

**NSW STATE LEGAL CONFERENCE
30 August 2007**

Topic: COLLABORATIVE PRACTICE

Presenters:

Nigel Nicholls
Lorraine Lopich
Robert Lopich
Irene Pickel
John Pollard
Marilyn Scott

COLLABORATIVE PRACTICE: I do this already!

Welcome: 1.30 -1.33 John Pollard to Introduce Panel

Session 1: 1.33 – 1.48 Overview of Collaborative Practice

Presenter: Nigel Nicholls
Practice “Outline and development of Collaborative
in stralia”

Session 2: 1.48 – 1.58 The Participation Agreement.

As a telephone conversation between lawyers and client confirming details of Participation Agreement and confirming agenda for first four-way meeting

Lawyer 1: Robert Lopich
Client 1: Marilyn Scott

Session 3: 1.58 – 3.00 Demonstration of a Collaborative Practice
Four-way meeting

Narrator: Lorraine Lopich

Part 1: Fishbowl demonstration of first four-way
meeting in case study

Lawyer 1: Robert Lopich
Lawyer 2: John Pollard
Client 1: Marilyn Scott
Client 2: Irene Pickel

Part 2: How does a Collaborative Practice Four-
way

meeting differ from a traditional settlement conference?

Moderator: Audience commentary
Lorraine Lopich

Afternoon tea: 3.00 – 3.30 *optional video shown during this break*

Session 4: 3.30 – 4.20 *(10 minutes each using powerpoint presentations)*

Chair: Nigel Nicholls

Paper Marilyn Scott:

“Preparation For Collaborative Practice Using Principled Negotiation Based Analysis”

Paper Irene Pickel:

“Identifying Interests Of All Parties In Collaborative Practice”

Paper John Pollard:

“Option Generation Before The Making Of Offers”

Paper Lorraine Lopich:

“A Comparison Between Interest Based Problem Solving And Distributive Bargaining And How The Collaborative Lawyer Remains An Advocate For Their Client In An Integrative Problem Solving Process”

Paper Robert Lopich:

“A Movement From The Narrow Concept Of Legal Problem Solving”

Session 5: 4.20 – 5.00

Moderator: Part 1:
Marilyn Scott
Exercise: Revisiting legal correspondence.

Chair: Part 2:
Nigel Nicholls
Panel Discussion on Lawyers' perspectives of being Collaborative Practitioners
Possible applications for Collaborative Practice
Where to go to find out more.

Close

The Presenters

Nigel Nicholls

Nigel Nicholls was admitted to practise as a solicitor in New South Wales in 1990 and in England and Wales in 2004 and has since admission practised almost exclusively in Family Law. From 1997 to 1999 he was appointed a Deputy Registrar and Mediator of the Family Court of Australia, before returning to private practise as a partner of Stuart Fowler and Partners.

In 2003, Nigel practised in the United Kingdom and was employed as an associate with Taylor Vinters Solicitors in Cambridge, a general commercial and litigation practice of 100 partners and solicitors, in the specialist family law team. While in the UK, Nigel trained and practised collaborative family law becoming probably one of the first Australian solicitor to use this innovative style of dispute resolution. Nigel is on the board of Collaborative Professionals (NSW) Inc.

Nigel's practice has focussed on larger and complex privately funded property and children's applications before the Family Court of Australia, including matters involving complex trust and company structures and international family law disputes. Nigel has also extensive experience in advising on de-facto and same-sex relationship disputes and related family law practice.

Nigel has been a part-time lecturer and tutor at University of Technology, Sydney, lecturing undergraduate programme in Family Law and conducting seminars in the graduate programme in legal practice, including negotiation techniques, mediation skills and court presentation. In 2000 Nigel was a Member of the NSW Law Society Family Law Committee and in 2002 was appointed a Fellow of the International Academy of Matrimonial Lawyers.

Marilyn Scott

Marilyn Scott, a Senior Law Lecturer and the Director of the Unit for Dispute Resolution, Faculty of Law, University of Technology, Sydney co-ordinates the post-graduate program in dispute resolution. This pioneering award program offers a very comprehensive range of subjects for the Master in Dispute Resolution and a Graduate Certificate in Dispute Resolution. Marilyn is a leading academic in the Dispute Resolution field and writes on, teaches and trains extensively in dispute resolution processes including negotiation, mediation and arbitration.

Marilyn is an experienced legal practitioner, mediator and negotiation strategist and is admitted to practice in New South Wales and the Federal Court of Australia. She is a member of the NSW Law Society's panel of mediators and a Registered Family Dispute Resolution Practitioner. Marilyn is a member of the NSW Law Society's Dispute Resolution Committee and has also been a member of the Arbitration Liaison Committee, from time to time.

In 2003 Marilyn was first introduced to the concept of Collaborative Law whilst a Visiting Scholar at the prestigious Strauss Institute for Dispute Resolution at Pepperdine University, California and was responsible for organizing and participating in the first training of practitioners in Collaborative practice in New South Wales and Queensland in 2005 and 2006 respectively. Marilyn has co-trained with Marion Korn in Sydney and Brisbane in both the basic and advanced courses.

Marilyn has recently returned from sabbatical leave which was taken in California, Minnesota, Canada and the UK where she studied the development of Collaborative Practice in these areas, the work of the practice groups and the adaptations in training that have been made to meet the growing sophistication of practice in this field

Marilyn has developed the Collaborative Practice program for the Professional Development Unit, Faculty of Law, UTS. This program will offer a regular training program for Collaborative Practice under Marilyn's leadership. Marilyn is a founding member of Collaborative Professionals (NSW) Inc and is currently a board member and a Vice –President

Marilyn.Scott@uts.edu.au

Irene Pickel

Irene Pickel has been a solicitor since 1980 practising in Bowral. She became an Accredited Specialist in Family Law in 1994. She has completed mediation courses through Bond University. In August 2005 she completed the basic collaborative training course in Sydney conducted by Stuart Webb (USA) and Marion Korn (Canada). Also present at that initial training was a fellow colleague from Bowral. Irene recalls how the two of them returned to the Highlands from that initial training with almost evangelical fervour to bring Collaborative Practice to their community. Although Irene has only done 21 collaborative matters to date, she uses many of the collaborative techniques in her other matters. In July 2006 Irene undertook the advanced training in Collaborative Practice and in February 2007 attended the three day interdisciplinary collaborative team training. She is a member of the International Academy of Collaborative Professionals (IACP) and is on the Board of Collaborative Professionals (NSW) Inc.

John Pollard

John Pollard has been a lawyer for almost 40 years and a mediator for over 20 years. He is an Accredited Specialist in Family Law and in Mediation. He was a member of the Law Society's Family Law Committee for 11 years and has now been a member of the Society's Dispute Resolution Committee for the past 7 years.

He was one of the pioneers of Family Mediation in Australia and is still a staunch supporter of family counselling and mediation and now, in his role as the President of Collaborative Professionals (NSW) Inc he is excited at the

prospect of helping to firmly establish collaborative practice as the newest and most effective form of dispute resolution in Australia.

John's broad legal knowledge and experience enables him to give clients competent advice and direction in parenting and property cases in the role of Advocate Negotiator, Arbitrator, Solicitor, Counsellor, Mediator and Collaborative Lawyer.

As an Accredited Family Dispute Resolution Provider, Mediator and Arbitrator, John will advise clients on the best way to settle their case. John's philosophy is that going to Court is the last resort and using his knowledge and experience, he helps his clients to achieve the best possible outcome to suit their needs. If all reasonable attempts at settlement fail, he will pursue Court action in a professional and effective way.

John prefers to work as a Collaborative Professional in the hope of assisting the parties to achieve a creative solution which will satisfy their financial, personal and emotional needs, while at the same time, assisting the separating parties to maintain their dignity, family relationships and a sense of justice in the outcome.

Lorraine Lopich

Lorraine is mediator and arbitrator experienced in local government, environmental planning and development law, general commercial law and family law.

Lorraine is currently a director of Mediation and Dispute Resolutions Australia Pty Limited and Collaborative Lawyers Pty Limited. She is a member elect of the International Academy of Collaborative Practice (IACP), member of the IACP International Taskforce, Secretary of Collaborative Professionals (NSW) Inc, Board member of ADRA, member of the Law Society of NSW Dispute Resolution Committee and an accredited mediator with LEADR.

As well as conducting a private practice Lorraine is a sessional mediator for Relationships Australia (NSW) and the project officer for the Illawarra and Shoalhaven Family Pathways Network, funded by the Australian Attorney-General Department to develop a collaborative inter-disciplinary network of family service providers to provide an integrated and coordinated service to separating families in transition.

Lorraine is a co-trainer in collaborative law for the Professional Development Unit: LAW, University of Technology Sydney. She has co-trained with international collaborative law trainer, Marion Korn, and conducts collaborative practice training for organisations such as ANGLICARE. She also conducts training in Family Dispute Resolution for AIRS Relationships Australia.

Lorraine is the author of the Collaborative Law in relation to Family Law tab in *Australian Family Law* and other papers on collaborative practice that have

been published by dispute resolution associations including ACDC and LEADR. She has presented numerous papers and conducted workshops on collaborative practice for inter-alia, Family Pathways Networks, Family Relationships Centres, collaborative law practice groups and conferences in both Australia and New Zealand.

On 17 and 18 September 2007 Lorraine will co-train with David Hoffman and Robert Lopich in commercial and civil collaborative law with international trainer David Hoffman from Boston US sponsored and organised by LEADR. lorraine@lopichlawyers.com.au

Robert Lopich

Robert is a senior commercial lawyer, Collaborative Practitioner, Mediator and trainer.

He is a partner of Lopich Lawyers and a director of Collaborative Lawyers Pty Ltd and of Mediation and Dispute Resolutions Australia Pty Ltd. Robert practises in the areas of commercial and business law, workplace relations and property law.

He is Vice-President of Collaborative Professionals (NSW) Inc., the Deputy Vice-President of ADRA, a member of the International Academy of Collaborative Professionals, a member of LEADR and a member of the Asia Pacific Mediation Forum. He is qualified to advanced level in Collaborative Practice.

On 17 and 18 September 2007 Robert will co-train with David Hoffman and Lorraine Lopich in commercial and civil collaborative law with international trainer David Hoffman from Boston US sponsored and organised by LEADR.

Email: robert@lopichlawyers.com.au

SESSION 1.

Outline And Development Of Collaborative Practice In Australia

Collaborative law as a structured form dispute resolution has developed in Australia remarkably rapidly, especially in the family law context. While this paper focuses on the family law model its underpinning concepts are ideally suited (perhaps with a degree of change in the way a matter is run) to assist in the resolution of a range of commercial or other disputes. Emotions in family law disputes often tend to run high but there is often an imperative for separating couples to find a way of dealing with each other as their relationships must continue for long periods after the separation or divorce is finalized.

In industrial relations or employment matters, commercial disputes or land and environment disputes, parties often need to resolve their differences with a capacity to continue a business or personal relationship after the dispute is finalized. The cost of all litigation is prohibitively high and is out of the reach of most people, whether in family law or commercial contexts.

Background

The passing of the Family Law Act in 1975 was revolutionary and groundbreaking, doing away with fault-based divorces and introducing a court that was intended to be less formal and 'user friendly'. It introduced compulsory counselling and conciliation as an intrinsic part of resolving family law disputes. Australia has been and still is seen as being at the forefront of dispute resolution in family law matters.

However, the passing decades have seen a steadily increasing percentage of breakdown in marriage and at the same time more strain on public resources to fund and maintain the traditional court structure. The Court has responded by making more rules for case administration and delays have become lengthier and more uncertain with over-listing being a feature of most court diaries. Voluntary counselling has been stripped from the court as a philosophy now prevails that the court must concentrate on its core role of hearing disputes. Confidential counselling at the court is a thing of the past and family consultants now focus on reportable counselling and family report writing.

Since 1 July it is now compulsory, with some exceptions, for there to be external counselling and a certificate filed before an application can be filed with the Family Court or Federal Magistrates Court in applications involving children.

The Government has been critical of the Family Court and the prevailing Family Law system generally to adequately meet the needs of divorcing couples and its response has been to channel resources to the Federal Magistrates Court in an effort to make access to the court simpler and more

cost effective. Already, however, delays in the Federal Magistrates Court can resemble those in the Family Court.

The Government has introduced Family Relationships Centres and resourced the community organisations to take over the voluntary counselling and information role the Family Court counsellors used to play.

It is perhaps, due to the perception that the traditional Family Court structure has failed many litigants that family lawyers are feeling, to some extent marginalized, as participants in family law matters. It is also probably due to the structural failings in many aspects of the current family law system that some family lawyers have sought other ways of resolving disputes.

This feeling is not unique to family lawyers in Australia. It is perhaps not surprising that, in that bastion of adversarial litigation, the USA, that family lawyers have also sought to come up with another model to resolve family law disputes. However, unlike most forms of dispute resolution, the collaborative family law model can be traced back to the idea, born of frustration at the limitation of the adversarial system of one individual Stu Webb from Minneapolis in 1990.

Collaborative family law has spread across the United States and Canada, although it has become embedded in the legal culture of some places more successfully than in others, in particular in Minnesota, California, Ohio, Texas and North Carolina.

By the end of the 1990s collaborative practice took off in a number of jurisdictions as well, including Calgary, Toronto and Vancouver. In 2003 the first training courses were run in England and in 2005 in Ireland. There are now well over 550 trained collaborative family lawyers practicing in the United Kingdom. Importantly for England and Wales the training and promotion of collaborative law has been taken up by the organisation known as Resolution, which was formerly the Solicitors Family Law Association. Through this means the training, advertising and promotion of collaborative law has been consistent and thorough.

Perhaps because the Australian family law landscape until recently has had a formal conciliation focus to it for many years, collaborative law has only really taken off since 2005, when the first training course was held in Canberra. Since then basic or advanced training courses have also been held in Brisbane, Sydney, Melbourne and Perth. Canberra has also held an advanced multi-disciplinary training for financial and child welfare professionals.

The Family Law Section of the Law Council of Australia has recently set up of a national committee under the auspices of the Law Council. The Family Law Council, a statutory authority set up under s 115 of the Family Law Act has recently released a Report to the Federal Attorney General¹ covering the

¹ Collaborative Practice in Family Law: A report to the Attorney general prepared by the Family Law Council, December 2006.

development of collaborative practice and making recommendations for legislative change and practice development.

At an organisational level, the states and the ACT, who have trained family lawyers, have set up organisations to promote collaborative practice in each state. In NSW a non-profit organisation known as Collaborative Professionals (NSW) Inc has been set up as the state peak body to represent collaborative practitioners in NSW. Collaborative Professionals (NSW) now has over 70 members, mostly made up of solicitors but also including financial and family professionals and community organisations. There are also being set up at local or regional levels practice groups to discuss the 'nuts and bolts' of local practice.

Importantly, the Law Societies of most of the States have taken an active interest in the development of collaborative practice. Certainly the Law Society of NSW has been actively supporting the development of Collaborative practice in New South Wales.

Lastly each of the state organisations recently set up websites to be able to promote collaborative practice and get information out to potential clients.²

What is the Collaborative Practice Model?

In its initial stage when Stu Webb decided that there had to be an alternative to traditional adversarial process by saying to clients that while he would assist them in resolving their family law matter, if they wished to go to court then he would withdraw from the case.

From that fairly simple thought a more considered model of practice has developed. As Pauline Tesler, a leading practitioner and trainer in the field, has stated, however "There is really only one irreducible minimum condition for calling what you do "collaborative law": **you and the counsel for the other party must sign papers disqualifying you from appearing in court on behalf of either of these clients against the other.** Beyond that, all else is artistry, and you are free to accept, reject, and adapt...to your personal style".³

Despite Pauline Tesler's call for very flexible practice, the model that is widely used and adopted locally is as follows:

- Both parties and solicitors sign a binding agreement defining the scope and the purpose of the lawyers' representation: to help the

² Collaborative Professionals (NSW) Inc: www.collabprofessionalsnsw.org.au
Collaborative professionals WA: www.collaborativeprofessionalswa.com
Queensland Collaborative Law: www.qldcollablaw.com.au
Collaborative Professionals Victoria: www.collaborativelaw.asn.au
Collaborative Practice Canberra: www.collaborativepracticecanberra.com.au

³ Pauline H. Tesler, Collaborative Law Achieving Effective Resolution in Divorce without Litigation. 2001 American Bar Association p. 6. (The emphasis added is Ms Tesler's.)

parties engage in creative problem-solving aimed at reaching a negotiated agreement that meets the legitimate needs of both parties.

- The parties agree that no-one will threaten litigation or actually file proceedings to coerce compromises.
- If the collaborative negotiation breaks down then neither solicitor shall continue to represent that party.
- Each party (and each solicitor) share a binding and commitment to keep the process honest, respectful and productive on both sides.

Solicitors maintain their role as advocates for their clients, but wherever possible negotiation is conducted within the framework of joint 4-way meetings with both clients and solicitors present.

In situations of urgency, whether due to a financial or a parenting issue, clients may make an application to the court. Given the nature of the collaborative process it would be unlikely that such a development would be frequently encountered.

Given that collaborative process is designed to reach agreements that, as far as reasonable and possible meet the needs of each of the parties, it is a part of the process that legal advice is given in the joint meetings. This avoids positional bargaining on the basis of a pre-considered legal outcome.

Financial disclosure is central to family law practice and no less so in collaborative practice, although the extent and format of such disclosure may vary from case to case. Issues such as the payment of legal costs are often a matter for negotiation at the first joint meeting. It is an explicit principle of a collaborative negotiation that no advantage will be taken of errors and both clients and solicitors have an obligation to correct errors.

The usual pattern to proceed with a collaborative family law matter is as follows:

- Initial client meeting to discuss options for resolving matter, including options from litigation, solicitor led negotiation, collaboration or mediation. At the initial appointment the solicitor is likely to spend more time listening to the client's account to make an assessment of the issues and suitability for collaboration than giving any advice as to outcome. The first appointment is an opportunity to give information about the process, to discuss the role of experts and to discuss interest-based versus positional negotiating.
- If agreement is reached to adopt the collaborative model then the solicitors would usually have a pre-meeting, to discuss the background and concerns that have come up and are likely to come up during a meeting. An agenda of the items to be discussed at the first 4-way meeting is discussed and agreed.

- There may well be a meeting with your client to prepare the matter for the first 4-way meeting, to discuss how matters will proceed and to assist the client in preparing for that meeting.
- The first 4-way meeting with both solicitors and clients is somewhat procedural. It is usual to formally review and explain the terms of the collaboration agreement, so that all parties are clear as to its terms and as to the process they are entering into. There may be interim or pressing issues that need to be discussed, such as immediate financial or children's arrangements that need resolving on an interim basis. How will the lawyers be paid? Often preliminary issues such as extent and nature of financial disclosure might be discussed. An agenda is agreed and timing for subsequent meetings.
- At the conclusion of the first and subsequent 4-way meetings one of the solicitors prepares comprehensive minutes of the issues discussed in the meeting as a record together with action points to be undertaken between meetings.
- There would usually be undertaken a debrief as between client and solicitor and between solicitors after the meeting.
- Any matters that come up between meetings should be discussed between solicitors and clients and an extra meeting arranged to discuss any urgent issues.

Why adopt the collaborative model?

For solicitors a family law matter starts at the first meeting, and concludes when the last bill is paid and the file is closed. For clients it is a short time in a domestic relationship that started much earlier and, especially where children are concerned, will continue for a long period after the solicitors have closed their files.

In most traditional family law matters the solicitor can often take the role as white knight or holder of the knowledge. Clients are often protected from communicating with one another "for their own good". Where information is being channeled only between the solicitors the likelihood of a particular version of the truth being spread and the capacity for this to lead to further misunderstanding or escalating a dispute is high.

Clients keep control and 'ownership' of their own matter.

Collaborative law depends on a model that encourages solicitors and clients to conduct all negotiations in an open forum, thereby reducing possibility of miscommunication. It explicitly requires good-faith amongst all participants.

It encourages and trains clients to take responsibilities for their own negotiations that can continue after the 'family law matter' has concluded. Each client, however, has the immediate comfort and support of having the

presence of an advocate and 'ally' in the negotiation, which is a big difference over mediation.

Solutions that are reached on the basis of needs-based negotiation are likely to be more tailored to the individual matter and be more durable.

It must be noted with some caution that where solicitors offer collaborative law because it matches personal ideals and values, clients often come to it because they see it is faster and less costly. It should not be seen, however, as a cheap alternative to other methods of dispute resolution. Because it is relatively hands-on, despite the other value added benefits of a collaborative approach, it may be no more expensive in monetary terms than a traditional solicitor-led negotiation.

From the solicitor's perspective, collaborative law has the benefit that there are rarely disputes about solicitor-client costs. The running of a collaborative matter is less paper-driven.

There is a degree of 'collegiality' in dealing with a matter collaboratively, although again care must be taken in ensuring that it is the client's interests that are being served and not the solicitor's in recommending a collaborative model to a client.

Clearly, collaborative law brings many of the hall-marks of a mediation to a traditional round-table meeting. It combines, however, the positive problem solving focus of mediation with the benefit of built-in advocacy and advice functions of having the solicitor present. As Pauline Tesler states: Two skilled legal advocates can go much further than a neutral mediator in seeing to it that playing field is leveled, at the same time that two skilled legal minds are engaged to help both parties arrive at creative "win-win" solutions wherever possible."⁴

When not to collaborate?

One of the skills of a collaborative family lawyer is to assess whether a matter should be handled as a collaborative law matter.

Firstly a collaborative procedure is a voluntary procedure, which will not be right for all clients. Some clients simply do not need any intervention to be able to sort out their matter – it is unlikely that you see them other than to perhaps draft consent orders.

At the other end of the scale there are those low functioning high conflict clients who are incapable of reaching or holding agreements without a third party making a decision for them.

In between there is a whole range of clients who can benefit from the collaborative law process. Even those clients who seem to be very

⁴ Tesler, *ibid.* p9.

entrenched on a dispute may well be able to use the collaborative model if there is a willingness to sit and hear what the other person has to say.

Particular areas where it may be inadvisable to use a collaborative model may be where clients are seeking to use the process to delay to coming to an agreement; where they perceive that it will be easier to avoid full financial disclosure through the collaborative process; or where there is a history of domestic violence, where there will be no level playing-field for a face to face negotiation. Another factor that may or not influence whether it is appropriate to begin on a collaborative matter (or any other sort of negotiation for that matter) is at what stage the client is to be able to negotiate.

Assessment of suitability for collaboration is therefore one of the things that you will be looking for in a first meeting with a client. This may involve as part of the discussion, questions such as:

- Whose idea was it to separate?
- How did you feel about it at the time? How do you feel about it now?
- Are you in a new relationship?
- How would you describe the communication with your partner before separation? Now?
- In your relationship did you have an equal say about financial matters/parenting decisions?
- How often did you and your partner argue? What about?
- Have you ever been frightened of your partner? Has your partner ever hit you? Are you still frightened?
- Will you be able to speak freely in front of your partner?
- Does your partner use the children to get what he/she wants?
- Are there any drug/alcohol/medical/psychiatric issues for either of you or the children?
- Have you had/Are you having counselling? How helpful was it?
- What will you do if you do not reach agreement?
- How flexible are you willing to be?

Becoming a collaborative lawyer?

Pauline Tesler suggests that it is easy to decide to become a collaborative lawyer. Doing it well is not.⁵ It requires a change in thinking as well as learning a process – unlearning being adversarial – and being the repository of all knowledge and solutions for our clients. She suggests that there are several key questions that need to be asked and considered:

- Who am I?
- Who is the client?
- What is the task?
- How do I do this task?

⁵ Tesler, *ibid.* p 23

Each of these questions requires self-analysis and challenging accepted ways of practice and habits. Not all solicitors have those skills. Not all solicitors want to learn them.

The first practical step in becoming a collaborative lawyer is undertaking one of the training courses that are being offered. The usual training course is a practical two-day training, which covers the procedural aspects of collaborative practice. This is followed by a three day advanced course, which deals with more in-depth 'mediation' techniques, issues such as getting away from positions and establishing interests and interest based negotiating.

Membership of Collaborative Professionals (NSW) Inc and a local practice group is recommended. For information, you could search the IACP at: collaborativepractice.com

Conclusion

The Commonwealth Attorney General has endorsed collaborative law as an appropriate approach consistent with the Government's reforms.

There is now a core of family lawyers in NSW who are trained and enthusiastic about collaborative law as a future way of practice. It is unlikely that it will now wither on the vine.

It will take further work. Even in USA, where eight to ten thousand practitioners have been trained as well as thousands more family and financial consultants, many divorcing couples remain unaware of this option as a dignified, constructive and child-protective family law option available to them. Getting the message out to clients and referrers is the next step.

Nigel Nicholls
Lawyer
Stuart Fowler & Partners

SESSION 4. PAPER 1

Preparation For Collaborative Practice Using Principled Negotiation Based Analysis.

As for all legal services, appropriate preparation is necessary for Collaborative Practice.

In Collaborative Practice, preparation can be enhanced when the 'seven elements' model of Principled Negotiation is applied.

These elements are:

- Interests
- Options
- Alternatives
- Objective Criteria / Legitimacy

- Relationships
- Communication
- Commitment.

The first four elements are procedural whilst the last three are themes or frames that are more contextual to the parties, their skills and attitudes.

This model was developed by the Harvard Law School's Project on Negotiation to provide an all-purpose strategy that could be utilized in preparing for the negotiation, as a schema for conducting the negotiation through all its stages and as a checklist for evaluating the effectiveness of the negotiation at its completion.

In their introduction to the model, Fisher and Ury state that this methodology allows

- issues to be decided on their merits rather than through a polarized haggling process;
- mutual gains to be sought wherever possible;
- conflicts in interests to be settled by persuasive use of independent standards of fairness rather than through a contest of wills;
- entitlements to be sought and obtained whilst decency is retained; and
- fairness to be exercised without this offer of fairness being exploited.

Whilst it is central to this methodology to identify the interests of all the affected parties, including, where required, their underlying interests, needs, fears, concerns and wants; to consider and rank options to meet these interests, to test these options against accepted external standards and to weigh up the possible alternatives to accepting the offered terms, the remaining three elements, relationship, communication and commitment, become integral aspects of the Collaborative Practice process, rather than being merely contextualizing frames for an interest-based negotiation.

It is the integrative approach of Collaborative Practice and the prominence of a continuing and functioning relationship between the clients, both in the short, medium and perhaps long terms; the emphasis on the quality and

quantity of effective communication between the clients and their lawyers and the explicit, mutual commitment to finding a consensual agreement, without reliance on adjudication within the Court system, which more fully realizes the potential of this all-purpose strategy.

Collaborative Practice also focuses on the future goals of the parties, particularly in family law matters, where the need to make a transition, from the separation phase through the divorce process, and onto a new construction of a perceived future, places emphasis on the extra importance of goals. This focus on goals has a significant impact on how the negotiation process is conceptualized both by the clients and their lawyers.

Broadly speaking, in distributive family law property negotiations the central concepts are strongly 'past related'. They center on the date of separation and the contributions of each client to the acquisition of the property during the term of marriage prior to this date. These findings are then scoped against the public policy of using their resources to minimize any potential needs of the parties to access the public purse in the future and distributions are made accordingly. The distribution is often limited to financial considerations that are bounded by providing for children until they reach eighteen years whilst how asset portfolios have been developed by the clients to finance their old age may be ignored by this approach.

If, however, the actual goals of the parties for how they will proceed on into their retirement years become a component of the negotiation, then the assessment of possible long-term financial scenarios by qualified financial analysts allows for more informed decision-making. Very sophisticated projections can be prepared that will demonstrate the consequences over a range of time periods for these scenarios.

There are anecdotes amongst Collaborative practitioners that these projection analyses are fundamental to making wise long-term decisions and that slightly different approaches to distribution at the time of divorce can have substantially significant financial consequences for retirement standards. This aspect of the model also has application in commercial and business disputes for examining the financial viability of options for solving problems for long term business relationships, such as supply contracts that have a contractual life covering decades.

By opening the option frame of the negotiation to include direct advice from financial advisers, communication coaches, child development experts and other relevant experts, a more holistic approach to considering options for the restructuring of the clients' life vision is a possibility in Collaborative Practice.

In Collaborative Practice, the communication element, whilst always acknowledged as an important aspect of Principled Negotiation, is addressed openly and directly when clients engage communication coaches who work with them on their communication issues so that the clients may make better use of the opportunities provided for direct communication in the four-way meetings. It is the use of the four-way meetings and the emphasis on a client-centred practice that elevates the need for the clients to have sufficient

communication skills to participate as the lawyers step back from their traditional role of *speaking* for the clients.

In situations where conflict, grief, lack of assertion skills and disparate levels of articulateness could challenge the successful conduct of a client-centred negotiation process, specialist attention to this element can effectively prepare the clients and enhance the process.

This preparation of the clients by communication specialists allows the lawyers to take the clients' participation to a higher level than would have been the case without this skills development. Potentially, this also offers Collaborative Practice opportunities to clients whom lawyers may have previously hesitated in considering as suitable candidates. Such communication skills preparation may also assist clients in conducting what are recognized as 'difficult conversations': where the conversation needs to be conducted at very deep personal levels for the clients. By engaging professionals with counseling and communication expertise to coach them, clients can be more fully prepared for the negotiations that need to be conducted.

The element of relationship may also fall under the aegis of the coach who can work with the clients in preparing to build a good working relationship. This support may be required when there are trust, respect and acceptance issues or perceived power inequalities between the clients. In divorce matters the collapse of the former relationship may be an acute impediment to participating in the critical negotiations that have to occur at this time. An initial analysis of the robustness of the relationship with a sufficient level of trust to be functional is necessary. Otherwise the client may need to work with a counselor or other allied professional to reach a functional level before participating in negotiation sessions.

When clients are in a transitional state in a relationship they may also need expert assistance to actually complete the transition to the next stage.

The relationship between the lawyers is also another area that needs special attention as the newly emerging Collaborative Practice requires that there is professional respect and trust between the lawyers, as well as between the lawyers and the clients and between the clients. The process relies on functioning relationships rather than on the impersonality of court rules and processes. It is a very new area of legal professional development.

In relation to commitment to negotiate a settlement, Collaborative Practice requires that the commitment of both the parties and their lawyers to be confirmed in writing in the Participation Agreement. In fact, this commitment to seek settlement is a hallmark of the practice.

In Principled Negotiation a party must consider their best alternative course of conduct should the negotiation fail to reach an agreement that is acceptable. This analysis is carried out for both parties to scope the possible alternatives open to both of them for satisfying their interests if agreement is not reached.

With the presence of the disqualification provision in the Participation Agreement, that the lawyers will not take instructions from the clients to conduct litigation in the matter if settlement is not reached, the alternative of going to court is potentially less attractive than it may usually be as new lawyers will have to be retained by the clients. Thus in Collaborative Practice the BATNA (best alternative to a negotiated agreement) for both clients, if it is litigation, is made financially less attractive as there would be additional costs in starting over again with new lawyers.

In Collaborative Practice the contextual frames, of relationship, commitment and communication, are not only considered in the analysis of the matter but may also be referred to specialist experts who may assist the clients in gaining skills, obtaining information and supporting their participation in the negotiation.

In relation to the procedural elements, the model provides a very comprehensive structure for preparing for the series of negotiation sessions. Firstly, once all the relevant parties are identified then their cares and concerns can be identified. Once this is done then there can be further examination to discern further underlying interests that may need to be met. In particular, their current interests can be distinguished from their future aspirations, needs and goals so that a more holistic picture can be obtained. It is then important to clarify and rank these interests and goals in their relative importance.

Once this part of the analysis is completed for both parties, then a list can be made of the possible ways that these interests on both sides could be met. This option generation phase also requires that consideration be given to finding ways to maximize joint gain to satisfy the key interests for both sides.

To remain in this principled model relevant external standards can be researched so that standards of fairness can be established that can be used to both persuade and evaluate options. Fairness of process is also an integral part of Principled Negotiation. In Collaborative Practice the clients undertake to make full relevant disclosure of information and agree to appoint a single expert when an expert appraisal or valuation is required. This final element promotes wise decision making in a process that the clients perceive as fair.

The Principled Negotiation preparation strategy offers a useful and comprehensive analysis model that contemplates a holistic approach to a negotiation that includes legal, relational, personal, financial and societal issues.

*Marilyn Scott
Senior Lecturer
Faculty of Law
University of Technology, Sydney*

SESSION 4. PAPER 2

The Role Of Establishing Goals & Interests In The Collaborative Process

THE CONFLICT RESOLUTION PROCESS

Generally speaking, the framework of the collaborative process is developed around the following 4 steps:

1. Identifying issues.
2. Gathering facts.
3. Developing options.
4. Negotiating solutions.

When clients first approach their solicitors, they may each believe that they already know all the issues that need to be resolved. Chances are there are quite a few issues that do not occur to the client but will become evident in discussions with their own solicitor. In addition, one client's list may not include the concerns or issues that their spouse may have. Before the clients can begin working on any specific issues, it is important to identify as many issues as possible to get a better sense of how to prioritise the next steps.

Experience has shown that it is important to ascertain the real goals and interests of each client to ensure a more successful collaborative process. Many clients may initially express their desire as just wanting the property settlement over as soon as possible. They may say "I just want custody of my children" or "I just want what is fair". It is important to delve more deeply into the background of these statements. It is important to move clients away from positions and clarify instead what their interests and underlying goals are. Shifting the discussion to focus on clients' interests rather than their positions, helps to cultivate a greater understanding of what is important to each party and it increases the chances that the needs of both clients will be met. It is important to focus clients on the big picture concerns such as the stability of their children and their long-term financial security as these issues will have the greatest impact on their life in the years ahead.

THE AIMS OF COLLABORATIVE PRACTICE

Divorce through the collaborative process views divorce as a complex experience requiring advice from multiple perspectives often requiring input from other professionals such as financial advisers and child experts. The collaborative process aims to prepare the clients to deal with the emotional challenges and changes associated with divorce and provide the resources that can best help clients make a healthy transition through the separation process.

The collaborative process builds an important protection for children as well. It aims to inform clients fully about how the children are experiencing the divorce and what they need to cope with the changes in their family structure

with the least amount of harm. It helps to protect the future relationship between the separating spouses informing both parties fully about the financial realities of the marriage and jointly arriving at solutions to protect the future wellbeing of the two new households that have been created. It also teaches both parties new ways of problem solving and conflict resolution so that they develop useful skills for addressing differences more constructively in the future.

Pauline H Tesler identified elements of collaborative divorce as:

- Helps the parties clarify their individual and shared values and priorities.
- Helps the parties reach maximum consensus.
- Includes complete advice about the law without using legal rights as the sole template for negotiation resolution.
- Assists the parties to resolve serious differences creatively and without destructive conflict.
- Helps parties improve their ability to co-parent after divorce.
- Builds in agreement about resolution of future differences after the divorce is over.
- Focuses not only on resolving past differences but also on planning for healthy responses to current challenges and on laying a strong foundation for the future after the divorce is over.
- Aims towards deep resolution, not shallow peace.⁶

THE PROCESS OF GATHERING INFORMATION

Collaborative lawyers begin their work with their clients by gathering and focusing on facts that are important for everyone to understand before good solutions can emerge. Initially each lawyer will work closely with their own client getting them to clarify their thinking and understanding and, where necessary, move them away from a positional view and help them to express their values, concerns and priorities. The information gathering exercise goes beyond the history of the marriage and separation and importantly starts with gathering information about the hopes, goals, values, needs and priorities of each party. Ideas will be developed by the collaborative lawyers and their clients before the first 4-way meeting.

At the first 4-way meeting, after going through the Participation Agreement and Ground Rules, the first Agenda item is usually an invitation to both parties to describe in simple, broad and value-based terms what they are hoping to get out of the process by describing issues that are concerning them and what they hope the future will look like. The description should be general and should not include specific issues or outcomes. This is not the place for parties to start talking about what percentage of the property they want or specific living arrangements for the children. These statements will go into the Minutes of the meeting so that everyone can refer back to them later to determine whether suggested solutions meet everyone's criteria or to keep the parties focused through the process. Both lawyers and the clients can

⁶ Pauline H. Tesler & Peggy Thompson, *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues and Move on with Your Life*, 2006. Regan Books. p28.

refer back to these statements at times of impasse or difficulties in negotiations and each party will be asked to reflect on the degree to which their efforts are or are not likely to bring them closer to the kind of future they described as what they most hoped for. The statements will form a touchstone for both the quality of the collaborative process and the quality of proposed scenarios for resolution.

With most clients we see, there is a common fear about divorce involving an expectation of harm as a result of the other partner's behaviour. By the time they see their lawyer, many of them are already experiencing harm through their change circumstances. Couples are often surprised and relieved therefore to discover the degree to which their concerns and future hopes overlap. Demonstrating to clients a degree of agreement at this early stage will encourage the clients to be optimistic and work towards further agreement throughout the process.

Even where the opening statements identify that the parties are not in agreement about their values, this information is still very useful and important for the process. Highlighting differing values alerts the lawyers to a need for creative problem solving in a particular area or the need to engage the assistance of other professionals.

COMPLETING THE INFORMATION GATHERING PROCESS TO GET THE FULL PICTURE

Information gathering continues until all the facts are on the table. For the collaborative lawyer, this goes beyond obtaining a history of the marriage including a history of the acquisition of the assets and liabilities and information covering section 75(2) factors. For the collaborative process, the information gathering exercise is achieved when the parties have:

- Shared full information about concerns, values, goals and priorities.
- Identified as many areas as possible where their differences can be accommodated without undue difficulty.
- Clarified any differences between them that will be more challenging to resolve.
- Obtain a full and comprehensive history of the composition of assets and the parties' current circumstances.⁷

To gather this sort of information, the collaborative lawyer will typically ask the client questions such as:

- What do you think is most important for your children as you move forward?
- What are your highest hopes for your children as they grow up?
- What are your highest hopes and goals for your own relationship with your children after your divorce?
- What kind of co-parenting relationship do you think would be best for your children after the divorce?
- What do you want for yourself in the future?
- What are your goals for your relationship with your ex-spouse?

⁷ Tesler, *ibid.* p142

- Who are the friends and extended family members that matter to you and what can you do now to ensure that your goals for your continuing relationship with them are realised?⁸

Examples of common goals and interests in divorce cases have been listed by Stu Webb in a recent publication aimed at assisting clients to choose the collaborative process.⁹ A copy of his list is annexed to this paper

Once all the facts are revealed, fear generally recedes and clients become more confident that a solution might be found. Each potential option for resolution that is ultimately considered during the settlement negotiations can then be measured by how well it fits the facts and values that the parties have revealed during the information gathering phase of the process.

As Pauline Tesler points out, using this foundation, the ultimate settlement agreement can truly resolve these issues because it will represent the parties' best efforts to respect the deepest values of each other regarding matters such as:

- Parenting their children.
- Preserving their relationship with friends and extended family.
- Acting with integrity.
- Using and conserving resources.
- Rebuilding healthy new family systems.¹⁰

Once both parties have reached a full understanding and have shared all information, the brainstorming process can then lead to creative problem solving, because every important piece of information required for the process is on the table.

How readily parties will reach agreement through brainstorming do in their collaborative process will depend on many factors including the extent and intensity of their differences and their ability to address such differences. Couples who are capable of communicating effectively about their fears and concerns and whose values and priorities match reasonably well, are likely to have success at readily reaching solutions that both parties can accept. Such couples may in fact find that there is little need for negotiation at all because the obvious solutions may quickly become apparent.

On the other hand, parties who are less open about their inner concerns and goals and who try to speed towards solutions and who may be more entrenched in their differences about values will probably need a more structured and extensive brainstorming phase in order to develop their options. In some cases, the parties may need to go back to their opening statements and develop a clearer understanding of their goals and values.

CONCLUSION

⁸ Tesler, *ibid.* p122-123

⁹ Stuart G. Webb & Ronald D. Ousky, *The Collaborative Way to Divorce: The Revolutionary Method That Results in Less Stress, Lower Costs, and Happier Kids - Without Going to Court.* 2006. Hudson Street Press. p211-218.

¹⁰ Tesler, *ibid.* p144-145

All of the steps in the collaborative process exist for the purpose of helping clients achieve their most important legitimate goals. It has become evident in running collaborative cases that clients cannot readily arrive at solutions to achieve these goals if they haven't firstly considered what they are. It is not unusual for clients to become involved in the immediate problems facing them and to focus only on narrow ideas about how they might resolve these urgent concerns or come to the solicitor with pre-conceived ideas on what are their entitlements. Client success in the collaborative process will depend a great deal on their ability to pause in the middle of the chaos to truly think about their long-term goals and appreciate the goals of the other party. Keeping these crucial goals in mind will make it easier to make compromises or let go of less significant issues in order to preserve the things that matter most to the client. Identifying common interests will provide greater opportunities to find solutions for accomplishing these goals.

CASE STUDIES

Following are some case studies demonstrating the importance of attempting to have clients establish their real goals clearly and early in the process. In some cases both parties have had a clear understanding of their concerns and goals and have expressed these clearly from the start and this has led to an early solution. Other cases have required more meetings than others but have sped along once the clients have finally dealt honestly and openly with their goals and have abandoned their previous positional stance.

Case #1 - Sally & Anton

This involved Anton aged 35 and Sally aged 31. They had 3 children, a daughter aged 16½ and two sons aged 14 and 12. The parties owned their home outright and also owned commercial property with factory premises subject to a mortgage. Anton was self-employed and conducted his business from the factory. About 2 years prior to engaging solicitors, the parties had decided to subdivide a block of land from their home block with a view to selling the block and using the money to help pay out Sally's interests so that Anton could keep the home.

The opening statement of Anton at the first meeting was not particularly helpful. He immediately expressed a desire to achieve "something that's equal, a 50% arrangement with the children and 50/50 with the property". Sally expressed her concerns as being her immediate financial security. As joint owner of the factory premises, she had received a tax bill on her earnings in respect of the rent received from the factory, even though, as is often the case, she had not directly received the rent. Sally also expressed a desire to obtain financial security for herself and the children with a child support agreement.

The first and second meetings revolved around keeping the clients focused on gathering information into the history of the acquisition of the assets, their current circumstances and full disclosure. A lot of the effort of both solicitors went into keeping Anton focused on this process as he was keen to jump to a conclusion and resolve the issues in accordance with what he understood was the parties' agreement 2 years ago. Not unusually, there were many problems in this approach, not least of which was that Anton had an idea that the share Sally would receive would be based on values 2 years ago whereas Anton would receive the benefit of improved values of the properties.

It was not until the third meeting that we were able to get to the core concerns of the parties. Anton finally let go of "the agreement" reached 2 years ago and instead both parties talked about their ideal situation. After some discussion, both parties agreed that the reasoning behind the steps to subdivide their property was to explore the possibility of keeping the home for the children but also for the overall financial gain of both parties. Anton explained that it was important for him to keep the present home as it was the home that the children were accustomed to and he wanted to provide the lifestyle that the children had become accustomed to and he wanted to afford this home on an

affordable level and without stress. Sally also explained that she wanted to be able to afford a house and that she wanted to have a similar standard of living to Anton and a 4-bedroom home to accommodate all the children. Anton expressed concern that Sally was wanting to live in a more expensive area (he was living in Moss Vale and she was renting in East Bowral, perceived to be a more salubrious town) and that this would lead to the children feeling that their father's accommodation was less desirable and that that would lead to the children living with their mother more than with him (the parties already had a fairly equal shared arrangement). Sally explained that she was only renting in East Bowral because that was the accommodation that became available when she needed it. She was not specifically looking for a home to buy in East Bowral and in fact did not see herself as seeking to buy a house as big as the former matrimonial home which was a 5-bedroom home.

Once the true fears and goals of the parties were revealed, the discussion became more focused and the parties worked jointly towards achieving both goals. They concentrated on ascertaining their respective borrowing capacities and Sally started looking for suitable, affordable accommodation. While this was going on, they were able to discuss and agree on firm arrangements for the ongoing financial support of the children including payment of health insurance and medical expenses and private education and tertiary education by Anton.

In the fourth meeting, the parties reached agreement whereby Anton bought out Sally's interest in the former matrimonial and the factory premises. Three months after settlement, Sally managed to buy a 4-bedroom home utilising the money she received plus a small mortgage to effect some renovations. The house is in Moss Vale, a short distance away from Anton's home.

Case #2 - Henrietta & Roy

Henrietta was aged 59 years and Roy 50 years. They had been married for 17 years and there were no children of their relationship. Since separation Roy had lived in the home. Henrietta had re-partnered and was living with her de facto partner. In their first meeting Roy expressed his first goals by saying that he recognised that Henrietta wants her half share of the house and he was agreeable to that and he explained that the house will need to be sold and he's agreeable to that. Henrietta simply agreed with Roy's summary. At this stage, neither party made a comment about the superannuation funds that existed and these funds were considerable, particularly those in the name of Roy. Despite the inauspicious start to the process, the parties covered a lot of ground in the first meeting and by the end of this meeting there was a full list of assets and liabilities, a comprehensive history of the acquisition of the assets and an understanding of the parties' section 75(2) factors. What was missing was an update of the values of those assets, particularly superannuation, which was considerable in this matter.

In the second meeting all the updated information of values, particularly for superannuation, were available and the parties started looking at options. It was during the process of looking at options that Henrietta and Roy finally

revealed their true concerns and goals for their future. Henrietta wanted to take care of her future retirement and while she was proposing to buy Roy's share of the home, she finally revealed that she would not live in the home as it had bad memories for her. She would simply rent it out as an investment property until she retired and then probably sell it. Roy expressed his fear that if this were to occur he felt that he would never again be in a position buy a house. Although on any view of this statement, it was an extraordinarily pessimistic and unrealistic view, it was nonetheless a stumbling block for Roy and therefore an impediment to reaching a solution. In the end, by understanding the parties' main goals and fears, the matter was settled on the basis of the husband retaining the house and a superannuation splitting order in favour of Henrietta for her share of the property. In this way, she would avoid the capital gains tax she would have eventually paid on the home. In addition, in a year's time when she turned 60 she could take advantage of the new superannuation rules, which would avoid any tax on her superannuation payout. Roy had 9 more years to make up the superannuation he had given to Henrietta and in the meantime he had the security of ongoing occupation of the home. On this basis, the parties were able to settle.

Case #3 - Sandra & Joe

Both Sandra and Joe were aged 56 years and had been married for 35 years. They had two children, a daughter aged 20 but with an intellectual age of 5 and a son aged 17 nearly 18, who was doing his Higher School Certificate.

Sandra was keen to separate from Joe, but expressed her priority as being her disabled daughter and expressed the desire to maintain the current standard and routine for her. She wanted to live close to her daughter's peer support group and to otherwise be close to where her daughter enjoyed her social life. Sandra was seeking to live in a home with 3 bedrooms so she could also accommodate her son but she also wanted to have a property that was fairly maintenance free. It was important to her that her daughter wanted to continue to have contact with her father and Sandra also expressed the desire to have her son visit her home whenever he chose. The son was doing his Higher School Certificate in the next 3-4 months and although Sandra was keen to have certainty about her future, she recognised the need to maintain the current arrangement so that she could give the ongoing support to the family unit that she had always maintained throughout the marriage, particularly practical support by way of preparing meals and doing domestic chores. Sandra recognised that she would have ongoing care for their disabled daughter and both she and the daughter would be dependent upon a pension, but she recognised that she required additional income for her future needs.

Joe had expressed the opinion that he felt Sandra and he agreed on most things but simply had trouble working out the detail. Joe expressed the desire that their son would take and accept some responsibility for his sister in the future. Joe was also keen to have an ongoing relationship with his daughter and agreed that it was important for her routine to be maintained. Joe pointed out that he wished to retire from his current employment within the next 9 years but then felt that he would take on a new career and was interested in

doing a real estate course. Both Joe and Sandra expressed a desire to develop some ground rules for re-partnering and its impact on their daughter.

It was evident that their priority was the children and the first document that they drew up was a memorandum of understanding regarding their daughter. They also engaged in a discussion about their Wills to provide for both children.

With their goals in mind, the biggest challenge in the property division was not so much agreeing on percentages but rather implementing the agreement. The parties had an investment property with a mortgage on it to the full value of the property, they had a small mortgage on their home and otherwise their assets were tied up in the husband's superannuation. Sandra obtained financial advice particularly regarding her ongoing income and as a result they reached a property settlement whereby Joe retained the home and Sandra received a payout and a superannuation split.

By February 2007, Sandra purchased a home a block away from the former matrimonial home. She has no mortgage on her home and she has a small income stream from her superannuation to augment her pension. Her son completed his Higher School Certificate and is now engaged in an apprenticeship and he readily splits his time between his parents' homes. Their daughter maintains the same routine as she did before her parents separated.

Case #4 - Andrew & Melissa

Andrew was 51 years of age and Melissa 48. They had been married for 16 years and had two sons aged 13 and 15. They had an investment property which had been given to the parties by Andrew's Aunt. They had used this property to secure a loan to purchase a home for Melissa and a home for Andrew. They had also used the sale proceeds of the former matrimonial home, which had been jointly owned. Andrew's new home was in Wollongong and cost more than Melissa's, which was in Goulburn. They were each contributing to repayment of the mortgage in proportion to the amount of loan they had each used. Andrew was now retired, medically unfit, and was receiving a pension from his superannuation which was indexed annually.

Melissa was employed as a casual teacher and had her employment confirmed on a yearly basis only. Melissa obtained employment in blocks, the maximum being a 1 year block but it could be from Term to Term, so that she did not know from one year to the next whether she would have work. Melissa was concerned about her future employment prospects, although the past indicated that she always obtained ongoing employment from one year to the next.

From the outset both Andrew and Melissa put an emphasis on the children's needs. Andrew expressed his concern as wanting to ensure the best for the children with regard to their financial and emotional welfare. Both boys were living with Andrew with the older child attending boarding school in Sydney,

paid for by Andrew's Aunt, and the younger, having special needs (Aspergers), attending a local State school close to Andrew's home.

Melissa expressed her aim as wishing to maintain a sense of continuity for the children to enable them to learn the skills of functioning as a family and she also desired that both she and Andrew would survive financially for the present and into old age. Melissa and Andrew were always focused on their main goals, being financial security for both of them and the children and an ongoing family life for the children with input from both parents.

Seeking solutions continually revolved around the expressed concerns of both Andrew and Melissa and in the end they reached agreement whereby they each retained their home and when the investment property sold the mortgage was paid out and each shared the proceeds with a view to each of them purchasing an investment property and Melissa paying more money into her superannuation fund by way of salary sacrifice. They continue to spend special events together as a family unit such as Christmas and birthdays. Otherwise, the boys spend regular time with Melissa on weekends and school holidays as well.

Case #5 - Ron & Lucy

Ron was aged 47 and Lucy 40. They had been married for 13 years and had 3 boys aged 12, 9 and 6, two of whom has Aspergers. They had a home which had already been sold with a delayed settlement in November 2007. Ron had just secured employment in south-east Asia which would take him away from the family for months at a time. Lucy expressed her concerns as meeting the needs of the children including keeping a roof over their heads and meeting their educational demands, particularly having regard to the special educational needs as a result of two boys having Aspergers. She wanted to ensure that the medical, emotional and physical needs of the children were taken care of and this included trying to re-house the children in the same environment so that their routine was as uninterrupted as possible. For Lucy, the re-housing issue was urgent as she would need to re-house the children after the delayed settlement in November 2007. At the same time, Lucy expressed the desire that Ron would not do without and that he would be able to have his needs met as well. Ron said that his goals were exactly the same. In particular, he wanted to be in a position to support the boys, particularly financially, but he also wanted a platform for himself to go forward. For him, the issue of re-housing was not as urgent. Ron's position in south-east Asia was indefinite and provided his accommodation. What he was looking for was some capital amount that he could put aside and eventually purchase an investment property back in Australia to keep apace with the market when he eventually returned to Australia.

By the end of the meeting the parties had all the information they needed to arrive at a suitable percentage and indeed they agreed on the percentage split. The issue then came down to how to put this into effect. Ron had a large superannuation and otherwise the only assets were the home subject to a mortgage and they each had a motor vehicle.

It was clear that Lucy was fearful of having a mortgage because of her limited work while also being involved with the boys and their education. Her initial suggestion was that she retain all of the proceeds of the home, being about \$300,000, and that Ron retain most of his superannuation as his share. This was unacceptable to Ron who initially suggested he receive about \$100,000 and Lucy would receive about \$200,000. When we tested both solutions against the parties' initial concerns and goals, it was conceded that neither was quite a match. The parties were unable to come up with any further proposals at this first meeting and were sent away to think about further solutions and to investigate further information. For Lucy it was to look for property available to purchase and investigate her borrowing capacity. With Ron it was to obtain certainty about his new work and its remuneration. Once they had done this we essentially settled on the basis that Lucy would receive \$250,000 from the sale and Ron the balance of just over \$50,000 and otherwise the adjustment would be made on a superannuation split.

Lucy had found a house in the same area to purchase for \$300,000 and was able to secure a mortgage for the balance.

Irene E Pickel
Collaborative Lawyer/Mediator

SESSION 4. PAPER 3

The Art of Brainstorming

One of the most important skills of Interest Based Negotiators is **BRAINSTORMING**.

The rules of BRAINSTORMING are:

1. Have a scribe who can quickly and accurately capture on the board/butcher's paper all the solutions generated.
2. Set a time limit – say 3 to 5 minutes.
3. Give all participants the basic problem and seek all possible solutions.
4. Don't evaluate the solutions suggested – just list them as they come:
 - 4.1. logical answers;
 - 4.2. nonsensical answers;
 - 4.3. self servicing answer – the lot.
5. Generate as many options as possible.
6. After the brainstorming you can still allow further options to be added.
7. Once all options have been identified, go through each option one by one evaluating all the options – and asking the proposer to justify how her/his proposal satisfies the problem – noting points for and against.
8. Ask all other participants for comments on each proposal – for and against.
9. Ensure that you are focusing on the “needs” or “interests” that have to be satisfied.
10. Identify and discard all options which don't satisfy the “need” or “interest”.
11. But identify any option which partially satisfies the “need” or “interest”.
12. Consider if 2 or more partial options, when joined together, offer a potential solution.
13. Evaluate all possible solutions which may satisfy the “need” or “interest” and allow the parties to then choose which of the options best solves the problems.

*John Pollard LLB LLM
Special Counsel
Watts McCray*

SESSION 4. PAPER 4

A Comparison Between Interest Based Problem Solving & Distributive Bargaining & How The Collaborative Lawyer Remains An Advocate For Their Client In An Integrative Problem Solving Process

For the purpose of this section of this workshop I will focus on a comparison between two dispute resolution processes; distributive bargaining or settlement negotiations and interest based problem solving or mediation. I will specifically focus on facilitative mediation and I will not consider settlement, therapeutic or evaluative mediation. In the second part of this section I focus on what collaborative lawyers do that distinguish collaborative practice from both of these processes.

	SETTLEMENT NEGOTIATIONS	FACILITATIVE MEDIATION
Process	Rights based bargaining.	Interest based problem solving.
The professionals	Lawyers – often barristers - with detailed knowledge of the dispute and the relevant law, as well as incremental bargaining skills; identification of their respective client's interests is not necessary.	Mediator with expertise in mediation process and techniques; knowledge of the dispute and/or the law not essential.
Objective	Lawyers bargaining to achieve the best possible settlement in context of their	Negotiations based on the parties' needs and interests instead of their positions and legal

	respective client's legal entitlements and positional demands.	entitlements.
Definition of the dispute	Positional difference based on the respective party's definition of the problem and their understanding of their legal rights.	The competing underlying interests and needs of the parties'.
Main role of the professional	To know their client's case and the relevant law. To know their client's range of expectations. To negotiate the best possible outcome for their client.	To facilitate the parties to engage in the process, assist them to identify their interests, encourage them to generate creative outcomes around their mutual interests, maintain constructive dialogue and enhance the negotiation process.
Strengths	I meet the clients' expectation that their lawyers will speak for them and to fix their problem. It is culturally acceptable and relatively easy to do.	Clients are in control of the negotiations and the outcome. The parties can bring to the process what is relevant to them. They can take account of all of their interests and develop outcomes that are fashioned around their needs.

Weaknesses	Does not take account of the parties' interests and needs. The parties play an extremely limited role in the negotiations. The parties may have little or no control over the initial ambit claim and may have false expectations of the process and the outcome. It can be difficult to convince the client to accept less than the outcome they expected.	The process can be lengthy and it may not reach an outcome.
------------	---	---

The most common response to a brief explanation of collaborative practice from both lawyers and/or mediators is “we already do that”. The lawyers tell you, we settle most of our matters and we often do so with our clients present during a round table conference. The mediators will tell you that collaborative practice is a form of co-mediation.

Sir Laurence Street would not entertain the view that collaborative practice was anything other than mediation¹¹. It might reasonably be presumed however, that Sir Laurence, along with most other lawyers, would not view lawyer negotiated settlements as mediation.

Although collaborative practitioners need mediation skills, collaborative practice has some very distinctive features that distinguish it from the broadest definition of mediation. It is fundamental to the collaborative process that the collaborative lawyers are not neutral or impartial third parties in the process. On the contrary, their role is to advise their clients and be their clients' allies¹². The lawyers must know the law relevant to the dispute but legal advice is acknowledged to be simply one facet of the dispute to be taken into account as the clients work toward a resolution that meets their needs.

¹¹ Personal telephone conversation with the writer

¹² Bernard S Mayer, *Beyond Neutrality – Confronting the Crisis in Conflict Resolution*, Jossey Bass, San Francisco, 2004

The collaborative lawyer provides the client with information about the law and guides their client through the negotiations. The clients conduct the negotiations based on their needs and interests. Frequently however the parties arrive at a point where they are negotiating competing interests. At this point the lawyers advise their clients and assist them to adopt distributive but principled negotiations skills. The lawyers may also advocate for their respective client's competing interests but must do so modelling principled negotiations to the clients. It is fundamental to the process that the lawyers do not enter into positional bargaining, as they do during a settlement conference.

In certain circumstances the early clash of interests requires the lawyers' management of discrete tensions, between for example creating and distributing value. Some negotiations lend themselves to creating value or "expanding the pie". In other negotiations where there are limited resources it may not be possible to "expand the pie" but the roles of the collaborative lawyers remains to assist the parties create value where ever possible. For example, where the parties each need to have the family home to continue to co parent the children they might come to an agreement to transfer their respective interest in the home from joint tenancy to tenants in common reflecting the adjusted interest of each party and then secure a further loan over the family home to purchase a second home for one of the parents.

In most instances settlement negotiations and mediations are conducted in the shadow of the Court. If proceedings have not commenced it is always an option to do so. The parties, their lawyers in settlement negotiations are fully aware that if the negotiations are not successful the parties can always turn to the Court for a determination. Likewise the mediator and the parties to mediation know that there is always the Court if the negotiations fail.

In the collaborative process the parties and their lawyers are fully aware that there is no easy way out. They sign a contract that prohibits the parties from threatening to go to Court and they know that if they do threaten to go to Court, their lawyers are likely to withdraw. If they do decide to go to Court their lawyers will withdraw. The parties and their lawyers have invested a great deal in reaching an outcome without going to Court.

In my view the role of the collaborative lawyer is significantly different to that of a lawyer involved in settlement negotiations and to that of a mediator. Collaborative law has been described as law without litigation and mediation with advice but it is much more than that. A mediator conducting evaluative mediation does provide advice, but he/she must always remain neutral. A collaborative lawyer is his/her client's ally. A lawyer negotiating a settlement on behalf of his/her client is an ally and advocate but the collaborative lawyer advocates using principled negotiation skills to assist the client to achieve an outcome which will take account of the parties interests and needs. The chances are that during the collaborative process the parties may acquire communication skills that allow them to have a relationship after they negotiate an outcome, such as necessary to co parent their children. The parties do not learn any skills to assist them to communicate after lawyers

have negotiated a settlement for them and they are often more acrimonious toward each other at then end of the process than they were at the beginning.

Lorraine Lopich
Collaborative Lawyer/Mediator
lorraine@lopichlawyers.com.au

SESSION 4. PAPER 5

A Movement From The Narrow Concept Of Legal Problem Solving

Introduction

The adversarial method of dispute resolution has been tried and tested throughout the common law world and is today still the most common form of dispute resolution in western societies.

Why then is there an ever increasing number of people, both litigants and lawyers, who take the view that the Courts do not dispense justice, they simply provide certainty through the administration of the law?

Judges and magistrates apply the law in proceedings before them which are governed by the rules of evidence and issues of admissibility and relevance 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 made based on less than the whole "story". The result is that the parties consider that they have not been heard and the decision imposed on them is not "fair" or appropriate.

Courts and the adversarial system are however but one tool in the dispute resolution toolbox and there are alternatives.

Alternate Dispute Resolution

Australia is recognised internationally as a leader in the field of mediation. Mediation has been used in Australia for close to 30 years to resolve disputes in almost every sphere of disputation from international issues to neighbourhood disputes with a significant degree of success.

Alternate dispute resolution practitioners are skilled negotiators and facilitators, who are able to identify commonalities between parties who are in dispute. The practitioners then guide the parties through a process that does focus on their entire "story" to reach a settlement of the issues between them.

When asked about mediation and other forms of alternate dispute resolution, most litigation lawyers commonly say: "Yes, I do that all the time. Most of my matters settle out of court!"

That may very well be true however, what is it that lawyers do when they engage in these settlement negotiations?

The following outlines the process that is most commonly engaged in by lawyers who conduct settlement negotiations:-

Party A asserts that their claim is worth not less than \$x, their legal argument is supported by precedent and that there are a number of serious problems

with the other side's evidence that they appear not to be able to address satisfactorily.

The other side of course, denies having any problems with their evidence. Says instead that party A's claim is worth but a fraction of \$x and that the authorities referred to by counsel for party A are all distinguishable. Apart from which, if party A does not accept party B's offer of settlement, party B will be asking the court for costs on an indemnity basis for one reason or another.

Simply put this is classical "positional bargaining". It is employed by litigation lawyers in settlement conferences and settlement negotiations. It is conducted between the lawyers and often in the absence of the clients.

Central to this form of negotiation is the threat that if the other side refuses to accept the offer currently on the table then the matter will go to the judge or magistrate to be decided at the peril of the other party.

Alternate dispute resolution practitioners will 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 possibilities of 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 parties in dispute.

Collaborative Law

The new kid on the alternate dispute resolution block is Collaborative Law. It was started in 1990 by a disgruntled divorce attorney from Minnesota, Stu Webb¹³.

The Collaborative Law process is designed to "resolves disputes respectfully". It is law without litigation and mediation with advice. Collaborative Professionals are committed to assisting the parties to resolve their own disputes with all of the benefits of mediation.

Collaborative Law is a new tool in the alternate dispute resolution practitioner's toolbox. It is different from mediation in that the Collaborative Lawyers are the ally of their client¹⁴. The Collaborative Lawyers are also an advocate for their clients and will advise their clients of the legal issues affecting their matter but unlike their litigating cousins, Collaborative Lawyers will not go to court.

The Collaborative Lawyers and their clients all contract at the commencement of the matter that the lawyers must disqualify themselves if the settlement negotiations break down. Further, the negotiations may be brought to an end

¹ StuWbb@aol.com

² Bernard S Mayer, *Beyond Neutrality – Confronting the Crisis in Conflict Resolution*, Jossey Bass, San Francisco, 2004

if either side uses the threat of litigation as a means of coercion to achieve their goal.

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 principled negotiation.

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 but is instead, the stated aim and purpose of the entire Collaborative Process.

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 needs and interests are identified, options to meet or satisfy those needs and interests are explored and developed and the parties effectively design their own outcome to their dispute with the benefit of the advice and skills of their Collaborative Lawyers.

The Collaborative Lawyers assist to facilitate these negotiations but unlike litigation which destroys the lines of communication between the disputing parties by the use of a lawyer directed process where the parties have no direct communication between them, the parties are helped by the Collaborative Lawyers to re-establish those lines of communication and to conduct the negotiations themselves.

Many of the major differences between the traditional narrow legal form of dispute resolution and the Collaborative Model are set out in the comparative table prepared by Texas based Collaborative Lawyer, Sherrie Abney attached to this paper.¹⁵

The Settlement Team

The concept of a “*settlement team*” is one of the indicia of the Collaborative Model of dispute resolution.

From the outset of the matter, the lawyers and their clients are committed to reaching a negotiated settlement of the dispute confronting them. They are all part of the settlement team.

It is common in litigated disputes for vast quantities of documents to be generated. Detailed pleadings are prepared and filed supported by encyclopaedic affidavits painstakingly prepared from evidence provided by the parties to the dispute and their army of witnesses.

³ Sherrie R Abney, Texas Collaborative Law Council (sherrie.abney@att.net)

Discovery is made and sought resulting in mountains of documents. Then subpoenas are issued and served. More documents!!!

The collaborative settlement team on the other hand generates little in the way of documentation even in complex commercial matters. The parties are required by the Participation Agreement signed by them at the outset of the matter, to make full, frank and honest disclosure of all relevant documents in their possession or control. These documents are tabled at the four way meetings of the settlement team but no notices for discovery, subpoenas or pleadings are prepared or filed.

The settlement negotiations are privileged and confidential.

Multi-professional and Interdisciplinary Teams

In California and in other parts of the USA, it is common for multi-professional or interdisciplinary settlement teams to include other professionals such as child consultants, divorce coaches, anger management coaches and financial experts from the outset. Known as the "*Interdisciplinary model*", the clients engage a "full team" of experts and are prepared by them so that they can more effectively engage in the four way meetings before they become involved with their lawyers.

In Canada, the United Kingdom and Australia it is less common for the settlement team to include such other experts from the outset. However part of the Collaborative method of dispute resolution is the ability to bring in experts as and when decided by the parties. This type of settlement team is referred to as the "*referral model*".

These 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 the event that the settlement negotiations fail. Like the Collaborative Lawyers, they too must disqualify themselves from acting further for the parties or either of them.

The type of expert that may be brought into the team depends on the nature of the dispute between the parties. An environmental scientist may be brought in by the parties to a dispute relating to an environmentally significant development; a building engineer in a construction matter; an expert surveyor for a property matter and so on.

The expert is therefore the settlement team's expert. As such their role is to employ their particular expertise in a way which will best advise all of the parties on how to address or solve a particular issue. Compare the situation in a litigated matter where 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 seek the opinion of a number of experts before finding one who they feel

will advance their client's cause. A consequent issue of credibility may then arise.

In Collaborative Law an impasse between the parties may also be addressed by engaging a mediator to assist the parties to negotiate a particular issue. Further, an opinion may be sought from counsel on a particular issue if the parties consider that they need the assistance of such advice.

The Collaborative Process is therefore extremely flexible. Able to meet the requirements of the parties without the concern of having to meet court imposed deadlines.

Conclusion

In theory, any matter that is capable of being litigated is capable of being resolved through the Collaborative Process. Family Lawyers in the USA, Canada, UK, parts of Europe and Australia have been quick to recognise the benefits of Collaborative Law. However, other civil and commercial issues as diverse as disputes between franchisee/franchisor, lessor/lessee, employer/employee, contracts for the supply of goods or services, disputes between company directors or business partners, building matters and family provisions matters, to name but a few, are all eminently suited to the Collaborative Law process.

Collaborative Practice is not a panacea; it is another dispute resolution tool for the use of dispute resolution professionals, a further tool to be included in their toolbox together with mediation, conciliation, arbitration and litigation.

It does however, require the appropriate training of lawyers and other professionals wanting to engage in Collaborative Practice to ensure that the interests of clients are protected and to preserve the integrity of the process.

*Robert Lopich*¹⁶

Collaborative Lawyer/Mediator

Email:- robert@lopichlawyers.com.au

⁴ www.lopichlawyers.com.au

WHICH WOULD YOU CHOOSE TO SETTLE YOUR DISPUTE?

By Sherrie R. Abney

v.

Litigation

Collaboration

Operates by assigning blame or fault and relies on coercion to obtain results.	Relies on problem solving and informed agreements.
Creates an atmosphere of intimidation and fear.	Provides a safe environment for the exchange of ideas and possible solutions.
Filters communications and negotiations by going through parties/attorneys using the "he said, she said" method of relaying information.	Employs face to face meetings with all parties and attorneys hearing the same information at the same time with the ability to instantly correct any misunderstandings.
Subjects parties to cross examination, depositions, subpoenas, written discovery, and unwanted hearings.	Follows an agreed meeting agenda with no surprises, demands, or court appearances.
Takes expenses out of your control and gives the other side the option of forcing you to spend money for depositions, hearings, and unproductive discovery.	Allows the voluntary agreement of the parties to determine what documents and information are necessary to reach a resolution of the disputed matter.
Gives the Court control over the scheduling of the case.	Gives the parties control over scheduling of all meetings and deadlines.
Provides a public record of all court hearings.	Employs private and confidential meetings.
Forces the attorneys to prepare for trial from the moment the case begins, creating unnecessary expenses if the case settles.	Allows attorneys to focus 100% of their time and talent as well as their client's money on discovering the optimum solution.
Requires each party to obtain at least one hired gun who must be willing to testify in support of that party's claims in court if an expert is needed.	Provides for a jointly engaged objective expert who will never testify; thus, saving money as well as giving a greater selection of experts since some experts refuse cases which require a court appearance.
Promotes the abdication of responsibility for the resolution of the dispute by placing the task in the hands of the judge or jury.	Takes control of the dispute and actively seeks resolution providing a greater likelihood that the parties will be satisfied with the results.
Imposes no duty to correct misunderstandings or mistakes that a party may rely on to his/her detriment.	Requires the parties/attorneys to correct all misunderstandings and/or mistakes.
Requires no party to disclose any relevant facts, documents, or information unless specifically asked by another party.	Requires full disclosure of facts, documents, or other information which has any bearing on the resolution of the dispute.
Creates an imbalance of power when one party has greater financial resources than the other parties.	Levels the playing field by giving all parties control over the choice of experts and financial expenditures.

Texas Collaborative Law Council, Inc.

COLLABORATIVE LAW PARTICIPATION AGREEMENT

(items in italics should be excluded unless there are parenting issues)

1. Parties

- 1.1. **Client 1 – Full Name (“Client 1”);**
- 1.2. **Client 2 – Full Name (“Client 2”);**
- 1.3. **Lawyer 1 (“Client 1’s Lawyer”); and**
- 1.4. **Lawyer 2 (“Client 2’s Lawyer”).**

2. Goals

- 2.1. **Client 1 and Client 2** wish to solve their problems through meaningful discussion and negotiation instead of going to Court.
- 2.2. **Client 1 and Client 2** and each of their lawyers agree to:
 - Work to reach agreement on all important issues between **Client 1** and **Client 2** arising from their separation.
 - Focus on the future well being of **Client 1** and **Client 2**.
 - Find solutions that are acceptable to **Client 1** and **Client 2**.
 - Work to reduce the negative emotional, social and financial consequences of **Client 1’s** and **Client 2’s** separation.
 - *Focus on the future well being and best interests of Client 1’s and Client 2’s children.*
 - *Promote a caring, loving and involved relationship between Client 1’s and Client 2’s children and each parent.*
 - *Be diligent in their efforts to ensure Client 1’s and Client 2’s children do not become involved in their problems.*
 - *Act quickly to resolve differences related to Client 1’s and Client 2’s children.*
 - *Openly share information about Client 1’s and Client 2’s children.*

3. What we will each do

- 3.1. The lawyers will work together with **Client 1** and **Client 2** in a series of group meetings to help them:
 - Discover what is important to each of them;
 - Identify the questions they need to answer;
 - Gather information;
 - Create the maximum number of choices which may help them to meet their goals; and
 - Reach agreement.
- 3.2. **Client 1** and **Client 2** and their lawyers will give complete, honest and open disclosure of all facts and information in a timely manner. We will ask for and provide information in our group meetings.
- 3.3. **Client 1** and **Client 2** and their lawyers may discuss the likely outcome of going to Court. None of them will use threats of Court as a way to force settlement.
- 3.4. The Lawyers may file consent Court documents reflecting the terms of **Client 1's** and **Client 2's** agreements reached in group meetings.

4. Participation with Integrity

- 4.1. We will all act with good faith:
 - Respectfully;
 - Honestly;
 - Openly;
 - Co-operatively; and
 - Moderately.
- 4.2. We will all work to protect the privacy and dignity of all of us.
- 4.3. We all understand the success of Collaboration depends on all of us working hard together.
- 4.4. Where what is important to **Client 1** and **Client 2** is different, all of us will use our best efforts to create proposals that are acceptable to **Client 1** and **Client 2**. If necessary, **Client 1** and **Client 2** will compromise to reach an acceptable agreement.

- 4.5. We will all immediately identify and correct mistakes, errors, wrong assumptions, omissions and miscalculations. We will all not take advantage of any of these matters in Collaboration.

5. Experts

- 5.1. If **Client 1** and **Client 2** need to retain experts to provide them with advice for them to use in the group meetings, they will engage those experts jointly.
- 5.2. Once an expert is engaged to provide advice for use in a group meeting the expert will become a party to this Agreement and be bound by it to the extent this agreement is not inconsistent with any professional obligations the expert might have or obligations imposed upon the expert from time to time by law.

6. Staying on the right track

- 6.1. **Client 1** and **Client 2** understand Collaboration is designed to solve only their legal problems arising from their separation. Collaboration is not personal or marriage counselling.
- 6.2. **Client 1** and **Client 2** understand there is no guarantee that they will successfully solve their problems in Collaboration.
- 6.3. **Client 1** and **Client 2** understand and agree that each Lawyer represents only his/her own client in Collaboration, even though we will all work together.
- 6.4. **Client 1** and **Client 2** understand that Collaboration may fail if:
- The Lawyers do not spend enough time educating **Client 1** and **Client 2** about Collaboration and preparing them for Collaboration;
 - **Client 1** and/or **Client 2** fail to follow temporary agreements they make in Collaboration;
 - **Client 1** and/or **Client 2** fail to do tasks they have agreed to do in Collaboration; or
 - **Client 1** and/or **Client 2** choose to go to Court to resolve issues they do not yet agree about.
- 6.5. We understand that **Client 1**'s Lawyer and **Client 2**'s Lawyer must withdraw from Collaboration if either learns that **Client 1** and/or **Client 2** has taken unfair advantage of Collaboration. Some examples of this are:
- Disposing of property without the consent of the other person;

- Withholding or misrepresenting information;
 - Failing to disclose the existence of the true nature of assets or debts;
 - Failing to follow agreements made in Collaboration; or
 - Failing in any other way to participate in the spirit of Collaboration.
- 6.6. If either of **Client 1**'s Lawyer or **Client 2**'s Lawyer withdraws from Collaboration, that lawyer will give written notice of the withdrawal to his or her own client and the other Lawyer.

7. Fees and Costs

- 7.1. Each of the Collaborative Lawyers is entitled to be paid for her or his services.
- 7.2. **Client 1** has retained **Client 1**'s Lawyer and will pay for his or her legal services. **Client 2** has retained **Client 2**'s Lawyer and will pay for his or her legal services. This will continue unless the parties otherwise agree.

8. What happens if Client 1 or Client 2 chooses to go to court

- 8.1. **Client 1** and **Client 2** understand that his or her Lawyer's representation is limited to Collaboration. Neither **Client 1**'s Lawyer nor **Client 2**'s Lawyer can ever represent either client in a contested Court proceeding against the other client.
- 8.2. If Collaboration ends and **Client 1** and **Client 2** go to Court, **Client 1**'s Lawyer and **Client 2**'s Lawyer will be disqualified as witnesses.
- 8.3. If Collaboration ends and **Client 1** and **Client 2** go to Court the Collaborative Lawyers will provide the written material on their files, including opinions or reports, to the respective new litigation lawyers for **Client 1** and **Client 2**.
- 8.4. If either **Client 1** or **Client 2** withdraws from Collaboration or goes to Court, he or she must give the other client and the Collaborative Lawyers written notice of his or her withdrawal from Collaboration.
- 8.5. **Client 1** and **Client 2** must not do anything in the Court system until 30 days after they have delivered this written notice. This means **Client 1** and **Client 2** must not file any Court documents, or bring any Court application, within 30 days of delivering written notice of their withdrawal from Collaboration unless there is an emergency or other exceptional circumstance in relation to children or an urgent financial issue.

9. Promise to Follow Contract

9.1. **Client 1, Client 2, Client 1's** Lawyer and **Client 2's** Lawyer pledge to follow and to promote both the spirit and the written word of this Agreement.

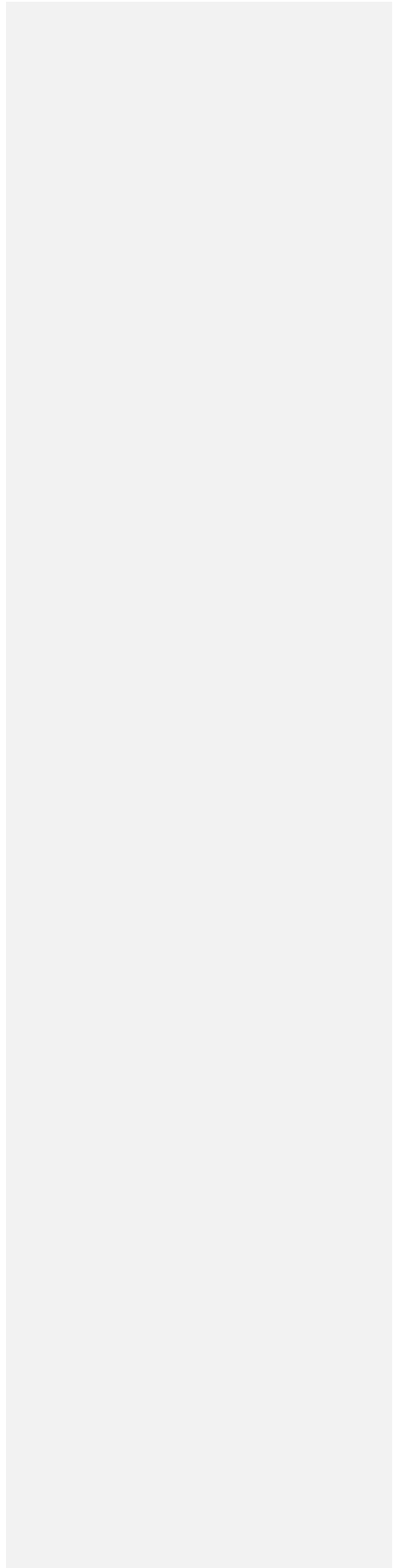
DATED:

Client 1 - Full Name

Client 2 - Full Name

Lawyer – Full Name

Lawyer – Full Name



PARTICIPATION AGREEMENT

This is a **COLLABORATIVE LAW PARTICIPATION AGREEMENT**

Made on _____, 200

BETWEEN

1. The Participants

1.1 The clients

_____ And _____

And their lawyers,

_____ And _____

_____ have chosen to use the Collaborative Law Process (CL Process) to resolve the issues arising out of the clients' dealings with one and other.

1.2 Each client and each lawyer are parties to this agreement and are collectively referred to as the "participants".

1.3 Each participant agrees to be bound by the terms and conditions of this agreement and to abide by, engage in and follow the CL Process.

2. Purpose of the Process

The purpose of the CL Process is to:-

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

~~2.1~~ | avoid delay associated with the court system and the economic impact and impositions on time likely to result from litigation; Formatted: Bullets and Numbering

~~2.2~~ | achieve a settlement that is more acceptable and satisfying to both parties than is likely to be achieved within the adversarial system; Formatted: Bullets and Numbering

~~2.3~~ | minimize the disruption and dislocation associated with the preparation and conduct of litigious action; and Formatted: Bullets and Numbering

~~2.4~~ | be future focused by preserving or restoring commercial relationships between the clients. Formatted: Bullets and Numbering

3. Principles Governing Participation in the Collaborative Law Process

~~3.1~~ | All communications among all participants will be respectful and constructive. Formatted: Bullets and Numbering

~~3.2~~ | The participants will engage in principled negotiation focused on identifying the issues between them, determining the underlying interests, developing and implementing settlement options that, so far as possible, satisfy the needs and interests of both clients. Formatted: Bullets and Numbering

~~3.3~~ | None of the participants will:- Formatted: Bullets and Numbering

~~3.3.1~~ use the threat of withdrawal from the CL Process, or the commencement of legal proceedings to achieve a desired outcome or force a settlement; Formatted: Bullets and Numbering

~~3.3.2~~ take advantage of inconsistencies, mistakes or miscalculations made by another participant, but will inform the other participants of them and accommodate their rectification.

~~3.4~~ | Each client will fully and frankly discuss and explore their own, as well as the other client's interests and needs and cooperate in the development of options to resolve issues between them. Formatted: Bullets and Numbering

~~3.5~~ | The clients will so far as reasonably possible, conduct the negotiations however, the lawyers will be:

~~3.5.1~~ the advocate for and ally of their respective client; and

~~3.5.2~~ inform their client of their rights and obligations relevant to the issues between the parties. The nature and particulars of the advice given will be communicated to the other participants to the extent necessary to further the negotiations and to facilitate settlement.

4. Use of other professionals

~~4.1~~ | The participants may engage other professionals including valuers, accountants, financial and tax planners and other experts as part of the "settlement team" to assist and advise parties in the resolution of the issues between them.

Formatted: Bullets and Numbering

~~4.2~~ | The clients will determine by agreement between them, the basis on which the expert's fees will be paid and the proportion each will contribute.

Formatted: Bullets and Numbering

~~4.3~~ | Generally, any opinion or report provided by an expert will be subject to the confidentiality provisions of this agreement unless the parties agree in writing to the contrary.

5. Cautions and Limitations

~~5.1~~ | The CL Process does not guarantee that the client's will successfully resolved the dispute between them.

Formatted: Bullets and Numbering

~~5.2~~ | The participants acknowledge and agree that although the lawyers share a commitment to the CL Process, their professional duty is to represent their own client diligently and not the other client.

~~5.3~~ | If the matter is not resolved in the CL Process, each lawyer (and all members of their respective firms) is disqualified from representing their client in any subsequent contested legal proceedings between the clients.

Formatted: Bullets and Numbering

6. Exchange of Information and Documents

~~6.1~~ | The participants agree to conduct all their dealings in relation to the CL Process with utmost good faith and to make full and frank disclosure of all relevant information and documents whether legally relevant or otherwise privileged, within their possession, custody or control and where such information or documents are accessible to the that party by making a request or application to some other person or body, then to do all that they reasonably can to obtain access to and to produce such information or documents.

Formatted: Bullets and Numbering

~~6.2~~ | All decisions made, and any settlement agreement reached, will be based on the understanding that each party has made a full and frank disclosure of all information and produced all documents that are necessary and appropriate for a fair and proper resolution of the issues.

7. Consent to Extension of Time to Protect Legal Rights

~~7.1~~ | The participants acknowledge and agree that it is not intended that either party should be prejudiced by having all or part of their right to commence any legal proceedings or to take any legal step statute barred due to the expiry of any limitation period. Accordingly, if such limitation period or time allowed for the taking of any step would expire during the CL Process, then each client hereby consents to a reasonable extension of time to permit the commencement of such action or the taking of such step as the case may be.

Formatted: Bullets and Numbering

8. Withdrawal or Termination

8.1 | Client Changing Lawyer: A client may by giving notice in writing to each of the other parties, suspend the CL Process to retain a new collaborative lawyer.

Formatted: Bullets and Numbering

8.2 | Lawyer Ceasing to Act: If, for any reason other than as provided under Mandatory Termination (clause 9) either lawyer ceases to act for his or her client and thereby withdraws from the process, that lawyer must give notice writing to each of the other participants.

8.3 | If the client intends to retain a new collaborative lawyer and continue with the process, he or she must give written notice of that intention to the other lawyer.

8.4 | Resumption of Process: In the circumstance referred to in 8.1 or 8.2 above, the client must be able to resume the CL Process within 30 days from the date of the notice referred to and the new lawyer and all other participants must execute a new Participation Agreement. If a new Participation Agreement is not executed within the 30 days, the other client will be entitled to proceed as if the CL Process was terminated with effect from the date of such notice.

Formatted: Bullets and Numbering

8.5 | Client Terminating Collaborative Law Process: A client may (for a reason other than such as requires mandatory termination pursuant to clause 9), terminate the CL Process by notice in writing given to each of the lawyers and resort to litigation whereupon both collaborative lawyers must disqualify themselves from acting further in the matter.

9. Mandatory Termination of the Collaborative Law Process

9.1 | A lawyer must terminate the CL Process, upon becoming aware that his client has withheld or misrepresented information, continues to withhold or misrepresent information, or has failed to act in good faith or has used the CL Process so as to undermine the CL Process or take unfair or improper advantage of the other client.

Formatted: Bullets and Numbering

~~9.2~~ | The lawyer terminating the process will advise the other lawyer by notice in writing of the termination without giving any reason, except to state that the termination is pursuant to this clause 9.

~~9.3~~ | The client referred to in clause 9.1 above shall not be permitted to continue or resume the CL Process, or to commence a new CL Process with the other client. This prohibition must be enforced by the other client and the other client and his collaborative lawyer must refuse to consent to a continuation or renewal of the CL Process.

~~9.4~~ | The clients undertake and agree that they will not for a period of thirty (30) day following the termination of the CL Process (except in an emergency) commence any Court based action to permit each of the clients to retain new lawyers and to allow for an orderly transition of the matter.

10. Temporary Agreements in Force During Transition

~~10.1~~ | Subject to any provision in the agreement to the contrary, all temporary agreements will remain in full force and effect during any period when the matter is in transition due to the operation of clauses 8 or 9.

~~10.2~~ | The intent of this provision is to avoid surprise or prejudice to the rights of the other client.

~~10.3~~ | Either client may bring this provision to the attention of the Court when requesting a postponement of a hearing and/or the continuation of temporary agreements.

11. Confidentiality

~~11.1~~ | The participants acknowledge and agree that all communications and information exchanged within the CL Process are part of settlement negotiations

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

and are therefore confidential and privileged.

~~11.2~~ | Except with the consent of both clients no evidence of anything said or of any admission or communication made, nor of any document prepared by any of the participants for use in the CL Process (other than the participation agreement and any other agreement not intended to be confidential) or in the course of the CL Process will be admissible in any legal proceedings, arbitration or other process for dispute resolution.

12. Rights and Obligations during the Collaborative Law Process

~~12.1~~ | Neither client will charge or encumber any property which is the subject of the CL Process or take any action or deal with such property in a manner which may prejudice the other client's rights or interests in such property without the written consent of the other.

~~12.2~~ | Except as may be required in the ordinary course of business, neither client will dispose of any business asset without the written consent of the other.

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

Executed as a Deed.

SIGNED by

(Client)
in the presence of:

.....
Signature of witness

SIGNED by
(Client)
in the presence of:

.....
Signature of witness

SIGNED by
(Lawyer)
in the presence of:

.....
Signature of witness

SIGNED by
(Lawyer)
in the presence of:

.....
Signature of witness