

Getting to Collaboration in Business and Employment Disputes

By Michael A. Zeytoonian

Given the novelty of our approach, the collaborative lawyer faces significant challenges when introducing it in business and employment situations. The first challenge is educating business people and/or their attorneys about collaborative law and showing how it matches their business interests. The second is getting them to consider using the collaborative process. The third is to creatively implement its use.

Collaborative law (“CL”) appeals to business people for two major reasons: the process is not contentious and, in many cases, it is more cost-effective. Most business owners and employers recognize and want to avoid the costs of litigation. In many disputes that arise -- particularly for small businesses -- heavy legal costs are difficult to justify, even if the business or employer prevails in the litigation. The investment in litigation is not cost-effective, largely because the parties are funding the mechanism of litigation -- the ‘civil procedure’ of pleadings, discovery, motion practice and court conferences -- instead of investing directly in substantive problem solving.

In addition to the cost factors, other benefits resonate with business owners, employers, partnerships and shareholders in closely held corporations. These include the ability to shape the process, the shorter time frame, the preservation of business relationships, the maintaining of confidentiality and privacy and the diminished drain on the organization’s emotions, morale and human resources. Still, despite these obvious benefits, the challenge of getting the parties and attorneys to use the collaborative approach is equally daunting to resolving the disputes. How do we get the parties to “try it” and accomplish the paradigm shift needed to reach the promised land?

One approach is the proactive way of introducing CL as the preferred option to dispute resolution before the dispute ever arises. In the same way that a person opts for preventive medicine before an injury or illness comes, or that employers take preventive steps of implementing policies, procedures and training to prevent discrimination or harassment, clients can be educated to invest in preventive legal counseling. In these situations, the lawyer has an opportunity to educate the client (i.e., owner, partner, shareholder or employer) about CL before he or she is confronted with a dispute.

One way of making CL part of the client’s preventive approach is to incorporate it into the dispute resolution section of contracts, including employment contracts and business formation agreements. Because CL is flexible, lawyers, working with their clients, can tailor it to suit the client’s needs. For example, the parties may agree in CL dispute resolution clause that they will try CL for a given amount of time, e.g. eight months. The clause can also include a tiered dispute resolution process that utilizes CL first with mediation incorporated into the CL period as needed, followed by arbitration and then, if desired, court intervention on some or all issues.

Establishing CL as the primary method of dispute resolution enables the parties to know ahead of time how they will approach a conflict. Further, the business principal or employer sends a positive message – the parties agree first to work together at resolving their dispute before they turn to outside intervention. By using a tiered approach, the parties preserve the option of seeking outside intervention, if necessary.

Once the dispute exists, the same process of educating the players about CL can take place, but the atmosphere has changed and the time frame may be more pressing. Still, a CL lawyer can meet with his client or potential client and present CL as an option to consider. Usually the business client sees the value of this approach and wants to implement it. The bigger obstacle of convincing the other party is next.

There are two approaches to suggesting CL to the other party. One is through your client, accomplished by educating your client and then letting the client discuss it with the other party, without attorneys involved. Another is to suggest either a three way meeting, if the other side does not yet have counsel, or a four-way meeting if there is counsel on the other side. However, it should be made clear before the meeting ever occurs that the purpose of the meeting is not to discuss the elements or the facts of the dispute but only to discuss the potential advantages and the process of a CL approach. Prior to the meeting, information on CL can be given to the other party and attorney to review. Then, at the meeting, the parties can discuss how the process might be shaped to suit their specific situation. They can also discuss whether they will utilize the traditional “Stu Webb” type model, agreeing by written contract not to litigate and that the lawyers will be disqualified as counsel should the CL effort be unsuccessful, or to utilize some variation of CL, such as a “two track” approach, in which CL is the first and preferred track and litigation is established as the second track.

Perhaps the most important accomplishments in these early phases of the collaboration are to get the clients to trust the process and to allow them to recognize that they are better served by this process. Once trust is gained, the process can be freely shaped and controlled by the parties, not the courts or the rules of civil procedures. For businesses, it is this ability of the parties working with their lawyers to control the process that may be the most desirable feature of the collaborative law process. The parties determine what needs to be addressed and what doesn't, what the timing and pace of the process will be, what interests can be satisfied and how to do so. The parties will still incur legal fees, but they will determine how and on what those funds will be spent, and will see a more direct connection between the work being done and the accomplishing of their goals.

Let's examine how the collaborative process worked in a recent business dispute that I handled regarding commissions. (The names here are fictitious, but the facts are from an actual dispute.) My client, Tom, a salesman, lived and worked in New England; the company and its counsel were in California. Although Tom had left the company, the industry is small enough that the players are still visible within the industry. Accordingly, both sides shared the interest of maintaining a respectful and civil relationship.

Tom contacted me through a referral from one of my clients that had a similar issue that was resolved efficiently and quickly without litigation. As part of our initial consultation, we discussed the concept of CL, comparing its costs, time and process with traditional litigation. Tom liked the idea of CL because he wanted a fairly quick resolution and wanted to keep the legal costs down. In fact, we set an initial cap on the legal fees, agreeing that we would either accomplish the desired results within that cap by using CL or, if unsuccessful, revisit the idea of litigation then. The next challenge was to convince the company and its attorney to use CL.

The company's attorney, George, was a member of a large firm. In my first phone call I suggested CL and that we approach the dispute collaboratively through a series of conference calls to keep down costs. While George had not heard of CL and was non-committal on the idea, he agreed to discuss it with his client. George agreed to let me send him some CL materials and promised that he would review it with his client, John, the CEO of the company. I sent him the Mass. CLC's general brochure and some reprinted articles in the media about CL.

The introduction and presentation is a critical step, and must be done in such a way as to build a level of trust between two lawyers, one of which is probably not a collaborative lawyer, and in the process. This step, whether done by a face-to-face meeting of the lawyers, by telephone calls or by letters, is critical as it sets the tone between the lawyers and will most likely determine whether the other side will agree to consider the collaborative process.

One technique that I find useful in establishing trust is to get agreement on some facts and to show the other side that we are taking their concerns seriously. In this case I suggested to George that as the initiating lawyer, I would set forth my client's position, present the facts as we saw them and openly provide supporting documentation. I then encouraged him to do the same. Most importantly, I told him that if I was convinced that he was correct, I would discuss it with my client and counsel him appropriately. I pointed out that this process was akin to informally taking the elements of a summary judgment motion, moving them right up front in the process, letting the two attorneys consider them without a judge, and then collaborate on what remains before them. George was intrigued.

If this initial approach is done in writing, the initiating collaborative lawyer can offer to provide something similar to a demand package without the demands, numbers or conclusions. This presentation will set forth the initiator's position and interests, the basis for it and its strengths. The goal here is to build some trust in the process and the attorney, and to get the other side engaged and willing to sit in on a live meeting or conference call.

A week or two later George called back and advised me that his client was willing to try the process, briefly. George and I agreed to exchange statements of our clients' interests and positions. We exchanged calculations and analysis of how we got to our

respective amounts and the documents that were the bases for these calculations. We scheduled a conference call to take place after the exchange, to see if we could agree upon some things and try to narrow or eliminate any issues up front. We were able to agree that certain underlying documents were relevant to our positions and did not dispute that. We identified three discussion points: Which of two formulas to my client's situation was applicable; whether any other sales people were entitled to a share of the compensation my client claimed as his share and the calculations themselves. Thus, issues were identified and narrowed, as were various interests, and we set an agenda and some parameters for the subsequent four-way conference call between attorneys and parties.

We agreed to put aside any discussion as which state's law was controlling and whether or not the binding arbitrator clause in my client's employment agreement was enforceable, as both issues could be rendered moot if we could resolve a couple of basic issues. The parties didn't waive their rights to address them; they just agreed to put those matters on hold and work on resolution. In the process, more trust was created between the attorneys and through the attorneys, between the parties. Having laid the groundwork, the attorneys counseled their clients on the scope and expectation of the four-way discussion. Within two weeks, we held a four-way meeting via telephone including the two parties and the two attorneys.

By framing the issues and interests, the lawyers succeeded in saving time, costs and inconvenience. In the first four-way conference call, the parties had the opportunity, unfettered by their attorneys, to set forth their respective positions and interests. The attorneys and the parties determined ahead of time that the purpose of this call was not to resolve anything or finish the process, but only to allow the parties to present their positions, free of any judgments or challenges by the other side. Suggestions were offered about what other information would be helpful, such as the consideration of the relevance of another document. Questions were asked solely for finding out more information, such as the basis for including or not other sales people in the distribution of commissions. There was no cross-examination, evaluation or conclusion-drawing. The conference call lasted about 30 minutes. The lawyers had previously agreed to schedule a follow-up conference between them only the next day, to review the progress made, assess the four way conference call and discuss what we could consider as being resolved. Within two weeks, the case was resolved.

The key to succeeding in this case was first establishing trust between the lawyers. I believe this was accomplished in the early discussions between George and I, in my willingness, along with my client, to lay bare his position and reasons for it and to suggest that if he could prove to me that my client's position without any legal or factual basis, I would advise him accordingly. Once that was accomplished and the interests and issues were narrowed, the four-way discussion was smooth and effective. The parties mutually desired to maintain good relationships and both saw the value of the CL method. They still disagreed on an issue or two, but the dollar gap was closed enough between the two positions that a compromise was easier for both to accept.

CL may not work in every business or employer-employee dispute. Practitioners should also look for situations in which maintaining the health of the business or employment relationship is important to the parties. A scenario in which the chemistry and well being of the company or employer will be damaged by the adversarial and public nature of litigation is a good candidate for CL. One recent case in which collaborative law techniques -- an immediate verbal agreement between the lawyers to focus on the interests of the two parties, an understanding that those interests were not inconsistent and a willingness to openly exchange background information -- prevented adverse consequences involved a private academic setting in which the administration initially contemplated the termination of a teacher. Through quick intervention and identification of interests that were essential to each of the parties, termination was averted and a more civil and palatable solution was found and worked out. The collaborative process prevented embroiling the school in a difficult, charged up atmosphere of distrust and a teaching career was spared of a harmful termination.

In some situations, quick collaborative intervention may not be possible, due to short statutes of limitations and filing windows, such as discrimination or harassment cases. In these cases, collaborative lawyers can seek out and suggest a logical place for a pause or time-out – once filing has preserved the client’s rights, or after the position statement has been filed. That pause point is an opportunity to switch out of the litigation mode and inject the collaborative law effort, perhaps with specific time limits. As an example, the Massachusetts Commission Against Discrimination (“MCAD”) offers a free mediation program inserted in one of these “time-out” places. This would be an excellent opportunity to involve collaborative lawyers, either as an alternative to, or as a prelude to mediation. The original litigators, who may want to keep the case if it doesn’t get resolved through collaborative law, may step aside temporarily to give collaboration a period of time, such as six months, to work. This, along with the other ideas presented here, will help collaborative law to gain wider acceptance in business and employment settings.

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