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Settle or Withdraw:

Collaborative lawyering provides incentive to avoid costly litigation

(By Robert W. Rack, Jr.)

As an ADR practitioner, do you ever feel like Sisyphus, eternally pushing a large stone uphill?

The dynamics working against collaborative problem solving are powerful and well known. First, there are the business pressures of law firms insatiable hunger for billable hours, lawyers need to create reputations for aggressiveness and clients' demands that their lawyers function as hired guns -- or they will hire someone else who will. Add all the human personality factors that trigger the instinct to flight or fight, and the ground gets pretty steep. Mediation helps but usually is not sought until communication breaks down and conflict is adversarial.

Mediation also can be abandoned. Whether expressed or just implied, the "do it my way or else" threat is ever present and undermining collaboration. But what if the context for negotiation itself could be changed? What if there was a way to approach a person, with whom one had a perceived conflict, with a request for an honest and detailed examination of the problem, in a way that also offered an absolute and irrevocable commitment to do so in a non-adversarial manner?

The Collaborative Law Institute

A group of 50 or 60 lawyers in Cincinnati has formed the nonprofit Collaborative Law Institute, Inc. as the structure for developing this new kind of law practice. The group includes a former Cincinnati Bar president, a federal court mediator and some of the area's leading domestic relations, corporate and civil trial lawyers. Collaborative lawyers and their clients undertake to resolve disputes without trial or even the threat of "see you in court."

When the decision is made to handle a matter on a collaborative law basis, the parties and their lawyers sign a detailed "participation agreement" in which they make certain contractual commitments: To cooperate in assessing the merits

and value of a claim; to disclose fully the information needed to make that appraisal; and to negotiate in good faith until a solution is found. If any party reneges and seeks court intervention, both (or all) collaborative lawyers must withdraw from the case and their clients must seek new, litigation counsel. The collaborative lawyers will cooperate in the transition, but neither they nor anyone in their firms may receive any further compensation for the case.

The project began with a lunch conversation between two lawyers who were lamenting the losses inherent in litigation. One of them had read about a group of domestic relations lawyers in Minneapolis who were pioneering something called "collaborative law," making a firm commitment to provide representation for settlement purposes only. The two Cincinnati lawyers called together focus groups of local lawyers from different areas of practice to see what they thought of the idea. The first group was composed mainly of litigators from major firms with big corporate clients. Not surprisingly, they were the most resistant. They agreed there is too much litigation and that it is frightfully expensive. Understandably, however, they could not imagine sending their important clients to another law firm if the collaborative law effort broke down.

Other groups included lawyers who mainly represented small businesses, employment lawyers, domestic relations lawyers and corporation counsel. The corporation counsel were enthusiastic, saying they can no longer "win" litigation. They all agreed high-cost legal fees and expenses, lost productivity of the employees pulled off their jobs to prepare for and testify at trial, loss of morale and damage to valuable business relationships made winning a losing proposition. The clear lesson from this group was that consumers could be an important market force for collaborative law.

Divorce lawyers take the lead

Perhaps because they felt so acutely the destructiveness of litigation over child custody and other issues typical in divorce situations, the domestic relations lawyers hit the ground running. In less than a year, 32 of the City's leading divorce lawyers began meeting and formed the Family Law Project as the first subgroup of the umbrella Collaborative Law Institute. They expanded and refined the participation agreement, arranged for a two-day training program, and developed a brochure which they are distributing to therapists, children's services agencies and new clients and their spouses. Their doors opened for business on Jan. 1. Several cases have been completed already and the reports are glowing.

Organizationally, the current plan is to structure institute membership into specialty practice subgroups. The domestic relations lawyers were the first. Other emerging subgroups include probate, environmental, personal injury, employment and corporation law.

The work of the institute is being done through committees. One committee has designed the training which consists of interest-based negotiation, development of non-adversarial communication skills, and the principles and rules of collaborative law practice. Other committees are considering membership criteria, evaluation tools, and a program for informing the public about this new option. Yet another is almost continuously amending the participation agreement as policy and practice adjustments are adopted.

Limited and much needed staff assistance is supported by small grants from some members' corporations and income from the continuing legal education accredited training, a requirement for membership.

Concerns about the process

It is too early to say what future problems and issues will ensue. Some concerns arise simply from the apprehension of traveling in such uncharted waters. Others may be more substantial. After considering if it was practical, the next question was whether it was ethical. Can a lawyer meet his or her duty to zealously represent a client while publicly declaring a refusal to litigate? Collaborative lawyers believe the answer is yes, as long as the client fully understands and agrees at the outset to these limitations in the representation contract.

What about the fact that it will probably cost a client, whose collaborative lawyer has to resign, more money to bring new counsel up to speed in the case? That possibility is fully disclosed in the participation agreement and is part of the incentive to stay with the negotiations.

What happens when an impasse occurs? Other collaborative lawyers from the group will be available to consult, and calling in a mediator is always an option.

If the collaborative lawyer has to resign, how will she be compensated? Probably on an hourly basis. This may call for new types of fee agreements.

If one side perceives the need for an emergency motion, will that trigger the mandatory resignation provision? It might.

Provision is made in the participation agreement for "agreed" interim and emergency orders and standstill agreements. In the case of some emergency filings, the other side can waive the resignation requirement, but these exceptions are limited.

What prevents someone from using this process for discovery and then filing suit? The possibility for abuse exists, but it is probably limited. First, only the party could do so, since the lawyer is forced to resign from the case. Second, all disclosures are completely confidential and not admissible unless otherwise properly discovered. The harder question will lie in determining what information is "relevant" and thus subject to the duty to disclose. Institute members are still discussing and refining those standards.

Finally, members wonder if this process can only work if all parties are represented by collaborative lawyers. The assumption is that participation agreements will only be signed when all parties and their counsel agree. It is not clear, however, that one side skillfully approaching the other on a collaborative law basis could not also be effective. If the non-signing party knows that the reasonable lawyer on the other side will have to withdraw and be replaced by a litigator if they cannot settle, there may be a strong incentive to remain at the negotiating table.

Not an easy leap

Collaborative law may not be for every lawyer, every client or every case. To sign the participation agreement is to cross a Rubicon. Lawyers leave behind the security of the option of the unilateral practices of adversarial law and enter new waters. As readers of this magazine know, the skills needed for collaborative problem solving do not come easily or naturally to everyone. Likewise, clients give up the comfort of a hired gun; there is no avoiding the other side's demands for and perceptions of fairness and reasonableness.

The benefits, of course, include all those typically associated with mediation: saved relationships and litigation costs, and better compliance with agreements. But there are two more that the planners of this project hope for. They will be measured by the answers to these two questions: How much less reactive and more forthcoming will people be when approached with an offer to address a problem this way? How much more smoothly, directly, and determinedly will negotiations progress when the threat of litigation is eliminated? Maybe this time next year we can answer those questions.

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