

USING COLLABORATIVE LAW IN EMPLOYMENT DISPUTES

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Collaborative law is a way of practicing law that uses a cooperative approach between parties and their attorneys. Its stated objective is to settle the issues giving rise to the dispute in a nonadversarial manner. It can be described as a process that focuses on the needs and interests of the parties and fosters their maintaining responsibility and authority for their actions and decisions.

A. Basic Principles Underlying the Collaborative Law Process.

A few of the principles that underlie collaborative law are:

- \$ Clients are in the best position to know what their needs are;
- \$ Parties will act in their best interests and make better decisions in the absence of conflict and fear;
- \$ Open and frank discussions that are managed in a controlled setting benefit the disputants by giving them insight into themselves and others;
- \$ Agreements that the parties voluntarily craft themselves will have lasting effect.

In choosing to use collaborative law, the parties and attorneys formally agree to use collaborative strategies and a defined process as they seek to reach a mutually acceptable settlement of the conflict. Attorneys play an important role in this process. They use active listening skills and assist their clients in exploring and articulating their needs. They provide

the parties with a safe environment where open discussions can take place, where each person's interests can be disclosed and acknowledged and where options toward resolution can be explored.

At the outset, parties and their attorneys agree that neither side will resort to or threaten litigation while in the collaborative law process. The threat of going to court is removed from the table and cannot be used as a power move or intimidation tactic. Clients expressly retain the right to terminate the collaborative law process and go to court; however, in doing so, they terminate the collaborative attorney-client relationship. Should one of the parties decide to withdraw from the collaborative law process and pursue litigation, the collaborative attorneys on both sides must withdraw and cannot continue to represent the parties in litigation. (This is true for any expert or professional hired in the collaborative process, too.) Additionally, all communications, including both collaborative attorneys' work product, remain confidential and cannot be produced during litigation discovery.

B. Collaborative Law: The Process.

There is a structured process or a set of protocols that participants in the collaborative law process follow. It begins with the first consultation appointment. During the initial meeting, the attorney listens carefully to the person as he or she tells his or her story. The attorney listens for clues (and cues) about the person's needs that would enable him or her to leave the past and move toward the future. Exploring where the person "sees" himself or herself in six months or a year, the attorney asks questions designed to reveal the person's

interests. The attorney then explains the variety of options available to resolve disputes: administrative proceedings; litigation; arbitration; mediation; collaborative law.

When the prospective client has expressed interest in pursuing the Collaborative Law Process as the means of dispute resolution, the collaborative lawyer needs to make his or her own evaluation as to whether the particular case and client are appropriate for the Collaborative Law Process. Thereafter, the collaborative lawyer can assist the prospective client in his or her own determination whether, based on all the relevant circumstances, the Collaborative Law Process is appropriate to meet the client's needs. When the Collaborative Law Process is chosen, the new client is given a Collaborative Law Retainer Agreement that clearly spells out the attorney's role as collaborative counsel, the client's role as a collaborative party and their fee arrangement.

Next, the collaborative lawyer contacts the other party or the attorney, if known, to determine their interest in utilizing the collaborative law process or introduce the concept and process if they are unfamiliar with collaborative law.

Presuming that both parties and their attorneys agree to use the collaborative law process, the two collaborative lawyers will contact each other and arrange to meet prior to scheduling an initial "four-way" meeting among the parties and themselves. At this meeting, they exchange basic information about their clients; go over any concerns they may have about their client's readiness for the first four-way meeting; identify any immediate, pressing issues; discuss areas of possible agreement and difficulty; schedule the first four-way meeting and decide where it should take place; and divide responsibilities.

1. Four-way Meetings – The First Meeting: The Participation Agreement.

This first four-way meeting is carefully structured to pave the way for future cooperative, productive and successful negotiations. (A paradigm shift here in defining “successful negotiations”!) Therefore, the Participation Agreement is usually the primary focus of this first meeting. At the meeting, the principles of the collaborative law process are reviewed by all participants. The Participation Agreement is read aloud and entered into.

The main components of the Agreement include:

- \$ Following common courtesy practices – not interrupting while others are talking, listening without judging, speaking in respectful terms, remaining open to new ideas and information;
- \$ Not threatening litigation as a means of forcing settlement;
- \$ Agreeing to deal in good faith and to exchange of all important information and documents;
- \$ Retaining and using professionals jointly;
- \$ Agreeing to confidentiality of all communications and information within the collaborative law process.

Once the Participation Agreement has been agreed to and signed, the participants return to the other items on the agenda which typically are:

- \$ Exchanging information requests;
- \$ Identifying items for the next four-way meeting agenda;
- \$ Scheduling the date for the next four-way meeting.

Sometimes, the agenda will include giving each participant time to describe what they hope to achieve through the collaborative process. The agenda for the first meeting is purposefully kept short with the focus of the meeting on the Participation Agreement and the principles which underlie it and the Collaborative Law Process.

2. Subsequent Four-Way Meetings: Negotiations Begin Based on an Agreed-upon Agenda.

At the second four-way meeting, the discussions follow the agreed-upon agenda and primarily occur between the parties, with attorneys offering advice, providing information, facilitating communication. No surprise or last minute items are added to the agenda so everyone knows, walking in, what they will be talking about.

Typically, the attorneys will alternate serving as note-taker. Prior to each meeting, the note-taker will send out minutes or summaries of the last meeting, including any agreements reached on specific issues. At the start of the meeting, those minutes or summaries will be reviewed to ensure that all participants share a common understanding of what happened at the earlier meeting.

If an impasse occurs, the participants will often agree to retain a (facilitative) mediator who will conduct a “five-way” meeting (mostly in open session) to explore ways of dealing with and resolving the impasse issue(s). Sometimes when emotions are high, the participants may hire a jointly retained coach or counselor who will meet privately with each party and do front-line triage designed to help the party see, hear and think and be in the present. Occasionally, this coach might attend the next four-way meeting and, when necessary, privately counsel a party to assist that person to stay in the present or to more

effectively communicate.

Collaborative family attorneys report that it usually takes several four-way meetings to fully resolve a family law case (disposition and separation of property, parenting plan, spousal maintenance). Straightforward employment termination matters may only require two or three four-way meetings to reach resolution.

3. On-Going Communications.

Prior to and following every four-way meeting, the collaborative lawyer should meet with his or her client either to go over the agenda of the upcoming meeting or to debrief about what occurred at the last meeting. It is important that the attorney check in with his or her client to find out how he or she felt about the meeting and to discuss concerns as well as ongoing interests that need to be addressed. It is also an opportunity for the attorney to review appropriate communication skills and to encourage the client to focus on realistic expectations of process and outcome.

Similarly, the two collaborative lawyers should confer prior to and following four-way meetings either to go over the agenda of the upcoming meeting or to debrief about what occurred at the last meeting. It is important that the attorneys check in with each other to find out how their respective clients felt about the meeting and to discuss concerns as well as ongoing interests that need to be addressed. In addition, it is important that the attorneys bring up any concerns about communication skills and whether there may be a need to bring in collateral professionals to assist in the communications and/or negotiations process.

4. Conclusion of the Collaborative Law Process.

When the parties have reach agreements on issues, the attorneys can work together to prepare the written document reflecting those agreements. It is helpful to hold a final four-way meeting so that all participants have an opportunity to review the final settlement agreement, congratulate themselves for reaching resolution and de-brief about the process they have just completed.

C. Becoming a Collaborative Lawyer.

Making the switch from litigation counsel to collaborative lawyer is not as easy as one might think! It takes strong resolve to shed the adversarial perspective where the goal is to win *your* case at the other party's and opposing lawyer's expense. It requires understanding that the provision of legal service does not mean that the lawyer steps in and takes over for the client. It means the lawyer moves from active decision-maker to active listener. The switch requires the lawyer to act in ways that foster the client's understanding of the underlying interests of all parties, thereby empowering the client to be responsible for figuring out ways to solve the dispute with the lawyer's legal counsel and guidance.

The process of moving from litigator to collaborative lawyer requires the attorney to adopt new skills sets. Across the U.S. and Canada, collaborative law training programs assist attorneys in making the paradigm shift and acquiring the skills to become an effective collaborative lawyer. In addition, there are conflict resolution organizations throughout the country that provide basic interest-based, facilitative negotiations or mediation skills training,

another essential component to understanding and practicing collaborative law.

Locally, Washington Collaborative Law is a nonprofit organization comprised of volunteer attorneys and allied professionals who support and promote the use of collaborative law as a viable method of dispute resolution. Persons are eligible for membership in Washington Collaborative Law upon completion of 12 hours of basic collaborative law training and 30 hours of facilitative, interest-based negotiation skills (or mediation) training. Members and interested practitioners are welcome to join one or more of Washington Collaborative Law's Practice Groups – Family Law, Allied Professionals, Employment Law and Trusts/Estates & Elder Law. More information about Washington Collaborative Law events, training seminars and Practice Group meetings may be found at www.WashCL.org.

In addition, the International Academy of Collaborative Professionals (“IACP”) provides members with on-line resources, publishes a quarterly review journal, hosts an annual two-day educational and networking forum and has launched a national public education campaign promoting the use of collaborative practice in family law cases. You may find out more about IACP at www.collaborativepractice.com.

For a thorough analysis and explanation of collaborative law, read Pauline Tesler's book, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*, published by the Section of Family Law of the ABA. Another excellent resource is *Collaborative Family Law: Another Way to Resolve Family Disputes* by Richard W. Shields, Judith P. Ryan and Victoria L. Smith published by Thomas Carswell. Although both books focus on family law, the information conveyed is applicable to employment law and other

areas of practice.

D. Conclusion.

For many of us, providing our clients with only one option – litigation – has become increasingly unacceptable. The statistics reflect that the majority of civil, including employment-related, cases settle prior to trial. What the statistics do not frequently reflect is that a significant number of cases are dismissed upon the court's entry of summary judgment. While summary judgment may occur in the earlier stages of discovery, usually the clients have expended a significant amount of money, time and resources leading up to and preparing for the summary judgment dismissal motion. By this point in the litigation process, the clients have become fully committed to their own version of events; positions have been clearly defined and staked out; any shading of gray has dissipated into black or white. If under court scrutiny summary judgment is denied, the likelihood of the parties coming out on the other end of the case with a better understanding of how the dispute arose in the first place, what responsibility each might hold, how they might have acted differently and how they need to change their behaviors in the future to avoid a repeat, is nil. Instead, both parties may be more desirous of seeking vindication from a third-party decision-maker, eschewing any need to reach a better understanding with the other disputing party.

It is with this mindset that litigants enter into settlement discussions with their lawyers as sole negotiators with or without a third-party neutral. The focus is on monetary compensation – how much if you are the plaintiff, how little if you are the defendant.

Litigation counsel is very resistant to their clients engaging in face-to-face discussions so negotiations do not occur with all parties seated around a common table. Rather, a third-party neutral will shuttle demands and counter-demands between the parties seated in separate rooms. Occasionally, the lawyers may talk face-to-face, but rarely the parties. Ultimately, a successful result to this type of settlement discussions is a compromise that leaves both parties mutually unhappy and does nothing to bring promise, or hope, of a better future. Thus ends the majority of litigation cases – the client goes home or back to business, a check is cut, the case file is closed.

Collaborative law practice changes both the dynamic of the process and the nature of the result. Collaborative lawyers do not contribute to an escalation of the conflict as so often happens in litigation. Rather, they guide their clients who are active participants in the resolution process and assist them in communicating, negotiating and developing workable and durable solutions designed to address underlying interests. Their role is fully consistent and complies with the Rules of Professional Conduct. *See, e.g., Rules 1.1, 1.2, 2.1.* The costs associated with resolving disputes using collaborative law are far less than the costs of litigation – the amount of out-of-pocket expenses is less; there is less loss of productivity; the process itself takes less time; and there is less emotional and psychological stress. And, at the end of the day, the clients leave with a much higher level of satisfaction, having actively participated in a process that they owned, having achieved a better understanding of themselves and the other participants and having reached a resolution that they devised.

Not for every client, not for every lawyer, not for every legal dispute, collaborative

law is a viable alternative for many employees and employers who find themselves in conflict and would prefer to find a way to resolve their legal dispute other than adversarial litigation.