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Challenges of Collaborative Practice and the Commercial Context

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Introduction

Collaborative Law or Collaborative Practice ("CL" or "CP"), as a relatively new form of alternative dispute resolution 'has grown and blossomed' in the last twenty years.[1] It is now a 'significant model of practice' in the family law area, particularly in the United States where it began, and is gaining popularity in other countries such as Australia. This article will begin with an exploration of the origins of CL, how this alternative has emerged in response to traditional litigation, and the conceptual challenges it presents. The positive and negative impacts of the disqualification provision along with ethical implications will be examined, with particular focus on CL in commercial settings. Finally, Cooperative Practice will be introduced as a viable alternative primarily in the business setting where disqualification provisions may be most deterring.

Collaborative Law

CL is a dispute resolution process combining 'elements of interest based negotiation, mediation and advocacy'.[2] CL 'is team work',[3] as lawyers and clients 'work together to achieve settlement'.[4] If the clients require any 'non legal expertise', experts are engaged to assist and an interdisciplinary team is formed.[5] Clients and their lawyers remain in control, and can decide 'when they need an expert, who they will engage and what they will engage the expert to do'.[6] This is a transparent process and clients 'are at all times fully informed and in control of what is happening in their matter'.[7]

[1] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 282.
[2] Simon Curran, 'Collaborative Law: An Oxymoron whose time has come?' (2006) 28(6) *Bulletin (Law Society of SA)* 37, 37.
[3] Lorraine Lopich, 'Collaborative Law, Collaborative Divorce, a Hybrid, or is it Mediation?' (2007) *LEADER Update* 1, 1.
[4] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 1.

[5] Lorraine Lopich, 'Collaborative Law, Collaborative Divorce, a Hybrid, or is it Mediation?' (2007) *LEADER Update* 1, 3.
[6] Lorraine Lopich, 'Collaborative Law, Collaborative Divorce, a Hybrid, or is it Mediation?' (2007) *LEADER Update* 1, 4.
[7] Lorraine Lopich, 'Collaborative Law, Collaborative Divorce, a Hybrid, or is it Mediation?' (2007) *LEADER Update* 1, 4.

The CL process was developed by Stu Webb, a family lawyer working in Minneapolis who proposed 'there was a way to practice law in a different manner that would obviate the negative traits of litigation practice'.[8] Webb experimented with an arrangement with another family lawyer, 'whereby the two lawyers agreed to take on divorce cases and work with the clients around the table in a four-way configuration'.[9] A self-declared 'collaborative lawyer' in 1990, Webb began inviting other lawyers to share his approach and by 1992, information about the new process was spreading.[10] Today, CP is a 'significant model of practice' as has been since mid-1990s in the United States.[11] It has been practiced in Canada and the UK and is gaining popularity in Australia.[12] CP Professional Associations have been established in a number of states and territories,[13] indicating increasing numbers of lawyers practicing in this area. A collaborative lawyers search on the Collaborative Professionals Victoria website, for example, returns 42 practicing lawyers in the state.[14]

Challenges of Collaborative Law

When Stu Webb shared his new collaborative vision with the Chairman of the Minnesota Alternative Dispute Resolution Committee in the early 1990s, he received a reply that 'he was "nuts"'.[15] CL has a very different starting point to traditional practice, evolving in response to this as a true 'alternative'. This is perhaps why, though growing in popularity in the family law area, CL may not yet be considered a mainstream practice.

CL represents a major conceptual shift for all engaged in the process. We live in a competitive society that is rights-based,[16] that is, we focus on our rights and how we can have these upheld. As an extension of this, 'the legal profession have encouraged the expanded use of lawyers to remedy and

[8] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 213.
[9] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 213.
[10] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 214.
[11] Simon Curran, 'Collaborative Law: An Oxymoron whose time has come?' (2006) 28(6) *Bulletin (Law Society of SA)* 37, 37.
[12] Simon Curran, 'Collaborative Law: An Oxymoron whose time has come?' (2006) 28(6) *Bulletin (Law Society of SA)* 37, 37.
[13] Lorraine Lopich, 'Collaborative Law, Collaborative Divorce, a Hybrid, or is it Mediation?' (2007) *LEADER Update* 1, 1.
[14] Available at www.collabvic.com.au.
[15] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 214.
[16] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 282.

redress problems and damages'.[17] Both today and historically, when conflict emerges, lawyers are often the first involved as our expectation is that the 'justice system [will] vindicate the situation'.[18] This attitude towards conflict and the role of the justice system has created 'a legalistic and narrow approach to resolving' disputes.[19]

CL challenges this traditional rights-based approach. Instead, it provides an interest-based approach where parties are encouraged to think about their deeper interests and goals in reaching settlement (not litigation). The growth of CP, particularly regarding family disputes, demonstrates that the 'public is becoming more aware of the downsides of litigation with its emotion and financial costs' which have the potential to damage the participants and often children as well.[20] CL can be a 'relationship-preserving process, rather than relationship-destroying'.[21] In divorce cases, for example, parties may need to have a continuing relationship, and CL offers them 'a way through the divorce process that puts their long-term relationship in less jeopardy'.[22]

Webb contends CL has originated from the 'negative practices of litigation'.[23] Firstly, traditional litigation discourages 'open communication' as communication is primarily between lawyers, and clients are largely absent from this process.[24] There is greater emphasis on competition, with lawyers 'focusing on "winning" and "losing"', creating animosity between parties.[25] Adversarial litigation also creates 'difficulty in developing true facts' as there is a 'tendency to hold back information…for strategic advantage' due to the closed communicative and competitive environment.[26] A significant negative effect of litigation is the 'lawyer's alignment with a client's view of facts'.[27] Lawyers often

[17] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 282.
[18] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 282.
[19] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 282.
[20] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 282.
[21] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 133.
[22] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 134.
[23] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 215.
[24] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 215.
[25] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 215.
[26] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 215.
[27] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 215.

feel they must accept and agree with the client's view 'rather than risk unpopularity' by presenting a more realistic view, meaning it is difficult to find common ground and solutions for the parties.[28]

By providing an alternative to many of the negatives associated with traditional litigation, CL presents an attractive option and not just to clients. In a traditional legal practice, the lawyer may take on the client's problem at a personal level, causing loss of composure and objectivity, as well high stress levels.[29] Lawyers also feel more responsibility for resolution of the conflict in traditional practice, as they may 'move more into the center of the negotiation' shifting responsibility from the client.[30] A significant impact of adversarial litigation is the 'diminishment of collegiality between lawyers' triggering 'personality disputes or ego battles' something clearly not in the interests of the lawyers or clients.[31] CP removes a lot of these issues as it creates a collaborative environment, where lawyers and other professionals work together to come to a creative solution for all clients that meets their needs and interests, not legal rights. Collaborative lawyers asked why they chose to practice CL often replied this was because the 'stress and pain of litigation' was eliminated for themselves and their clients, and 'provided a reason to stay in practice'.[32] CP was viewed as a way to provide 'better service to clients and help them negotiate constructive outcomes for their families'.[33] On a personal level, CP allowed lawyers to receive 'greater satisfaction by synthesizing their personal and professional values'.[34] These results indicate that CL has developed as a way to avoid negatives associated with traditional litigation for both lawyers and clients.

The growth and success of CP rests largely with legal professionals, as CP only works when lawyers are willing and able to change the way they work traditionally. While maintaining alliance with their client, when practicing CP this is 'very different from the usual lawyer/client relationship'.[35] A collaborative lawyer must commit to a 'non litigious resolution of the dispute and to keep his/her clients focused on interest based negotiation'.[36] In a traditional practice, lawyers may focus on providing their client with interest-based legal advice, however in CP legal advice is 'simply once

[28] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 215.
[29] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 215.
[30] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 215.
[31] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 215.
[32] John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49(2) *Family Court Review* 257, 262.
[33] John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49(2) *Family Court Review* 257, 262.
[34] John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49(2) *Family Court Review* 257, 262.
[35] Lorraine Lopich, 'Collaborative Law, Collaborative Divorce, a Hybrid, or is it Mediation?' (2007) *LEADER Update* 1, 2.
[36] Lorraine Lopich, 'Collaborative Law, Collaborative Divorce, a Hybrid, or is it Mediation?' (2007) *LEADER Update* 1, 2.

facet of the dispute' working to create a resolution.[37] This can be challenging, contends Curran, for lawyers 'immersed in the adversarial tradition of common law' as the concept of CP is counter-intuitive for them.[38]

CP 'has grown and blossomed into a powerful force in the world of conflict resolution' and looks set to continue to grow.[39] The future of CP, suggests Mosten, will include education and specialisation for family lawyers in the collaborative area.[40] To help lawyers with the conceptual shift that is required when practicing CP, 'every law school will have at least a survey course on collaborative practice', and courses that 'feature modules' of CP.[41]

The Disqualification Provision

Perhaps one of the most identifying and conceptually challenging elements of CL is the disqualification provision, seen as the 'governing rule'.[42] Disqualification provisions are an essential part of the Participation Agreement signed by the lawyers and clients when beginning the collaborative process. The effect of this provision is that 'the lawyers must not continue to act for their respective clients in any future litigation of the dispute'.[43] This provision will come into effect 'in the event that *either* client withdraws from the process and pursues litigation'. [44] The provision is a clear expression of the interest-based focus of CL (reaching settlement) rather than rights-focus (retaining a lawyer for litigation).

On a practical level, a disqualification provision means lawyers will seek settlement as they will be unable to 'collect additional fees by taking the case to court'.[45] It also means that it would be 'costly…for a client to litigate because he or she will need to hire a new attorney'.[46] It may be seen

[37] Lorraine Lopich, 'Collaborative Law, Collaborative Divorce, a Hybrid, or is it Mediation?' (2007) *LEADER Update* 1, 2.
[38] Simon Curran, 'Collaborative Law: An Oxymoron whose time has come?' (2006) 28(6) *Bulletin (Law Society of SA)* 37, 37.
[39] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 282.
[40] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 282.
[41] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 283.
[42] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 213.
[43] Lorraine Lopich, 'Collaborative Law, Collaborative Divorce, a Hybrid, or is it Mediation?' (2007) *LEADER Update* 1, 2.
[44] Marion Korn, 'Fitting the fuss to the "form": The ethical controversy over collaborative law contracts' (2008) 8(1) *QUT Law & Justice Journal* 279, 279.
[45] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 133.
[46] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 133.

that the provision acts as disincentive to litigate. In other words, 'the intention is never to *use*' the provision.[47]

These provisions also play an important role as they represent the commitment parties are making to process. From the beginning, both sides are aware that the other has 'similarly tied its own hands by making litigation expensive'.[48] The provision can also be seen as a signal to each other 'that they truly intend to work together to resolve their differences amicably through settlement'.[49]

While disqualification provisions clearly provide an 'incentive to reach agreement', issues may also be created. Firstly, clients may be wary of taking part in a process that 'jeopardizes their continuing relationship with their lawyer'.[50] Secondly, these provisions can create 'a risk of significant settlement pressure'.[51] For many clients, investing time and money in the collaborative process may leave them feeling they have lost the option of going to court 'because they feel economically or psychologically unable to hire a new lawyer to litigate when it might be in their best interest to do so'.[52]

A 2004 study examined the impact of disqualification provisions on the CL process.[53] It found that 22% of the collaborative lawyers surveyed believed the collaborative process created pressure for parties, particularly the weaker party.[54] Another study by Schwab asked clients involved in a collaborative process that had reached agreement the impact of the disqualification provision.[55] For 55% of respondents, the provision 'had not kept them in negotiation'.[56]

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[47] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 133.
[48] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 133.
[49] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 133.
[50] John Lande, 'Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115' (2007) *Mediate.com* < http://www.mediate.com/articles/landeJ3.cfm>.
[51] John Lande, 'Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115' (2007) *Mediate.com* < http://www.mediate.com/articles/landeJ3.cfm>.
[52] John Lande, 'Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115' (2007) *Mediate.com* < http://www.mediate.com/articles/landeJ3.cfm>.
[53] John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49(2) *Family Court Review* 257, 269; John Lande, 'Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203.
[54] John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49(2) *Family Court Review* 257, 269; John Lande, 'Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203.
[55] John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49(2) *Family Court Review* 257, 269; William H. Schwab, 'Collaborative Lawyering: A Closer Look at an Emerging Practice' (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 351.
[56] John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49(2) *Family Court Review* 257, 269; William H. Schwab, 'Collaborative Lawyering: A Closer Look at an Emerging Practice' (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 351.

Whether disqualification provisions are ethical has been debated recently. In 2007 the legal ethics committee in Colorado found the 'practice of Collaborative Law unethical'.[57] This was based on examination of a 'four-way agreement signed by both divorcing spouses and their respective lawyers', including a disqualification provision.[58] The committee found that in the context of this four-way agreement, an agreement was created between the lawyer and a third party, violating state conflict of interest rules.[59] Taking this view, it is arguable that a collaborative lawyer, by creating an agreement with their client's spouse, has created a conflict of interest. However, the four-way agreement is not the only option available. In fact, Peppet argues, in a scenario 'where the opposing sides never sign a document together' there would be little potential for conflict of interest, and if the committee considered this it may well have come to a different conclusion.[60]

It would be easy to dismiss all disqualification provisions as unethical following the committee's finding. The 'great deal of contractual variation' in provisions may mean that some may be seen to create conflict of interest, some may not create a contract at all, and others may create contracts with no conflict of interest.[61] Perhaps more standardisation is required for provisions – Peppet suggests it should become 'best practice to avoid contractual, lawyer-privity four-way documents completely'.[62] This means lawyers will not be contractual parties thus 'reducing the ethical risk' in the Colorado context.[63]

As discussed, the presence of disqualification provisions can create pressure for clients to settle when they are not in a position to financially or psychology take any other options, even where it may be best for them to do so. The importance of screening and preparing parties at the beginning of the process cannot be overstated.[64] Not all clients will be suited to the collaborative process, even if they are keen to try it. Clients should also be advised 'they they need not feel they have to reach an agreement'.[65] The provision should exist in the agreement as an expression of the commitment of parties to reaching agreement, not to create pressure to settle for the sake of settling.

The Commercial Context

[57] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 142.
[58] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 143.
[59] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 143.
[60] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 144.
[61] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 155.
[62] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 155.
[63] Scott R. Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133, 160.
[64] John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49(2) *Family Court Review* 257, 269.
[65] John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49(2) *Family Court Review* 257, 269.

The 'overwhelming number of cases' that use CP are family-related, and the 'civil community has been slow to entertain this approach'.[66] There are a number of reasons why this is the case; there is often 'more money at stake…a stronger relationship between lawyers and clients' and often 'weaker reputational pressure to make sure that lawyers act collaboratively'.[67] The disqualification provision has perhaps been the biggest barrier preventing CP from entering the commercial arena. For businesses with long-standing relationships with their lawyers, such provisions may be 'too restrictive' and impractical.[68]

We may question why collaborative law has been 'so slow to catch on in the world of business', but Hoffman suggests it is better to ask 'why it has caught on so quickly in the world of family law'.[69] CP, as discussed, emerged in response to issues in family law providing a 'solution to a unique set of problems that often exist in divorce cases' but not so often in business or other areas.[70] Clients who have a business conflict 'may like the idea of avoiding court if possible but they generally do not see the advantage of the disqualification provision'.[71] There is usually no existing relationship of trust, so potential clients 'fear they will be outflanked by a wily adversary' meaning they will then have to expend more time and money finding a new lawyer.[72] The business setting is by its own nature a competitive one, so CP seems at first glance unsuitable.

However, as Hoffman contends, many factors that make CP suitable for family law are in fact evident in a commercial setting also.[73] For example, there may not appear to be common interests between the parties, however these do exist, 'even if it is only in the reduction' of cost of the process. [74] Like family cases, often those in a business dispute need to maintain an ongoing relationship. After settlement, parties will continue 'to be tied in contractual relationships' meaning CP may be a suitable option.[75] Even the issue of lawyers being unable to represent the client in litigation, one of the main hurdles in acceptance of CP in the business community, is also being dealt with. Some law firms are now offering 'settlement counsel', who practice in the same firm but specialise in settlement.[76] The effect of this is 'similar to disqualification' – if the collaborative process halts, new lawyers will be

[66] Marion Korn, 'Fitting the fuss to the "form": The ethical controversy over collaborative law contracts' (2008) 8(1) *QUT Law & Justice Journal* 279, 281.
[67] John Lande, 'Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115' (2007) *Mediate.com* < http://www.mediate.com/articles/landeJ3.cfm>.
[68] Marion Korn, 'Fitting the fuss to the "form": The ethical controversy over collaborative law contracts' (2008) 8(1) *QUT Law & Justice Journal* 279, 281.
[69] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 2.

[70] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 2.
[71] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 5.
[72] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 5.
[73] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 5.
[74] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 5.
[75] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 6.
[76] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 5.

assigned but from the same firm.[77] Settlement counsel has two actions, single and dual track.[78] Single track will see the 'litigating lawyers "stand down" and create a litigation freeze" allowing the settlement counsel to step in and work with the parties.[79] Dual track means that both settlement and litigation counsel will work concurrently on the case, 'and assume that there are litigation-related issues that cannot await settlement efforts'.[80] This 'model of settlement counsel' may well represent the future of CP in the business setting.[81]

CP may apply to a variety of conflicts that arise in 'the business, commercial and professional world'.[82] Particularly in cases where privacy and public relations may be a concern, CP keeps the dispute between the parties. For example, where professionals would 'prefer to resolve their disputes in a private, confidential setting' or intellectual property issues best kept 'out of the business magazines and off the front page of the morning paper'.[83] CP, as discussed, aims to preserve the existing relationship in some state, whereas litigation usually terminates this. In the business context, cases of unfair dismissal or the end of business partnerships may benefit from a process that allows this.[84]

For Hoffman, unwillingness to use CP in the commercial context is partly due to the 'culture and sociology of litigation practice', that is the trial continues 'to be a reverence…of the lawyer's ultimate test'.[85] Trials present 'enormous intellectual and emotional challenges' and are conducted in a public setting.[86] While negotiation may also carry these challenges, it is a private affair.[87] Within law firms, 'a similar culture prevails'.[88] A firm's 'status and influence' come from the revenue they produce, of which litigation is a major source.[89] For Hoffman, this long-standing culture means that firms may

[77] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 5.
[78] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 286.
[79] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 286.
[80] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 286.
[81] Forrest S. Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282, 286.
[82] Lawrence Maxwell, 'The Collaborative Dispute Resolution Process is Catching On in the Civil Arena' presented to IACP Core Collaborative Practice Skills Institute in Dallas (June 2005).
[83] Lawrence Maxwell, 'The Collaborative Dispute Resolution Process is Catching On in the Civil Arena' presented to IACP Core Collaborative Practice Skills Institute in Dallas (June 2005).
[84] Lawrence Maxwell, 'The Collaborative Dispute Resolution Process is Catching On in the Civil Arena' presented to IACP Core Collaborative Practice Skills Institute in Dallas (June 2005).
[85] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 6.

[86] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 6.
[87] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 6.
[88] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 7.
[89] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 7.

view CP 'as a threat to the firm's livelihood'.[90] Though this attitude is changing, it remains a significant reason CP is not more widely used in the commercial setting.

It is clear that CP has developed in a family law context, which is why the business community has been reluctant to accept this as rapidly. There is no denying that the family and commercial arenas are vastly different, and to expect CP to simply apply to the commercial/civil setting would be unrealistic. While it addresses many of the issues that apply in both settings, evidently disqualification provisions carry more significance in commercial cases. Because of this, it is likely the collaborative process will develop differently to how it has with family law, perhaps in the direction of separate settlement counsel.

Cooperative Practice

CL has developed as an 'important new dispute resolution process' and now emerging is a 'variation of that process, called "Cooperative Practice".[91] As we have seen, disqualification provisions are an 'essential element of the Collaborative model'.[92] Responding to the issues associated with this requirement of CP, a new 'movement has started to grow in the shadow'.[93] Cooperative Practice, like CP, is 'designed to promote early and productive negotiation intended to benefit both parties'.[94] Both types of practice aim to 'reverse the traditional assumption that negotiators will use adversarial negotiation'.[95] However, Cooperative Practice is distinguishable by the fact that disqualification agreements/provisions are not required.[96] Often, written agreements are also not created, but the 'negotiation strategies, techniques and norms' used in CP are present as they have 'enormous value' even without a signed agreement.[97] Cooperative Practice has been labelled 'CL-Lite' but as Hoffman contends, the term is 'misleading', as the essential element of CP is the disqualification provision.[98]

Perceptions of Cooperative Practice and the effect of the lack of disqualification provision were examined in a 2008 study by John Lande, 'a scholar who has closely studied Collaborative and

[90] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 7.
[91] John Lande, 'Developing Better Lawyers and Lawyering Practices: Introduction to the Symposium on Innovative Models of Lawyering' (2008) 1 *Journal of Dispute Resolution* 1, 2.
[92] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 205.
[93] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 205.
[94] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 205.
[95] John Lande, 'Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115' (2007) *Mediate.com* < http://www.mediate.com/articles/landeJ3.cfm>.
[96] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 205.
[97] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 7.
[98] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 7.

Cooperative law in recent years'.[99] He reported on an empirical study of lawyers from 'an organization called the Divorce Cooperation Institute (DCI)' in Wisconsin, considered the 'oldest and largest effort to promote Cooperative processes'.[100] Data was collected from members of DCI, members of the Collaborative Family Law Council of Wisconsin (CFLCW) and members who belonged to both groups.[101]

Considering the importance of disqualification agreements in upholding the purpose of CP, that is avoidance of litigation, Cooperative Practice would appear more likely to lead to litigation. However, when survey participants were asked whether there was 'any difference between Cooperative Practice and ligation-oriented practice' most respondents said there were 'important differences'.[102] This suggests that disqualification provisions are not essential to alternative dispute resolution processes that aim to reduce litigation.

Perceptions on disqualification agreements differed depending on whether the survey respondent as a DCI member also belonged to the CFLCW.[103] Members belonging to both groups 'generally indicated that the disqualification agreement can be helpful as an indicator that everyone intends to act in good faith… and by giving people an incentive to make an extra effort to settle'.[104] Few of the DCI-only members shared this few, and half 'believed that Collaborative Practice violates ethical rules'.[105] Over 80% of the DCI-only members believed that parties involved in a collaborative process were 'likely to feel abandoned by their lawyers if they need to litigate'.[106]

Overall, the study suggests that Cooperative Practice is perceived 'as sharply distinct from both litigation-oriented and Collaborative Practice'.[107] However, even with this distinction, a definition of Cooperative Practice is elusive. While the goals of Cooperative Practice are 'generally shared', even

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[99] John Lande, 'Developing Better Lawyers and Lawyering Practices: Introduction to the Symposium on Innovative Models of Lawyering' (2008) 1 *Journal of Dispute Resolution* 1, 8.
[100] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 205.
[101] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 205.
[102] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 213.
[103] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 217.
[104] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 217-218.
[105] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 218.
[106] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 218.
[107] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 249.

amongst practitioners there is 'no clear consensus about the definition of the practice'.[108] Cooperative Practice aims to provide a process based on 'valid information, direct negotiation, and decision-making by clients'.[109]

It would appear that Cooperative Practice processes could afford to be more standardised. Lande suggests that both lawyers and clients would here 'benefit from clarification of norms and requirements for disclosure of information' in cooperative cases.[110] It is also suggested that 'it would be desirable for people in Cooperative cases to use written participation agreements more often'.[111] This would help define 'goals, expectations, and consequences' involved in the process and may 'inspire greater commitment by the parties'.[112]

Certainly, Cooperative Practice appears to be a viable alternative to CP but must be recognised as a distinct and separate option, rather than a 'lite' version. Cooperative Practice may present an attractive option in the commercial setting for businesses concerned with the disqualification provision required in a CP agreement. Hoffman believes Cooperative Practice is one available alternative 'in a setting whether either the client or the attorney's firm is not willing' to use CP.[113] Compared to traditional litigation-based processes, parties involved in cooperative cases were generally found to be 'more involved…cooperative…and satisfied with the process'.[114] With further clarification and definition, perhaps Cooperative Practice will become a more widely-used alternative where CP is unsuitable.

Conclusion

CP has come a long way from the small group of collaborative lawyers working in Minnesota with Stu Webb, founder of the movement.[115] While an emerging practice in Australia, knowledge, popularity and practice of CL is increasing as there is now a 'significant pool of trained collaborative

[108] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 227.
[109] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 227.
[110] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 257.
[111] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 256.
[112] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 256.
[113] David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 7.

[114] John Lande, 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203, 213.
[115] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 215.

lawyers in most states and territories'.[116] As we have seen, CP is a conceptual alternative to traditional litigation-oriented practice, and offers an attractive way to avoid detrimental impacts of litigation, especially upon family relationships. Though the inclusion of disqualification provisions has been criticised, it appears that these provisions are important in ensuring commitment to the collaborative process, and when used appropriately do not appear to be unethical. Though CP has developed in the family arena, its future undoubtedly lies in the commercial sector also. Where parties 'have a stake in an ongoing relationship',[117] CP appears a suitable option, even with disqualification provisions. And for those involved in commercial disputes who are wary of disqualification provisions, settlement counsel presents a new alternative. While similar to CL, Cooperative Practice offers many of the same benefits without disqualification, so is also a viable alternative, and will perhaps be more so with further development and standardisation.

Bibliography

Journal Articles

Curran, Simon, 'Collaborative Law: An Oxymoron whose time has come?' (2006) 28(6) *Bulletin (Law Society of SA)* 37

Hoffman, David, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1

Korn, Marion, 'Fitting the fuss to the "form": The ethical controversy over collaborative law contracts' (2008) 8(1) *QUT Law & Justice Journal* 279

Lande, John, 'An Empirical Analysis of Collaborative Practice' (2011) 49(2) *Family Court Review* 257

Lande, John, 'Developing Better Lawyers and Lawyering Practices: Introduction to the Symposium on Innovative Models of Lawyering' (2008) 1 *Journal of Dispute Resolution* 1

[116] Catherine Gale, 'Collaborative law in lawyers' hands', *Lawyers Weekly* (online), 20 July 2011 <www.lawyersweekly.com.au/the-new-lawyer/comment-debate/collaborative-law-in-lawyers-hands>.
[117] Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213, 219.

Lande, John, 'Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115' (2007) *Mediate.com* < http://www.mediate.com/articles/landeJ3.cfm>

Lande, John, 'Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) *Journal of Dispute Resolution* 203

Lopich, Lorraine, 'Collaborative Law, Collaborative Divorce, a Hybrid, or is it Mediation?' (2007) *LEADER Update* 1

Mosten, Forrest S., 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49(2) *Family Court Review* 282

Peppet, Scott R.,'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 133

Schwab, William H., 'Collaborative Lawyering: A Closer Look at an Emerging Practice' (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 351

Webb, Stu and Ousky, Ron, 'History and Development of Collaborative Practice' (2011) 49(2) *Family Court Review* 213

Other

Gale, Catherine, 'Collaborative law in lawyers' hands', *Lawyers Weekly* (online), 20 July 2011 <www.lawyersweekly.com.au/the-new-lawyer/comment-debate/collaborative-law-in-lawyers-hands>

Maxwell, Lawrence, 'The Collaborative Dispute Resolution Process is Catching On in the Civil Arena' presented to IACP Core Collaborative Practice Skills Institute in Dallas (June 2005)

www.collabvic.com.au