The Collaborative Dispute Resolution Process is Catching On In the Civil Arena

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The collaborative dispute resolution process is expanding, slowly but surely, "outside the family law box." This paper was initially planned to cover two topics:

1. Areas of civil law in which the collaborative process can be efficient in resolving disputes.

2. The new collaborative law procedures provision in the Texas Civil Practices & Remedies Code.

The discussion of the second topic will be brief, at least for now, for the reasons as hereinafter set forth.

Activities in Texas and Nationwide

Collaborative family lawyers in Texas and throughout the country are experiencing wide acceptance and unitization of the process.

In the summer of 2004, a group of lawyers in Dallas studied what was happening in collaborative law in Boston, Cincinnati, Washington state and other areas of the country, and set about the task of expanding the process "outside the family law box" in Texas.

A non-profit corporation was organized, Texas Collaborative Law Council, Inc., with the mission of training lawyers in the use of the collaborative process in resolving civil disputes and educating the public as to the benefits of the process. A web site has been established, www.collaborativelaw.us, Protocols of Practice for Collaborative Lawyers, a Participation Agreement and practice forms have been developed.

Membership in TCLC is growing and civil collaborative practice groups are being formed.

In January of this year, the Houston Bar Association established a Collaborative Law Section and the Dallas Bar Association has established a Collaborative Law Study Group which will be formalized within the next six months as a Section of the Dallas Bar. Sherrie Abney, TCLC's VP for Training and CLE serves as Chair of the Study Group.

In March TCLC, the Dallas Bar Association Collaborative Law Study Group and the Texas Center for Legal Ethics and Professionalism, jointly sponsored a two day training for lawyers, which was attended by several sitting judges and lawyers from five states.

The breadth of interest in the collaborative process is evident in the backgrounds of those attending the training: an in-house litigation attorney with a major international company, probate lawyers, construction lawyers, employment lawyers, securities lawyers, intellectual property lawyers, family lawyers, lawyers engaged in general civil litigation (business and commercial practices, plaintiff and defendant personal injury practices), a law school professor, sitting judges and full time mediators and arbitrators.

Business Lawyers Are Seeing the Light

The collaborative process is the business imperative of our time. The process captures the exponential power of cooperation. In our fast moving, complex and demanding world, resolving disputes in litigation is simply too costly, too painful, too ineffective and too destructive.

It just makes sense to focus on the interests and goals of the parties, have a full and complete disclosure of relevant information, avoid the costly discovery fights in litigation and communicate face to face rather than through intermediaries.

Conflicts inevitably arise in the business, commercial and professional world and clients have a clear choice either to litigate or use the collaborative process. The following situations are all candidates for the collaborative process:

- When an employee feels he or she has been unfairly terminated, the average cost nationwide of defending a wrongful termination lawsuit is staggering.
- When a vendor fails to make timely delivery of ordered goods, but the seller and the buyer want to preserve a long standing relationship, the courthouse is not the answer.
- When business and professional partnerships fall apart, the financial and emotional cost of sorting things out in litigation will leave permanent scars and no chance for doing business in the future.
- Professionals, such as health care providers, lawyers, accountants, architects and engineers would much prefer to resolve disputes in a private, confidential setting.
- Intellectual property issues are best sorted out in private, out of the business magazines and off the front page of the morning newspaper.
- Construction projects seem to breed conflicts between the owners, general and sub-contractors, architects, suppliers, sureties and liability insurance carriers, and everybody loses unless disputes are promptly resolved so that the project can be completed on time and within budget.

"Tort reform" in Texas has created a situation where a sensible alternative to litigation is essential to preserve the rights of all parties.

Successful businesses and professional organizations maintain relationships over the long run by resolving disputes promptly and economically. Disputes cannot be resolved promptly and economically, and relationships cannot be maintained in the expensive litigation "arms race."

Appendix "A" to this paper lists many areas of law in which the collaborative process can be efficient in resolving disputes.

Lawyers Role in Dispute Resolution

Granted, it will not be easy to change the legal culture, but a dispute is a problem to be solved, not a battle to be won. Lawyers should not be hired to fight a war. Litigation wars only benefit the attorneys, and often leave the parties devastated.

Lawyers as leaders of thought, and keepers of the rule of law, need to think and act creatively. Our vocation is more than tutoring clients in ways of using the law against other parties. A lawyers primary task should not be to protect our clients from other lawyers.

Several years ago, Chief Justice Warren Burger, in his not so subtle criticism of our litigation system which is operated by lawyers and judges, reminded us that lawyers need to return to their role as healers of conflict:

> "*Our litigation system is too costly, too painful, too destructive, too inefficient for civilized people.*"

When a conflict arises, a lawyer's primary task should be to assist the clients in meeting their goals and interests and resolving disputes ethically, with civility and professionalism as quickly, peacefully and economically as possible.

Justice Sandra Day O'Conner correctly sets forth a dispute resolution time line:

> *"The courts of this country should not be the place where the resolution of conflicts begins. They should be places where disputes end, after alternate methods of resolving disputes have been considered and tried."*

In our legal culture today, the first option for resolving a dispute is litigation. Use of the collaborative process reverses the traditional dispute resolution time line. Litigation becomes a remote final option.

H.B. 205 Collaborative Law Procedures

The roots of the collaborative process in Texas and throughout the country are in the area of family law. Since 2001, collaborative law procedures have been a part of the Texas Family Code, Sections 6.603 and 153.0072.

In December of 2004, a bill was filed in the Texas Legislature to include collaborative law procedures in the Texas Civil Practice & Remedies Code. A copy of the bill is attached as Appendix "B".

The bill was referred to the House Civil Practices Committee and a public hearing was held in April, 2005. At the hearing, the committee was presented with letters supporting the bill from the current and immediate past chair of the State Bar of Texas ADR Section, an appellate court chief justice, and Judge Frank Evans, the father of the Texas ADR Act, which became law in 1987. A number of respected lawyers from around the state including trial lawyers and IACP members, Harry Tindall and Gay Cox, testified in support of the bill.

The Texas Trial Lawyers Association (plaintiff personal injury lawyers) and the Texas Association of Defense Counsel (insurance defense lawyers) opposed the bill.

In the week following the hearing, the Representative who sponsored the bill advised that the bill would die in the Committee unless the bill excluded personal injury and property damage cases being handled under a contingency fee arrangement.

The bill was revised to include the exclusion and returned to the Committee. When supporters of the bill returned to Austin for the Committee vote on the bill, the Representative sponsoring the bill advised that even with the exclusion, the Chairman of the Civil Practices Committee would not let the bill get out of the committee.

The supporters of the bill, made a written appeal to the Texas Association of Defense Council (TADC) and the Texas Trial Lawyers Association (TTLA) to withdraw their objection and support the bill.

With only a month remaining in the regular session of the Legislature, the TTLA advised that it would do whatever the TADC wanted it to do. The TADC refused to withdraw its objection and support the bill. H.B. 205 did not get out of the committee, and we can only speculate as to what might have happened had these two organizations of trial lawyers withdrawn their opposition and supported the bill.

Passage of the collaborative law procedures bill would have given a big boost to the expansion of the collaborative process in the civil arena in Texas and nationwide. But, politics is what it is, and in the year 2005, in the Texas Legislature the Chairman of the

House Civil Practices Committee and two organizations of trial lawyers in Texas have more political clout than a small band of collaborative lawyers seeking to enact legislation which would be in the best interest of the citizens of Texas.

Winston Churchill, who had many years of experience with Parliament, commented:

> *"There are two things that you do not want to see being made: laws and sausage."*

On a positive note, collaborative law is already showing its power and effectiveness in bringing people to common ground. It has united the Texas Trial Lawyers Association and the Texas Association of Defense Counsel, two organizations that historically have not been able to agree on the time of day.

Invaluable Support From Family Collaborative Lawyers

Collaborative law organizations such as the International Academy of Collaborative Professionals, the Collaborative Law Institute of Texas and other organizations around the country are seeking to expand into the civil arena, and are providing invaluable assistance to lawyers who are working to expand the process to resolving civil disputes.

Many of these organizations maintain web sites which contain helpful information regarding the expansion of the process to resolving civil disputes:

Collaborative Law Institute of Texas
www.collablawtexas.com

International Academy of Collaborative Professionals
www.collaborativepractice.com

Massachusetts Collaborative Law Council
www.massclc.org

Washington Collaborative Law
www.washcl.org

The Collaborative Law Center of Cincinnati
www.collaborativelaw.com

Boston Law Collaborative
www.bostonlawcollaborative.com

New Hampshire
www.collaborativelawnh.org

A Boston lawyer, Jeanne Fahey (jmfahey@mindspring.com) has arranged a regular monthly conference call the second Wednesday of each month at 3:00 p.m. CST. The call is open to anyone interested in civil/business applications of collaborative law. To participate call the bridge line at 1-805-620-4000 on the specified date and time. When prompted, enter the access code "02135" and you will be linked to the conference call.

Stacey Langenbahn, TCLC's VP for Marketing and Membership, has arranged a monthly conference call the last Monday of each month at 3:00 p.m. CST. The call is open to anyone interested in organizing civil collaborative law nationally. To participate call the bridge line at 1-641-985-8000 on the specified date and time. When prompted, enter the access code "684224#" and you will be linked to the conference call.

Jeanne Fahey has also established a Yahoo Listserv group for lawyers around the country, in Canada, England, and recently in Greece, to share information on the civil collaborative dispute resolution process:
http://groups.yahoo.com/group/civilcollaborative/

Outstanding articles on collaborative law regularly appear in law school journals and other periodicals on a regular basis.

The International Academy of Collaborative Professionals has established a nationwide network of collaborative family lawyers. Civil collaborative lawyers are looking forward to the business track which is going to be included in IACP's fall meeting in Atlanta.

Although the collaborative process will likely develop in the civil/business arena in a different manner than it has in family law, in time we envision such a nationwide network of civil collaborative lawyers. And, as the collaborative process gains acceptance in the civil/business arena, collaborative lawyers will develop practice groups specializing in their area of expertise, such as probate, real estate, construction, insurance, employment, elder and health law.

My Crystal Ball Says

For the next two years, the tasks of Texas collaborative lawyers are four-fold: (1) educate "the market" that collaborative lawyers are their dispute resolution service providers of choice, (2) train a "critical mass" of lawyers in the collaborative process, (3) gain "experience on the ground" by resolving civil disputes utilizing the collaborative process, and (4) learn the ropes on getting legislation through the sausage grinder in Austin.

Our next visit to the Texas Legislature will be in 2007 (fortunately or unfortunately the Texas Legislature meets every two years), and the supporters of this worthwhile legislation will not go to Austin as naive, political novices. Lawyers in Texas seeking to expand the collaborative process to the civil/business arena are going to do their homework, and get well acquainted with the folks in Austin over the next two years.

Conclusion

Once our clients come to realize that in the collaborative process they truly "own the dispute," they will quickly realize that they not only control the process of resolution, but also the personnel (lawyers) who effectuate the process.

Nineteenth century philosopher, novelist and poet, Victor Hugo said:

> *"Nothing is more powerful than an idea whose time has come."*

The theme of a modern day baseball movie is:

> *"If we build it, they will come."*

The "nay-sayers" objections to the collaborative process today, are almost a perfect echo of the objections to the mediation process when it was just getting started in the early 1990's. Look where the mediation process is today.

Despite the "nay-sayers" objections (which come mostly from lawyers), if the collaborative dispute resolution process is good for the clients (which it is), in the long run it will be good for the lawyers. We are building something that people truly need and want, and we must be persistent and patient.

This paper was presented in June, 2005 to the IACP Core Collaborative Practice Skills Institute in Dallas, Texas.

New Frontiers for Collaboration

The First Option for resolving disputes in the following areas of law:

Probate:
- Will contests
- Disputed guardianships
- Breach of fiduciary duty

Real Estate:
- Sales contracts
- Lender issues
- Commercial Leases
- Condemnation
- Title insurance

Business and Commercial:
- Intellectual Property
- Securities & Antitrust
- Computer & Technology
- Consumer issues
- Liquidation of businesses
- Partnership dissolutions
- Banking & loan work-outs
- Bankruptcy & Receiverships

Professional malpractice:
- Lawyers
- Accountants
- Health care providers
- Architects & Engineers

Insurance:
- Personal injury
- Wrongful death
- Property damage
- Products liability
- Toxic torts
- Life, Health & Disability

Construction:
- Owners & Developers
- General & Sub-contractors
- Suppliers
- Architects & Engineers
- Sureties & Liability Insurance

Family Law:
- Divorce
- Child custody & support
- Spousal support & alimony
- Property division

Health Law:
- Hospital liability
- Heath care provider liability
- Partnership dissolutions

Elder Law:
- Care facilities
- Entitlements

Labor & Employment:
- Title VII
- Sports & Entertainment
- Non-compete covenants

Administrative & Public Law
- Federal, State & Municipal
- Quasi-governmental agencies

Other areas:
- Aviation Law
- Environment Law
- Natural Resources
- International Law

APPENDIX "A"

A BILL TO BE ENTITLED
AN ACT

relating to the resolution of certain disputes by collaborative law procedures.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 7, Civil Practice and Remedies Code, is to read as follows:

Sec.161.001. COLLABORATIVE DISPUTE RESOLUTION PROCEDURES. (a) On a written agreement of the parties and their attorneys, a dispute or lawsuit may be conducted under collaborative procedures.

(b) Collaborative law is a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to request the court to approve the settlement agreement.

(c) A collaboration agreement must include provisions for:

(1) full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case;

(2) suspending court intervention in the dispute while the parties are using collaborative procedures;

(3) hiring experts, as jointly agreed, to be used in the procedure;

(4) withdrawal of all counsel involved in the collaborative procedure if the collaborative procedure does not result in settlement of the dispute; and

(5) other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the dispute or lawsuit.

(d) Notwithstanding Rule 11, Texas Rules of Civil Procedure, or other rule or law, a party is entitled to judgment on a collaborative settlement agreement if the agreement:

(1) provides, in a prominently displayed statement that is boldfaced, capitalized, or underlined, that the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the attorney of each party.

(e) Subject to Subsection (g), a court that is notified 30 days before trial that the parties are using collaborative procedures to attempt to settle a suit may not, until a party notifies the court that the collaborative procedures did not result in a settlement:

APPENDIX "B"

(1) set a hearing or trial in the case;
(2) impose discovery deadlines;
(3) require compliance with scheduling orders; or
(4) dismiss the case.

(f) The parties shall notify the court if the collaborative procedures result in a settlement. If they do not, the parties shall file"

(1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and

(2) a status report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance that the court shall grant if the status report indicates the desire of the parties to continue to use collaborative procedures.

(g) If the collaborative procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court may:

(1) set the suit for trial on the regular docket; or

(2) dismiss the suit without prejudice

(h) This section does not apply to a dispute relating to a claim that arises out of personal injury or property damage if a party to the dispute is represented under a contingency fee arrangement.

Sec. 161.002. CONFIDENTIALITY OF COLLABORATIVE LAW PROCEDURES. The provisions for confidentiality of alternative dispute resolution procedures under Section 144.073 apply to collaborative law procedures under this chapter and Sections 6.603 and 153.0072, Family Code.

SECTION 2.

(a) This Act applies only to an action commenced:

(1) on or after the effective date of this Act; or

(2) before the effective date of this Act if the trial in the action has not begun before the effective date of this Act.

SECTION 3. This Act takes effect September 1, 2005

APPENDIX "B"