

IF I HAD NO HAMMER:

COLLABORATIVE SKILLS FOR COLLABORATIVE LAWYERS

BY GLENN MEIER, ESQ.

Litigation is a big hammer, and lawyers spend a lot of time honing their ability to swing that hammer. Somewhere along the way, we recognized that not every dispute is a nail, so we developed other tools to address those problems. This recognition gave rise to Alternative Dispute Resolution (ADR).

One of the most widely used ADR methods, arbitration, is procedurally similar to litigation. Both are adversarial processes. If litigation is a regular hammer, then arbitration is a rubber mallet. It's a little softer than a regular hammer, but you still use the tool by swinging it and hitting something. A lawyer with strong litigation skills can easily transfer those skills to arbitration. Other ADR methods, however, such as interest-based mediation and collaborative law, are collaborative processes, not adversarial ones. If lawyers bring their hammer-swinging skills to a collaborative process, at best they will be less effective at representing their clients. Beyond that, they run the real risk of completely undermining the process.

Lawyers representing clients in collaborative ADR matters must put down their hammers and make sure they are using collaborative tools instead. Genuine collaboration requires its own unique skillset, and masterful ADR representation demands that a lawyer actively develops and strengthens those skills. Here are six fundamental components of collaborative skills for the lawyer seeking a bigger toolkit.¹



Just Win/Win Baby

You've heard it a million times: one of the benefits of ADR is the ability to identify win/win solutions. Truly collaborative approaches to dispute resolution require that all participants adopt a win/win mentality. It is not enough to say, "I'm going to look out for the interests of my client and let the other lawyers worry about their clients' interests." When each individual focuses only on getting his or her individual wins, compromise, not collaboration, is the result. Compromise means sacrificing something you want in exchange for a concession. When people compromise, by definition, everyone loses something. It's no wonder that people often evaluate a good compromise settlement by determining whether or not everyone is unhappy with the agreement. If you want to experience the full benefits of collaboration, however, you have to approach the process wanting to make sure that everyone involved in the process, not just your client, wins.

Engage Everyone

One of the benefits of a collaborative approach to dispute resolution is that it promotes people's self-determination. Parties in a collaborative process don't have the answer to their problems imposed on them by an outside authority; they create their own solutions. Since collaborative processes are voluntary, any individual involved has ultimate veto authority over a collaborative solution. Consequently, if any participant in a collaborative process is not fully on board, there is a major risk of failure. ADR lawyers need to make sure that both they and their clients are not just willing, but also enthusiastic participants in the process. In addition, clients need to understand that collaboration is an active process for them, not a passive one. Clients can't just sit back and wait for someone to hand them the solution; they need to recognize their responsibility to actively participate in designing the solution.

Maintain Alignment

Not only do all of the parties in a collaborative process need to actively participate; they also need to make sure they stay aligned about the overall objective of the process. It is important at the outset to have an open discussion about the overall objectives of the process and to make sure that all participants agree on those objectives. Once there is alignment on those objectives, lawyers and other professionals facilitating the collaborative process need to keep a sharp eye out for signs that the involved parties are drifting out of alignment. If alignment starts to break down, those

facilitating professionals need to step in quickly and help restore it. A big part of the job as a collaborative lawyer is to help keep everyone rowing in the same direction.

Get Explicit

Often, people fall out of alignment because they do not have explicit communication about potentially troublesome topics. A great example is the classic negotiation problem involving two children fighting over one orange. If you aren't familiar with the scenario, it involves two young children who both want the last orange in the bowl. For the parent, it seems like an unsolvable problem. Both children insist they need the whole orange. What is left unsaid in this scenario is the reason each child wants the orange. When the parent initiates an explicit discussion regarding why each child wants the orange, the parent learns that one child wants the seeds to plant a tree and the other wants to eat the fruit. Following that explicit conversation, the win/win solution becomes obvious. Assumptions are a huge obstacle to collaborative work. If you

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are involved in a collaborative process and seem to have become stuck, check to see if any of the parties are operating under some implicit assumptions that need to be explicitly discussed.

Process is Critical

I recently heard a retired bishop of the Episcopal Diocese of Dallas speak about how the diocese used collaborative law to resolve a series of disputes involving their member congregations.² He noted the importance of a well-designed formal process for handling the disputes. He said that church leaders told him that when they could trust the parties on the other side, they were able to trust the process. Being able to trust that the process would protect them created an environment in which they could successfully work with the other parties.

When collaborating, create a robust procedure that protects the parties. An example procedure is an agreement that meetings will run by agenda, that everyone will have the chance to review and approve the agenda in advance and that any off-agenda issues will be held over to a future meeting.

Define the Problem

My father was an avid woodworker, and one of the biggest lessons I remember from working with him was “measure twice, cut once.” Applying that principle to problem-

solving reminds us that it is vital to make sure that we have accurately defined the problem before we begin solving it. People generally experience a problem as some sort of pain. When asked to describe the problem, they describe the pain. It is easy to fall into the trap of equating the problem with the pain and thinking that if you remove the immediate pain, you have removed the problem.

To illustrate this trap, imagine being at work when a new employee comes to your office door saying, “I’m thirsty.” Being ever-so-helpful, you hand the new person a bottle of water. He thanks you and goes on his way. Problem solved right? The next day, the new hire shows up at your door again announcing his thirst. You “solve his problem” again by giving him water. Imagine this going on every day for days. Finally you erupt and ask the new person why he expects you to provide him with water every day. He responds by telling you he appreciates the water, but was really wondering if you could tell him where the office water fountain is located. The “presenting problem” you heard from the person was thirst, but the problem he was really trying to solve was how to find the water fountain.

When you first encounter a problem while collaborating, investigate and find out why that issue is a problem. Keep digging down past all the pain points a person tells you, until you get to the root problem. One way to be sure you have discovered the root problem is to ask yourself whether solving that problem will keep the presenting problem/s from recurring over and over again.

Collaborative dispute resolution has the potential to be a major benefit for participants. Genuine collaboration leads to solutions in which everyone wins and the relationships between the parties can be preserved and even strengthened. For lawyers to effectively represent clients in collaborative proceedings, the lawyers need to make sure they show up to the party with more than just a hammer in their toolbox. Fully building their collaborative skills gives lawyers the variety of tools necessary in order to deliver huge value to clients who would benefit from a collaborative approach to their problems. **NL**

1. These fundamentals of collaboration are drawn from training in The Collaborative Operating System. For more information, visit www.thecos.org.
2. For background information regarding the disputes throughout the Episcopal church in the United States see: www.pewforum.org/2011/03/31/churches-in-court7.



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GLENN MEIER is a shareholder with the Las Vegas firm Holley Driggs Walch. His practice is centered on helping his clients design, build and maintain mutually beneficial relationships with their stakeholders. He practices in multiple areas around that purpose, including values-based contracting and collaborative law.