

Collaborative Law: Using it in Commercial and Business Disputes



Conflict Resolution Program



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What?

- > Collaborative law is a non-adversarial approach to resolving disputes, whereby the parties, their lawyers and other experts enter a formal agreement to focus on settlement rather than litigation.
- > If the dispute is not resolved and proceeds to litigation, the lawyers engaged in the collaborative process must withdraw.
- > This is set out in the agreement.
- > Collaborative law has been practised in the United States and Canada for about 15 years. It is now being practised in the United Kingdom and some countries in Europe.

Collaborative Practice

- > A viable alternative to litigation internationally.
- > Parties commit to reaching a mutually acceptable outcome without litigation.

Recent International Developments

In Maxwell's article, 'The Collaborative Dispute Resolution Process is Catching On In the Civil Arena', he suggests these situations as candidates for collaborative process:

- > when an employee feels he or she has been unfairly terminated;
- > when a vendor fails to make timely delivery of ordered goods, but the seller and the buyer want to preserve a long standing relationship;
- > when business and professional partnerships fall apart;
- > when a claim is made on the basis of professional malpractice involving lawyers, health care providers, accountants, architects and engineers;
- > in intellectual property issues;
- > and in construction projects, conflicts involving the owners, general and sub-contractors, architects, suppliers, sureties and liability insurance carriers. (referred to in Chrisman and ors).

What Are Lawyers Doing?

- > "A Collaborative Law case can be compared to a journey on a boat through whitewater rapids.
- > Parties and their respective lawyers are all together in one boat. Lawyers are piloting the boat, because they are familiar with the river and know how to navigate. Their role is to assist the client in staying dry throughout the entire trip, especially when something unexpected occurs.
- > In the passages where the river is smooth and calm it won't take much effort to stay in the boat. But everybody in the boat knows they will have to work together as a team in order to survive the perilous periods of rapids and rocks.
- > During these passages, passengers may lose some of their possessions in order to preserve the others. Lawyers work as a team in navigating the river successfully to its end, because they know it cannot be done without cooperation. By working together, they meet the goals of their respective clients -staying safe and dry in the boat until the end of their journey and focusing on saving the possessions most precious and valuable. " (Chrisman and ors)

Why?

“In our fast moving, complex and demanding world, resolving disputes in litigation is simply too costly, too painful, too ineffective and too destructive. It just makes sense to focus on the interests and goals of the parties, have a full and complete disclosure of relevant information, avoid the costly discovery fights in litigation and communicate face to face rather than through intermediaries.”
(Chrisman and ors)

Advantages?

- > Can lawyers differentiate themselves from their competitors? – and possibly even charge more for their services – if they become known for their commitment to collaboration?
- > Gilson and Mnookin suggested that by “choosing lawyers with reputations for cooperation, clients might be able to commit to cooperative litigation strategies in circumstances where the clients themselves would not otherwise trust each other.”

What?

- > Hoffman – “Sophisticated non-family lawyers have, in recent years, added mediation, arbitration, and case evaluation to their standard toolbox. Indeed, the tremendous success of mediation in resolving non-family cases stands as one of the primary obstacles, in my view, to greater acceptance of CL.
- > Unlike divorce cases, where mediation is generally done without lawyers and therefore can create a dangerously unlevel playing field, non-family cases are typically mediated with lawyers present. Commercial mediators report settlement rates in the 70-90% range and higher. For non-family litigators, there is a tendency to think ‘if it ain’t broke, don’t fix it.’ For them, CL may appear to be a solution looking for a problem.
- > However, mediation and CL often work successfully hand in hand.”

What are the Hallmarks?

- > Signed participation agreement.
- > Obligations to disclose and participate with respect and in good faith
- > Retention of legal advice.
- > Capacity to jointly retain neutral experts to reduce conflict opportunities and support parties.
- > Privacy, flexibility and confidentiality.

How?

Collaborative processes use interest-based negotiation. The lawyer guides the client through that process.

1. Identifying and communicating interests.
2. Defining the issues (setting the agenda)
3. Obtaining, organising and analysing the information needed to consider the issues.
4. Generating resolution options.
5. Evaluating the options in light of interests and reaching agreement.

Issues in the Commercial Sector

1. Many firms have a continuing relationship with commercial clients
2. Severing the relationship with a major client is problematic and undesirable
3. Most collaborative models developed in the family sector assume that lawyers cannot continue to act if the dispute has not resolved.

Dilemma?

A task force of the International Academy of Collaborative Professionals (IACP) met in Chicago in August 2005, to explore how to best promote the use of this new approach in all areas of civil jurisprudence.

The vision of IACP is to "transform how conflict is resolved worldwide through Collaborative Practice." The group firmly held to the Collaborative Commitment -that the participants must sign a participation agreement requiring the lawyers to withdraw if settlement is not reached -as a basic universal premise of all Collaborative Law and Collaborative Practice cases.

In 2006 – this view seems to be under discussion / debate.

Suggested Responses?

1. If the law firm is large enough – refer to someone else.
 2. If smaller – create a distinct agreement (see Hoffman) – unilateral CL.
 3. Use a collaborative agreement without a disqualification provision (see Lande) – CL lite.
 4. Cooperative litigation.
- > Hoffman – “To be sure, neither ‘CL-lite,’ ‘cooperative’ litigation, ‘unilateral CL,’ nor settlement counsel should be confused with CL, but they may be good alternatives to CL in a setting where either the client or the attorney’s firm is not willing to use CL.”

Concerns...

- > Hoffman – “My experience has been quite different, however, with non-family cases. The clients typically do not ask for CL, and, even after I describe CL, they are often skeptical.
- > They may like the idea of avoiding court if at all possible, but they generally do not see the advantage of the disqualification provision. They fear that they will be outflanked by a wily adversary who is not as attached to, or confident in, their attorney, and thus be forced to go searching once more for an attorney after spending time and money educating the first one.”

CL Lite

- > Hoffman - "CL attorneys have also been experimenting with variants of collaborative law. As noted by (Lande) the negotiation strategies, techniques, and norms used in CL may have enormous value even if the parties do not sign a formal CL agreement containing a provision for disqualification of CL counsel in the event that litigation is necessary.
- > Some CL attorneys have referred to this form of practice as 'CL-lite,' but this term is misleading, because the essence of CL is the disqualification of counsel from any form of litigation."

Adaptations

- > Hoffman – “The use of settlement counsel, described above, solves the disqualification problem if the settlement attorney is in the same firm as the litigating attorney.”
- > Hoffman – “In additionPerlmutter has described a model of litigation in which attorneys agree in advance to ‘fight fair’ – i.e., to seek a court decision on the merits without taking advantage of any inadvertent procedural mistakes and without obstructing the exchange of necessary information.”

Benefits

1. Not necessarily cheaper but more likely to support durable relationships
2. Large commercial transaction situations
3. Client needs, expectations and procedural satisfaction
4. Retention of clients.

Ethical Requirements?

1. Truthful and honest negotiations? (McFarlane)
2. What are our ethical boundaries in negotiation? – being redefined.

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