

COLLABORATING WITH CARE

Putting the pieces in place in family law matters is often challenging.

Collaborative practice offers new options - and responsibilities - for all involved.

By Stephen Winspear and Elizabeth Turnour

Achieving client satisfaction is very challenging for family lawyers. The litigation process often exacerbates the intense grief, stress, fear and anger clients are feeling. The collaborative law process has developed in response to this. It is designed to increase client satisfaction by keeping the dispute out of court, facilitating client input and control, and building trust between the parties (which is especially important where children are involved). It has the added benefits of being flexible, creative, and relatively quick and inexpensive - especially compared to litigation.

As a new process of dispute resolution, interesting questions are raised about the role of the collaborative lawyer. What are lawyers' duties to their clients in this process? Are they different to the duties of a non collaborative lawyer, and do any differences amount to an addition or subtraction from the duties of non collaborators? And, do clients understand any differences in their lawyer's role well enough - especially if their lawyer's obligations to them could be less than in a traditional legal process?

Our premise is that the traditional legal and ethical responsibilities of lawyers to their clients remain, but there are additional responsibilities collaborative lawyers need to be aware of. This article highlights the distinctive features of collaborative practice and suggests ways for practitioners to best manage these while maintaining an optimum and ethical service for their clients.

Collaborative law: what's different?

The distinctive features of collaborative law are:

1. The collaboration contract: signed by all parties and lawyers, and containing a promise to settle the dispute without litigation. If the dispute cannot be settled the parties must instruct new lawyers for any litigation, and the collaborative lawyers (and their firms) are prevented from acting. All documents and evidence from the collaboration are inadmissible in the later court proceedings.
2. Interest based negotiations: negotiations are interest based rather than positional in nature. Interests are what motivate people. They are the silent movers behind positions. There are usually several possible positions which could satisfy an interest. For example, rather than saying, "I must have the house" - a position, clients are encouraged to say something like, "I need security for myself and the children".
3. Four-way meetings: all negotiations take place in four-way meetings between the clients and their lawyers. In some cases neutral experts (accountants, valuers, financial planners, psychologists) are invited and give their guidance and opinions on the issues.
4. "Negotiation coaches": collaborative lawyers are trained to be "negotiation coaches". The clients are encouraged to speak. The lawyer assists their client in articulating their interests, formulating and following an agenda, and avoiding provocative language.
5. Not taking advantage: Under the collaboration contract, each party must identify and correct any mistakes of the other party, including drafting mistakes.
6. Disclosure: parties promise to give full disclosure of all relevant documents and financial records. This goes beyond simply waiting for the other party to ask for something.
7. Co-counsel: the lawyers are not "opposing solicitors" but they are "co-counsel" or "counterpart solicitors". The lawyers in fact work as a team in getting to a solution.
8. Advising on "legal rights": Early advice to a client is usually given in broad terms, which avoids "positions" becoming fixed before the negotiation begins. It is generally only in the four-way meeting that lawyers give their "definitive" opinion as to the likely outcome of a matter if it was litigated. The opinions of both lawyers are then discussed openly before both clients.

The Collaboration Contract and Consent

The collaboration contract describes the process and codifies the obligations of the parties and lawyers – and aims to build trust. Arguably, it imposes obligations beyond what may traditionally exist. The nature of these obligations should be carefully explained to the client, so that the client's consent to the collaborative process is fully informed. Clearly, if the consent is not informed, it is not real consent.

Obviously, both clients must have ample opportunity to read and discuss the contract with their lawyer privately. Best practice in collaborative law mandates that the first item on the first meeting agenda is to again go through the contract. The major characteristics of the contract are highlighted, questions are invited, and then the contract is signed by all parties to it.

Some of the more contentious issues that require thoughtful handling are outlined below.

Advising on "legal rights"

The Law Institute of Victoria Conduct and Practice Rules 2005 require practitioners to give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge.

The Family Law Act 1975 also specifically mandates that a lawyer must give advice to their client on the effect of and the advantages and disadvantages of a binding financial agreement prior to signing. Failure to do so may well lead to the agreement being set aside at a later date.

Clearly, the lawyer must fully inform a client of their "legal" rights, especially before agreeing to a settlement, as well as prior to signing settlement documents, be they consent orders, binding financial agreement or other documents. This advice cannot be restrained by an enthusiasm for the collaborative process and a desire to avoid spoiling the settlement which may be "in sight". If the advice is incomplete a later complaint against the lawyer may well be sustained.

The definitive legal advice is usually not given prior to a four-way meeting but, if such advice is incomplete or possibly unclear, the lawyer must ensure that it is made clear subsequently. Regardless, the advice should be confirmed in writing before the client signs settlement documents, both to ensure the client fully understands what she/he is agreeing to, and for the lawyer's own protection.

Disclosure

A discussion with a client about collaboration should include a discussion about disclosure. The collaboration contract requires full disclosure of all relevant information. It is an essential element of the process and failure to comply justifies withdrawal from the process, including unilateral withdrawal by a lawyer if their own client "misbehaves".

The requirement to give full disclosure is not new – see the court rules. What is new is the process of disclosure.

Court rules are quite prescriptive as to what documents and information must be disclosed, and disclosure is largely controlled by persistent and insistent lawyers. By contrast, the collaborative process works largely on principles of trust and will often be informal. It may not involve seeking such extensive documentation relating to assets and income as is stipulated in the court rules.

Collaborative lawyers should advise their clients of the documents and information that would ordinarily be disclosed and of their right to insist on formal disclosure. This is part of the obligation to provide legal advice and failure to do this may leave the lawyer vulnerable to a complaint.

There is some American literature suggesting that the collaborative process of disclosure requires clients to waive their right to confidentiality, but this is resolved by attaining client consent.

Correcting Mistakes

Consider the following example. The husband intends to sell a property after the settlement. The wife's lawyer knows that there will be tax consequences that the husband's lawyer is not aware of. If the husband knew those tax consequences, he may not agree to settle on the proposed terms.

Whilst the wife's lawyer is obliged to act in the best interests of her client, the lawyer is also contractually obliged to correct the mistake. The two obligations may conflict, creating at least a theoretical legal and ethical dilemma for the lawyer. Therefore, it is doubly important that this aspect of the collaboration contract be highlighted and explained to a client prior to signing.

Conflict of Interest

The collaboration contract creates contractual duties from one lawyer to the other lawyer and to the other client. This does not sit comfortably with the requirement that a practitioner must not allow an interest of theirs to conflict with their client's interest, nor the requirement to act for only one party.

The duty to correct mistakes has been mentioned. Another question is whether or not the collaborative process creates excessive pressure to settle. A Family Law Council Report into collaborative practice in family law noted:

...the structure and objectives of the collaborative law process may in itself restrain a lawyer from exploring litigation as an option for resolving a client's dispute and while the client will have consented to the process, the ethical issue will arise where a settlement may not necessarily achieve an outcome that is in the best interests of the client and if the settlement is not accepted the collaborative lawyer will be required to cease representing the client.

The report emphasises the need for informed consent to be given prior to signing the collaboration contract, and the necessity of the client understanding all the relevant considerations.

Webb v Birkett

The extent to which these issues become problems in practice will only become apparent over time. To date, we have a Canadian example of a claim in negligence against a lawyer after the husband and wife settled through the collaborative law process. In *Webb v Birkett* the wife claimed that her lawyer failed to properly advise her of her right to insist on a full valuation of the family business. The evidence established that the lawyer had apprised her client of the opportunity to have a full business valuation and the client had knowingly and with comprehension decided not to insist on it.

In analysing the lawyer's duty of care, the judge took into consideration the nature of the collaborative law process. He noted that while a lawyer had a fundamental responsibility to provide professional legal advice to their client, it was the client who had control over the process, cost and outcome of the dispute. The client was entitled to give up certain legal rights for other considerations or non "legal" interests. In this case, freedom from financial dependence on her spouse, including ongoing spousal maintenance, was important to the client. As the lawyer had advised her client properly of her rights, she was not negligent when the client made an informed decision to waive those rights and settle, having satisfied her "interests".

Conclusion

Collaborative law is fundamentally different to other forms of alternative dispute resolution and the role and additional required skills of the collaborative lawyer are quite different.

If, however, the client's expectations are not fulfilled, a collaborative lawyer may face a complaint. That risk is minimised by managing client's expectations through ensuring that their consent prior to and throughout the collaborative process is properly informed. Collaborative lawyers would be wise to give advice in writing on the advantages and disadvantages of all dispute resolution processes and the implications of the collaboration contract, not relying solely on their standard retainer and the collaboration contract itself. And then – go on collaborating, for the benefit of the client and the increased job satisfaction of the lawyer.

Stephen Winspear
Accredited Family Law Specialist
Chair Family Law Section LIV
Principal Moores Legal

Elizabeth Turnour
Trainee Lawyer
Moores Legal

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