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# The Front Edge of the Wave

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Many of us remember when mediation was first introduced. In Texas, after the statutes governing mediation took effect, there were waves of skepticism and indignation at the thought of bringing in a perfect stranger to "settle" an ongoing case. There were many questions about the process, and few definitive answers. Who could become a mediator? Would there be any specialized training? And, more importantly, would it really work or would it be a waste of time? I remember a very early mediation when no one—the mediator included—could decide whether or how to conduct the opening caucus. I also remember mediations taking place a year or two after mediation had begun to catch on, where at least one party and their counsel had little idea of what they were doing. The uninformed often settled poorly, or not at all. Over the years the details of mediation have slowly come to be formalized. Today it is a rare company that has not experienced mediation. Some experiences have been good, some not so good.

The latest development in alternative dispute resolution, known as Collaborative Law, may accomplish what mediation typically cannot, by giving clients greater control of the resolution of the dispute and allowing companies to decrease their litigation costs. Like mediation before it, the Collaborative Law process is likely to be codified in various state statutes. In Texas, a growing number of judges, lawyers and corporate officers are taking a hard look at Collaborative Law and working at a steady pace to see it implemented in many types of cases where it has not been used before, such as insurance defense, coverage disputes, professional liability claims, and more. For those who delay in learning and utilizing the process, litigation as usual may be a costly and outdated endeavor.

So what is Collaborative Law? In Collaborative Law all parties to a dispute sign an agreement requiring them to disclose facts directly relevant to the dispute, exchange documents on an agreed-upon schedule, jointly retain experts to investigate uncertainties, and participate in joint conferences with pre-set agendas to work toward resolution of the dispute without resorting to litigation or arbitration. This approach fast-tracks discovery and short-circuits the motions practice that often attends the discovery process. It also directly involves the parties, as early as possible, in setting meeting agendas, calendaring all steps of the process according to their own schedules, and working toward a mutually agreeable outcome.

More than 96% of all civil cases are resolved by settlement prior to trial or a final hearing in arbitration. In the typical model, settlement occurs after each side is financially and emotionally exhausted, often just before trial. Most of the costs incurred in getting to resolution are generated by the kinds of pre-litigation activity that may be useful in the event of trial, but often prove to be excessive in the event of settlement. The enactment of the new Federal Rules dealing with discovery of electronically stored data is but a harbinger of the increasing risk of exorbitant discovery costs. Many of these expenses can be avoided by use of Collaborative Law.

Collaborative Law has already been used with great success for more than a decade in some of the most contentious and emotional cases handled by civil lawyers - divorce and custody disputes. When used successfully, this approach reduces costs because it takes much of the grandstanding and gamesmanship out of dispute resolution. It is anticipated that the Collaborative Law process will be even more successful in less emotional disputes.

How is Collaborative Law different from mediation? A significant difference is the requirement that the collaborative lawyers withdraw from representation if the case does not settle but proceeds to litigation. Another difference is that

mediation is usually conducted after the bulk of pre-trial expenses have been incurred. Because there is no method in the mediation process by which the parties identify and freely exchange truly relevant evidence, and because full discovery is typically a necessary predicate to settlement negotiations, by the time the parties get to mediation they have often already spent a substantial portion of the litigation budget. Also, unlike in mediation, the parties to the Collaborative Law process negotiate over time, setting their own agendas and strictly adhering to them. The element of surprise and the "gotcha" tactics of litigation and even mediation are removed from the process, putting the parties in the position of negotiating the types of settlements possible only where all parties are well-informed and business considerations prevail.

An additional benefit of the Collaborative Law process may be the preservation of the relationship between the contending parties. Because the parties are meeting regularly and negotiating directly with one another and with one another's counsel, they can frequently avoid the scorched-earth approach to conflict resolution (and resulting bitterness between litigants) which are often the result of pretrial litigation. Situations in which an ongoing relationship will likely continue after the dispute is resolved can be ideal for Collaborative Law.

What if the process doesn't work? In Collaborative Law, either side may terminate the process at any time. Communications made during the process are treated as confidential, just as they are in mediation. Documents and information produced in the course of the Collaborative Law process are admissible and discoverable in any ensuing litigation only to the extent the same are admissible and discoverable independent of the Collaborative Law process. However, facts and documents disclosed during the Collaborative Law process can be used in any ensuing litigation if, and to the extent, that the parties have agreed ahead of time. Such an agreement can help keep discovery costs down even if litigation ensues.

Is Collaborative Law the best choice for all cases? No, it isn't. Cases in which one or more parties have committed fraud are probably not suitable. The level of cooperation and commitment to resolution of the conflict that is required in Collaborative Law is too high to admit participants who have already demonstrated a predilection for deceit and underhandedness. Although Collaborative Law is contractually afforded the same confidentiality that parties enjoy in the mediation process, the heavy reliance on the mutual exchange of information, at least with regard to topics agreed to be relevant by the participating parties, requires a degree of trust, professionalism and/or commitment to resolution of the conflict that will not be present in all cases.

Ready to take the leap? You won't be alone. One large Texas corporation has already begun negotiating the use of Collaborative Law with parties with whom it contracts. Collaborative Law forums and bar committees are being formed throughout the United States, and lawyers and other professionals are rapidly training in Collaborative Law. Proposed legislation governing the Collaborative Law process will be considered by the Texas Legislature in its current session.

The developing impact of Collaborative Law is exemplified by a statement by Judge Ross Foote of the 9th Judicial District Court of Alexandria, Louisiana:

> I think it is completely changing the culture of the conflict. To me the fact that we can go to the collaborative process and empower the people, the litigants, the parties, to make their decisions, to grab control of their future as opposed to come in, say all the bad things they can and hope the judge rules their way. I think this is the front edge of the wave and I predict in 10 years this will be the norm.

Collaborative Law is coming of age. And now is an excellent time to learn how and when to implement it.

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