The Brave New World of Mediation

By Sherrie R. Abney, JD

Do you ever get tired of people coming to mediation with ridiculously high demands while the other side claims no liability? Perhaps you have wished that you could speak privately to a party during a mediation to ask what he or she really wants to accomplish, but you seldom get that opportunity. Have you ever wanted to try to concentrate on solutions rather than listen to each party trying to lay blame on the other to avoid responsibility for his or her part in the dispute? If you would like an opportunity to avoid these kinds of scenarios, you should acquaint yourself with interest based negotiation and the collaborative process.

What is It?

Collaborative Law is a new voluntary dispute resolution procedure that is gradually being recognized as a common sense method of settling disputes and keeping parties out of the courthouse. For this reason, many litigation lawyers have attacked the process without giving any consideration to what it is capable of accomplishing for their clients. Consequently, before you accept courthouse gossip, hearsay, or the opinion of lawyers whose expertise regarding Collaborative Law would not stand up to a Daubert Challenge, you owe it to yourself and your clients to find out what Collaborative Law is really about.

Some litigation lawyers have viewed the purpose of the collaborative process as a means of drawing their clients away from them. Other lawyers have the attitude that anything that reduces the amount and duration of litigation should be shunned. Many mediators fear Collaborative Law will take away some of their business. These attitudes place the focus of dispute resolution on the wrong people. Collaborative Law is intended to serve clients rather than protect the comfort zones and pocketbooks of lawyers and mediators. The purpose of the collaborative process is not to compete with any process, person, or entity or to take control of the legal community. The purpose is simply to provide relief for people who wish to honestly and peaceably negotiate an agreement or resolve a dispute.

Resisting Change

Another road block to this innovative method of dispute resolution is an inherent resistance to change. Change disrupts the familiar by altering and replacing what is "known" with something that has no history. Statutes and case law dictate what can and cannot be accomplished in court, and the idea of settling a dispute without relying on the methods that have previously been employed is unsettling. The reluctance to accept Collaborative Law is natural and reminiscent of the response to mediation when it was first introduced to lawyers in the 1980's.

Litigation warriors have no reason to be concerned that Collaborative Law will have any greater impact on their practice of law than mediation did. In fact, the effect should be less since the collaborative process is voluntary, so no one can be coerced by contract or ordered by a judge to participate in the process. In addition, the first requirement for participation in the collaborative process is that the parties and the lawyers must make a written commitment to proceed honestly and in good faith to work toward achieving a fair and equitable resolution. This requirement eliminates many parties and lawyers who want to concentrate on "hiding the ball" and playing the "blame game" rather than developing beneficial options for their clients' futures. Mediators may find it a source of new business. Collaborative cases can reach points of impasse the same as any other dispute, and when that happens, the parties may opt to use a mediator trained in interest based negotiation.

Understanding the Purpose

Justice Sandra Day O'Connor once said, "The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried." Justice O'Connor's statement does not appear to have been made to promote competition between dispute resolution processes and our judicial system. It is more likely that the Justice was speaking from wisdom gained during her years of dealing with "unnecessary" litigation.

Gaining acceptance for interest based negotiation in a legal community that has always relied on positional bargaining has been a slow process. But progress is being made and collaborative cases have been successfully completed in the areas of medical error, partnership dissolution, construction, family business disputes, sexual harassment/retaliation, and probate. Recently AT&T used the collaborative process to settle a dispute with another large corporation, and several other large companies are exploring the use of the collaborative process for disputes in which they wish to preserve long term business relationships.

When is a Radical Procedure Necessary?

In the medical profession, a conscientious physician will treat a patient according to the facts that exist at the time the patient is examined. People suffering from extreme trauma, broken bones or multiple injuries are usually rushed to surgery as soon as possible. The cost of delay might mean the patient's life. However, most patients who visit their doctors are suffering from injuries or aliments that do not require immediate surgical treatment, and those patients receive alternative treatments in order to attempt a cure prior to the physician recommending anything as radical as surgery. When surgery is recommended, it is generally recommended as a last resort, and then only after a second opinion.

Despite the fact that many disputes would settle without anything as radical as litigation, most lawyers spend all three years of law school learning how

to go to court. They are taught that the primary solution to any problem is to win a lawsuit and get a judgment against the other party. Litigation is often begun without taking into consideration circumstances that would cause the parties to prefer to avoid an adversarial contest. Moreover, litigation may take months or years, and a judgment may not solve the client's problem since there are limits to what a court can order. Nevertheless, due to litigation being the only tool lawyers have been taught to use, there are a great many lawsuits that should never have been filed and cases that unnecessarily linger on court dockets for many months or years without resolution.

New approaches to dispute resolution are long past due. When a doctor believes surgery is necessary, patients are told their options, and they decide how they wish to proceed. It is time for litigation attorneys to follow this example and offer clients more options for dispute resolution. It is also time for mediators to develop new skills and look to new methods. Asking a lawyer, If you tried this case ten times, how many times do you think you would win?" or "What case law supports your client's position?" will not work in interest based negotiation. That is why training is of vital importance. These folks do not plan to go to court, and discussions regarding what a judge might decide will likely have little to do with the true interests and concerns of the parties.

Choosing the Right Cure

When a client walks into an attorney's office to discuss a dispute, how many options are made available and how well are these options explained? The options should depend on the facts of the case and the parties rather than the abilities or inclinations of the lawyers. Options to consider prior to resorting to litigation may include an invitation for the other parties to simply discuss the problem, or to mediate, or to participate in the collaborative process prior to filing any legal action. If suit has already been filed, these same options still exist and can be suggested prior to diving headlong into costly discovery battles.

Sometimes clients need immediate relief, and the dispute may require a temporary restraining order or injunction. Once emergency relief has been obtained, an investigation of the facts surrounding the dispute may be made to determine if "radical surgery" is still actually necessary. The same settlement options are available at any time prior to or during litigation. It is never too late to stop the adversarial tactics and negotiate.

When a settlement option other than litigation is chosen by the client, the very worse thing that can happen is that the other parties will refuse to discuss early settlement. However, a flat "No," is not likely when a serious offer to negotiate is made in a commercial dispute. In fact, given the opportunity, almost every party would prefer to settle rather than go forward with litigation.

So How Do You Settle Early?

The first step in finding the best way to settle a dispute is to take the focus off the attorneys and concentrate on the clients and what they need and want to accomplish. Although law students are seldom taught this in law school, disputes belong to the clients. The clients are the ones paying to have their disputes settled, and they are the ones who must live with the results after the lawyers have gone on to the next case.

n litigation, explaining settlement options to a client usually consists of the lawyer telling the client that a demand letter will be sent, and if the other party does not comply with the demand, the lawyer will file suit. A demand letter containing the threat of a lawsuit is sent, and the attorney waits for an answer. The party receiving the letter generally does not agree with the sender's position, or may be unwilling or unable to comply with the demand, so there is often a surly denial or no response at all, and a law suit is filed.

What would happen if the client was given the option of sending a letter simply stating that there is a problem that needs to be addressed, and the other parties are invited to a face-to-face meeting to discuss the possibility of amicably resolving the dispute? If all of the finger pointing, blame laying, and position taking that are usually present in demand letters are replaced with a simple invitation to talk things over before proceeding, more lawyers might receive favorable responses to proposals for early settlement discussions. Some cases will wind up in litigation, but a different approach could settle many cases faster and provide significant savings of money and stress.

If the client has already been sued or is about to be sued, a similar letter may be sent to the plaintiff. In this instance, the client's response may explain that the client does not agree with the demand letter or Original Petition, but the letter should plainly state that the client realizes there is a problem that must be addressed. Rather than denying or arguing with the demand letter or petition in a written reply, the defendant acknowledges that a problem exists and requests a face-to-face meeting to discuss an amicable resolution.

Fact-to-Face Meetings

It is important that the parties and their lawyers all meet face-to-face; otherwise, the lawyers will likely resort to positional bargaining and making offers and demands over the telephone which will result in leaving the clients completely out of the negotiations. In addition, telephone negotiations require lag time between offers and answers to allow lawyers to consult with their clients, and this increases the chances that communications will break down.

Allowing the lawyers to maintain complete control of all communications totally shuts out any opportunity for the parties to have a meaningful discussion that could further reduce the chances of misunderstandings. The "he said" "she said" method of communication with messages going back and forth through the lawyers is eliminated in the collaborative

process. Bringing the parties together to explain their interests and concerns allows them to clear up misconceptions and false assumptions they may have made about each other and gain an understanding of each other's situation. Most minor disputes will require only one or two meetings with matters usually being resolved in a matter of days instead of months or years. Mediators can follow this same approach of keeping the parties face-to-face as much as possible rather than wasting time traveling back and forth between caucuses and being asked to deliver ridiculous offers and demands. It is amazing how much more reasonable parties and lawyers become when they are face-to-face rather than attempting to use the mediator as a conduit for their barbs and discontentment.

Voluntary Discovery

Taking a non-adversarial approach to settlement is the first step in learning to be a collaborative lawyer. It is certainly not the "whole ball of wax," but it is a great beginning. The next step is to voluntarily provide the information necessary for the parties to make informed decisions regarding their options.

When information is obtained in litigation, it can occur at great expense to the parties. Some litigation lawyers would like to believe that formal discovery is necessary since it will guarantee that they will get what they have asked for. If this was true and formal discovery was foolproof, there would be no motions to compel, no one would ever lie under oath, and judges would not have to act as referees.

Litigators often forget that litigation has no more guarantees of discovering facts and evidence than any other method of dispute resolution. A dishonest person will not hesitate to conceal damaging information whether or not the information is given under oath.

A Safe Environment

There are a number of safe guards for information gathering that are provided to the parties that elect Collaborative Law. Careful screening and preparation by the collaborative lawyers should eliminate people who would attempt to abuse the collaborative process. However, in the event that someone was able to perpetrate fraud or commit some other breach of the participation agreement, the other parties to the dispute are able to institute an action against the perpetrator based on a breach of their written contract if they so desire.

All collaborative meetings are private and confidential. Anything that the parties say or do during the process is inadmissible at court. The only exceptions to confidentiality in most jurisdictions are the intent to commit bodily harm or admissions of the ongoing neglect or abuse of a child or elderly person.

To eliminate parties who would attempt to use the process to gain information that later could be used against the other party, the participation agreement requires the collaborative lawyers to withdraw from representation if the parties fail to settle. Consequently, there is an additional layer of safety since the collaborative lawyers and any lawyers in their firms will never be able to cross-examine the other parties regarding the subject matter of the dispute. The withdrawal provision is also added incentive for the parties and lawyers to do their best to reach resolution. If the parties fail to settle, they will be required to hire new counsel, and the collaborative lawyers will be out of a job.

Voluntary discovery is conducted during the face-to-face meetings. Parties determine the information they require to come to an agreement and request that the person in possession of the information deliver it. Unlike litigation, the participants have the advantage of looking the party delivering the information in the eye if they have questions regarding the validity or accuracy of any information that is disclosed.

The face-to-face meetings are conducted according to agendas. If a topic is not on the agenda, it will not be discussed until the next meeting unless all participants agree. This removes any possibility of presenting new information in a manner that would place the other parties at a disadvantage.

If for any reason a party decides not to continue in the collaborative process, that party's lawyer may give notice at any time, and the party can simply walk away. In litigation if a countersuit has been filed, you cannot opt out without the permission of the other party.

Facilitators and Conveners

If someone should decide to do a collaborative case but that person has not been trained, the first option is to get trained as soon as possible. A second option is to find a collaboratively trained mediator and ask that person to act as a facilitator. If both of the lawyers attempting to do a collaborative case have not been trained, they may employ a collaboratively trained lawyer/mediator to convene and facilitate the face-to-face meetings and assist the untrained lawyers in finding mentors.

There are those who would discourage anyone who has not been trained in the collaborative process from attempting to do Collaborative Law, but with the proper attitude and assistance from someone who has been trained, it is possible to successfully use the process. More important than training is the ability to participate in a non-adversarial manner. This is a skill some people naturally possess while others will continue to be left wanting despite the amount of training they receive.

When a case is overly complicated, has more than two parties, or involves extremely emotional issues such as medical error or sexual harassment, a facilitator should always be considered. Face-to-face meetings may be conducted with only the parties and the lawyers, but often a third party neutral can save the participants a great deal of time by keeping the conversations focused on the agenda topics and moving forward. In addition, a

neutral facilitator may intervene in discussions regarding highly emotional issues and call for breaks or timeouts to deter participants from becoming too adversarial.

Dream or Reality?

Is this approach to dispute resolution an impossible dream? Apparently the American Bar Association does not think so. Collaborative Law has gotten enough attention to warrant the ABA Standing Committee on Ethics and Professional Responsibility to publish Formal Opinion 07-447 on August 9, 2007, stating that it is perfectly ethical for a lawyer to represent a party in a collaborative case provided that the lawyer thoroughly explains the process, so clients will understand what benefits and risks they are taking. Perhaps the ABA will one day require that litigation lawyers give the same sort of explanation regarding the risks and benefits of litigation.

Although Collaborative Law began in family law, it is rapidly being acknowledged as an important addition to all areas of civil practice. The DR Section of the ABA established a Collaborative Law Committee in February of 2007. The committee voted to pursue the promotion of the collaborative process in both family and civil cases. Since that time lawyers practicing in business law have begun to use the process to negotiate contracts. By taking the interests and concerns of the parties into consideration, they are better able to avoid litigation in the future.

The Uniform Law Commission put its stamp of approval on Collaborative Law with the adoption of the Uniform Collaborative Law Act (UCLA) in 2009. March 30, 2010, Utah's governor signed the Utah version of the UCLA into law making Utah the first state to enact any portion of the Act. The Act is being introduced in a number of other state legislatures with the only resistance continuing to come from the litigation lawyers' organizations.

Conclusion

There are already jurisdictions that require lawyers to explain alternative dispute resolution options to their clients before committing them to litigation or any other dispute resolution process. The time is coming when a more comprehensive set of skills will be necessary to be successful in the practice of law and mediation. If these professionals want to provide quality services to their clients they had better begin offering a variety of dispute resolution procedures, or, in the alternative, consider a working relationship with professionals who have the ability to think outside of the box in regard to settlement solutions.

Understanding that the purpose of Collaborative Law is to bring relief to people in legal disputes is the first step to a collaborative practice. The next step is to put that purpose into practice. Lawyers and mediators can begin by giving their clients the option of taking a non-adversarial approach to settlement. Today would be a good time to start.

Sherrie R. Abney is a collaborative lawyer, mediator, facilitator, and trainer. She was co-founder and first chair of the Dallas Bar Association Collaborative Law Section and is past chair of the ADR Section of the Dallas Bar. As a founding director of the Global Collaborative Law Council (formerly the Texas Collaborative Law Council), she has served as Vice President of Education and Training for the organization since 2004. Sherrie has presented at many dispute resolution conferences all over the world, and she has trained lawyers in the collaborative process in Ireland, Australia, Uganda and at Oxford University as well as cities across the U.S. and Canada. Currently, Sherrie serves on the ADR Advisory Council for the State Bar of Texas and the Collaborative Law Committee of the DR Section of the American Bar Association. She is the author of *Avoiding Litigation, A Guide to Civil Collaborative Law* and numerous articles on the use of Collaborative Law in resolving civil dispute.

To learn more about Collaborative Law, interest based negotiation, and other forms of dispute resolution, go to www.adr-attorneys.com.

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