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Précis Paper

Challenges for Collaborative Lawyers in providing CP Processes – Part 2

A discussion of the challenges faced by collaborative practice lawyers and the benefits that practice groups can provide to practitioners.

Discussion Includes

- Handling client's emotions
- Disqualification clause
- Client awareness
- Communication

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Challenges for Collaborative Lawyers in providing CP Processes – Part 2

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1. In this edition of BenchTV, Marilyn Scott (Senior Lecturer – University of Technology, Sydney) and Pauline Collins (Associate Professor – University of Southern Queensland) discuss the research they conducted regarding collaborative practice groups and the challenges that are faced by collaborative practitioners

Handling client's emotions2

2. One of the advantages with using communication coaches is that they can work with the client separately, meaning the client is able to work out what their own interests are, rehearsing that and looking at options, etc. so that the client is able to go into negotiation prepared and ready to participate.

3. If a client is in a highly emotional state, you can defer the meeting until they are in a better position to conduct the meeting. This means that you are able to accommodate the emotional highs and lows of the parties. With the collaborative practice model you have a series of meetings so it is possible to stop a meeting if a party is feeling that their emotions are affecting their decision making abilities.

4. For simple consent orders, there are usually about 3 meetings. For a more complex matter, it could be about 7 two hour meetings. Other matters may adjourn for a period of time to allow the grieving cycle of the matter to mature.

Disqualification clause

5. A disqualification clauses usually exists in these matters which essentially quarantines the negotiation from any threat of adversarial litigation.

6. When participants were asked about the disqualification clause, they tended to talk about how the disqualification provision negatively impacts on the other lawyer, rather than commenting on how they viewed it. However, some practitioners do have the view that they do not want to sign away their right to go to court.

7. In the Family Court of Australia's Annual Report 2014-2015 it was reported that there were nearly 20,500 matters filed, but of those 67% were consent orders and did not go to trial. Of all of the filings for that year, only 2.048% actually went to judgement.

8. The statistics from the 2016/2017 report were very similar. Nearly 21,000 matters were filed, 68% were finalized as consent orders but only 1.68% actually went to judgement. About a third of these matters are being contested. This highlights that the chances of a matter going to some sort of settlement is much, much higher than going to trial.

9. There is settlement through lawyer-lawyer negotiation, and settlement through mediation or collaboration. With the collaboration process you have a holistic approach in which relationships are hopefully maintained.

10. The large number of consent orders may reflect the impact that mediation is having on people working out their issues without the intervention of litigation. Collaborative law is another step up in relation to the dispute resolution processes that are already used.

11. The primary difference between mediation and collaborative practice is that in collaborative practice you have the lawyer and client on both sides working together, rather than just the mediator mediating with the clients.

12. The more experienced collaborative practitioners have said their experience in collaborative practice is actually impacting upon how they run all of their matters. It may not be a collaborative law matter, but they are using the process, the principles and the techniques to run a meeting so that they reach settlement, even though it may have been a trial matter.

Client awareness

13. There may be a lot of ready and willing collaborative practitioners, but these practitioners need the clients to be willing to participate in such a process. Raising education awareness not only amongst practitioners but also amongst clients is extremely important.

14. It is suggested that an active approach is required, one that involves more than just putting a collaborative practice pamphlet in the waiting room of the firm, but actually engaging with the client about the practices and processes of collaborative practice.

15. There are clear parallels between the developmental stages of mediation and collaborative practice. Mandatory mediation for children's matters has meant that practitioners have become more comfortable and confident with the process as they see how it worked.

16. In Texas there is a system where matters are filed, but there is an option to choose the collaborative practice process rather than the trial process. Implementing something like this would be a step towards normalizing collaborative practice.

17. It is suggested that there is a need to teach collaborative practice in law schools and incorporate it in the training of our future law graduates in order to ensure that they understand this new paradigm and way of practicing. It is such a different approach to problem solving than the traditional adversarial nature of practice that is traditionally taught in law school.

Communication

18. There is a shift from a lawyer focused approach to a client focused, interest based approach. The education offered needs to be more balanced to allow for both trial advocacy and dispute resolution advocacy.

19. This research has shown that you cannot have collaborative practitioners without the practice group to support it. There has been a departure from the solo performance of most legal representatives towards working together in a team based way. The practice groups help to assist this in that members are able to communicate with each other and to better understand each other's practice styles.

20. This assists practitioners to be able to work together, and allows for peer mentoring. Having an environment to discuss possible mistakes that have been made in practice without being criticized is important for practitioners' professional growth. The cultural changes that this trans-disciplinary approach to legal problem solving brings requires ongoing support.

21. The role of the neutral coach was one that was identified as assisting the lawyers greatly in facilitating this communication. More experienced practitioners like to have the neutral coach at the beginning of the process because it means that the clients understand that it is a normal part of the process.

22. In the UK they find that if the parties know that a coach is available and what their function can be from the outset, they will often be more comfortable if they are used later in the process.

23. In a single neutral model, the coach's function can be to organize the meetings and build rapport with the clients. Other times only one party may need a coach, or sometimes there will be one coach working with both parties. Less commonly there may be instances where each party has their own neutral coach, but this method is not currently used in Australia.

24. Keeping communication channels open is crucial to the collaborative practice area. It is not only about honesty and trust, but about being less combative in communication with other practitioners and clients.

25. Constructive debriefing with a colleague before, during and after a matter allows for professional development. Acknowledging your own mistakes is a learning curve that the collaborative practice group brings to the collaborative practitioners.

26. Both the metropolitan practice groups and the regional city practice group experienced similar issues at the varied stages in their establishment and in the conduct of their practice groups.

27. It was clear from this research that the essential nature of the practice group and the many supportive roles it plays is the enabler of good collaborative practice. The findings of Scott and Collins' research may assist the emergent and maturing practice groups as their members make the paradigm shift from traditional adversarial processes to collaborative practice.

BIOGRAPHY

Marilyn Scott

Senior Lecturer – University of Technology, Sydney

Marilyn is Head of the Dispute Resolution Program at UTS and presented the first training in Australia on Collaborative Law. This training program went on to be presented in Queensland, Western Australia and New Zealand. Her qualifications as a lawyer, arbitrator, practicing mediator and negotiation strategist bring practical experience to her teaching. She researches and publishes in the field of Interdisciplinary Collaborative Practice and is founding Vice President of Collaborative Professionals (NSW) Inc. and a foundation member of the Australian Association of Collaborative Professionals.

Pauline Collins

Associate Professor – University of Southern Queensland

Pauline is an Associate Professor in the School of Law and Justice. She is also a nationally accredited Mediator, currently mediating in the QCAT Minor Civil Jurisdiction. Pauline has professional memberships in the Downs and Southern Western Queensland Law Association as well as the International Law Association. Her research interests include International and Comparative Law, Legal Education, Mediation and Military Law.

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