Expanding Collaborative Law Beyond Family

By Sherrie R. Abney

Collaborative Law first found success in family disputes; however, it is now being applied in probate, medical error, employment, construction, insurance, GLBT, and business cases.

The collaborative process relies on teamwork, honesty, voluntary disclosure, and developing constructive options. The entire process is designed to achieve one goal—to quickly settle the dispute and satisfy each party as much as possible. This does not mean there are no compromises, but it does mean that the parties have enough facts to eliminate the guess work found in positional bargaining.

Once the collaborative process has been agreed upon and clients have given their informed consent, the parties and their collaboratively trained lawyers sign a participation agreement (contract) that sets out guidelines to be followed during the process.

There must be a commitment by the parties to accept responsibility for their involvement in the dispute, and a commitment by all participants to go forward honestly and in good faith. Collaborative lawyers do not take advantage of the other sides' mistakes; nor do they attempt to withhold relevant information.

The resolution of disputes takes place in a series of confidential face-to-face meetings of the parties and their lawyers. An agenda is employed that allows participants to prepare for each meeting and avoid surprises.

The first step of the process is to determine the interests and goals of all parties. Each party has an opportunity to state what he or she wants and “why” that party wants it. Participants hear the goals and interests of the other parties first hand instead of having information channeled through their lawyers. This saves time and eliminates misunderstandings.

After the parties have stated the basis of their concerns, participants have a much better idea regarding the information that must be collected to intelligently approach resolution of the dispute.

The second step of the process is the task of actually gathering the necessary information. Parties agree to only request information that is relevant to resolution of the issues. “Relevant” is defined as the knowledge necessary for each party to reach an informed agreement.

Some disputes require expert opinions. In those instances, the parties may employ a single expert. Use of a single expert provides an “objective” opinion, reduces costs, and eliminates the expense of trying to qualify, disqualify, and/or depose the other parties’ expert.

The third step involves brainstorming. Participants try to think of as many options for the resolution of each issue as possible. Brainstorming will lead to out-of-the-box thinking which results in opportunities for formulating creative alternatives.

Once the parties have developed a comprehensive list of options, they evaluate each one and discard any that are unrealistic, inappropriate, or unnecessarily burdensome.

The final step of the collaborative process is to negotiate resolution. By following the steps in the process, the parties and their counsel have systematically worked through the elements of the dispute and explored solutions that might never have been considered in other ADR procedures.

If parties do not settle in the collaborative process, their attorneys must withdraw. Collaborative lawyers cannot represent clients in an adversarial proceeding related to the subject matter of the parties’ dispute. However,
this provision does not disqualify the lawyers from representing the same clients in any matters unrelated to the current disagreement.

The mandatory withdrawal provision is important for three reasons: First, all participants are able to focus 100% of their time and skills on working toward resolution. Next, the participants know they must retain new lawyers if they do not settle, so parties who are not serious about settling are eliminated. Finally, in order to have open and honest discussions, all parties must be comfortable with the process. If the parties know that the other lawyers can never cross-examine them in an adversarial proceeding, they are more apt to feel free to honestly participate and exchange information.

In the collaborative process, parties are in control of all decisions that relate to the resolution of their disputes. They are not dependent on the law or third party neutrals to determine the outcome. Some clients may be less interested in a money judgment and more interested in an apology or having a change in the design of a product that has caused serious injuries. These are options that courts do not have the power to order, but collaborative parties have the power to agree to them and settle.

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