

Why is the Participation Agreement Necessary?

By Sherrie R. Abney

Many have asked, “Why is the participation agreement necessary?” Simply stated: it is necessary because it provides ground rules for the entire collaborative process. The words in the participation agreement impart the spirit of the process which can best be described as “honesty and fair dealing.” This agreement, which may also be viewed as a covenant between all participants, acts as a map providing direction and instructions for the attorneys and their clients as they work toward final resolution.

From the moment a law suit is filed, a litigator is forced to perform the dual role of peace maker and trial lawyer. The litigator may wish to settle, but he or she is always keenly aware that if there is no settlement, it will be necessary to try the case. Much of the litigator’s time, talent and energy, as well as the client’s money, is wasted pursuing this schizophrenic task.

The threat of litigation does not exist in the collaborative process. The participation agreement makes it quite clear that collaborative attorneys cannot threaten to take the dispute to court since their signatures on the agreement are evidence of the fact that they must withdraw if the process fails. Moreover, if no resolution is reached, the parties must hire new counsel in order to proceed to litigation. In the end, all participants succeed, or all participants fail. This fact alone provides a tremendous incentive for everyone involved to do their utmost to seek out options and craft them into viable solutions.

The only way that collaborative resolution can be reached is for all parties and attorneys to work together. Each person must pull in the same direction to advance the process to a successful conclusion. Litigation by its very nature forces parties in opposite directions. The workings of the collaborative process are totally alien to litigation. The participation agreement plays a significant role in implementing the attorneys’ paradigm shift from the world of litigation to the brave new world of collaboration.

Once the parties and attorneys realize that they not only may – but must – devote themselves to the sole task of solving the dispute, they are free to think in an entirely different way. They are able to consider options that would never have come to mind – much less have been discussed during the litigation process. The

face to face meetings described in the participation agreement foster opportunities for creativity through discussions and brain storming. No other process creates so many favorable circumstances for rendering superlative results.

The participation agreement is why the parties must proceed honestly and in good faith. The participation agreement is why the attorneys must withdraw if the parties go to court. The participation agreement is the formula that contains the necessary elements which produce the chemistry of the collaborative process. These are the reasons why there must be a participation agreement.

Sherrie R. Abney
Vice President, TCLC