Collaborative Law, Partnerships and Prenups

By Jeffrey N. Fink

Several years ago, I spoke on a few conference panels about expanding the use of collaborative law techniques to contract preparation, particularly relationship-heavy contracts like prenuptial agreements and partnership agreements. It was all theoretical. The speakers on the panels were being creative to try to provoke discussion. Nobody on the panel had actually done one.

We now have some experience under our belts. We have learned that these are do-able and that clients like them! In the right context and with the right parties, collaborative techniques make the process faster and easier for clients and counsel. The end product seems to reflect the clients’ real goals at least as closely as traditionally negotiated contracts.

The contracts are conceptually similar in many ways. A prenup looks to the end of a marriage, whether by death or divorce. It may contain unenforceable precatory language about “lifestyle” during the course of the marriage, but lifestyle provisions are not the main reason for the agreement. A partnership agreement also contemplates the end of the partnership – death, disability, resignation, retirement, sale, etc. – and then addresses major aspects of how the business relationship will be conducted from the start, like management and financial splits. Occasionally, a prenup will seek to bridge the conceptual gap by addressing financial splits between separate and marital income and expenses during the course of the marriage. The roots are similar: how do we start this relationship? However, the nature of the contracts and their legal context dictate slightly different paths for the parties and collaborative team.

Taking a page from the dispute resolution playbook, I start collaborative contract negotiation with two process steps:

1. Establish communications guidelines
2. Have the parties think about their core goals and interests

For prenups, this often takes the form of a questionnaire that the parties complete separately. The questionnaire may go beyond the four corners of the eventual agreement if the professionals think it is appropriate to look at the relationship as a whole. The clients share it with only the lawyers at first, rather than with each other. The lawyers work to frame the discussion at an in-person meeting at which the parties share their answers to the questionnaire with each other; the participants work collaboratively to reduce their responses to a series of interests; and the parties and lawyers work through alternatives to address the interests. Coach-facilitators have not been necessary for the agreements we have done so far, but one could be helpful in the right context. My experience has been that these agreements are more cost-effective to develop than traditionally negotiated prenups.

Business relationships follow a slightly different path. In order to solicit interests, there may be a series of questionnaires to ask the parties about personal and professional goals and to
help them develop a shared vision for the business. These can be prepared by attorneys or a business coach in conjunction with attorneys, as long as the professional team collectively has a basic understanding of organizational development. There is often a series of meetings to discuss. The context demands more flexibility than a prenup, so the early meetings and related questionnaires should be crafted to the situation and the budget. When it comes time to prepare a document, the end product will take a different form depending on whether the entity is a partnership, limited liability company, or corporation. In my experience, these agreements cost roughly the same as traditionally negotiated documents since the increased number of meetings is offset by fewer drafts. However, the process of developing the agreements makes the ongoing business relationship more effective.

When approaching contract preparation collaboratively, lawyers should keep in mind their obligations under Rule 1.2 regarding limited scope representation. In many cases, the risk factors to a collaborative approach are not appreciably different from those in a traditional negotiation. While, anecdotally, some attorneys do use collaborative process agreements that might trigger a need for additional disclosure during client intake, they are not strictly necessary if the attorneys are able to manage the process appropriately. For example, in the context of a voluntary negotiation, it would be meaningless to require all counsel to withdraw from representation if either party commences litigation, as is typical in a collaborative divorce process agreement. Collaborative divorce process agreements generally require full disclosure by the parties of all relevant information, but this too is superfluous in prenuptial and certain other agreements that are not enforceable without full disclosure. Also, in many cases, collaboratively prepared contracts have the same kinds of representations and warranties requiring full disclosure as traditionally negotiated contracts.

As a final caution, professionals who are used to working with family matters should be careful in their choice of language in business matters. While the dynamics may be similar, the vocabulary is not the same. For instance, the business coach who asks “how does that make you feel?” will soon be out of a job.

Lawyers who are comfortable with the collaborative process should consider whether their next prenup or partnership could benefit from a collaborative approach.

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