Collaborative Dispute Resolution:An Idea Whose Time Has Come

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"A dispute is a problem to be solved together,
not a combat to be won."

I start with the assumption that the adversarial system of law as we know it under the Federal Rules of Civil Procedure and most state rules, is inefficient, burdensome, costly, and unpredictable in a rather extreme degree. Even Abraham Lincoln encouraged all lawyers to encourage clients to avoid the court house if possible, and the problem is orders of magnitude worse now.

Further, it frequently occurs that contracts are made which have been poorly negotiated or drafted, which are inconsistent with the facts, or which for some other reason can not be performed as written. This is particularly common when a "standard contract form" is used as a short cut by some business man in connection with a somewhat new situation wherein all the needed changes in the contract to fit it to the new situation are not negotiated or drafted into the contract form that is signed. Any adjudication of the dispute based upon these past acts including the erroneous contract is necessarily harsh and commonly grossly unfair.

This and some other common situations cry out for the flexibility that can be derived only from some degree or form of renegotiation and balance of equities rather than acceptance of slavery to past erroneous acts and contracts that make up into a nonsequitur, as both common law and civil law generally command.

Recently there has been developed a new mode of dispute resolution called "Collaborative Law" or as I prefer it, "Collaborative Dispute Resolution." It has proved highly successful in family law, and I am one of the folks to urge vigorously its wide use in commercial cases, and particularly patent cases.

The basic theme is that, with or without advice of counsel, the parties agree to scrap the idea of the adversarial system of law, and to work at every phase of their dispute resolution process in a collaborative, cooperative mode to resolve the dispute. Having

so decided, each party selects a counsel, its settlement counsel. Famously aggressive trial counsel are not necessarily the best role model for this selection of settlement counsel.

While this meeting can of course be held after the complaint and answer is filed, I have for a couple of decades felt it essentially necessary (save only when needing preliminary relief or to win a forum fight) not to file a complaint or answer until I got opposing counsel on the phone, invited him to lunch to meet him, get acquainted with him, and to brainstorm with him how we are going to approach the resolution of the dispute at hand. --A very valuable preliminary conference in any case. But that conference initiated by a potential plaintiff or defendant before suit is filed or by a defendant before the answer, or at other early time, starts out the collaborative dispute resolution process at the right time and on the right foot, and can lead promptly to the next step, the "four-party meeting" --which may include more than four persons in spite of its nick name.

The four people, two counsel, plaintiff, defendant or their representatives, in a "four party meeting", sit around a table and talk about how to collaborate and cooperate in all the various aspects of the resolution of the particular dispute a hand. In the process they get acquainted and hopefully, some trust is developed along the way. If not, parties can return to adjudication or mediation as they desire, or can select new collaborative settlement counsel and try again.

Sometimes a mediator is brought in to make it a five person meeting. Sometimes parties have more than one person present. But I still nickname this as the "four party meeting" for handy reference.

At this "four party meeting" the clients and counsel negotiate a four-party contract which may desirably be entitled a "Collaborative Dispute Resolution Agreement. " Hopefully, they will find it comfortable there to commit explicitly to resolve the dispute in "an atmosphere of honesty, cooperation, integrity and professionalism" seeking an objectively fair result. Some also urge a foreswearing of litigation which as you see below, I'm not bold enough yet to urge.

In this contract which the settlement counsel accept and join in, the clients agree to cooperate with each other and the counsel. The clients jointly direct the two settlement

counsel to collaborate with each other fully in discovery and all aspects of the dispute resolution, without secrets from each other, without any limits on collaboration, and to reach and jointly recommend and advocate a settlement of the case. At this stage they become co-mediators, but evaluative/highly directive mediators advocating their proposal with force because their determination is essentially guaranteeable to be better overall, given costs in time, money and turmoil of the court alternative, than you could ever expect from any adversarial court process.

The parties agree to cooperate with the settlement counsel, informally making available people, documents, visits to places and equipment, what ever settlement counsel think is helpful to a just and cost-effective investigation of the case merits, and a settlement. Parties and counsel agree to preserve the confidentiality of all party disclosures whereby to preserve any privilege. The counsel always meet and indulge most party-communications with or to the two parties together in collaborative mode, not with either party separately except when addressing minor details like programming such as a date for counsel inspection, etc.

The parties commit to a standard of "good faith" in the disclosures to the settlement counsel, "good faith cooperative responses to all good faith discovery requests", a standard markedly different from adversarial court practice. Only information useful in the collaborative process for resolving all the issues in the subject dispute need be sought or discovered in "good faith", because this is not a step on the road to the court house. The normal practice is not to construe the "good faith question/good faith answer" standard as requiring presentation of privileged material, but that should be explicitly recited in the contract. The determination of whether a privilege truly obtains is to be decided like any other dispute subsidiary to the global one-by the settlement counsel in their collaborative effort, sometimes involving trade-offs between them.

Can an in-house counsel take part as a collaborative lawyer? Sure, why not, except that the other party must be comfortable with the prospects of his/her removal from the entire scene if impasse is reached and the case goes on to an adversarial process of dispute resolution. Absent that questionable consent, the in-house lawyer should not be involved as a collaborative dispute resolver.

It sometimes occurs that a client representative in this negotiation agrees to and abides

by his commitments, but in the corporate hierarchy there may be such as a VP in charge of . . . or a general counsel or lesser counsel whose career path is in jeopardy if his prior written opinion is not vindicated. Such a person may not dedicated to full scope compliance with the collaborative approach. Even a CEO having grown up and participated in the adversarial system of dispute resolution, may instinctively frustrate the program without thinking about what he is doing. Any of many may not be "filled with the spirit" of the process and may at times obstruct full disclosure.

Any ranking malcontent can foul the water. So everybody in the chain of command of people likely to have any significant interest or responsibility in this dispute needs to be brought into some sort of live meeting to have the process explained to and accepted by them. And the signature of each of them on the contract is highly desirable if not a must. That done well, compliance is deemed to be so good as to shock all the skeptics.

The settlement counsel meet and communicate with the two parties together in collaborative mode, mostly not with either party separately. No secrets from each other except as necessary to protect trade secrets and private competitive information that the settlement counsel may be shield from the parties.

For openers the settlement counsel in collaborative mode quickly arrange for the production, within search burdens and costs they deem to be reasonably cost effective in context of the case and the values at risk, of at least

1. documents either party might wish to rely upon to make out its case,
2. documents in either party's control which are inconsistent with any of the controlling party's dispute resolution themes,
3. documents in either party's control which are consistent with or support any of the other party's themes,

-of course limited by the all encompassing concept of "objective good faith" in all things, which does not permit a flooding of the other side with largely irrelevant material.

Given the premise, pursuit of a cost effective objectively fair result, that much is appropriate to reasonable ethics in a dispute resolution, in any event. And the

settlement counsel go from there with further study and discovery as their review of those documents and related client and witness interviews reveals to be appropriate.

If at any time a lawyer finds, or a client finds, that a lawyer can not work or is not working in a collaborative mode, (s)he is out of there and the four party contract must so provide. Similarly, the contract must provide that if either the counsel or a party begins to distrust the integrity of the other party, or perhaps better even without cause, the party may give notice and withdraw from the process at any time, but the bias is strongly against doing it without very good cause. Assuming the proper preparation and set of signatures on the contract, this will occur much less frequently than any skeptic would suspect.

Since they are in settlement consultation, the counsel's work and their discovery is privileged and not to be revealed at any time to any body except each other as part of this process, and to the parties to what ever degree the settlement counsel agree as appropriate to this process. As with the mediator in a mediation, it is explicitly agreed that neither of the counsel will be subpoenaed or otherwise called as a witness of anything involved in their cooperative effort in this dispute settlement effort. These things too should also be expressed in the contract.

If experts are needed, the settlement counsel together employ only one expert for any topic. The expert is instructed to work with both parties jointly in open candor to help construct the settlement. The experts love this employment by contrast with their advocating-witness employments. Of course the contract should disqualify the collaborative expert if impasse is reached and the case goes on into a litigation or arbitration process.

The Cincinnati Dispute Resolution Center suggests these further contract thoughts which I recite here for your consideration:

- require that each party's collaborative lawyer complete a minimum of two days of training in collaborative dispute resolution;
- prohibit a party from unilaterally initiating litigation, even while permitting a lawsuit to be filed under limited circumstances or with mutual consent when "necessary to accomplish the purposes of the parties in their pursuit of an agreement";

- permitting the parties to enter into temporary agreements such as agreements to toll a limitations period and making such agreements enforceable in court;
- requiring that all relevant and currently available insurance coverage be maintained during the collaborative dispute resolution process;
- allowing any participant to call for the assistance of another collaborative lawyer or a mediator before impasse is declared;
- where necessary, governing all aspects of the transition from the collaborative process to litigation with other counsel.

Like the "Wise Men" or "Dispute Resolution Board" that are directed to settle promptly the many disputes that unavoidably arise out of major construction contracts, the collaborative settlement counsel succeed in settling most of the cases, quite cost effectively.

If settlement counsel don't settle the case, they and their firms are dismissed; new counsel who have no access to what the settlement counsel may have already discovered and discussed, are employed to handle the further efforts with the case either by a mediation, regular adversarial arbitration or court trial; the settlement counsel cooperate in turning the case over to the trial counsel but preserve the privilege and confidentiality of all they have learned in confidence.

This process has taken over as if by storm a number of pockets in several practice areas, and has some corporate house counsel shouting its merits from the roof tops and straining at the bit to try it out in their commercial cases. There are Collaborative Law groups now functioning in Cincinnati, Minneapolis, California, Dallas. This process has particular appeal to me in the highly complex big commercial case, like a patent infringement suit.

By way of example of some of the further considerations:
Unlike jurors or even judges for that matter, the two settlement counsel can be selected for their background in the subject matter of the dispute. They can take as much tutorial training as they think is helpful them, as Bob Monsoon and his co-neutral did in the IBM v Fujitsu case, possibly the world's largest ADR case. The Mnookin training from sources other than the parties in open meeting was video taped so each party would know what that training was and tutorials were conducted both in this country and in Japan.

They have the flexibility of not being bound by, of compromising out, contract recitations that conflict with the clear facts of the situation, the flexibility of considering future relationships and interests of the parties as well as past facts which are the common sole drivers for the adversarial system's end result.

The bias toward compromise from such poorly drafted contracts also extends to some legal areas of troublesome law, like the patent law which includes many standards that are hideously vague and indefinite in application to real world facts (e.g. what is an "enabling disclosure" of an invention--enabling to whom; what is an "equivalent"--recently the 12 judge Federal Circuit en banc split five ways on that issue; what is obvious to persons of ordinary skill in the art when the definition of the creative talents of such persons is not given nor definable in evidence and they likely differ extremely in their creative talents and their views; etc.). The resolution of vague legal standards is inherently somewhat biased toward compromise of those indefinite standards in pursuit of an "objectively fair result". Those who would elect this process should be aware of these realities, going in.

These two collaborating settlement counsel, by training, by experience, and by the nature of their joint collaborative probing for evidence from cooperative clients instead of from obstinate obstructionist warrior enemies, will always understand the case better than less well trained jurors who get to hear testimony but do not themselves get to study the background for that testimony, nor the technology or business context and no opportunity to study it.

When working with parties dedicated not to make war but cooperatively to yield discovery as needed, the cost of discovery in time, burden and money is almost always less than 10 %--often less than 1 %--of what we pay now for that same discovery and related motion practice in the big case tried adversarially under the Federal Rules of Civil Procedure.

Let me urge you to try it (and write a report on it to me). You'll like what you get. You'll be in love with what you pay for it in the big case.

"Nothing is more powerful than an idea whose time has come", Victor Hugo. Collaborative dispute resolution is an idea whose time has come.

Biography

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