

REAL AND PERCEIVED DISADVANTAGES OF COLLABORATIVE LAW

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Collaborative Law, like every other process choice, has some potential disadvantages. Some of those disadvantages are real and others, which are often raised by collaborative professionals themselves, not the clients, are potential or perceived disadvantages.

Perhaps the potential problem, which is most often raised by the professionals, is the additional cost to the client of closing down the collaborative case and transferring to litigation counsel if the process breaks down. Although this happens in approximately 2% of cases, if the matter cannot be concluded to the mutual satisfaction of the parties, and one party, or one attorney, decides to end the process, then *both* parties must bear the cost of hiring and educating successor counsel. Collaborative counsel make the commitment to assist in the smooth transfer of the case to litigation counsel. While this is a legitimate concern, the statistical likelihood of having to transfer the case to litigation counsel is really *de minimis*, and probably happens no more often than when a client decides to change counsel during a litigated case. Clients rarely raise this as a concern.

It is also true that, if several aspects of the case have been settled during the collaborative negotiations, those agreements can follow the case to new counsel, and only the contested issues need be addressed; there is no need to throw out agreed-upon items and begin from scratch. Furthermore, some cases which do not settle during the collaborative process go on to settle in mediation or arbitration. It is not inevitable that the case will go to trial.

While there is some concern that the collaborative process could be abused by one party taking advantage of the transparent and voluntary full disclosure provisions, there is little anecdotal

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evidence that abuse of process actually happens. The fear is that the party with greater resources, or a collaborative attorney who has not truly made the paradigm shift, could feign collaboration in order to get full discovery, and then throw over the process for litigation, forcing an end to the collaborative case. The Collaborative Process Agreement provides for counsel to withdraw if the client abuses the process by refusing to disclose relevant and discoverable information; this is often a deterrent to potential abuse of the process by either party. Proper screening of the client also makes this more of a potential or perceived disadvantage than a real one.

One of the more cogent concerns about the collaborative process is how effective is the screening process, especially with regard to domestic abuse. Due to the fact that many collaborative professionals are so enthusiastic about this process, and are so eager to establish a collaborative practice, their enthusiasm could lead to sloppy in-take interviews. Not every party to a dispute is motivated to settle their matter through open, transparent, equitable negotiations; some parties to the dispute are driven by the need for revenge, or by a desire to win at all costs. Domestic abuse is not always revealed during the in-take interviews, so if and when it does surface, the professionals may not be ready to deal with it. Having mental health professionals as part of the collaborative team means that issues of abuse, personality problems and emotional difficulties can be dealt with by the team member with the most expertise. The collaborative community also seems to be unusually committed to understanding how to work most effectively with challenging clients. The international forums and conferences feature workshops on how to deal with difficult, high conflict clients. The process is not automatically inappropriate for high conflict parties, or for couples where domestic abuse has been part of their dynamic. Skilful in-take interviews help select appropriate clients for the collaborative commitment.

Some sceptics have raised questions about confidentiality, since the collaborative process is touted as a *transparent* process. However, there is nothing in this process which requires an attorney to compromise, ignore, modify or breach the confidential relationship which any client expects with his/her counsel. If your

own client reveals information which is relevant and material to the negotiated outcome of the dispute, and instructs you not to divulge it, the collaborative attorney is bound by the same attorney/client privilege one has with all clients. However, since the parties and counsel have signed a Participation Agreement which is rooted in full, transparent disclosure, honesty and integrity, failing to disclose relevant information may be an abuse of the process. If, in the attorney's judgment, the information is not material to the outcome, then there is no abuse of process to keep the client's confidence. This conundrum rarely occurs, but when it does, ethical canons dictate appropriate behaviour.

One of the potential disadvantages cited is that collaborative counsel may not make as much money by settling their cases collaboratively as by litigating them. While this "bottom-line" analysis might look accurate on its face, collaborative attorneys who have limited their practices to settlement options have seen a steady flow of business, with satisfied clients, good outcomes and healthy lifestyles for the attorneys. Most divorce cases in the States settle before or at trial. Sometimes cases settle because there has been some court involvement, and neither client has been satisfied with court intervention. There are other reasons that contested cases settle, such as the parties run out of money and resources, run out of steam, too much time is passing without a resolution, or pressure from new partners or other family members. Collaborative counsel have discovered that their accounts receivables have been significantly reduced because clients are satisfied with the outcome of their representation, and satisfied clients are making referrals for more collaborative work.