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Developments in dispute resolution alternatives

Collaborative law overview — towards collaborative problem-solving in business

Robert Lopich

Introduction

Judges apply the law in proceedings before them governed, inter alia, by the rules of evidence including issues of admissibility and relevance which all serve to limit and restrict what can be put before the Court. The result is that litigants often feel that the decision of the Court has been based on less than their 'whole story'. The consequence is that the parties often consider that they have not been heard and that the decision imposed on them is not 'fair' or appropriate.

Courts and the adversarial system are, however, but one tool in the dispute resolution practitioner's toolbox. There are alternatives.

Alternative dispute resolution

ADR practitioners are skilled negotiators and facilitators, who are able to identify commonalties between parties in dispute. The practitioners then guide the parties through a process that focuses on the party's entire 'story' to reach a settlement of the issues between them.

When asked about mediation and other forms of ADR, litigation lawyers frequently say: 'Yes, I do that all the time. Most of my matters settle out of court!'

That may very well be true, however, what those lawyers are commonly referring to is 'adversarial negotiation' or 'positional bargaining'.

Positional bargaining is commonplace and used in everyday transactions such as the sale or purchase of a car, house or business. It is also used widely in negotiations in relation to such money-based disputes as insurance claims, building disputes and personal injuries matters.

Typically, the negotiations in respect of such disputes are conducted in the 'shadow of the law' where the parties are competing for an identical but limited resource. To this end, in conducting positional bargaining each party is focused on 'winning' at the cost of the other party. Game theorists and psychologists describe such negotiations as 'zero-sum' or 'constant sum' games.[1]

This form of negotiation is employed by litigation lawyers often as a precursor to litigation or in settlement conferences. It is commonly conducted between the lawyers for the disputing parties and often in the absence of their clients.

Further, positional bargaining is characterised by each party making an extreme opening offer (ambit claim) at opposite ends of a potential 'range' together with attempts to deceive, coerce or persuade the other party to move closer to the offeror's position. The parties then engage in a series of offers and counteroffers resulting in increments to a point where they either agree to 'split the difference' or the negotiation fails.[2]

ADR practitioners say that there is a better way of resolving disputes that actually addresses the needs and interests of the disputing parties. More importantly, it allows the parties themselves to discuss the issues and to explore the options for settlement themselves.

In the facilitative model of mediation, however, mediators are handicapped in that they are required to be neutral and not to offer or provide advice to the disputing parties.

In this model of mediation the parties will occasionally 'get stuck' on an issue which may be simply addressed if the mediator was able to step out of the role of a third party neutral and become an ally or advocate for one or other of the parties.[3]

Other models of mediation such as 'evaluative mediation' (or conciliation) have evolved to enable the mediator to step out of the role of a third party neutral and to assist the parties to address some of these difficulties, with varying degrees of success.[4]

A new ADR tool

There is, however, a new kid on the ADR block which does provide an advocate and an ally for each of the parties in dispute and at the same time provides a safe environment for them to resolve their dispute.

That process is collaborative law.[5] The brainchild of Stu Webb[6] who, as a disgruntled divorce attorney from Minnesota in the United States, felt that there had to be a better way for separating couples to resolve the issues between them than the high-cost, time-consuming and emotionally destructive process offered by the divorce courts.

The history

By 1990 Stu had been practising as a divorce attorney for some 20 years. On the verge of giving up the practice of law, he felt that rather than resolving the problems of separating couples, the legal system often produced outcomes that made the situation very much worse for them. In his view, court-imposed outcomes frequently made it extremely difficult (if not impossible) for parties to deal with each other in a reasonable and rational fashion.

In January 1990 Stu sought the support of a judge of the Supreme Court of Minnesota whom he knew and a couple of likeminded colleagues. Together they started working collaboratively to change the way

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separating couples resolved issues between them and maintained a workable relationship into the future.

Some hiccups occurred in the early stages of the process (principally due to the fact that at that time the lawyers were not required to cease acting if the settlement negotiations failed. This allowed the parties to conduct their negotiations 'with one eye on the court'). Soon, however, they had worked out a process that they called 'collaborative law'.

At the end of his first 12 months as a collaborative lawyer, Stu had completed approximately 99 cases using this new process. Of that number only four of the matters had failed to settle.

The process caught on throughout the United States, spreading to Canada, the United Kingdom and parts of Europe. In the second half of 2005 Stu Webb himself and a Canadian collaborative lawyer, Marion Korn, delivered the first collaborative law training program to a group of about 30 lawyers, counsellors, financial advisers and others in Sydney. Today there are about 500 lawyers and others in Australia trained in collaborative law.

Further, collaborative law is now used in some 18 countries around the world including India, South Africa and Israel.

Collaborative law

The collaborative law process is designed to assist parties to resolve their disputes without resort to litigation. Unlike mediation, it is most effective in the early resolution of disputes. Many mediations take place shortly before the hearing date set for the matter and after considerable time, effort and expense have been invested in the matter in a last ditch attempt to avoid litigation.

Limited retainer

Collaborative practice is characterised by the tenet that, if the parties are not able to resolve their dispute by negotiation, the lawyers (and any experts retained by the parties) must withdraw from the matter. The lawyers and their firms are then prevented from acting for any of the parties if the matter proceeds to litigation.

A common misconception among civil and commercial lawyers is that if the lawyers withdraw from the matter, neither they, nor their firms, may ever act again for that particular client. That is simply not the case. The withdrawal requirement prevents the collaborative lawyers (and their firms) from acting further for that particular client in a dispute in relation to the same subject matter.

Seen in context, the withdrawal provision is intended to serve a number of purposes. First it removes the 'court option' from the negotiating table. Secondly, it is intended to prevent the situation where the lawyers misuse the collaborative process by simply going through the motions of exploring settlement before the matter is passed to a litigation lawyer in that firm.

The settlement negotiations may also be brought to an end if either side uses the threat of litigation as a means of coercion to achieve some concession or agreement from the other party or withholds or misrepresents information.

The collaborative lawyers work with the parties by assisting them to resolve their disputes within a structured process that includes all of the benefits of mediation but which also provides each of the parties with the benefit of an advocate and an ally.[7] As with mediation, the parties are encouraged to be future focused and to be motivated by their needs and interests rather than by adopting 'positions'.

The collaborative lawyers do not operate in the role of co-mediators. They are retained to diligently represent their respective client's interests but their retainer is limited to the settlement negotiations conducted between the parties to the dispute.

The ethical issue of a lawyer's ability to limit his or her retainer in the manner required of collaborative lawyers has received considerable attention both in Australia and elsewhere. In August 2007 the American Bar Association Standing Committee on Ethics and Professional Responsibility issued a formal opinion on this question.[8] The ABA opinion took the view that a lawyer may limit the scope of his or her retainer to that of acting for his or her client in relation to the settlement negotiations only.[9] The ABA also rejected the notion that in so limiting their retainer the lawyer had created a conflict of interest.

A ruling has been sought on this issue

from the Ethics Committee of the Law Society of NSW and is pending at the time of writing this article. It is not anticipated, however, that the view of the Law Society of NSW will be significantly different from the opinion expressed by the ABA.

Informed consent

Another issue that has received attention is the question of 'informed consent'. It is the view of this writer that a lawyer has a heightened obligation to ensure that the client understands and accepts that the collaborative lawyer will withdraw from acting further if the settlement negotiations fail or are compromised. The clients must be aware that in such circumstances they may well incur the cost of retaining alternative counsel if they proceed to litigate.

If the lawyers become aware that the parties or either of them are not being frank and honest, are withholding information or have some other 'agenda' then the lawyers are required to terminate the process and cannot act further in the matter.

Placing the client in a position where he or she can make an informed decision on whether to adopt the collaborative option is therefore essential. To do that the collaborative lawyer must not only explain to the client how the collaborative process works but also all of the options available, including litigation. The lawyer must also assess whether the matter and the client are suitable for the collaborative process.

Integrative bargaining

Instead of creating an atmosphere of intimidation and fear, where the lawyers control the discussions under the threat of a court imposed outcome, the collaborative environment is one in which the parties and their collaborative lawyers are focused on the resolution of the dispute through the use of integrative bargaining (or principled negotiation).[10]

Spencer and Altobelli[11] say that integrative bargaining is characterised by its adversarial nature but distinguish it from positional or adversarial bargaining on the basis that the parties make trade-offs or concessions to reach an accommodation with each other. In integrative bargaining, the parties are no longer competing for the same limited and scarce resource, but by looking at their respective needs and interests they are able to 'enlarge the pie' by trading off items which one might perceive as being of lesser value for something that is of greater value to that party.

The settlement of the dispute between the parties, therefore, is not the by-product of the litigation process where the parties involved are willing to accept the fallback position of a court-imposed outcome. Instead, the stated aim and purpose of the entire collaborative process from the outset is the resolution of the dispute between the parties.

Unlike litigation which is focused on the past to identify the perpetrator of some wrongful act or breach and to apportion blame, the collaborative process is future focused. The parties are encouraged and guided through a process in which their goals and objectives are considered, their needs and interests are identified and options to meet or satisfy those needs and interests are explored and developed. Importantly, it is effectively the parties themselves who through negotiation design their own outcome or settlement to the dispute between them.

Contrast this with litigation where communication between the disputing parties is discarded in favour of the use of a lawyer-directed process where the parties have no (or very little) direct communication between them.

Further, there are other aspects of the collaborative process that make it attractive in civil and commercial disputes and distinguish it from litigation, including that:

1. The collaborative process is private and confidential whereas in litigation the court records are in the public domain and available to the press.
2. Unlike litigation, the parties are encouraged to be future focused and to engage in problem solving techniques instead of seeking to assign blame or fault.
3. The collaborative process is not fettered by court-imposed deadlines which allows the parties to proceed at a pace that is of their choosing.
4. Apart from the Participation Agreement there is little in the way of documentation or letter writing and no pleadings, notices or other documents are filed or served (other than to prevent a matter becoming statute barred or, by agreement, to protect a status quo).

The collaborative process

Many of the skills of the mediator such as active listening, reflecting, reframing and others are used by the collaborative lawyer. These are well-recognised negotiation skills which are commonly used in many forms of negotiation.

There are, however, a number of significant differences between mediation and the collaborative process. The most obvious of these differences are the dynamics of the process.

The mediator is a neutral third party whose role is to facilitate the negotiation, but not to advise. The parties may and often do (particularly in non-family law matters) have lawyers present but generally the lawyers do not actually engage in the mediation process. The lawyers' role in mediation is to advise their client and to protect their client's legal rights. Their focus therefore is on 'winning' and they are not focused on negotiating a settlement of the dispute as part of a 'settlement team'. It is not uncommon in this situation for lawyers in a mediation context to have a dysfunctional effect on the mediation.

In the collaborative model, however, the dynamics at work are entirely different. In this model the lawyers and the disputing parties all speak to one another: see Figure 1. There is a frank, open and honest exchange of views and information and all of the persons present are working together as part of the 'settlement team'.

In the litigation model the principal players are the lawyers. Little if any dialogue actually takes place between the disputing parties. As the matter progresses the disputants become more and more positional, as they become more 'rights focused'. This then makes it extremely difficult for the parties to maintain any sort of ongoing working relationship, whether in the setting of a family law dispute or in a business or commercial dispute.

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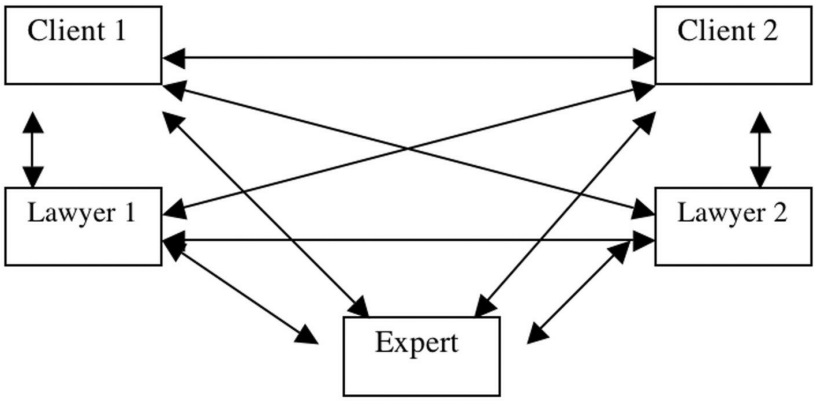
Figure 1: Collaborative Practice model



So how does the collaborative process work?

The collaborative process is voluntary and confidential. The settlement negotiations are conducted much like business meetings and comprise a series of structured meetings between the parties and their advisors. These meetings are generally limited in length to sessions of two to three hours each. At the first such meeting any issues relating to the Participation Agreement are discussed and resolved and the agreement is signed. A time and place for the next meeting is agreed and an agenda set for that meeting. Consideration is also given to whether any documents, including reports and valuations, are required for the next meeting and if so, who will obtain or produce that material.

Minutes are kept and circulated for approval, commonly by email. Each session is followed by a debriefing between the lawyer and their client and between the lawyers themselves.

This format is ideally suited to commercial clients who are familiar with the structure.

The interdisciplinary settlement team

The concept of a 'settlement team' is one of the indiciae of the collaborative model of dispute resolution.

In the collaborative process the parties, their lawyers and any experts (eg accountants/surveyors/building consultants) that are needed are all part of the 'settlement team'. From the outset of the matter the lawyers, their clients and the experts are committed to reaching a negotiated settlement of the dispute confronting them.

Significantly from a commercial perspective, the settlement negotiations are privileged and confidential.

There are two commonly adopted team structures in the collaborative process. They are the 'interdisciplinary model' and the 'referral model'.

The 'interdisciplinary model' is used principally in parts of the United States and Canada in family law matters where the clients engage a 'full team' comprising child consultants, divorce coaches, anger management coaches and financial experts from the outset.

The 'referral model' is more commonly used in civil and commercial disputes and is the favoured model in Australia. In this model the experts are brought into the process when their particular skill is needed. Accordingly, during a four-way meeting it may become evident that the assistance of a taxation expert, environmental scientist or civil engineer is needed. The parties will then agree to engage the services of the appropriate expert.

The experts form part of the settlement team and as such they are bound by the same rules. They are therefore not able to act in their professional capacity for either party in relation to the same subject-matter if the settlement negotiations fail.

The parties may agree, however, to permit certain experts or expert reports to be called on or produced in subsequent litigation of the dispute where, for example, the skills of the particular expert are rare or if neither of the parties challenges the expert's report.

Importantly, the expert is the settlement team's expert. As such their role is to employ their particular

expertise in a way which will best inform and assist all of the parties to address or resolve a particular issue.

Compare the situation in a litigated matter where separate experts are engaged by both sides of the dispute. These experts are then expected to provide as their expert opinion a view that best suits their client's argument or position.

It is not uncommon in adversarial proceedings for parties, at significant cost to the client, to seek the opinion of a number of experts before finding one who they feel will satisfactorily advance the client's cause.

In complex civil and commercial matters in Australia it is usual practice to engage a mediator as part of the settlement team as 'case manager/ facilitator' to manage the process and to assist the parties by mediating any impasse between them.

What are the advantages?

In Medicine Hat, Alberta, Canada the advent of collaborative practice in that town has left the divorce court with little or no family law matters with which deal.[12]

Collaborative practice should not however be regarded as a panacea. Not every matter and not every client is suitable for collaborative practice. Matters will continue to be litigated although both State and Federal Governments in Australia are recognising the benefits of ADR including collaborative practice.

At an address given at Old Parliament House by the Federal Attorney-General, The Hon Robert McClelland MP on 4 June 2008 to senior departmental and agency heads, the Attorney-General urged that there be a move away from litigation in disputes involving Federal Government agencies and that those agencies make greater use of ADR processes wherever possible instead.

Further, due to the level of informality, instead of waiting months or even years to get a matter into court, a collaborative matter can be started within days or weeks. The average collaborative matter generally settles within four to 10 of the four-way meetings described above.

The result is that apart from being a very much quicker process than litigation, it is also considerably less disruptive to the parties than preparing for a hearing before a court, and is significantly less expensive.

Parties in the collaborative process are able to produce a far greater range of solutions than would be available through the court system. Generally, these outcomes are more sustainable than court-imposed outcomes simply because they are the result of negotiations conducted between the parties themselves, formulated with the assistance of their collaborative lawyers.

At the successful conclusion of the settlement negotiations, the terms of any agreement reached can be reduced to writing by the lawyers who prepare any formal documents for the parties to sign or consent orders for filing in court as may be appropriate.

In May 2007 one of the earliest commercial collaborative law matters involving Boston collaborative lawyers Paul Faxon and Michael Zeytoonian was successfully resolved. This dispute involved the restructuring of a closely held company. Some complex legal issues also arose under Massachusetts State law. Since that date similar successes have been achieved in Australia and elsewhere.

Collaborative law and business

The level of support and recognition given to collaborative family law practice by the former Federal Government assisted significantly to establish the process among family law practitioners in Australia. The hope and expectation of the collaborative movement is that similar support will be forthcoming from the current Federal Government.

From a non-family law perspective, civil and commercial collaborative practice in Australia has been slower in gaining recognition. This is also the case in the United States[13] and elsewhere.

David Hoffman[14] suggests that instead of asking why collaborative law has been so slow to catch on in the world of business, a better question may be why it has caught on so quickly in the world of family law.[15]

There are, however, promising signs of change being driven largely by consumers and by governments of a move away from litigation to other methods of dispute resolution.

Small to medium enterprises in particular are finding the cost and time spent in litigating and the dislocation caused by litigation to be devastating for business. Few small to medium enterprises can afford to litigate. In a climate of narrowing profit margins and increased cost of operations, protracted litigation with a key supplier may result in the loss of market share, the loss or destruction of relationships with key suppliers, consequent drop off in cash flow and a possible financial crisis in the business.

Even the largest corporations are finding the cost of litigation to be prohibitive. Kathleen A Bryan,[16] former President and CEO of Motorola Inc, is reported as having said: 'Our business is not litigation. One of the goals we have is to ensure that litigation does not disrupt the company', and about litigation lawyers' awareness of ADR, she said: '[T]hey wouldn't even know about these alternatives if we hadn't brought them to the table and described the downsides of litigation'.[17]

In 1991 the Toro Company introduced a program for the early settlement of product liability and warranty claims. The company estimates that during the period from 1991 to mid-2005 it had saved $100 million in litigation costs.[18] Toro has cut the average cost of handling product liability claims against it from $115,000 to $35,000 per claim and has not set foot in a court room in relation to a product liability claim since 1994.

The foregoing is illustrative of an emerging recognition in both large and small to medium enterprises that litigation carries with it some significant cost and other disadvantages. ADR, including collaborative practice, can provide more commercially acceptable outcomes and also reductions in cost, time spent and dislocation to the business operation.

The collaborative process is suited to most forms of business/commercial disputes. This is particularly true where there is a need for some form of

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ongoing relationship between the parties. Disputes involving franchisee/franchisor, lessor/lessee, employer/employee and beneficiaries of estates are all well-suited to the collaborative process. Contracts for the supply of goods or services, disputes between company directors or business partners, disputes concerning intellectual property rights and construction disputes are also eminently suited to collaborative practice.

Collaborative practice is also very effective in the resolution of disputes between neighbours and has proved to be particularly helpful in the settlement of medical negligence, workplace discrimination, sports and entertainment law issues. The use of dispute resolution clauses in commercial agreements which nominate the collaborative process as the first option for dispute resolution are also becoming more common.

Conclusion

So has the collaborative dispute resolution revolution arrived?

It is probably fair to say that although collaborative practice has made significant inroads in the resolution of family law disputes, it will be some time before it is accepted as 'mainstream' in the civil and commercial areas of dispute resolution.

The process does, however, have much to recommend it. It is not helpful to suggest that collaborative practice is superior to mediation. Each is a tool in the dispute resolution practitioner's toolbox.

The important consideration is that these forms of dispute resolution empower the client and bring them into the dispute resolution process. Businesses large and small are subject to the same economic pressures and time constraint issues when faced with litigation.

It is this writer's view that collaborative practice is in fact a sound civil and commercial dispute resolution process that will change the way we, as lawyers, deal with conflict. ●

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Endnotes

1. David Spencer and Tom Altobelli, *Dispute Resolution in Australia: Cases and Materials* (2005).
2. See generally, Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005).
3. Bernard Meyer, *Beyond Neutrality* (2004).
4. See above note 1.
5. The terms 'collaborative law' and 'collaborative practice' used in this article are not inter-changeable. Collaborative law refers to the role and function of lawyers within collaborative practice which in turn refers to the process in which lawyers, financial advisors, and other professionals engage.
6. <StuWbb@aol.com>.
7. See above note 3.
8. American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 07-447 dated 9 August 2007.
9. Above note 8.
10. See above note 1.
11. See above note 1 at 70.
12. *Alberta National Post* (4 March 2002) see <www.collaborativedivorce.ca>.
13. David Hoffman, 'Collaborative law in the world of business', 6 *The Collaborative Law Review* 3 (Winter 2003).
14. <DHoffman@BostonLaw Collaborative.com>.
15. See above note 13.
16. See <www.cpradr.org/pdfs/kbrayn.pdf>.
17. Kathy Bryan is the former head of worldwide litigation for Motorola and a corporate vice-president of Motorola's Law Department. She has developed 'best-in-class' litigation management techniques for resolving business disputes in Motorola and has established a system of regional counsel firms across the United States.
18. LAW.COM article by Ashby Jones, Corporate Council (24 September 2004).