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Treating with the Enemy: Civil Collaborative Practice

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If you feel sure you have been cheated by a business partner, an employee, or a contractor, your first instinct may be to file a lawsuit, in the hope that you can annihilate the person who did you wrong.

But if it's not your first rodeo you know how expensive, time-consuming, stressful, and uncertain it is to try for a "complete win" in court. Instead, you may wisely reset your goal to reach an outcome you can *tolerate*, as quickly and cheaply as feasible. You may then consult your lawyer and ask whether your first approach should be to *litigate*, to *arbitrate*, to *mediate*, or simply to *negotiate*? You may be surprised if, after listening to your story and talking preliminarily with opposing counsel, your lawyer suggests that you try to *collaborate*.

Huh? Collaborate literally means "to work with." You are probably shocked because you don't want to work with the person who caused you to visit your lawyer! Didn't the victorious Allies punish "collaborators" after World War II? When your lawyer suggests collaboration, you first say to yourself, "What I need is a new lawyer." But you trust your lawyer from past experience, so you let her explain this "collaboration" process.

Your lawyer tells you that collaboration is a relatively new process for resolving disputes. She explains that it was first used for family law matters and now is being applied to many other types of disputes. It is a very different type of alternate dispute resolution process, and its proponents hope that participants can finish a collaboration actually feeling good about the resolution instead of having to be soothed with the old adage: "If nobody is happy, it was a good settlement." Although it is not appropriate for all people, or for all situations, collaboration sometimes can result in an acceptable resolution of the situation for all involved.

Committed Negotiation

The premise for collaboration is that the parties commit themselves to genuinely seeking a resolution short of litigation. The parties do not agree to avoid litigation at all costs, but they do agree to participate in the process under a set of conditions that will make litigation a more unattractive option for all concerned.

The collaboration process calls for the parties to commit to negotiation, candor and courtesy in communication, and creative cooperation. The parties and their counsel sign a contract (the "participation agreement") containing these promises. The process also requires that each party devote a considerable investment of time and money.

The most important commitment a collaboration participant makes is to "change horses" if the process fails and the matter is litigated. This means the participants agree that the lawyer, or the law firm, used by any party in the process cannot later represent that party in litigation. This means that if collaboration fails and the matter proceeds to litigation, the collaboration counsel is completely out. The collaboration counsel then cannot coach the new lawyer on the case to try to make the hand-

off more efficient, as she could in an ordinary situation if the client changed counsel. The client truly will have to start over, but the other party to the collaboration will have the same disadvantage.

Candid and Courteous Communication

The participation agreement requires that lawyers adhere to a series of protocols, and that the client be generally informed about these rules. The collaborative lawyer must explain to the client that the negotiation will be "interest-based" rather than "positional," and that the collaborative process gives priority to non-adversarial resolution of client disputes. The protocols absolutely require courtesy and respect among all participants at all times and also require agendas to be set for meetings and minutes to be kept.

In the participation agreement, the parties consent that during the collaboration, they will make a full and candid exchange of information, authorizing their lawyers to make the exchange. Each lawyer also agrees that if the client is not making a full exchange of information, the lawyer will withdraw from representation in the collaboration, but will not divulge the reason for the withdrawal.

During the collaboration, information is exchanged in an open and informal manner, and all communications must be kept in confidence. The participation agreement provides for protections against abuses of this open communication. For example, the parties agree to treat discussions during the collaborative process as settlement discussions not generally admissible as evidence in court. The parties also agree that if there is subsequent litigation, the lawyers who represent the parties during collaboration may not be called as witnesses.

Creative Cooperation

Collaboration absolutely demands that the parties try to think in good faith about a solution rather than seeking to cut the best deal they can by posturing and using the "pressure point" style of negotiating. The general model for collaboration is a free exchange of information and ideas among the parties and the lawyers, all working together and talking with each other, much as one might see in negotiating a friendly business deal. Ideally, each party, having gained a full understanding of the other's needs and interests, attempts to craft a resolution that can work for everyone. In other words, the parties actively participate and it's not an "all lawyer show."

Additional Participants

If the subject of the dispute requires the use of an expert, the parties usually agree, in the participation agreement, to joint engagement of neutral experts. The parties establish ground rules about the neutral experts, who report openly to all parties. However, parties may separately engage consulting experts if the identity of the expert is disclosed to the other party.

Different from Arbitration and Mediation

Mediation is a non-binding process in which one party, the mediator, acts as a go-between and tries to "mediate," or broker, a settlement between the disputing parties. The mediator does not choose a "right" or "wrong" party, and cannot force the parties to accept a settlement.

Sometimes, parties engage in "pre-dispute" mediation, but quite often, this does not result in settlement because the parties do not feel the pressure of an impending trial. However, in North Carolina, once the matter is filed as a lawsuit, most litigants are required to participate in mandatory pre-trial mediation, which often results in settlement.

In contrast, arbitration involves one or more individuals who issue a decision about who is wrong or right. Most arbitration is "binding arbitration," meaning that the parties submit their dispute to arbitration instead of litigation and agree to abide by the result, without appeal. "Non-binding arbitration," in which the parties can choose whether or not to accept the ruling, is really an alternate form of mediation. Many practitioners and litigants no longer see arbitration as preferable to litigation because it is in practice not much more efficient than litigation, and arbitrators have a tendency to compromise a matter rather than reach

a resolution based on the evidence.

Collaboration differs greatly from arbitration and mediation because, in those types of dispute resolution, the central figure in the proceeding is the mediator or arbitrator (or arbitration panel). Although a participation agreement may allow for the retention of mediators or facilitators to resolve impasses, collaboration generally is **not** designed to be controlled by a central figure like a mediator or arbitrator. Also, mediators often take the approach of going back and forth between the parties rather than bringing the parties together for the full and candid discussion that collaboration envisions.

When is Collaboration Appropriate?

Your impression of the collaboration process will likely depend on your experience with litigation. Some people who have experienced nasty litigation may read this article with great interest and see collaboration as a way to save money and reduce stress. Others may roll their eyes, declaring that all negotiation is positional and that "creative cooperation" with contract breakers is appeasement.

It is easy to see how collaboration may be appropriate to resolve some family law matters. Parties who once were close enough to marry and perhaps have children together now may be bitterly disappointed, but should understand that the issues of divorce and child custody usually cannot be "won" and any "victory" is apt to be pyrrhic. Even if one spouse claims the other is a serial cheater, collaboration may be preferable because the children probably still love, and the court probably will order the sharing of property and visitation with, that serial cheater.

But what about cases other than family law matters? Whether collaboration is appropriate always will depend on the particulars situations and personalities involved, not simply the type of dispute. Collaboration may be useful in many types of disputes, such as those involving construction projects, business restructurings, trust and estates, and employment situations. Each matter is different, and the client and lawyer have to size up the situation, the issues, and the parties with whom they are dealing, and determine whether collaboration might be the best approach for that particular matter.

Potential Benefits

Collaboration is private, allows each party a voice in the resolution, and challenges the lawyers to help shape that resolution rather than simply be "mouthpieces" for their clients. Another advantage of collaboration is that the ground rules the parties establish also should allow lawyers with particular skills in the subject matter at hand, (e.g. estate taxation or LLCs) to take a leading role in the process. Of course, experienced litigation lawyers probably will continue to bring their skills to bear in collaboration.

In most cases, collaboration should be less costly than litigation- provided, of course, that it is successful. If collaboration is not successful, however, then engaging in the process almost always will increase the overall cost of resolving the dispute.

The real hope for civil collaborative practice is that it establishes a formal process for resolving disputes in a manner that can leave its participants feeling at least relieved that a dispute was ended efficiently and sensibly, and perhaps, in a few cases, actually feeling some sense of reconciliation with their former adversaries.

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