A NEW WAY OF DOING BUSINESS: COLLABORATION

By Sherrie R. Abney

In case you haven't noticed, there are a number of changes going on in the area of conflict resolution. New avenues to resolve disputes are appearing on every level of society. Individuals, corporations, and world powers are seeking new directions. Growing dissatisfaction with our courts, lawyers, and judges has initiated the pursuit of alternative approaches such as preventative law, holistic law, restorative justice, therapeutic jurisprudence, and collaboration. Those who still hanker for a good fight are finding that the cost has become financially and emotionally prohibitive.

Effects of Litigation

The psychological and emotional effects of the legal process has resulted in the establishment of special courts to handle disputes over mental health, families, juveniles, domestic violence, and drugs. All of these movements seek ways to end conflict, guarantee equal treatment, and promote healing. Nevertheless, the problem remains: the parties are still in court relying on others to craft solutions for problems created by the behavior of one or more of the parties. Neither the litigants or their counsel are committed to seeking the best alternatives for both parties. The result: litigants give control of their lives to others and are seldom, if ever, satisfied with the outcome.

The idea of eliminating conflict through negotiation and dialogue is certainly not new. "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." Abraham Lincoln

The concept of treating the sore before it festers and erupts into a full blown infection works. The sooner intervention occurs, the greater the

opportunity to contain expenditures of time, stress, and money. All attorneys will tell you they have settled at least a few cases, but they will also tell you that many times settlement occurred on or near the day scheduled for trial after months filled with written discovery, depositions, expert reports, motions to compel, motions to enjoin, motions to enforce, mediation, name calling, and, of course, exhaustion of the client's monetary resources.

Here is just one example of the failure of litigation to serve any legitimate purpose:

> A middle aged man came to mediation with no hope of resolving a dispute that started over nine years ago with his employer. Marvin appeared at mediation because it was court ordered. This was his third lawsuit over the same problem. The first suit was supposed to have been resolved when the court indicated that the employer should remedy the situation. A final order was never entered, so Marvin pursued the problem. The second suit filed was a claim by Marvin against the same employer for retaliation. It was tried to the bench, and eleven months later Marvin was still waiting for a decision. The judge had recently asked for another brief, and there was a good chance for an appeal by Marvin's employer if the decision went in Marvin's favor. The third suit grew out of the second with allegations of continued discrimination and retaliation. The third suit was the subject of the mediation. Marvin had spent over $10,000.00 per year for the previous nine years. He had also given up a significant portion of his life.

What would Marvin have said if he had been asked at mediation what he thought of courts, lawyers, judges, and the opportunity to have your day in court? Marvin thought he "won" his first suit when the court stated it would rule in his favor. Nine years later Marvin was still wondering, "Is there really such a thing as `winning' at court?" It was hard to imagine that Marvin could have been any worse off than he was with litigation.

What is "winning at court?" Is winning getting money? Is winning punishing the other side? Or could winning be a means of satisfying the interests of the client? If dispute resolution focuses on the clients' "interests" instead of "winning," there would be a greater number of people who would experience lasting satisfaction with the results of litigation. Unfortunately, most litigation focuses on the law or who has the most power. Until the interests of the parties are addressed, no one really wins, and there is no lasting resolution.

Attorneys who practice family law will tell you that even a good result at trial will not necessarily satisfy a client. A day in court seldom, if ever, gives the degree of satisfaction the parties want or expect. Even if it was possible for one party to get 100% of the pie, there are always costs to litigation no court can compensate. Just ask someone like Marvin.

Collaborative Approach

The collaborative approach to law began as the response of a family law attorney to the inequities of litigation. Collaboration has caught the attention of attorneys in other areas of civil law and the approach is rapidly spreading. This approach or process is referred to by several names: collaborative law, collaborative approach, collaborative divorce, collaborative dispute resolution, and collaborative problem solving -- to name a few. The approach is based on team work; full disclosure; honesty; respect; civility; healing; integrity; parity of costs; exploration of alternatives to determine a fair resolution; and parties maintaining control over the results. If you think this sounds like fantasy, hold on because it gets weirder. If the parties cannot settle, the attorneys have to withdraw. The collaborative attorneys cannot try the case.

The Process

The parties and attorneys sign a participation agreement that sets out the rules that will be followed during the process. In family law cases, the mutual injunction which is normally included in temporary orders is added to the participation agreement. Parties in other forms of civil litigation may enter an agreed injunction or other order to protect property, toll limitations, etc. Parties who abandon the collaborative process may file the agreement with the court for enforcement if necessary. Parties and counsel in any civil collaborative case may craft Rule 11 agreements appropriate for the circumstances of their particular situation.

Collaborative attorneys are able to focus on the interests of the parties and resolution of disputes rather than devoting time and energy preparing for trial. Most litigation ends in settlement. The difference between collaborative resolution and regular litigation is that collaborative settlement happens months, sometimes years, in advance of settlements that occur on the court house steps. The collaborative approach redefines good lawyering as analysis, clarification, negotiation, and compromise. Good lawyering becomes the ability to utilize skills seldom seen in litigation. Trial attorneys rely on taking advantage of the other sides' mistakes and oversights; they often seek to avoid revealing the entire truth

of the matter if the whole truth is not advantageous to their client; and they use power plays or similar tactics which are all unacceptable in the collaborative approach.

Collaborative attorneys must give up taking positions and search out creative options, or they are out of a job. This approach guarantees that the parties will have good representation through the settlement phase; and in the event settlement fails, the parties can still get an attorney whom they believe is "meaner than a junkyard dog" to take them to trial.

When the parties and attorneys have agreed to the collaborative approach, several four way meetings are scheduled. The first meeting will involve identifying issues, interests, selection of neutral experts, and planning for the exchange of information. (In Texas family law, the parties use the state bar forms 7-1, 7-2: sworn inventory and appraisement. Collaborative counsel working on other civil disputes may draft Rule 11 agreements appropriate for necessary discovery.) Parties and their attorneys agree to request and produce only those documents necessary to arrive at a final resolution.

Should it appear that an opposing party is concealing information or otherwise violating the participation agreement, the opposing party's attorney should be approached in private to determine if there is an infraction. Open communication can prevent the process being derailed as a result of misunderstandings or the imaginations of the parties. In the event any attorney becomes aware that his or her client is not being honest by concealing information or acting in an inappropriate manner, that attorney must immediately confront the client and urge the client to correct the situation. If the client continues to violate the agreement, the attorney must withdraw from representation.

The participation agreement creates privity of contract between the parties and attorneys, so it is conceivable that a party could bring a breach of contract suit against opposing counsel if that counsel was aware of bad acting or fraud by his or her client; failed to withdraw; and allowed entry of a final order. In addition, the likelihood of a successful settlement is not a realistic expectation when the parties refuse to honor the agreement. Withdrawal is the only logical choice.

Once initial discovery is exchanged, the parties and attorneys will commence discussion to determine each party's interests, expectations, and concerns. Attorneys must emphasize that discussion sessions should avoid any attorney or party taking a position.. Once taken, it is often difficult to abandon the

position, and this will limit the party's ability to keep an open mind to alternative solutions. The focus of the meetings is to develop as many options as possible and consider how the various options can facilitate the realization of each party's interests. During sessions, counsel and clients should actively listen for what is right about a suggestion or plan proposed by the other party in lieu of pouncing on what is wrong with it.

The collaborative approach is not a unilateral process; therefore, unlike mediation, no one comes with an offer. Each attorney and client prepares for the first meeting by gathering as much pertinent information and documentation as possible. Successful collaboration requires the participation of everyone in crafting viable solutions. No one should ever be asked, much less demanded, to accept and participate in a plan which substantially affects an aspect of their life, family, property, or business when they have had no part in the development of the plan; yet, that is what business as usual demands each and every day when decisions are left to a judge or jury.

As the parties explore possibilities, they should be encouraged to concentrate discussions on the future. When negligence is an issue, responsibility for the damage must be discussed; however, the attorneys should direct the discussion to the acts of the responsible party and avoid judgmental personal attacks. Casting blame or finger pointing is, at its very best, nonproductive.

During the process, it is hoped that each party will become comfortable with opposing counsel. For this reason, it is very important clients understand that although this is a collaborative approach, each attorney has a duty to represent his or her own client and a duty to honor the participation agreement. Neither attorney has a duty to represent the opposing party. Clients should rely on their own attorney to answer their questions, and no discussions regarding the case should occur between a party and opposing counsel outside the hearing of that party's attorney..

Retooling the Mind

One of the two most difficult obstacles for most litigation oriented attorneys is the duty the collaborative approach imposes on them to correct any mistakes by opposing counsel. If you realize that an order drafted by opposing counsel reflects the agreement of the parties but for some reason is unenforceable, you have the duty to identify the error to opposing counsel and see that it is corrected prior to entry of the order. Since you and your client have agreed to abide by the

collaborative rules, this should not conflict with zealous representation of your client's interests. Attorneys not comfortable with this kind of agreement should not consider representing a client using the collaborative approach.

The second obstacle for litigants is to stop considering the law **first** and the part**ies last**. **You must stop talking to your client about how the law will limit your settlement agreement.** The law need only limit the agreement enough to keep the parties from committing an illegal act. Other than an illegal act there are **no limits except the interests of the parties.** For example in family law, the court cannot order the payment of child support after a child is eighteen and has finished high school; however, the parties **can** agree that the parent paying child support will continue to pay for college and put that in an order which may be enforced as a contract.

Let the parties consider their interests first. Tell your client about his/her rights under the law later. Emphasizing interests is vitally important to setting the proper tone for the four way conferences. You will not create an atmosphere conducive to settlement by starting off with talk about a party's rights under the law; what a judge would decide in this case; or the party's BATNA (best alternative to a negotiated settlement). You were not hired to litigate the case; your Employment Agreement forbids it, so don't even think about it. Again, attorneys not comfortable with this kind of agreement should not consider representing a client using the collaborative approach. Serving the personal interests of your client as opposed to his/her legal interests is not an easy job.

Experts

The parties may discover that some decisions cannot be made without expert assistance. In that event, a single expert is hired, and the parties share the expense unless agreed otherwise. Any reports from experts or any other person hired to assist the parties should be marked, "**For Settlement Purposes Only in the Collaborative Law Process**." The parties further agree not to call any person involved in the collaborative process as a witness should the case end in litigation.

The prohibition against experts being called to trial is extremely advantageous to the parties since more people will usually be willing to act as neutrals than would be available to act as advocates. For example, in a medical

malpractice case, the best expert opinion may not be available if that expert knows that ultimately there will be the possibility he/she will be required to testify as a "hired gun" against another doctor or health care provider. This is also true of many psychologists, CPA's, and other professionals.

Arbitration

Some collaborative employment contracts in California contain provisions for a judge or arbitrator to decide any issue that the parties in family disputes cannot settle. Many California attorneys have come to believe that arbitration is not in the spirit of collaboration and have deleted this clause from their contracts.

In other civil cases, arbitration may be the only way to get a specific issue decided and allow the parties to move forward. Parties may not be able to reach agreement on the definition of a term in an intellectual property dispute or the definition of standard of care in a malpractice case. In business as usual litigation an impasse on this question would be entrusted to a jury with little or no knowledge of the particular technical area. In collaborative dispute resolution, the parties could pick a panel of three qualified arbitrators and have an educated answer in a few hours, freeing them to continue on with the resolution of any remaining issues.

Mediation

Mediation is another story. When parties have difficulty with particular aspects of their case, they have the option of employing a mediator. Mediators in collaborative law cases should find a completely different relationship between the parties and attorneys. There will be less need, if any, to caucus since the parties are sharing all information necessary to resolve the case. The amount of time wasted at game playing should be eliminated. Have you ever played the "smoking gun" game? That is when one side tells the mediator not to reveal something to the other side, even though the other side has already told the mediator they know about it, but they have instructed the mediator to not let the other side know they know. Then the first party will say that they know that the other party knows, but don't tell the other side they know they know, etc.

Collaborative law is a dream for a mediator. No stupid games; just a lot of new challenging tasks. The mediator will likely be expected to contribute to the creative settlement process and do more than carry water or beat up on a stubborn party. The mediator is free to put away all of the court reports and

statistics of cases won and lost in the county. No more time wasted speculating on what Judge So-in-so would do if he heard "that" motion. No more speeches to intimidate the parties about the "only qualification you have to have to be a juror is a driver's license." No more bullying folks into taking responsibility for solving their own problems. When a collaborative case comes to the mediator, they **already** have taken responsibility. Imagine working with parties who have a written commitment to act in good faith and are there because they want to work for a fair settlement! In the words of Gomer Pyle, "Shazam".

Attorney Fees

Attorney fees are handled in several different ways. A few attorneys use a pay-as-you-go method, collecting fees prior to each session. Most appear to use the traditional retainer. The attorneys do not necessarily received equal pay, but the parties agree that each attorney will be paid. Some agreements state that payment in full will be made to both attorneys prior to the entry of a final order.

Collaborative Attorney Groups

Groups of attorneys who accept collaborative law cases are currently forming in many states. The groups usually fall into one of two categories: open or closed. Members of some closed groups refuse to accept a case with an attorney that is not a member of their group. The rationale is that they cannot trust just any attorney to honor the participation agreement, so they refuse to work with someone they do not know believing it will put their client at risk. There can also be the questions regarding disputes over different kinds of training and forms.

Refusing to work with someone you do not know or who is not in your group appears to fly in the face of the collaborative process by limiting the freedom of the other party to chose any collaborative counsel that party wishes. This approach also fails to consider the fact that a party may not wish to retain an attorney having an association with opposing counsel. More importantly, attorneys who work opposite each other in collaboration on a frequent basis may tend to fall into comfortable patterns and rely on the same or very similar solutions over and over again eliminating the need to search for new solutions which may be better suited to the interests of the new parties. Introducing new blood may have its risks; but when a cost-benefit analysis is performed, the risks of poor results from inbreeding appear greater.

Another argument for closed groups is the necessity to control group members who fail to honor participation agreements or act inappropriately while engaged in the collaborative process. There appears to be no reason that an open group cannot exercise the same control over members through peer review and suspension or expulsion. Finally, some groups are requiring attorneys to be board certified prior to being admitted. Query: Since board certification emphasizes litigation skills which are diametrically opposed to collaboration skills, why require it? Currently there is no certification for attorneys who engage in dispute resolution in Texas, but even if there was, I doubt that passing a test can convert a dyed in the wool warrior into a peacemaker.

A possible solution to the question of forming groups may rest in the ADR Sections of the local bar associations. Mentors, CLE programs, referral panels, section websites, and peer regulation committees already exist. Why not use them to regulate? This would give the local bar and the collaborative attorneys the organization and support they need while providing the public a **neutral** (does that word sound familiar?) referral service. The criteria for selecting a collaborative law attorney should not depend on membership in an open or closed group, nor should it depend on board certification. A good collaborative law attorney must be capable of zealously representing the interests of the client within the parameters of collaborative dispute resolution. Tom Arnold of Howrey Simon Arnold & White has described such a person:

> The collaborative attorney is not the decider of any merits issue, but director of case development and the coach of the process, and then also an evaluative co-mediator dedicated to the interests of the parties more than either the legal rights or raw power of the party. ...guiding rather slowly and deliberately by persuasion rather than by decision or decree. I am a healer, a peacemaker.
> And you know, for most disputes, that is a lot better than being a barracuda-warrior whose warmaking and its burdens and costs, as often as not, eat up most of the potential gains of `winning' the trial by (intellectual) combat at the court house.

Past and Future

The idea began with Stuart Webb of Minneapolis in 1990 as a remedy for family disputes. That is all it was -- an idea for a better way to conduct business. Collaborative dispute resolution has spread to family practices in many states. California has passed legislation regulating collaboration in divorce cases. It is good to find out what is going on in other states, but when it comes to putting this idea into practice in Texas, it is better to develop our own way of doing business. Texas laws are different from Minnesota and California. Our culture is different. There is no absolutely right or perfect way to do anything, but there are a few basic premises that must be followed to preserve the spirit of Mr. Webb's idea. Those premises are honesty, fair dealing, integrity, full disclosure, and a promise to withdraw if the process fails. That is all collaborative dispute resolution is about. So you can dress it up and require hours of training and certification and impose forms and rituals from other states, but after all is said and done, have you turned a barracuda-warrior into a peacemaker?

Predictions are all over the board regarding the future of the collaborative dispute resolution approach. There is speculation that the time will come when an attorney will commit malpractice if the potential client is not advised that there are alternatives to adversarial proceedings. And of course, there are those who say that collaborative dispute resolution will never work. There will be times when both predictions will be correct. The prediction that will apply in a particular case will depend on the parties and on the attitudes and abilities of the attorneys. As for me, I am waiting for the day when litigation at the court house is the "alternative" to dispute resolution.