties' interests and areas of common interest. A game plan will be developed for gathering information, setting meeting agendas and scheduling meetings.

F. Retained Neutral Experts

In the next stage of the collaborative process settlement options are developed and evaluated. At this stage, the parties may determine that retaining experts, qualified by knowledge, skill, experience and training, would be helpful in evaluating information, formulating options and evaluating options for resolution of the dispute.

Another hallmark of the collaborative process is that unless the parties agree otherwise, adversarial experts will not be engaged to counter each other's position. Rather, only neutral experts will be engaged. The cost savings to the parties can be enormous when the battle of the experts is avoided.

In choosing neutral experts, parties must have faith in the success of the collaborative process, because such experts' work product, opinions, mental impressions and facts upon which they are based are available to all participants in the collaborative process, and are not discoverable or admissible in any adversarial proceedings resulting from the dispute addressed in the collaborative process.

This is as it should be. The collaborative process seeks to insulate and limit the role of the collaborative lawyers and retained neutral experts in order to ensure that a party cannot attempt to use the collaborative process to gain tactical advantage in an adversarial proceeding should the collaborative process not be successful.

Although the neutral expert cannot testify in an adversarial proceeding involving the parties, such expert's findings may be introduced by stipulation of all parties.

G. Consulting-Only Experts

Parties in the collaborative process may privately engage consulting-only experts, who must have no first hand knowledge of the dispute, and no factual knowledge except for what the expert has learned through the consultation with the party and the collaborative lawyer. The identity of the consulting-only expert must be disclosed to all parties; however, the work product of a privately engaged consulting-only expert and communications between such expert and a client and lawyer is privileged, provided that such work product or communications are not reviewed by a neutral jointly retained expert. In such event, the attorney-client privilege is waived and the work product and communications of the consulting-only expert must be shared with all participants in the collaborative process; and the consulting-only expert loses the status of a consulting-only expert and becomes a retained neutral expert whose work product must be disclosed to all parties.

Parties must decide if the consulting only-expert is disqualified as a fact or expert witness. The consulting-only expert may not represent a party in adversarial proceeding arising from the dispute or in any other adversarial proceeding among the parties.

H. Outside Legal Opinion

Prior to or during the collaborative process, a party or group of parties may privately engage a lawyer, including a litigation lawyer, for the purpose of giving an outside legal opinion on a specific issue or issues. The identity of such lawyer must be disclosed to all parties; however, the work product and opinions of such lawyer are attorney-client privileged and are not required to be disclosed to other participants in the collaborative process.

Prior to signing the Participation Agreement, all parties will decide whether or not such a lawyer engaged outside of the collaborative process, and any other lawyers associated in the practice of law with such lawyer, are disqualified from testifying as a fact or expert witness, and prohibited from representing the engaging party

or parties in the dispute, or in any other adversarial proceeding among the parties.

If such outside legal opinion is *jointly sought by all parties* in the collaborative process, the opinion is to be disclosed to all parties and the lawyer is a jointly retained neutral expert.

I. Termination of the Process

A client or collaborative lawyer may terminate the collaborative process at any time, in which event all lawyers in the collaborative process shall withdraw from representation of their respective clients. Neither the collaborative lawyers, nor any lawyer associated in the practice of law with the collaborative lawyers, may serve as litigation lawyer in any adversarial proceeding regarding the subject matter of the collaborative process, or in any other adversarial proceeding among any of the parties in the collaborative process. The collaborative lawyers will assist their respective clients in a transition to litigation lawyers to avoid any prejudice to the clients, and the collaborative lawyers will cease further work on their clients' matters.

Upon notice of termination of the process to all lawyers, there will be a thirty day waiting period (unless there is an emergency) before any court hearing to permit all parties to engage other lawyers and make an orderly transition.

J. Understandings Regarding the Uniqueness of the Process

By signing a Participation Agreement, parties understand that no attorney-client relationship exists between one party's lawyer and any other party. The lawyers are independent from each other and representing and advocating only for their respective clients in the collaborative process. No legal duty exists that would require a lawyer to act on behalf of any party to the Agreement other than his or her own client.

The parties further acknowledge that unless the process is terminated, they are giving up the right to conduct formal discovery and the right to have their dispute decided in an adversarial proceeding.

V. Ethical Considerations

Ethics opinions supporting collaborative law have been issued by state bar associations of six states: Minnesota (1997), North Carolina (2002), Maryland and Pennsylvania (2004), Kentucky and New Jersey (2005).

In February 2007, the Ethics Committee of the Colorado State Bar (a non-integrated bar), issued a maverick ***advisory opinion*** stating that Colorado lawyers cannot sign a collaborative law participation agreement without violating the Colorado Rules of Professional Conduct.

In August 2007, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-477 approving the practice of collaborative law by lawyers. The ABA Ethics Opinion squarely supports the use of collaborative law agreements so long as the clients are well informed about the process.

VI. Major Milestones in Civil Collaborative Law

Although the civil collaborative law is still in its infancy, the movement to expand collaborative law beyond family law is gaining tremendous momentum nationally and internationally.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has established a Drafting Committee which is in the process of drafting a Uniform Collaborative Law Act. The Act will cover all areas of civil law and will be submitted to the fifty state legislatures in the summer of 2009.

The American Bar Association's Section of Dispute Resolution established a Collaborative Law Committee. The mission of the Committee is to educate lawyers and the public as to the benefits of Collaborative Law, to encourage the use of the collaborative process for resolving disputes in all areas of law and to monitor and keep lawyers and the public informed about developments in Collaborative Law.

Local bar associations in Dallas and Houston and other cities around the country have established Collaborative Law Sections. Collaborative law organizations throughout the

country which were originally established as family law practice groups are now expanding to include lawyers practicing in various areas of civil law, and new civil collaborative practice groups are springing up.
The International Academy of Collaborative Professionals (IACP), a worldwide organization with over 3000 members who practice primarily in the area of family law, established a Civil Committee, with the goal of expanding the use of collaborative process in all areas of civil law.

The ADR Group of the United Kingdom, the largest mediation network in the U.K., is expanding its services to include collaborative law, and is planning to train lawyers and other professionals in civil collaborative law. In Australia, collaborative law is moving ahead at a rapid pace. The Federal Attorney-General recently conducted the launch of collaborative law web sites in several Provinces and Territories.

Sherrie R. Abney of Dallas, has authored the first book to be published on civil collaborative law: *Avoiding Litigation: A Guide to Civil Collaborative Law.* With a background in family law practice, the author is uniquely qualified and eloquently demonstrates that the collaborative process can be used in resolving many civil disputes with the same success the process is experiencing in family law matters.

VII. Conclusion: An Idea Whose Time Has Come

There is no guarantee that the collaborative process will successfully resolve a client's dispute. But, if we draw ***a practical time line for resolving many civil disputes,*** collaboration should be the logical first option and litigation or other adversarial proceedings the last option.

Victor Hugo, a nineteenth century French poet, novelist, essayist, statesman and human rights campaigner, once said,

> *"Nothing is more powerful than an idea whose time has come."*

The collaborative dispute resolution process is just such an idea. Granted, it will not be an easy task to change the legal culture. But, all it takes for a good idea to come into fruition is a handful of individuals that want to make a difference.

VIII. Postscript

The collaborative process for resolving disputes is well established in the area of family law, in Texas and throughout the country. Texas continues to lead the way in expanding the use of the process beyond family law.

In the summer of 2004, a handful of individuals in Dallas set upon a mission of expanding the use of the collaborative process for resolving disputes in all areas of civil law, training lawyers and other professionals in the process and educating the public as to the benefits of the process.

Texas Collaborative Law Council, Inc., a Texas non-profit corporation was organized. The Council has developed Protocols of Practice for all lawyers, scheduled training programs, and developed a Participation Agreement and other documents to be used as guidelines by lawyers in the collaborative process.

The Council's website: www.collaborativelaw.us contains a storehouse of information, including the Protocols and a form of Participation Agreement, a history of the collaborative process, detailed information about the process, an interesting comparison of litigation and collaboration, current news about trainings and collaborative law activities and articles, papers and other valuable resources.

Appendix A to this paper is a listing of areas of law in which the collaborative process may be efficiently used to resolve disputes.

Appendix B is a Collaborative Law Procedures bill which was filed in the 2005 and 2007 Sessions of the Texas Legislature. A similar provision has been a part of the Texas Family Code since 2001. The bill will expand the process to all areas of law by adding a new Chapter 161 to the Tex. Civ. Prac. & Rem. Code.

In each Session the bill has been supported by many trial and transaction lawyers, judges, and business and trade organizations from around the state. Unfortunately, efforts to enact the

legislation have not been successful. The only opposition to the bill has been from the Texas Trial Lawyers Association and the Texas Association of Defense Counsel. One can only speculate as to the reasons that these organizations of trial lawyers would oppose the bill which supports a ***voluntary dispute resolution process*** that can benefit the citizens of the State of Texas.

On a positive note, collaborative law has already demonstrated effectiveness in bringing people to common ground. These two organizations of trial lawyers that historically have been unable to agree on the time of day ***collaborated*** in a common cause, to prevent passage of the collaborative law bill.

We are reminded of Winston Churchill's comment, after he spent many years as a member and dealing with Parliament as Prime Minister:

> "*There are two things that you do not want to see being made: laws and sausage.*"

In 2001, Texas was the first state to enact a collaborative law provision in its Family Code. The many supporters of the Collaborative Law Procedures bill will be back in Austin for the 2009 Session of the Texas Legislation. Hopefully, the third time will be a charm, and Texas will be the first state to statutorily expand the collaborative process for use in all areas of civil law.

New Frontiers:

Collaboration Can Resolve Civil Disputes in Many Areas of Law

Probate:
- Will contests
- Disputed guardianships
- Breach of fiduciary duty

Real Estate:
- Sales contracts
- Lender issues
- Commercial Leases
- Condemnation
- Title insurance

Business and Commercial:
- Intellectual Property
- Securities & Antitrust
- Computer & Technology
- Consumer issues
- Liquidation of businesses
- Partnership dissolutions
- Banking & loan work-outs
- Bankruptcy & Receiverships

Professional Malpractice:
- Lawyers
- Accountants
- Health care providers
- Architects & Engineers

Insurance:
- Personal injury
- Wrongful death
- Property damage
- Products liability
- Toxic torts
- Life, Health & Disability

Construction:
- Owners & Developers
- General & Sub-contractors
- Suppliers
- Architects & Engineers
- Sureties & Liability Insurance

Family Law:
- Divorce
- Child custody & support
- Spousal support & alimony
- Property division

Health Law:
- Hospital liability
- Heath care provider liability
- Partnership dissolutions

Elder Law:
- Care facilities
- Entitlements

Labor & Employment:
- Title VII
- Sports & Entertainment
- Non-compete covenants

Administrative & Public Law
- Federal, State & Municipal
- Quasi-governmental agencies

Other Areas:
- Aviation Law
- Environment Law
- Natural Resources
- International Law

APPENDIX A

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By: Carona S.B. No. 942

A BILL TO BE ENTITLED

AN ACT

relating to the resolution of certain disputes by collaborative law procedures.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 7, Civil Practice and Remedies Code, is amended by adding Chapter 161 to read as follows:

CHAPTER 161. COLLABORATIVE LAW

Sec. 161.001. POLICY. It is the policy of this state to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures.

Sec. 161.002. COLLABORATIVE LAW PROCEDURES. (a) On a written agreement, parties and their attorneys may undertake to resolve a dispute using collaborative law procedures.

(b) Collaborative law is a voluntary procedure in which the parties and their attorneys agree in writing to use their best efforts and make a good faith attempt to resolve their dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' attorneys may not serve as litigation counsel except to request the court to approve the settlement agreement.

(c) A collaborative law agreement must include:

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(1) provisions for full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case;

(2) provisions for suspending court intervention in the dispute while the parties are using collaborative law procedures;

(3) provisions for hiring experts, as jointly agreed, to be used in the procedure; and

(4) provisions for withdrawal of counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute.

(d) The collaborative law agreement may contain other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter.

(e) Notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative law settlement agreement if the agreement:

(1) provides in a prominently displayed statement that is boldfaced, capitalized, or underlined, that the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the attorney of each party.

(f) Subject to Subsection (h), a court that is notified 30 days before trial that the parties are using collaborative law procedures to attempt to settle a dispute may not, until a party notifies the court that the collaborative law procedures did not result in a settlement:

(1) set a hearing or trial in the case;

(2) impose discovery deadlines;

(3) require compliance with scheduling orders; or

(4) dismiss the case.

(g) The parties shall notify the court if the collaborative law procedures result in a settlement. If a settlement has not been reached, the parties shall file:

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(1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and

(2) a status report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance that the court shall grant if the status report indicates the desire of the parties to continue to use collaborative law procedures.

(h) If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date suit was filed, the court may set the suit for trial on the regular docket.

Sec. 161.003. CONFIDENTIALITY OF COLLABORATIVE LAW PROCEDURES. The provisions for confidentiality of alternative dispute resolution procedures as provided in Chapter 154 apply equally to collaborative law procedures under Chapter 161.

SECTION 2. This Act applies only to an action commenced:

(1) on or after the effective date of this Act; or

(2) before the effective date of this Act if the trial in the action has not begun before the effective date of this Act.

SECTION 3. This Act takes effect September 1, 2007.

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