Commercial Practice

Business and Commercial Collaborative Law

Collaborative Practice
A Civil and Commercial Perspective

Further Reading…

- The Collaborative Law Process

There is a growing trend in the business and commercial community towards the recognition of the benefits of Alternate Dispute Resolution (ADR) processes in the early resolution of disputes. A new arrival on the ADR scene for civil and commercial disputes is Collaborative Practice.

At Collaborative Professionals (NSW) Inc, our focus is on ensuring that business owners and operators receive sound advice and that they are aware of the alternatives to litigation as a means of resolving their disputes.

What is Civil & Commercial Collaborative Law?

Firstly, imagine that you have a dispute involving your business. You go to see your lawyer who advises you to commence legal proceeding to protect your rights. In making the decision to litigate, you have set off on the often long and expensive road of adversarial dispute resolution.

Off you go to court with all the attendant disruption to your business in terms of making you and your staff available to give instructions so that affidavits and the like may be prepared. Then there is the considerable expense in terms of time, resources and financial outlay. At the end of that process, you pass the problem to a third party (the judge or magistrate) who does not know you, your business or anywhere near as much about the problem as you do and effectively, you say to that person, "*.you sort this out for me.*"

Consider whether this would be a better process.

Instead of engaging in the process described above, you meet around a table with your collaboratively trained lawyer, the other party and their collaboratively trained lawyer and proceed to resolve the dispute without going to court by using structured principled negotiation techniques. You engage in a series of confidential meetings ending up with a solution that you and the other party have designed yourselves to best address the issues that are important to you and your business.

That process is Collaborative Law, it has been described as:- "Law without litigation & mediation with advice."

Where did it come from?

Collaborative Law was started by a divorce lawyer in Minnesota by the name of Stu Webb. He had been going through the stress and distress of family law litigation for about 30 years and had reached the point where he was ready to pack it in. He felt that there had to be a better way for people to deal with these very important issues in their lives instead of going to court. So he spoke to a few of his colleagues and a judge and they started to work out a process.

There were a couple of hiccups along the way but soon they had worked out a process that they called "Collaborative Law". This process kept the disputing parties out of court, assisted them to resolve their disputes is a way that addressed their needs and interests and assisted the parties to maintain a workable relationship between them.

At the end of his first 12 months as a Collaborative Lawyer, Stu had completed approximately 99 cases through this process. Only 4 of those had failed to settle.

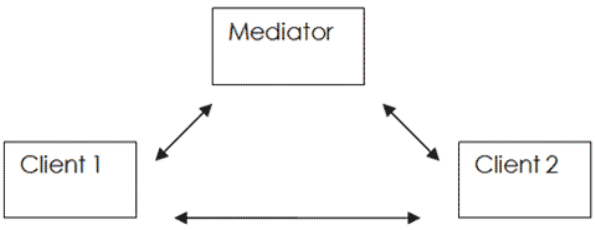
The process caught on throughout the USA, spreading to Canada, the United Kingdom and parts of Europe. In the second half of 2005 Stu Webb himself and a Canadian Collaborative Lawyer, Marion Korn, delivered the first collaborative law training program to a group of about 30 lawyers, counsellors, financial advisers and others in Sydney, Australia. Today there are about 300 trained lawyers and others in Australia.

The new paradigm had arrived in Australia!

What does the Collaborative Process look like?

The Collaborative process has been compared to mediation. In fact certain very senior mediators in Australia regard it as another form of mediation.

Mediation model:

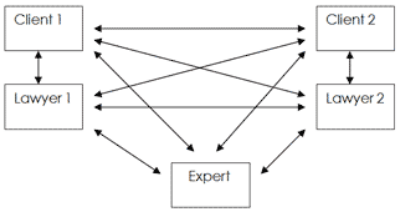


Looking at the diagram above, you will see that mediation is essentially a 3 way discussion. The Mediator is a neutral third party whose role it is to facilitate the negotiation but not to advise. The parties may have lawyers present but generally they do not actually engage in the mediation process. The lawyers are there to advise their client and to protect their client's interest. Their focus is not therefore on negotiating a settlement of the dispute as part of a settlement team and can in

fact be dysfunctional.

Then there is the collaborative model. In this model all of the parties speak to each other.

Collaborative Practice model:



Compare litigation, where the only parties actually talking to the each other are the lawyers. The clients themselves never get to talk to each other. As the matter progresses the disputants become more and more positional. As a result any sort of business relationship in the future between the clients becomes at best very difficult and at worst, impossible. The lawyers do what they are trained to do and do very well, they litigate!

So how does the Collaborative Process work?

The Collaborative Process is voluntary and confidential. All of the parties enter into it committed to engage in principled negotiation with a view to settling the dispute without going to court. The lawyers' role is that of legal adviser and of ally to their client. They will facilitate and guide the negotiations while the clients themselves conduct the negotiations. A Participation Agreement which sets out the rules governing the process and the obligations of the parties is signed by the clients, the lawyers and any experts.

The lawyers actually contract with the clients that if they are not able to resolve the dispute through negotiation, then they must disqualify themselves. This is one of the central principals of Collaborative Practice. Similar rules affect the experts who are also part of the settlement team. Neither the lawyers nor the experts can be called to give evidence in Court of what transpired through the Collaborative Process.

The clients are focused on settling their dispute and are therefore willing and committed to entering into good faith negotiation with the other party. In fact, 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 for the parties.

In the Collaborative Process, the parties, their lawyers and any experts (accountants/ surveyors/ building consultants etc) that are needed are all part of the settlement team.

The negotiations are conducted in a series of meetings, generally about 2 hours in length. At the end of each meeting an agenda for the next meeting is set. Consideration is given to whether any documents, reports, valuations etc are required for the next meeting and who will obtain or produce them. A time and place for the next meeting is also set. The meetings are followed by debriefing sessions between the lawyers and their respective clients and between the lawyers themselves. Minutes are written up to be tabled and approved by the parties at the next meeting.

What are the advantages?

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 settles within 2 to 10 of the 2 hour meetings. There is very little, if any letter writing between the lawyers and their clients or the other lawyer, no court documents, affidavits or pleadings are prepared and most of the work is done in the 4 way meetings.

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

But the major benefit to the client is that they themselves negotiate the solution to their dispute. They are the architects of their resolution and are guided through the process by their lawyers. The result of this is that the solution generally lasts much longer than a court ordered solution.

The lawyers then prepare any formal agreements or consent orders for filing to complete the matter.

So what types of matters are suitable for the Collaborative process?

In theory any matter that can be litigated can be resolved through the Collaborative Process. By way of example, disputes in the areas of workplace and industrial relations, between partners, between directors or directors and shareholders, franchisees and franchisors, lessors and lessees are all well suited to the Collaborative Process. The list goes on and on.

In the area of civil disputes, the range of matters that are suitable for resolution using the Collaborative Process are as diverse as disputes arising in relation to Wills or estates and fencing disputes between neighbours.

The important consideration is that because of the manner in which the dispute resolution process is conducted, the lines of communication between the parties remain in tact and may even be improved. The parties are able to continue to work together.

More and more business people are beginning to recognise that there is a smarter more productive way of dispute resolution and that Collaborative Practice is that way.

- **FIND A COLLABORATIVE LAWYER**

  View our listings of NSW Collaborative Professionals here

- **FIND OUT MORE ABOUT COLLABORATIVE LAW**

  What is Collaborative Law and how does it work? Find out here!

- **COLLABORATIVE LAW FAQs**

  Answers to all your questions concerning Collaborative Law

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