

Collaborative Law
By
Edward S. Hill, Esq., CRE

Counselors of Real Estate (“CREs”) can expand their practices and enhance professional satisfaction through participation in the emerging dispute resolution process of collaborative law. The collaborative process allows real estate counselors to use their experience and expertise to help the parties solve the business problem that is at the root of the dispute.

The focus of traditional litigation is to resolve a dispute by winning a case in court or in some other forum. In that context, settlement is perceived, often by both sides, as losing. By contrast, in the collaborative process, a settlement is a win and court intervention a loss. The foundation of the collaborative process is the written agreement of the parties *as well as* their lawyers to certain ground rules that include:

- Clients and their lawyers actively participate together in face-to-face negotiations to find a workable and agreeable solution to the dispute (allowing creative solutions that would not be available through litigation or arbitration).
- All litigation activities are prohibited as long as the collaborative process continues (with obvious savings in legal expense).
- Clients and their lawyers agree to act in good faith and to disclose all relevant information freely and fully (promoting the relationship of the parties and cost savings).
- Experts are retained *jointly* by the parties to assist in the search for an acceptable resolution (creating more opportunity for innovative solutions and avoiding the cost of the “battle of the experts”).

Most importantly, the agreement expressly requires that if either party so much as threatens, much less proceeds, with a motion or other litigation procedure or if the other ground rules are not obeyed, the collaborative process ends and both lawyers must withdraw, leaving the parties to obtain other counsel to pursue the matter. This is the enforcement tool that encourages collaborative problem solving.

The collaborative process promotes dispute resolutions that are effective, that are reached more efficiently (both in terms of time and cost) and that preserve beneficial relationships between the parties. The collaborative law movement began as an approach to settlement of divorce cases. Its obvious advantages, however, are why an increasing number of lawyers, especially in Massachusetts, seek to apply the collaborative process to resolve all manner of real estate-related and other commercial business disputes.

The joint retention of experts in the collaborative process presents an opportunity for CREs. For many real estate consultants who do litigation support, traditional litigation support has followed the pattern of traditional litigation. One side hires an expert to help develop its side of the case, often on a valuation issue, to support that side, and to defeat the other side. The other side does the same. The collaborative process enables CREs to provide expanded service beyond the limits of traditional litigation support in real estate-related disputes. It allows CREs to do what they do best – solve real estate-related problems.

Those involved in the collaborative process – lawyers and parties alike – look for experts who are committed to the process. Their focus is on solving the problem, not on supporting an adversarial position. The expert has no allegiance to either party but rather to both parties and to development of an effective business-oriented solution to the business problem that led to the dispute. Experts who think “outside the box” are particularly desirable. Unlike a litigated matter, where the winner gets money damages or narrowly focused injunctive relief, the terms of a negotiated settlement are limited only by the imagination of the parties. The terms can be specifically tailored to the unique needs of the deal. The freedom to explore innovative solutions with the parties is particularly gratifying - both professionally and intellectually - to the Counselor; especially in dealing, as would likely be the case, with sophisticated parties.

The collaborative process benefits from the involvement of Counselors of Real Estate. Counselors of Real Estate benefit professionally from their involvement in the collaborative process. For more information on the collaborative law process, see the website of the Massachusetts Collaborative Law Council (www.massclc.org).

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