

COLLABORATIVE LAW BASICS

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A simple view of the basics for lawyer and non lawyer alike.

Section 1: A. The Basic Legal Element, The Law of Contracts. -

In its' true essence, collaborative law is a creature of contract. At a minimum it involves a 4 way contract between two parties and two lawyers, with each individual undertaking obligations to each of the other three, and to all of the other three, any breach of which can cause the termination of the process, and the varying consequences which impact each of the four individuals in the event of that termination. This contract is frequently referred as a Participation Agreement.

1. The essential procedural elements of that contract are:

- a. that once collaboration commences, no one can file any document in or go to court for any reason related to the subject matter covered by the collaborative agreement unless agreed to in writing by all four participants to the agreement, and;
- b. that once commenced, any one of the four participants can terminate the process at any time for any reason, and need not justify that decision, and;
- c. that if that happens, neither attorney may in the future represent either party against the other, directly or indirectly, in litigation related to the subject matter covered by the collaborative agreement, and;
- d. that in the event an attorney learns that his or her client is abusing or undermining the process in any way, and refuses to confess, cease, desist and correct such conduct, that attorney shall withdraw from the matter and terminate it.

2. The essential substantive elements of that contract are:

- a. commitment to open, honest, voluntary and full disclosure of all relevant information;
- b. commitment to negotiate in good faith, and take no action inconsistent with that commitment;
- c. commitment to engage no expert witness, consultant or outside advisor except jointly, unless otherwise agreed to in writing by all four participants;
- d. commitment that should the collaborative process be terminated short of agreement, any experts or consultants involved will be disqualified as witnesses and their work product will be inadmissible, except to the extent agreed upon in writing by the parties and their attorneys; and,
- e. provisions to insure parity in the ability to pay attorney's fees .

3. Additional elements commonly seen in that contract are:

- a. Aspirational promises about how all parties, and don't forget the lawyers are parties in this context, will treat each other and communicate with each other to achieve the intended goal.
- b. Contractual facsimiles of typical injunctions with respect to persons or property.
- c. Acknowledgments of the fact that the process involves foregoing certain investigative tools so long as the process continues, as well as certain "defenses" to requests for information during the same interlude, i.e. that formal discovery may be waived, and that consulting one's own experts or investigators while the collaborative process is in effect is a definite 3 shot foul.

Section 2: B. The Basic Practical Elements, Flexibility and Creativity-

Because Collaborative Law is a concept and a process employed in a variety of locales, with a variety of procedural frameworks, there will be substantial variety in the content of participation agreements, but I believe you will find these elements common to most. You can add almost anything to the participation agreement, so long as it is not inconsistent with the essentials set out above, but beware of tampering with the essentials, particularly the procedural essentials, for that can cause insoluble problems in my opinion.

1. Initial flexibility could be added by:

- a. Agreement to the filing of a joint petition, including agreed temporary orders to automatically take effect in the event of termination of the collaborative process.
- b. Providing that testimony and/or work product of certain experts or consultants will be admissible in the event of trial upon agreement of all parties including the expert.
- c. Agreement that information disclosures conform to local rules concerning form, content, verification or even admissibility, in the event that a trial ultimately takes place.
- d. Other agreements related to the preservation of information or work product in a fair and equitable manner so that information customarily gathered in the course of preparation of any case need not be lost to the parties merely because it was obtained voluntarily during the collaborative process.

SIDEBAR REMARK: Additions to the Participation Agreement like those above can serve to mitigate the cost of "retooling" in case the collaborative process does not succeed. Indeed the process has been criticized because the parties' divorce will be more expensive if collaboration is tried and fails, and they press on to trial. While the truth of that argument seems obvious, it also seems disingenuous to me. Sort of like arguing in favor of surgery as the sensible approach to all medical conditions on the theory that if anything less fails, the cost of the more conservative measures, when added to that of the surgery will make the total bill higher.

2. Flexibility can also be added on the fly.

The four of you are free to agree to almost anything in midstream, so long as it does not violate an essential element of the contract. For example, if no compromise seems possible on a particular issue or set of issues, everyone is out of ideas, and the issue seems an insurmountable roadblock to the entire settlement, the parties could all agree, in writing, to:

- a. Engage the services of a mediator to assist in the resolution of the issue.
- b. Submit the issue to non binding ADR such as arbitration, summary jury trial or the like.
- c. Call in an experienced attorney/expert to render a frank neutral opinion of each side's arguments. This is called "neutral case evaluation" in many jurisdictions, and is a common form of ADR. This happens in many Texas mediations, although mediators are often reluctant to admit it.
- d. Submit the issue to binding ADR such as arbitration, either binding for the purpose of further collaborative proceedings, or in some cases binding period.

These are merely examples, to be added to as your experience dictates, and should not limit the exercise of anyone's imagination about creative ways to solve big problems by finding ways to eliminate small stumbling blocks.