Lessons from Collaborative Process

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My starting point: Our view of "interests in common" is too narrow:

Collaborative practice as it presently exists takes place almost entirely in family law disputes or at the initiative of the parties in such areas as estates. The characteristic most commonly thought to lend a dispute to solution by a collaborative process is relationship, by which is usually meant a family relationship.

But there are many other things parties may have in common which may prompt them to consider recourse to collaborative process, such as --

- Property ownership, joint or related;
- Shareholding in common;
- Business interests, joint or related;
- Market relationship;
- Cultural concerns;
- Legislative concerns;
- Environmental concerns;
- The wish to maintain privacy.

Each of these areas entangles the disputants in a web of experience, extended relationships, conventions, trade practices, law and regulation that they have in common, and which is bigger and more complex than the dispute between them. Thus, while the matter over which they disagree may be a driving force in their dispute, the nexus of common circumstances surrounding them both may prompt them to act in unison in some measure to preserve and maximize the interests they have in common.

While it is a step in the right direction, mediation as it is mandated under the *Rules of Civil Procedur*e in Toronto, Windsor and Ottawa, can be said to undercut collaborative process, because it takes place in actions that are already in litigation – which is to say that the damage is already done, and there is less incentive on the parties and their counsel to consider mediation divorced from the litigation process. The same may be argued of some specialized areas where mediation takes place under legislation or by a governing agreement, most notably union disputes.

Factors which may prompt the parties to choose a collaborative process can include the following --

- The knowledge that a collaborative process is available to them, and understanding of that process;
- Expense: The wish to avoid the expense and delay of more combative procedures such as contested motions and trials;
- Shared Values: distaste for combat-style proceedings, and the choice to work on their dispute civilly and cooperatively;

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- The belief that there is no “magic” in litigation and that the parties can do as good a job of resolving their problem as a Court can do;
- The wish for privacy.

It should be borne in mind that a factor which might seem remote from the dispute can prompt collaborative process: for example, two companies that command substantial market position in the field they have in common might choose to conduct a collaborative process in the public eye in order to preserve and enhance their position of leadership in that market. Not every party wishes to conduct itself as a thug, or to be seen that way: a civilized approach to solution of a dispute may turn out to be an excellent promotion opportunity.

My point: our view of “issues in common” is too narrow in collaborative practice as it presently exists. People may not be accustomed to thinking of greater commonalities, but they exist and would support wider use of collaborative practice if we made a point of turning our collective attention to them and taking advantage of them.

Corollary: Our view of possible remedies is too narrow, as well:

If I am correct that our understanding of issues in common is too narrow, it follows that our perspective on possible remedies is too narrow, as well.

My conviction that this is true is what originally motivated me to write this article: I believe we could take much better advantage of two existing forms of alternative dispute resolution, being --

- collaborative law as it is practiced in family cases; and
- proceedings under the Ontario *Commercial Mediation Act*, (S.O. 2010, Ch. 16, Sch.3).

This article will begin with descriptions of both of these forms of alternative dispute resolution, and will then move on to consider broader issues, as outlined in the Table of Contents.

Please note:
In Ontario, collaborative practice is almost exclusively practised as Collaborative Family Law, but I do not intend to examine it with respect to conventional family law issues such as the welfare of children, family property and support – rather, I propose to consider it from a generic perspective, to show how it could be employed in the resolution of disputes of many kinds.

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An overview of Collaborative Family Law:

Origin and nature of collaborative law:

Collaborative Family Law is the brainchild of a single individual, Minnesota family lawyer Stuart Webb, who conceived it alone about 30 years ago when he was at his wit's end, frustrated and burnt-out by his adversarial-style family law practice.

In creating it, Webb identified two structural defects in conventional family law practice that he wanted to address:

1. The inherent conflict of interest in which all litigation lawyers find themselves because they earn fees in the context of their clients' cases and the litigation system, which often prompts them to resort to litigation in their own interest and contrary to the interests of their clients; and
2. The fact that clients are not direct agents in their own cases, distancing them from understanding and decision-making, because the lawyers act as their advocates in the dispute process.

In addition, like many other conscientious practitioners, Webb disliked and wanted to minimize the combat-mindedness that so often takes over in dispute processes.

Webb came up with an idea for a process the purpose of which was to avoid litigation altogether. It would be based on a contract between the two parties and their two lawyers, in which the clients would agree that they wished to undertake a voluntary, cooperative, respectful process in good faith by which to address the issues between them with a view to settlement. The parties would make full and frank disclosure in support of this process, which would then be conducted by means of a series of 4-way meetings with their lawyers. The contract might contain as many specifics as they wanted, but the two basic provisions would always be the same, and would be designed to address the two numbered points set out above:

1. The parties would agree that if discussions between them broke down and litigation ensued, the collaborative process would be at an end, the lawyers acting in the collaborative process would be barred from acting as litigation counsel and the parties would have to retain new counsel. Some agreements to collaborate provide that the mere threat to resort to litigation is enough to disqualify the lawyers from acting and to end the collaborative process. Similar provisions apply to the breach of any provision in the agreement to collaborate or any agreement made in the process of negotiations;
2. At the settlement meetings, the clients would act as their own advocates, having undertaken the necessary preparation with their own lawyers to be enabled to do so effectively. The lawyers' roles at those meetings would be in the nature of advisors, coaches and, if necessary, umpires, rather than as advocates.

Basis is in contract:

In Ontario, there is no statute governing the practice of collaborative law: it is entirely the creature of the agreement between the parties, in which their respective counsel join. An agreement to collaborate in the attempt to resolve a dispute is typically referred to as a "Participation Agreement" (PA).

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The PA will include recitals as to the intention of the parties to conduct their process in good faith, fairness and respect, without coercion, in their own best interests and the interests of their family. They will typically acknowledge the importance of these principles to them, with declarations of intent to govern themselves and instruct their respective counsel, accordingly. The PA will always set out the basic ground rules as per paragraphs 1 and 2 set out above, and the parties' "stand-still" agreement while corroborative process is in play.

Because there is no legislation prescribing procedure for the mediation as such, the parties and their counsel may decide to include provisions in the PA governing some or all of the following --

- agreement that the collaborative process is "without prejudice";
- agreement that communications within the collaborative process are confidential;
- process to be conducted through meetings of the parties with their counsel;
- tenor of communications in the collaborative process;
- preservation of the status quo during the process;
- delivery of statements of issues in the nature of pleadings;
- agreement for full and fair voluntary production of documents and information;
- a timetable;
- the involvement of other team members, including the roles and duties of those other members, and terms as to retainer and payment;
- intention to embody any ultimate settlement in a written agreement;
- recourse to the Courts in the event of breach of a settlement agreement.

Advantages of collaborative process include the following:

In addition to making possible a dispute process that is dignified and respectful, collaborative process can provide the following advantages:

Speed: a collaborative case can end up in the court system if settlement fails and litigation is begun, or if one of the parties seeks the assistance of the court in connection with default under a settlement. Barring those two circumstances, a collaborative case can move much more quickly than a case in court because it is not encumbered by procedures such as case conferences and hearing lists and the waiting times that go with them. A collaborative case can literally move as quickly as the parties are willing and able to conduct it.

Economy: Although a collaborative case can be conducted by means of documents and procedures analogous to those in a court action, that need not be the case. The parties may devise their own processes, provided they are fair and created on consent. This can result in savings of both time and expense.

Procedural flexibility: The most advantageous use of procedural flexibility is the involvement of expert assistance in the case. Collaborative practice is often described as a team effort. *Under the Rules of Civil Procedure*, the use of expert evidence is an elaborate and costly process, but in collaborative cases it need not be. Collaborative cases dispense with the wasteful adversarial process of pitting experts against one another. Instead, where specialists in other fields can assist in the process, the parties retain those specialists jointly, and those specialists assist in the areas of their expertise on a neutral basis for the benefit of both parties and their counsel. The focus is on problem-solving. This may be done in separate consultations behind the scenes or the parties may invite such experts to sit down at their meeting table to assist in discussions there, or both.

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The Ontario *Commercial Mediation Act*, (S.O. 2010, Ch. 16, Sch.3) (hereafter the "*Act*"):

Purpose of the *Act*:

S.1 "This *Act* was created to facilitate the use of mediation to resolve commercial disputes."

"Mediation": is defined as a collaborative process in which the parties to a commercial dispute agree to request a neutral person, referred to as a mediator, to assist them in their attempt to reach a settlement in their dispute, and the mediator does not have authority to impose a solution to the dispute on the parties. (2010, c. 16, Sched. 3, s. 3)

Definition of "commercial dispute":

The *Act* can be used for mediation of a huge variety of commercial disputes, defined as ...

> s.3 "dispute(s) between parties relating to matters of a commercial nature, whether contractual or not, such as trade transactions for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements and concessions, joint ventures, other forms of industrial or business co-operation or the carriage of goods or passengers."

Exclusions to application of the *Act*: Although the parties may decide that the *Act* will not apply to their proceeding, or make some limited modifications to it, the only express exceptions to application of the *Act* relate to conflicts with other provisions and --

(a) a mediation under or relating to the formation of a collective agreement;
(b) a computerized or other form of mediation in which the mediation is not conducted with an individual as the mediator;
(c) actions taken by a judge or arbitrator in the course of judicial or arbitral proceedings to promote settlement of a commercial dispute that is the subject of the proceedings; or
(d) mediations for which procedures are prescribed in the *Rules of Civil Procedure* made under the Courts of Justice Act. 2010, c. 16, Sched. 3, s. 2 (4).

"Invitation": The *Act* is unique in that the mediation is not launched by operation of rules of the Court, nor by any provision in a pre-existing agreement. The verb used in the *Act* is "invite" (s.5(2)), and the process is launched simply by one party asking the other whether he or she would like to participate in such a process. There is no prescribed form for the invitation. The *Act* provides only that the invitation will expire if it isn't accepted within 30 days after it is made, or within the time provided in the invitation itself.

The making of an invitation to mediate a commercial dispute, a party's willingness or refusal to mediate the dispute, information exchanged between the parties before the mediation commences and any agreement to mediate the dispute are not discoverable or admissible in evidence in arbitral, judicial or administrative proceedings.

Appointment of Mediator: The mediation is to be conducted by a mediator appointed by agreement of the parties. (2010, c. 16, Sched. 3, s. 6 (1)). In the alternative, the parties may ask another person or entity to recommend or appoint a mediator and, if the person or entity agrees to do so, the person or entity shall make every effort to recommend or appoint a person who is impartial and independent. (2010, c. 16, Sched. 3, s. 6 (2)).

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Conflict of Interest: (6): For the purposes of this section, a person is deemed to have a conflict of interest with respect to a mediation if,

(a) the person has a financial or personal interest in the outcome of the mediation; or
(b) the person has an existing or previous relationship with a party or a person related to a party to the mediation. (2010, c. 16, Sched. 3, s. 6 (6)).

(3) A person who is approached to be a mediator shall,

(a) make sufficient inquiries to determine if he or she may have a current or potential conflict of interest or if any circumstances exist that may give rise to a reasonable apprehension of bias; and
(b) without delay, disclose to the parties any such conflict of interest or circumstances. (2010, c. 16, Sched. 3, s. 6 (3).

The mediator's duty to disclose under clause (3) (b) continues until the termination of the mediation. (2010, c. 16, Sched. 3, s. 6 (4)).

Authority of the Mediator: The mediator may,

(a) meet or communicate with the parties together, separately or in any combination; and
(b) make proposals for settlement of the dispute at any stage of the mediation. 2010, c. 16, Sched. 3, s. 7 (3).

Obligation of fair treatment: The mediator shall maintain fair treatment of the parties throughout the mediation, taking into account the circumstances of the dispute. (2010, c. 16, Sched. 3, s. 7 (4)).

Parties may not opt out of subs. (4): The parties shall not modify the obligation of the mediator in subsection (4) nor relieve the mediator from the duty to comply with that subsection. 2010, c. 16, Sched. 3, s. 7 (5).

Disclosure of information between parties: A mediator may disclose to a party any information relating to the mediation that the mediator receives from another party unless that other party expressly asks the mediator not to disclose the information. 2010, c. 16, Sched. 3, s. 8 (1).

Process in mediations under the *Act*:

Process such as statements in the nature of pleadings, documentary production and fair notice are not spelled out under the *Act* as they are for civil cases under the *Rules of Civil Procedure*, for example.

The process for the mediation can be worked out by the parties or by the mediator, or by all of them in consultation, and may take any form they like, provided it complies with the principles of the United Nations Commission on International Trade Law, (UNCITRAL) Model Law on International Commercial Conciliation (2002) – hereafter "the UNCITRAL Model Law (C)" – upon which it is expressly based. (Note that there is also a UN model law on arbitration. The two should not be confused, and it is the Conciliation model with which we are working here, which is why I have designated it (C)).

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Nature of the UNCITRAL Model Law (C): The UNCITRAL Model Law (C) is essentially a codification of the principles of natural justice. It was created by the United Nations Commission on International Trade Law as a sort of universal template for conciliation proceedings around the world. It is not imposed on any jurisdiction, but may be taken for reference and as an example in the creation of legislation in jurisdictions that choose to consider it.

Application of the UNCITRAL Model Law (C): When an issue arises for interpretation under our *Act*, consideration must be given to the international origin of the UNCITRAL Model Law (C), the need to promote uniformity in its application and the observance of good faith. (2010, c. 16, Sched. 3, s. 4 (1)). Section 4(2) of the *Act* expressly provides that recourse may be had to,

(a) the Report of the United Nations Commission on International Trade Law on its 35th session; and
(b) the UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002. (2010, c. 16, Sched. 3, s. 4 (2)).

Although the Model Law (C) underwent some amendments in 2018 and is now under revision, no change has been made to reflect any changes in our *Act*, which continues to reference the Model Law (C) as it came into being in 2002.

If a question arises during a mediation that no provisions of this *Act* or the regulations expressly cover, the question is to be settled in conformity with the general principles on which the Model Law (C) is based. (2010, c. 16, Sched. 3, s. 4 (3)).

The parties to a mediation to which this *Act* applies may not exclude or modify the application of this section as to governance by the UNCITRAL Model Law (C). (2010, c. 16, Sched. 3, s. 4 (4)).

Special Provisions – Confidentiality, Admissibility & Inadmissibility:

Under both this *Act* and the UNCITRAL Model Law (C), the provisions relating to confidentiality and admissibility (or, to be more exact, inadmissibility) are far more detailed than the general rules as to procedure. The commentaries under the UNCITRAL Model Law (C) and the Guide as to its Use make it clear that these areas were dwelt upon in more detail because greater concern was expressed during the drafting of these provisions as to making conciliation processes "water-tight", so that content from conciliatory processes didn't spill over into related arbitral, administrative or judicial proceedings that might ensue.

Thus while general rules as to the procedure for mediation under the *Act* are dealt with in only the most general terms, and largely by referral back to the UNCITRAL Model Law (C), very detailed provisions are made as to confidentiality and issues of admissibility and inadmissibility in any subsequent proceedings.

Recourse to the Courts, Arbitration:

If no enforcement proceedings or other recourse is undertaken to the Courts, process under the *Act* can be entirely private and confidential – even more so than under the *Rules of Civil Procedure*, since there is no Court action to be dismissed and no Mediator's Report to be filed.

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The *Act* does include provisions for limited recourse to the Courts, however, for the purposes of --

- carrying out or enforcing a settlement agreement (2010, c.16, Sched. 3, s. 13(2));
- after the final resolution of the dispute to which the mediation relates, for the purpose of determining costs of the mediation or of proceedings taken because the mediation did not succeed (2010, c.16, Sched. 3, s. 9(3)).

Also, while the parties may agree not to proceed with arbitral or judicial proceedings before the mediation is terminated, an arbitrator or court may permit the proceedings to go forward and may make any order necessary if the arbitrator or court considers --

- that proceedings are necessary to preserve the rights of any party; or
- that proceedings are necessary in the interests of justice. (2010, c.16, Sched.3, s.11(2).

The commencement of any arbitral or judicial proceedings is not of itself to be regarded as a termination of the agreement to mediate the commercial dispute or as the termination of the mediation. 2010, c. 16, Sched. 3, s. 11 (3).

The Advantages of mediating under the *Act*:

The first advantage is that one need not have recourse to it at all if that is one's choice: one may opt out of application of the *Act* altogether. However, if one chooses to have recourse to the *Act*, there are certain limitations on the parties' freedom of action, the most important of which are the inability to contract out of application of the UNCITRAL Model Law (C), and inability to relieve the mediator of the obligation to act fairly.

Parties who choose to have recourse to the *Act*, in whole or in part, are electing to use a tried-and-true procedure with respect to the issues of confidentiality, inadmissibility and recourse to the Courts while maintaining the ability to craft the general procedures of their mediation as they wish, provided those procedures comply with the Model Law (C).

The roles collaborative process can play from larger perspectives:

The potential impact of collaborative process on the administration of justice:

The Courts are backlogged: procedural delays are frustrating to clients, counsel and the Courts themselves, and we all know the old saw that justice delayed is justice denied. The Courts are aware of the fact that they do not meet the needs of the public in respect of speedy delivery of results.

That was the easy observation. This one is more difficult, and many lawyers may disagree with me on this one. When considering some of the choices made by the Courts and the justice system, I have concluded that the Courts in some measure have lost confidence in the Bar. Why should it take a year to get a motion date? And why should it take 2 or 3 years to get a date for trial?

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Our Judges are not fools: they recognize the inexperienced, the ill-informed, the fakers, the sharks amongst members of the Bar. I believe the justice system has itself acquired a distaste for litigation. One need only look at the increasing case management procedures to see that the Courts have concluded that the judgment of many lawyers is off, that they are motivated by self-interest in too many situations, that their clients are often baffled by what is going on, and sometimes need to be protected from the predations of their own counsel. I believe that part of the reason the Courts are slow and legal procedures are elaborate is to discourage -- rather than enable -- inept, badly-conceived and abusive litigation and the lawyers and clients that advance it.

Years ago, there was a clothing business in Buffalo that used the slogan "an educated consumer is our best customer". That is what I am arguing here. Collaborative processes require more involvement by clients in their own disputes, which can yield greater client understanding and thus greater client satisfaction with results – as to process, the merits, costs and their relationship with their own counsel. It can raise barriers to some of the self-interest that may otherwise tempt counsel. And lawyers who are trained in collaborative process are more likely to be attuned to the interests and concerns of their clients, making them more sensitive and effective advocates when they are acting in litigation.

Disputes that can be pulled out of the justice system through collaborative processes – whether through the enlightenment of clients or lawyers, or both – ease the load on the Courts, making them more effective overall, and able to deliver good results more reliably and more quickly. In short, collaborative processes are in the interest of the administration of justice.

Role of collaborative process in service of the public:

The public is intimidated by the justice system. It is conducted in language with which they are not familiar, by authorities and representatives they may not know or trust, through procedures that often seem unnecessarily complex and slow.

Challenge yourself to think of these collaborative processes from new perspectives. For example, the provision that the lawyers will be disqualified from taking any resulting litigation in a collaborative case can be turned to a selling point: clients who distrust lawyers and legal fees may take some comfort from the fact that the process itself will protect them from that eventuality, and many clients will value the opportunity to act as their own advocates.

Collaborative processes offer options to the public to secure results to their disputes more quickly and often less expensively, through processes that are more intelligible to them and over which they have more control.

Collaborative processes are in the interests of the public.

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Narrative as to value of collaborative process to the profession:

Before writing this article, I spoke to members of the Bar who left combat-style family litigation to practice collaborative family law instead. Their responses were stunning --

1. On making the change in their practice known to clients and other counsel, many of them found that they quickly had as much collaborative work as they could handle, and were turning away combat-style cases to lawyers they trusted who still handled that type of work;
2. The number of short-notice emergencies and Court attendances in their practice dropped, because the parties were cooperating with each other to a greater degree;
3. They enjoyed working with their clients as coaches and advisors rather than combat-style advocates, because the relationship between them became something different and their clients appreciated and enjoyed it more;
4. The relationships with opposing counsel with whom they worked in collaborative cases were more civil and rewarding and ultimately led to a greater degree of professional collegiality than had been true in their combat days;
5. Many of their clients reported greater satisfaction with the results achieved through the collaborative process;
6. They were generally able to deliver results to their clients more quickly than would have been possible through Court process, there being no extraneous processes and no downtime in awaiting hearing dates and sitting on lists, etc.;
7. They were often able to deliver results to their clients at a lower cost – and this at the same time as their own income actually went up, there being no downtime in unproductive Court attendances and thus a higher ratio of billable time;
8. In all of these circumstances, the lawyers I talked to universally reported that their quality of life was enhanced by their adoption of collaborative practice – by which they meant not only the quality of their professional lives but of their personal lives, as well.

I cannot resist repeating the story that moved me the most as I was collecting these narratives. I was speaking to a senior member of the family law Bar who had practiced dispute-based family law for many years before changing her practice entirely to collaborative law. She told me of a collaborative case she worked on over a series of months in which she was acting for the husband. Work on the case was progressing steadily enough, but one day her client simply vanished without explanation. Several months later, she heard from him again and he told her that the collaborative process had made him see his estranged wife in a completely different light – capable, articulate, decisive but welcoming and kind – and the result was that he had fallen in love with her all over again, and they had reconciled.

Do you remember law school, when we were taught that the first obligation of a family law lawyer was to do what he or she could to bring about reconciliation in the marriage? If you are a family law practitioner, how often can you honestly say you have seen it happen? It is no secret that the legal system does much more to cause further damage to failing marriages than it does to bring about reconciliation ...

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Training & other Resources:

Starting on the road to collaborative practice can be as simple as take a training course in collaborative practice – even if it is offered by an organization that specializes in family law and you do not – or retain a senior collaborative professional to tutor you, but there are many other points of access.

Mediation and collaborative family law both arose out of the field of family disputes, because there were many such disputes, need for assistance was often urgent, and the parties were typically of modest means. When we consider existing organizations in these fields, it is generally easy to see that heritage.

The umbrella organization in the world for collaborative practice is the International Academy of Collaborative Professionals (IACP), the original mission statement of which was --

> "to transform the way families resolve conflict by building a global community of Collaborative Practice and consensual dispute resolution professionals."

Although the mission statement referenced familial disputes, the site now invites broader membership, with the words --

> *"The International Academy of Collaborative Professionals (IACP) is a global resource for learning about and promoting Collaborative Practice. Membership in IACP is open to anyone. While most members are legal, mental health or financial professionals, we also welcome members who are not in these fields to join IACP in order to support the vision of the Collaborative Practice movement."*

IACP offers its members collaborative practice training, as well as --

- Forms, documents, manuals and practice guides;
- Articles and educational video and audio recordings;
- Listing of your professional profile in the only online international directory of Collaborative practitioners;
- Special member rates for educational programs, conferences and events;
- Practice Group information and support;
- The Collaborative Review, the only scholarly professional journal devoted to Collaborative Practice;
- A Speakers Bureau through which experienced collaborative professionals can attend with your practice group for educational events, Annual Meetings, networking opportunities – any events at which your Practice Group comes together. The speaking engagement is free and IACP will split the travel cost with your organization;
- A Trainers' Directory.

If you are interested in getting an ambitious start with membership in IACP, note that its widely-respected annual Networking and Education Forum is being hosted at the Toronto Westin Harbour Castle next year, from October 19 to October 22, 2023.

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Ontario has its own chapter of IACP – The Ontario Association for Collaborative Professionals (OACP) – although its website does not yet indicate that non-family professionals are contemplated – which isn't to say that they wouldn't be if you pursued the issue!

Once you dive into on-line research about memberships and training you will find lots of options. Check out Collaborative Practice Toronto. I found a 3-part luncheon program offered by Collaborative Practice Toronto in conjunction with Peel Halton Collaborative – the program was free and lunch was provided at an address here in Toronto – and the subject was specifically how to go about launching a collaborative practice once you have your collaborative training in place. The program did have a heavy family-practice slant, but it could be a useful starting point, and it was offered by professionals who already have experience as trainers.

The OACP website lists local practice groups by region within the province, with connection information for each one. Practice groups typically provide training opportunities, precedents for everything from invitations to Participation Agreements to guidelines as to appropriate financial disclosure to reporting letters, and articles and blogs in which experienced collaborative practitioners recount real-life stories about what they have encountered in their practices.

Eligibility to Practice:

While collaborative process is not regulated, the IACP, local practice groups and regional and national organizations provide training and accreditation. Without training, professionals will not be aware of accepted practice norms and other practitioners may not always agree to proceed collaboratively without that knowledge.

In Ontario, to be a member of the Ontario Association of Collaborative Professionals (OACP), a lawyer must be a member in good standing of the Law Society of Ontario, have completed 40 hours of collaborative training, and have errors and omissions insurance of at least $1 million. Ordinarily, a professional will support his or her membership in the Ontario organization with participation in a local practice group such as Collaborative Practice Toronto.

Opportunities collaborative processes afford to lawyers:

- Better service: Collaborative processes afford lawyers an opportunity to deliver better service to their clients – more quickly and often more economically. Better service is the means to growing and sustaining a lucrative, stable practice. Happier clients means fewer clients lost, more clients making referrals;
- Improved ability to compete: As the public and other professionals become more accustomed to the ideas of collaborative process, there will be increased demand for services in that area. Training in collaborative process will afford lawyers a better footing from which to compete for delivery of those services in the marketplace;
- Opportunity to serve: Collaborative processes afford lawyers an opportunity to serve the justice system, the Courts and the public at large by avoiding the delays, expense and ugliness so often accompanying litigation. Public service is a time-honoured tradition of the Bar, and can itself generate opportunities to build a profile in the field, to attract like-minded lawyers who may be interested in a chance to work with a lawyer who is working to initiate change, and to attract clients who are interested in resolving disputes through conciliatory methods rather than adversarial process; and

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- Leadership: Collaborative practice is a rapidly growing field and it offers many opportunities for leadership. In the 1980s, when a handful of us were watching the developing field of mediation, there were no courses and precious few ways to see how we could develop practices in the field. Pioneers like Genevieve Chornenki literally educated themselves and then wrote training programs that they offered to the profession, some of which were ultimately acquired by the universities. Many of the senior mediators in practice today began their training through such programs.

  There are myriad ways to access and participate in this growing field --
  - Start a study group;
  - Start a newsletter;
  - Identify a client or practice group that would be interested in learning more, and approach them to offer a speaking engagement;
  - Become a trainer yourself;
  - Keep an eye on your own existing clientele and counsel you encounter in the course of your work in order to identify those who may be interested in taking a fresh look at these issues; and
  - Teach collaborative principles to the young people you meet: in years to come, this is the way they will practice.

A note to those lawyers with solicitors' practices:

This article was originally intended to outline and argue for two different forms of collaborative practice which, in my opinion, have not been given enough attention by civil and commercial litigation lawyers. As I worked on it, however, it occurred to me that it might be of equal use to lawyers who work in solicitors' fields, and I now hope it will attract some attention from them.

Solicitor's work often involves disputes. As matters now stand, solicitors often manage to resolve those disputes, but when they don't, they may be obliged to refer their client away to a litigator. That can work out in two ways:

- the litigator may do a good, competent, economic job with the result that the client is satisfied – in which event the solicitor may lose the client to the litigator; or
- the litigator may do a slow, expensive, ineffective job, with the result that the client is unsatisfied – in which event the solicitor may lose the client anyway, when the client lays part of the blame on him or her.

To those alternatives there has now been added a third – namely, referring a case to a collaborative practitioner rather than a litigator. This type of referral can also result in the solicitor losing the relationship with his or her client.

What is a solicitor to do? My answer is that, as collaborative practice becomes more prevalent, the most effective way for the solicitor to maintain relationships with clients is to undertake training and obtain experience as a collaborative practitioner in his or her own field, and to serve clients by undertaking the service rather than referring the matter away. If he or she is an effective collaborative practitioner, client referrals and repeat business will be the means by which his or her practice is sustained and built.

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The last opportunity I wish to address is the opportunity to build market share:

"Where is my next file coming from?" is the perpetual question of practitioners. Once we stop thinking of collaborative practice as the exclusive province of family law disputes and Court-mandated mediation, the answer is that files can come from everywhere: commercial lease cases, franchise cases, minority shareholder cases and every other sort of case can be managed through collaborative process – and they are no longer the exclusive province of litigators, either. Solicitors who are trained as collaborative practitioners and apply those skills within the area of their legal expertise will be as viable as litigators in competition for carriage of those files. As public taste for corroborative rather than adversarial process gains steam, those solicitors will be able to amass market share at the expense of lawyers who do not keep up with collaborative practices and values.

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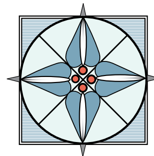
Please consider making yourself an agent for change by giving a copy of this article to someone you think might find it interesting ... and to those members of the profession who believe our initiatives as to collaborative practice place us at the cutting edge of change I say you are wrong: in my forays online into collaborative ideas and practice I found lots of areas where organizations are forging ahead without us and flourishing... Have a look for yourself!

Jane Demaray, Mediator
November 8/22



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This article is dedicated to the memory of my late father, C.R. Demaray, a skilled lawyer and peacemaker.

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