



CIVIL CASE COLLABORATIVE PRACTICE: A REALITY CHECK AND A PROTOCOL

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Notwithstanding the increasing number, here in Massachusetts, nationwide and throughout the world, of business lawyers interested in the concept of Collaborative Law, there are extremely few known cases in which two business people and their lawyers have signed a participation agreement with a disqualification clause and thereafter resolved the case through a series of “four-way” meetings. For those of us who have tried to market Collaborative Law, it often has been difficult even to sell the concept to an existing client, particularly an institutional client, who relies on its lawyers for all manner of things, and who therefore cannot understand why the lawyer and his firm will not be able to continue the representation if negotiations break down. For that reason, aspiring collaborative lawyers themselves are sometimes skittish about proposing collaborative law to an existing client, lest the client abandon the firm altogether. Even where an individual lawyer has convinced himself and his existing client, or a new client, to suggest Collaborative Law to the other party, it is likely to be even harder to convince the other party, who also may have had a longstanding relationship with a lawyer or law firm, that the lawyers must withdraw

if the collaborative process is unsuccessful. Thus, the model, as it has been defined in the family law context, simply is not readily or easily marketable in business to two very essential target groups – our clients and the individuals or institutions with whom they have a dispute. And while presentations to prospective “end users,” such as construction industry professionals, insurance industry professionals, family business advisors, human resources professionals, associations of in-house counsel and the like, have generated interest and “buzz,” these potential clients, at least to date, have remained clients of the litigators and transactional lawyers they know best.

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agreements that have been used to resolve family law disputes. Those differences include, without limitation, (1) the fact that one or more parties to a civil dispute already may be represented by trusted counsel, in-house or outside, rendering unlikely a willingness to assent to disqualification, (2) there are few guidelines as to what a case is “worth” if the case is litigated because jury verdicts are all over the map and there are so many variables, (3) many parties to a civil dispute no longer need or desire an on-going relationship, (4) the disputes are often primarily about money, (5) the decision-makers may not reside in the same state, (6) the decision-makers may not have the time or inclination to negotiate and discuss process agreements, (7) civil disputants usually do not need the state to end their relationship (as do divorcing parties), so there may be an disincentive to settle early and more of a tendency to play chicken by waiting until a case actually is filed, and (8) factors 3 through 7 as well as others may make a series of four-way meetings impossible, impractical or undesirable.

Nevertheless many of us who have been trained in Collaborative Law techniques consider ourselves collaborative practitioners and have undergone a paradigm shift in the way we resolve disputes, with excellent results. To us, Collaborative Law (or Collaborative Practice as the concept has been called by the International Academy of Collaborative Professionals) is more than the sum of its parts. In essence, Collaborative Practice revolves around several important and revolutionary

principles. The principles include (1) interest-based negotiations only, (2) a pledge not to threaten litigation during negotiations and to make clear that the purpose of the engagement is an intention to settle, (3) use throughout of respectful tone and language, (4) acknowledgement of the other parties’ interests and goals, (5) promotion of your client’s interest to the other party and counsel, and concomitantly promotion of the other party’s interest and its counsel’s to your client, (6) ensuring that your client understands the potential costs and benefits as well as the “collateral damages” of full scale litigation, (7) use of joint and neutral experts, (8) meetings among the necessary parties if possible and desired and (9) exploration of non-monetary aspects of a settlement to further a satisfactory outcome. In fact, when lawyers follow these principles, it is unlikely that litigation will result.

Here are a series of developing protocols for a Civil Collaborative Practice Case.

1. Qualifying the Client. It is critical to have a lengthy meeting with the client to determine, first of all, whether the client has a viable claim. Simply being fired from a job, for instance, is not a “claim” unless the termination from employment arguably violates some statutory or common law rule or constitutes a breach of contract. The other party will rarely be interested in negotiating unless there is a semblance of a claim. You also have to determine whether the client understands the “client-centric” nature of Collaborative Practice; if they are willing to compromise and to consider the other



party's interests; and if the client has reasonable expectations of the range of outcomes. Clients claiming they "want justice" or who are expecting the seven figure payment they just read about in the newspaper are not qualified clients. Similarly clients on the other side (the ones who have to reach into their pocketbooks) who have a "take no prisoners" approach to asserted claims and tell their lawyers, "I'd rather pay you to fight than pay that [fill in the expletive] a dime" are not qualified to engage in a collaborative process. Where there is an immediate danger of assets being dissipated or fraudulently transferred if you even raise a claim on behalf of your client, then your client may need to use the court process to secure assets, thus precluding collaborative negotiation at the outset.

2. Initiating the Collaborative Practice Negotiation. If you happen to know the in-house lawyer for the other party, it can be appropriate to initiate the negotiation with a phone call. Phone calls to principals are more problematic and may run afoul of the disciplinary rules prohibiting contact if the lawyer knows that the client is represented by counsel in the matter. Usually a collaborative negotiation is initiated through a letter. It is worth figuring out with the client to whom the letter should be sent. If there is a choice, the right choice will maximize the possibility that the other party will be willing to negotiating collaboratively. The letter should (i) identify the claim sufficiently so that the other party understands that there is something to

negotiate, (ii) identify your client's real interests, with transparency, (iii) make clear that the purpose of the letter is to initiate settlement to further those interests, (iv) propose a meeting among lawyers and principals, where practicable and (v) adopt a tone that at once expresses advocacy and conciliation. Under certain circumstances it is appropriate to propose how the dispute might be resolved. The contents and tone of the initial contact is critical for maximizing the chance of collaboration.

3. Contact with the Principal or In-house Counsel: During the first phone call, it is critical to emphasize the desire to settle and not to threaten litigation, even if you had intimated in the letter that the alternative to settlement could be potentially destructive for both parties. Explore whether a meeting would make sense. Promote your client to the other side. Find out what information the other party needs to help resolve the dispute. Request only the information you need to investigate your client's claims further

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and that will put you in the same position as the lawyer for the other party to analyze your client's claim, understand the countervailing interests and suggest settlement alternatives.

4. Process Agreements: If the negotiations involve a series of preliminary steps, such as an investigation by a neutral, an

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appraisal by a jointly retained expert or a medical examination for the purposes of determining accommodations for a disabled employee, a formal process agreement, or at least a series of

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confirmatory letters as to how the information will be used, should be in place. The parties need to agree upon a timetable, confidentiality and whether or not the information can be used if negotiations fail.

5. Meetings: As with family law Collaborative Practice, it is important to establish, after introductions, that the meeting is confidential and for the purposes of settlement. Emphasize the important of mutual benefit, cost effectiveness of the solution for both parties, and the open exchange of information. However, this said, if some of the questions raised at the meeting seem irrelevant to the dispute resolution and have the potential to create acrimony that will divert the parties from the task at hand, it is important to question, in a non-confrontational way, whether that information really is necessary. At these meetings, mediation techniques such as “active listening,” “reframing” issues and “reflecting back” are very important. It is equally important to create the “container of trust” that our family law peers discuss. Obviously a disqualification covenant further promotes the “container of trust”

because the participants in the meeting know the other lawyer is not preparing her cross-examination should negotiations break down.

However, many of us who have used the other key Collaborative Practice principles have established trust even without a disqualification clause.

If there are a number of issues, or a number of steps to take before the issue can be resolved, there should be an agenda to help everyone focus. Someone should take notes and disseminate a typed-up version to everyone involved so there are no misunderstandings later. Agree upon a series of next steps, if these are necessary. Explore whether third party professionals should be retained if you have not already made that determination before the first meeting.

6. Future Contact with Other Lawyer and Your Client: One of process changes brought about by applying Collaborative Practice principles to civil dispute resolution is the promotion of the other side’s interests to your client just as you are promoting your client’s interest to the other party and its counsel. In mediation, there is a concept called “reactive devaluation,” in which anything that is suggested by the adversary is automatically “devalued” simply because it comes from the adversary. By personalizing your client and the other party and its counsel, you can avoid reactive devaluation and cause more mutual “buy-in” to the solution.



7. Make Hurdles a Mutual Effort in Problem Solving: Sometimes a solution may be agreed upon only to find out that it is difficult or impossible because of, for instance, an IRS ruling or statutory prohibition. It is important to make the other party and/or counsel your “partner” in finding the best alternative so that the deal does not collapse and, further, to educate the client that the problem was unanticipated and that he or she needs to be flexible.

8. CBB (Clients Behaving Badly). Losing a job, feeling that the other party breached a lucrative contract, or breaking up a partnership, can be a very emotional experience notwithstanding the fact that these situations arise in a business context. It is important to recognize the human side of the negotiation. That means sometimes explaining to the other party or its counsel your client’s behavior or explaining to your client the reasons why the other party or its counsel may have reacted in a way that has angered your client. Sometimes apologies for behavior are in order. Small, seemingly irrelevant setbacks can derail settlements. By doing your utmost to commit to the settlement process, you can ensure that emotional issues, while acknowledged and addressed, do not sabotage a workable settlement.

9. Giving Thanks. This may sound trite,

but consistently thanking the other counsel and the other party for the concessions or suggestions made and

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commending your own client for his or her patience and fortitude helps tremendously in making the process collaborative.

These protocols are part of an evolving effort to codify Collaborative Law or Collaborative Practice as it applies in civil arena and to ensure that parties in civil cases benefit from this transformative process of dispute resolution.



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