The Addendum to the Civil Collaborative Participation Agreement.

By Sherrie R. Abney, J.D.

Purpose

The civil collaborative process may be applied to disputes which arise in many different areas of the law and include situations involving multiple parties. The nature of the disputes may necessitate the use of a variety of experts and employ more than one alternative dispute resolution procedure. Setting up the ground rules for the collaborative process will require the parties to make some decisions regarding how the process will be handled. The more decisions the parties have in writing, the less chance there will be of later encountering misunderstandings. Making written decisions regarding the management of the process during the first joint meeting will avoid many unnecessary surprises and disagreements that could result in an impasse or termination of the collaborative process prior to resolution of the dispute.

The participation agreement is the contract which governs the collaborative process, and like any other contract, the participation agreement should be as complete as possible. The addendum to the participation agreement is designed to assist the parties in managing the process and tailoring the terms of the agreement to the preferences of the parties and the subject matter of the dispute. In addition, the addendum alerts the parties to certain situations which they may not have anticipated but that may arise during the collaborative process or immediately after the termination of the process should the process end prior to resolution of the dispute.

Building A Safe Environment

The addendum begins by asking when and where the parties will have the next three joint meetings. Anyone who has conducted or participated in mediations knows that getting the parties to agree on a time and place can be a time consuming task when it is done by letters, telephone, fax or e-mail. At the first joint meeting the parties are face to face, and the collaborative lawyers should take advantage of this opportunity to schedule the next three joint meetings. Next, the length of the meetings may be agreed upon, and the parties should understand that they need to be prompt, and that no meeting will go beyond the scheduled time unless it is agreed to by all of the participants.

The parties have little or no idea of what to expect in the collaborative process, so setting up the next three joint meetings and establishing time limits for the joint meetings will allow the parties to have some predictability regarding their participation in the process and to plan time for any preparation that will be necessary for their participation in the joint meetings. This predictability is the first step in beginning to build the safe, comfortable environment which is necessary to enable the parties to freely and constructively contribute to the collaborative process.

Assuming Responsibility

When the parties start out by agreeing on the time and place of the meetings and

continue to other management decisions which must be made in order to move the process forward, the parties have proven that it is possible for them to reach agreement on some matters. Getting the parties to agree on housekeeping chores begins setting the tone for the joint meetings. The more agreements the parties are able to make, the easier it will be for the parties to agree on the difficult issues which will be addressed later in the dispute.

In litigation, the attorneys make all of the decisions regarding hearings, discovery, depositions, and other deadlines. Parties are told where and when to appear, and are accustomed to following instructions rather than being a part of the decision making process. In the collaborative process the parties begin actively making decisions from the onset. Involving the parties in decision making early on will better prepare them for the time when they will be required to decide on the terms of the settlement agreement.

Who Let Him In?

As the collaborative process continues, one of the parties may expect to be able to bring another person, who is not a party to the dispute, to the joint meetings. The non-party person could be a friend, relative, CPA, or any other person on which a participant has relied to make decisions. Notice of the party's intent to include another person in the joint meetings should be given to all parties at the first joint meeting.

Any disagreements or concerns over the attendance of any person who is not a party to the dispute should be resolved prior to that person being allowed to attend any session. If all participants to the process agree that a non-party person may attend one or more joint sessions, the person who is not a party should sign a confidentiality agreement stating that the non-party person will maintain the confidentiality of the collaborative process and not disclose anything that is said or done in the joint meetings to any person or entity outside the collaborative process. The language of the agreement should also state that any of the other parties may give notice, at any time, that they no longer want the non-party individual to attend the joint meetings, and that upon receiving notice, attendance of such person will immediately cease.

Can We Talk?

Another consideration for the addendum is the methods by which the parties will communicate during the term of the collaborative process. Some parties may only wish to communicate with the other parties to the dispute in the joint meetings. The parties should be polled to see if they do or do not desire to have any discussions regarding the dispute outside of the face to face meetings. If one of the parties is intimidated by another party or just plain doesn't like another party, it may add to their comfort level to have the other parties agree to not discuss the dispute with them outside the presence of their lawyers.

On the other side of the question, a probate, partnership, or similar dispute where the parties have a prior on-going relationship, one or more of the parties may want to discuss certain aspects of the dispute outside of the joint meetings. An instance may arise when the parties wish to communicate in regard to gathering information in order to eliminate

duplication of effort, or the parties may want to discuss some other matter having to do with the mechanics of the collaborative process that could be accomplished and reported to the other participants at the next joint meeting. That being the case, the parties may want to indicate limitations, if any, that they will place on the subject matter which may be discussed and how the communications will take place, i.e. fax, phone, e-mail or face to face.

If one of the parties is cooperating with another party's collaborative lawyer in gathering information, the participants may agree that any party to the dispute may speak to any other party's collaborative lawyer regarding certain aspects of the dispute without that party's own lawyer being present. This would ordinarily not be done in litigation, but there are times in the collaborative process when a party might go to the other collaborative lawyer's office to review, identify, or organize documents; or sign documents previously reviewed by their own collaborative lawyer. When the participants are comfortable with this arrangement, it is not necessary for all, if any, of the collaborative lawyers to be present. Participants may or may not want to address this situation in the addendum to the participation agreement.

Forward Focus

In litigation, the parties rely on the law to determine who in the dispute is to "blame." Blame then determines liability. Depending on the circumstances, the law may require too much or too little of one of the parties which will result in an inequitable outcome. Since the purpose of the collaborative process is not the assessment of blame but the resolution of the dispute in a manner that will give each party the greatest possible benefit, the focus of the process should not be on the law. To achieve a fair and equitable result, the parties will explore all available options and only exclude those options which are illegal or against public policy.

Continual references to what would happen if the parties went to court, or what rights the parties may be waiving under the law due to their participation in the collaborative process, takes focus away from the best possible result and hinders the progress of the joint meetings. Consequently, the parties may wish to agree in the addendum that during the joint meetings they will not discuss the possible outcomes should the dispute be resolved in an adversarial proceeding outside the collaborative process. Discussions regarding possible outcomes of litigation can take place in private conferences between each party and his or her collaborative lawyer.

Flexibility

The participants in the collaborative process should keep in mind that the addendum was created as a management tool. Items listed in the addendum may not be an issue in every dispute, and if any item in the addendum is not relevant, it may be crossed out and initialed. If there is an item not mentioned in the addendum that the parties want to address, it may be added.

Retained Expert

The addendum goes on to mention the use of retained experts. When an expert is needed, the use of a single retained expert is the most economical course of action for all of

the parties. Should the parties decided to employ more than one retained expert, they may wish to agree that each party will select one expert, and the party selecting a particular expert will be responsible for that expert's fees. Depending on the circumstances of the dispute, one party may be willing to pay all expert fees. Whatever the agreement of the parties, selection and payment of fees should be given consideration at the beginning of the collaborative process and recorded in the addendum.

There will be instances when the parties will not know if they will want an expert or how they will handle fees at the time of the first joint meeting. In that event, decisions regarding how the matter of the expert(s) will be managed may be made as the parties progress through the collaborative process and the need arises. Whatever the situation, it is important for the parties to understand is that there may be a possibility of needing to hire one or more experts, and should hiring an expert become necessary, decisions will be required concerning whether one or all parties will retain the expert and how the parties will compensate the expert. Having this discussion at the first joint meeting prepares the parties for that possibility.

Outside Legal Opinion

Provisions in the civil collaborative process allows for an outside legal opinion by an attorney who is not a collaborative lawyer. The attorney giving the legal opinion will normally be retained by one party and all communications between that party and the outside legal opinion attorney will be privileged and confidential. The relationship between the outside legal opinion attorney and the engaging party and their collaborative lawyer will make it possible for the engaging party to have someone with expertise in the area of the litigation provide legal opinions throughout the collaborative process.

Although communications of the outside legal opinion attorney and the engaging party are privileged and confidential, the outside legal opinion attorney's identity must be disclosed to all parties to the dispute. If the parties have retained an outside legal opinion attorney prior to the first joint meeting, they must disclose the attorney's identity at the time the participation agreement is signed. If any of the parties decide to retain an outside legal opinion attorney after the participation agreement is signed, disclosure of the outside legal opinion attorney's identify must be made to all parties prior the outside legal opinion attorney actually being retained.

When an outside legal opinion attorney is retained, all of the parties must agree on whether or not the outside legal opinion attorney will be allowed to testify as a fact or expert witness in any adversarial hearing outside of the collaborative process or if that attorney or any attorney associated with that attorney will be allowed to represent the party in an adversarial proceeding regarding this dispute or any future dispute among the parties outside of the collaborative process.

Consulting Only Expert

The parties must make similar decisions regarding the consulting only expert. The consulting only expert may be an attorney or someone else who has knowledge, experience or expertise in a particular area

that is relevant to the dispute. An attorney who is engaged as a consulting only expert may not represent any party in the dispute in an adversarial proceeding; however, the parties may agree that the consulting only expert may testify as a fact or expert witness in an adversarial proceeding. The identity of the consulting only expert must be disclosed prior to the commencement of the collaborative process, or prior to engaging the consulting only expert if the decision is made to retain the expert after the participation agreement has been signed.

Information Gathering a/k/a Discovery

The parties will have agreed in the participation agreement to voluntarily disclose all information which is relevant to the dispute. Once the collaborative process is underway, the parties will begin gathering the information. Despite the terms of the participation agreement which state that the parties will voluntarily disclose all information relevant to the dispute, situations may develop in which one of the parties might require reassurances that another party is acting in good faith. For example: in a dispute which involves the existence or nonexistence of a document, the plaintiff believes the document exits and is in the possession of the defendant, but the defendant claims to have no knowledge of the document and believes that the document never did exist. The plaintiff might request that the other party to sign an affidavit stating that the document is not in the defendant's possession and that the defendant has no knowledge of the document's whereabouts or existence.

All documents which are created within the collaborative process are considered to be confidential, so the party requesting the affidavit must also request permission to use the affidavit in an adversarial proceeding should the collaborative process terminate prior to settlement. If this request is not made, the affidavit would be of little use since no one outside of the collaborative process would ever have access to it. In this example if the affidavit is true and correct, the affiant should not object to the affidavit being discoverable.

The addendum provides an opportunity for the parties to stipulate to what types, if any, discovery methods that they will use in the collaborative process, or to indicate that decisions regarding discovery will be made at a later time. Should the parties make a decision on discovery tools that they later find unworkable or too restrictive, the parties may amend that portion of the addendum.

It should be remembered that formal discovery should not be encouraged in the collaborative process should only be used in a very limited manner.

How To Avoid Attorney Withdrawal

Well over ninety per cent of all cases filed in the courts settle prior to trial whether they are litigated, mediated, or collaborated. There has been a great deal of emphasis put on the fact that the collaborative lawyers must withdraw if the dispute does not settle during the collaborative process. Current statistics show that there is no reason to believe that more than one out of every twenty-five cases, at the very most, would ever leave the collaborative process and go to litigation. With the possibility that only four out of every one hundred cases being at risk for having to

hire a second attorney and the fact that the parties are aware of this possibility before they enter into the participation agreement, this requirement should not create a hysterical reaction, but apparently it is the only near legitimate reason the "nay sayers" can find to object to the collaborative process.

With advanced planning on the part of the participants, the collaborative lawyers may avoid litigation all together. The participants may agree in the addendum that if they reach an impasse and the impasse is not settled by mediation or another alternative dispute resolution procedure, the parties will go to binding arbitration.

Arbitrate Don't Litigate

In Texas, Section 154.027 of the Civil Practice and Remedies Code provides for binding arbitration if the parties stipulate in advance that the arbitration decision will be binding. The agreement to arbitrate may be made at the time the addendum to the participation agreement is signed, and it should stipulate that should the dispute go to arbitration, the binding arbitration award will be memorialized in a written agreement which will be filed with the court having jurisdiction over the dispute as a Rule 11 agreement. (Rule 11, Texas Rules of Civil Procedure). The parties may also decide if they will use one or three arbitrators. Three arbitrators might be preferred in larger cases that would have ordinarily gone to a jury if the dispute were resolved in litigation.

Arbitration falls under the alternative dispute resolution statute; thus, it is protected by the confidentiality guidelines set out in Section 154.073 of the Texas Civil Practice and Remedies Code. Under the confidentiality provision of this section the parties who desire to preserve the privacy of their dispute are afforded protection that is not available in ordinary litigation.

In Conclusion

The addendum to the participation agreement is not only a tool which allows the parties to manage the collaborative process, it is a primer for the parties to begin decision making and taking responsibility for resolving their dispute. As the parties consider the various questions in the addendum, they will get an overview of the kinds of options that will be available to them and begin to realize what they can expect to happen on the road to settlement.