



Précis Paper

Collaborative Practice

This presentation highlights a new form of dispute resolution particularly applicable in family law, but which is also a useful tool for other fields of law.

Discussion Includes

- What is collaborative practice?
- Interdisciplinary collaborative practice
- The role of the coach
- Considerations and challenges for lawyers
- Appropriate matters for collaborative practice
- Teaching and training for collaborative practice
- Differences between traditional dispute resolution and collaborative practice

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Collaborative Practice

1. In this edition of BenchTV, Shelby Timmins (Mediator, Dispute Resolution Practitioner and Collaborative Coach, Divorce Done Differently, Sydney), Rachel Slat (Solicitor, Director, Broun Abrahams Burreket Family Lawyers, Sydney) and Dr Susan Armstrong (Adjunct Professor, Western Sydney University, Sydney) discuss the development of collaborative practice in Australia.

What is Collaborative Practice?

2. Collaborative practice is a bespoke process on the dispute resolution spectrum specifically tailored to the parties in dispute. It is most often applied to family law, but is also suitable to other areas where the parties have an interest in maintaining the peace or reducing tension, such as employment law, disputes over estates, and surrogacy disputes. It began in the USA in 1990, as an attempt to resolve matters in a settlement-focused way and with the parties' interests at heart. Collaborative practice is ultimately about educating a client about what is the best method to resolve their dispute.
3. The primary element that distinguishes collaborative practice from traditional dispute resolution mechanisms is an agreement by all of the parties not to litigate or threaten litigation. The objective of collaborative practice is to assist the parties to be self-determining, in a supportive way that encourages resolution of the issues in dispute. It is modeled on mediation, but is quite distinct from it. Collaborative practice is a flexible process that can be multi-disciplinary, involving professionals other than lawyers.
4. An important aspect of collaborative practice is the coach, who acts as the facilitator for the process. The coach can work on the parties' ability to communicate and determine the issues that need resolution, rather than focusing solely on the legal issues. This can include emotional issues, and can involve bringing onboard other experts.
5. Interdisciplinary collaborative practice involves bringing in other experts. Those involved in collaborative practice can include:
 - The clients;
 - The lawyers;
 - The coach;
 - A financial adviser;
 - A financial planner or accountant;

- A lawyer and/or social worker for the children; and
 - A child psychologist.
6. Ultimately, collaborative practice is interests-based negotiation, not rights-based negotiation. This means that the practice explores the interests of the parties and works towards finding common ground, rather than bargaining solely based on the parties' respective rights.

The Process

7. One important aspect of collaborative practice is the participation agreement, in which the parties agree not to litigate or threaten litigation. In addition, the participation agreement specifies that lawyers and other experts cannot act for the same client if the dispute does not resolve and it ends up in court. This means that the costs of stepping outside of the collaborative process once it has begun can be substantial and there is an incentive for all involved, including the clients and the lawyers, to seek to resolve the matter. However the presenters noted that even if a collaborative case does not settle, considerable progress can be made through the process.
8. The coach is a key element of collaborative practice. The coach will usually have training in social work or psychology, and can assist the party to emotionally prepare themselves for the meeting. A coach will often have an initial meeting with the parties to extract the underlying issues to the dispute, and may meet with the parties individually to try to manage their expectations and understand what is driving the process for them. The coach may continue to meet with the parties on their own after joint sessions, to keep the process on track. Often coaches will ask the parties to prepare an opening statement.
9. A coach can also assist a lawyer appreciate the non-legal aspects of the dispute. At times, the role of the coach can also be to even out the playing field. For example, in a family law dispute, if one party has less financial knowledge and/or control than the other party, a financial planner may be brought in by the coach to even out the knowledge imbalance.
10. Experts can be engaged by both parties to advise on various aspects of the case. The advice that is given by experts is given in an open format so that everyone has access to the same information. This can be confronting but is a key aspect of collaborative practice.
11. The presenters noted that it is important to get the vetting process right to ensure that appropriate cases go through collaborative process. Notably, a willingness not to go to court is not enough. The lawyer must consider how comfortable the client feels in sitting across the table from the person with whom they are in a dispute. The presenters did not

consider that family violence would necessarily rule out collaborative practice, but in fact it could be of assistance to a victim of violence as it is a supportive process, more so than traditional litigation, and enables experts to come on board.

12. However, collaborative practice is not suitable for every case. A keen sign of success in a collaborative case is whether each of the parties care about what happens in the end to the others. Often the lawyers will meet with each other after having met with their clients to have a frank discussion about whether the matter is appropriate for collaborative practice.
13. If an agreement is reached through collaborative practice, the same binding documents are prepared as in a normal legal settlement.
14. In family law, collaborative practice can serve as a form of Family Dispute Resolution (FDR) that is required before parties can commence legal proceedings in some areas, including parenting orders. A party seeking parenting orders must make a good faith attempt to resolve the dispute through FDR before going to court, and must obtain a certificate under s 60I of the *Family Law Act 1975* (Cth). The coach may assume a similar role to the mediator in FDR as a neutral facilitator of the process and if the collaborative process breaks down and there is no resolution, the coach can issue a s 60I certificate, certifying that the parties have attended FDR.
15. Collaborative practice will generally take less time than a case progressing through the courts. In the Sydney registry at the moment, family law matters may take between 3 to 4 years to resolve. Unlike court, the parties can set dates that suit them in collaborative practice, and the coach can work with a party to speed up or slow down the process. The number of meetings involved in a collaborative case will depend on the issues involved, whether external experts need to be engaged, and where the parties are at in terms of their attitudes to resolution of the matter. Overall, the rate of resolution of collaborative matters is high. Although it is not a cheap option, it is generally more cost effective than litigation.

Considerations and Challenges for Lawyers

16. Lawyers have an adversarial culture so need to be trained in collaborative practice to recognise that it is interest-based, and that clients may require advice about non-legal issues. The goals of the parties may have non-legal components, and lawyers need to be able to identify these and assist their clients to work towards them.
17. The presenters emphasised that the biggest challenge for lawyers engaging in collaborative practice is to shift their mindset away from seeking to “win”, to instead striving for the best possible outcome for their client, keeping in mind a variety of issues that they

may be facing. Ultimately, collaborative practice is a team process which involves seeking common goals and assisting the parties to work out their common issues. The process is ultimately driven by the parties, who set the agenda and dictate what they want to resolve, and so the focus frequently moves away from legal issues.

18. The founder of collaborative practice considered that lawyers' true talents were not being best utilised through traditional means of dispute resolution. Their reasoned ability to solve problems and generate creative alternatives and a positive context for settlement were not used sufficiently in the normal adversarial process. Collaborative practice thus has the potential to engender "new lawyering", which enables lawyers to fully develop their capacities as dispute resolvers. The skills used in collaborative practice also make people better lawyers and litigators, by developing skills such as effective listening; brainstorming solutions; and teasing out the interests of the parties.
19. The presenters considered that lawyers need to be introduced to all forms of alternative dispute resolution, including collaborative practice, at an early stage, including as a subject in the legal curriculum in law school. However, collaborative practice is properly in the realm of experienced lawyers. A lawyer involved in collaborative practice needs to be able to trust that the other lawyer is giving appropriate advice, and a collaborative practice session might fall apart if starkly different advice was being given by the lawyers involved.
20. Collaborative practice can be challenging because it is about empowering the client to make a decision and lawyers have to play a different role to normal. However lawyers still need to do considerable due diligence so that they know that the advice that they are giving their clients is accurate.
21. In a collaborative process, both lawyers must be collaboratively trained. Practice groups exist across Australia to support collaboratively trained lawyers involved in collaborative practice. A practice group is a voluntary group of the experts who practice collaborative law. The role of the practice group is to develop trust and respect amongst practitioners. Every state in Australia has some form of collaborative training (for NSW, see Collaborative Practice (NSW) Inc, see <http://collabprofessionalsnsw.org.au/>). Lawyers should contact their local practice group or law society for more information. In the future, the Australian Association of Collaborative Professionals (AACP) will provide a national body for collaborative practice, however at this time, the association is in development. The International Academy of Collaborative Practice (IACP) (<https://www.collaborativepractice.com/>) also offers training overseas.

BIOGRAPHY

Shelby Timmins

Mediator, Dispute Resolution Practitioner and Collaborative Coach - Divorce Done Differently, Sydney

Shelby Timmins is an Accredited Family Law Specialist, who holds a Masters in Law from the University of Sydney, is a Nationally Accredited Mediator, Family Dispute Resolution Practitioner and Collaborative Professional. Shelby is a member of Collaborative Professionals NSW (Inc) and President of Southern Sydney Collaborative Professionals. Shelby has over 18 years' experience as a solicitor in the area of Family Law. Shelby has also presented and published works on collaborative practice and dispute resolution. Shelby is passionate about doing things differently in the family law space and is determined to get parties, their lawyers and other professionals to look at separation, divorce and the breakdown of families in a more respectful and future focussed way. With this in mind, Shelby has recently stepped aside from practising law and established a boutique family dispute resolution practice which specialises in mediation and collaborative practice known as Divorce Done Differently.

Rachel Slat

Solicitor, Director, Broun Abrahams Burreket Family Lawyers, Sydney

Rachel is an accredited specialist (Family Law) with significant experience in both complex financial cases and difficult parenting cases. In the Doyle's Guide she has been voted by her peers as a Recommended Leading NSW Family Lawyer. She has over 20 years experience in family law and her advice and approach are clear, thorough and practical. Rachel has lectured to lawyers at Masters level for the College of Law on negotiation, mediation and collaboration. She is a founding member of both the Sydney CBD practice Group Central Sydney Collaborative Forum and of the Australian Association of Collaborative Professionals. Rachel is also a mediator, having completed the Mediating Dispute Courses at Harvard Law School. Rachel is an editor of the CPNSW (Inc.) newsletter for the NSW collaborative body.

Dr Susan Armstrong

Adjunct Professor, Western Sydney University, Sydney

Susan is an Adjunct Professor in the Western Sydney Law School where was a researcher and legal educator for over 20 years. She has presented and published widely about family dispute resolution and is a founding member of the Australian Dispute Resolution Research Network and a committee member of the Family Dispute Resolution Special Interest Group of the Resolution Institute NSW. Sue is an accredited FDR practitioner and a Collaborative Practice coach.

BIBLIOGRAPHY

Legislation

Family Law Act 1975 (Cth)