



Collaborative Law Strategies for the Insurance Defense Practice **By Dwayne J. Hermes and Erica R. Lay**

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Although collaborative law has traditionally only been utilized in the family law context, there are opportunities to adapt the collaborative law framework for an insurance defense practice. In the insurance defense context, collaborative law can be utilized as a means of reducing the cost of litigation. Regular reporting to the insured and carrier that includes analysis of whether collaborative law is an option is a method of demonstrating to the carrier the firm's ability to achieve resolutions creatively and in a way that furthers objectives of all involved.

According to the 2015 Claims & Litigation Management Alliance Litigation Management Study General Report, risk industry executives indicated that they wished their panel firms did a better job of demonstrating creativity, focusing more on resolution and utilizing non-discovery and nontraditional methods. Simply put, carriers are looking for defense firms to 'think outside the box' in achieving resolutions. This is where collaborative process comes into play. The goal of this article is to share a few strategies for adapting the collaborative law framework for an insurance defense practice. The process described is a robust version that can be modified based on the particular case.

The first step is to educate the insured and the carrier regarding the collaborative process. Make sure that the insured and the carrier agree to expectations of conduct and sign the participation agreement. If they are unwilling to sign the participation agreement, the collaborative tools can still be utilized informally. Defense counsel should then contact the counsel for the other party and gauge the other party's receptiveness. Assuming that the other party agrees to engage in the collaborative process, ask the insured and carrier to identify the goals that they would like to accomplish during the collaborative law process and their reasons for identifying each goal. Also, ask the insured and the carrier to identify what they believe are the goals of the other party. Finally, ask the insured and carrier to identify their greatest concerns regarding the lawsuit/matter. These steps ensure that you as the attorney are fully cognizant of your client's position. These steps also help the client begin to think about the case from the perspective of the other party.

After both parties have had a chance to individually determine their goals, the parties should schedule the first joint meeting. This meeting is an opportunity for both parties to share their respective goals for the process and to share any pressing needs. It is best for the parties to refrain from actual negotiations at this meeting.

After the initial meeting, the next phase is information gathering. First, decide what information is needed and assign information gatherer(s). Then review all information shared by the other party. After gathering all the necessary information, identify the hot button issues based on the investigation. Develop various options for resolution by making a list of all possible options. Evaluate the various options and discuss probable outcomes of each.

Now that you and your client have evaluated the various options, it is time to negotiate the agreement. Another joint session should be scheduled to allow the parties to discuss the various options they have identified. Narrow down the options to those that meet the most important goals of both parties.

After the parties have agreed on the best option, begin preparation of the legal documents. Exchange drafts with the other party's counsel, and schedule a joint session to present the document to both parties for their review and comments. Jointly determine whether all closing documents have been prepared and finalized. The meeting concludes after all closing documents have been signed.

The collaborative process described in this article can be modified based on the particular case and the parties involved. The collaborative process can also be used to resolve disputes that arise within the case as opposed to the case as a whole. In the insurance defense practice, the collaborative process is an opportunity to demonstrate to carriers that you, as defense panel counsel, have a vested interest in partnering with the carrier to reach a desired outcome and that you have the ability to formulate creative solutions to complex legal issues. Collaborative process is generally under-utilized and therefore, carriers are unlikely to request it. However, the typical benefits of collaborative process, namely, reduction in defense costs and more timely resolution, are benefits that resonate with all carriers. In addition, the fact that the process is designed to promote civility among litigants is a benefit to all parties involved.

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