

## **COLLABORATIVE LAW FOR BUSINESS DISPUTES?**

By: L. Stephen Rizzieri

I am not an expert in theory or practice in the area of Collaborative Law. Others are better versed in both. However, I do have a perspective and an opinion that I would like to share.

Shortly after leaving an in-house position, I was interviewed by a panel at a prospective new employer. I very confidently and proudly touted my history of having managed a legal department as a profit center, in an historically litigious environment. I was certain the new employer would agree there was no better person for the job. Legal departments were known mostly as an economic means to receive legal services and to forego the large fees often paid to outside counsel. They were never intended to be a profit center. Lawyers were more a necessary evil among those that were the real business movers and shakers in the organization.

At this interview, in a West Texas drawl, I was quite politely informed, “around here we like to do things a little different[ly], and we like to try to work things out”. That was the last time I boasted about having operated as a profit center, and the knocking heads mentality of the practice of Law.

When I went to Law school, as many others have no doubt experienced, I was schooled in the art of being the best advocate for the client that one could be. This, you were bound by oath to accomplish. To do this, an advocate must tirelessly promote all arguments, and resist all offensives and counterattacks. If your argument won the day then you had fulfilled your mission. If you lost, well there was the appeal, where the process continued.

How many of us were raised in Law school with the following: (i) if the law is on your side then you pound on the law; (ii) if the facts are on your side then you pound on the facts; and (iii) if neither the law nor the facts are on your side then you pound on the table?

I often wonder whether that is still being taught in our schools. Especially since I learned that a local Law school recently pulled the plug on a long-standing Collaborative Law course offering. There is, at the least, tacit approval and messaging that to be a proper lawyer one must attempt to win at all costs. If you were to look solely at the level of competition that prevails in the schools, not only as to academics, but also as to internships and interviews and all manner of interaction beginning at the 1L level, you could only conclude that we are in fact perpetuating the aura that to “win” is what is truly important. And, by “winning” I mean to trounce the other side. If you do not have that mentality can you truly be a real advocate?

But, the systematic approach to the practice of Law has evolved, albeit at a snails pace. Seminars compare the relative merits of litigation, arbitration and mediation. In a purely litigious atmosphere, the warrior advocates pound on the facts, or pound on the law, or pound on the table! Usually, the judge will indulge the antics of warrior advocates, save in the cases of abuse or contempt. And my favorite scenario pits two warriors at battle in the arena of the Court, where they vilify the adversary yet make plans for their weekend tee-time in the hallway.

Then, there is arbitration. This is supposedly a less contentious means to resolve disputes, though you couldn't prove it. Emotional issues continue to drive the waging of the dispute, where again the advocates look for a means to "win", here meaning to convince the arbitrator of the righteousness of argument. Arbitration is supposed to add some civility to the process, but is Solomon's sword swung by an independent really the best way to resolve issues between contentious and often emotional clients?

Of course there is always mediation, where the warrior advocates are poised to persuade the soothsayer mediators that really, their Client has been wronged and if only the mediator could persuade the other party how awful its litigation position is the matter could be resolved in just a few hours. All they have to do is pay up! At least through mediation the parties themselves do have some control over their own destiny. But still, isn't the mediator, as wizard, really just manipulating the parties toward the outcome. And aren't the warrior advocates complicit in this wizardry? If the mediator is successful the belt is notched for another "successful" mediation. If not, then the parties move back to the arena, and the judge is miffed that the case has not been resolved without further use of the Court's limited time and resources. Let's also not forget how many judges tout their time on the bench in a future career as a mediator. As if this arena offers a very special training for the resolution of problems and disputes among very human parties.

### **Debut Collaborative Law**

The first time I asked a colleague his view of the Collaborative Law process applied to a business dispute, the response was, "let me get this right, you want me to turn my client over to you to solve his problem because you don't think I can do that?" I let the comment go, but I should have emphatically replied, "yes." Because of the inherent nature of advocacy, through litigation, arbitration and even mediation, a large part of the Bar is ill equipped to jointly, collaboratively problem solve.

We even need ethics opinions to guide us in our use of working together with other counsel and professionals in the representation of our respective clients, so that we don't run a fowl of our obligations of confidentiality and zealous representation.

As an aside, the adversarial approach is not limited to dispute resolution, but also permeates many negotiations where parties are actually trying to jointly complete a contract or a transaction. How many corporate clients would prefer a “deal friendly” lawyer to one that prolongs negotiations by hammering on inconsequential “wins” while churning billable hours? Certainly some industries are more prone to knocking heads (sorry construction). But if the parties are interested in utilizing a well reasoned approach to deal making I wonder if there isn’t a better basis for resolving subsequent disputes simply because there is a better overall relationship that has been nurtured. And, this could subsequently lead to a longer relationship and additional business between the parties.

There is hope. The Family Law Bar has utilized the tool of collaborative problem solving for a long time. The Collaborative Law Institute of Texas describes the approach (in the Family Law context) as one where: (i) clients have control over the process and outcome; (ii) a civilized, respectful, creative and individualized process for determining relationships is fostered; (iii) the importance of future relationships is recognized; (iv) innocent parties are protected from the adverse impact of litigation; and (v) a high value is placed on personal responsibility for handling conflict with integrity. Please take a look at the Collaborative Law Institute of Texas website if you are interested in getting the full flavor of this process.

We know that the Collaborative divorce process affords the parties, often emotionally vested in a certain outcome, the opportunity to work together to address the goals and needs of all parties. Most importantly, where children are involved, the process provides the opportunity for parents that may be deeply divided to communicate with the assistance of professionals. So instead of a fight to the death, the parties may come away with the ability to share in the future, birthdays, graduations and grandchildren, and the children get to see how adults work together to solve problems.

I think this is often where business lawyers and litigators get lost. How does this possibly help me in my multi-million dollar dispute or negotiation? I think we tend to minimize the transference of these principals to business situations. What can we possibly learn from a process that deals with two soon to be ex-spouses? What can we possibly learn from the Family Law Bar? Isn’t my Wall Street experience superior? Isn’t my multi-million dollar transaction bigger and more important? Isn’t my need and ability to be a warrior for my Client bigger than any new learned form of communication between two emotional individuals?

What is the application of the principals utilized in the Collaborative Law approach, successfully utilized by the Family Law Bar, to business transactions and disputes? Or, is there one? I would submit, the answer is yes, in the proper context, why not? Another way to ask the question, are the tools of litigation, arbitration and mediation all we have to offer?

Like I said at the beginning, I am not the theory or practice expert in this area. Others are making great strides in educating and fostering progressive legislation to legitimize the process. Even though legal education apparently prefers the old school ways, my hope is that we don't have to wait for a yet to be born generation to be educated differently before these concepts are implemented nationwide. I think we owe it to ourselves, and the profession to explore a better way.

Like I was told in West Texas, to "do things a little different [ly] around here."

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