Why Should Businesses Hire Settlement Counsel?

*Kathy A. Bryan**

I. Introduction

As a former in-house litigation manager, I hired separate settlement counsel in only a few cases and with varying results. With responsibilities for hiring and managing a large portfolio of outside firms, I was loath to increase case-staffing ranks for many reasons—and cost was only one factor. Internal resources must oversee litigation, and having another set of outside lawyer relationships on the same case generally seemed duplicative. Worse, it demanded more of my scarce time to manage both the relationship and the primary litigation firm.

In addition, I viewed in-house counsel's role as akin to settlement counsel—coordinating with the litigation team but reaching agreements separately in many cases. In-house attorneys generally tend to share this bias against settlement counsel.

Today, with a greater understanding of the sea change that Collaborative Law has had in family law, I want to reconsider that conclusion and explore whether using separate settlement counsel, and borrowing other techniques from the Collaborative Law movement, enhances and increases the potential to resolve business disputes.

II. Collaborative Law and Collaborative Law Techniques

With humble beginnings in Minnesota family courts in the early 1990s, Collaborative Law (CL) has grown swiftly to include groups in thirty-three states in the United States and in most Canadian provinces, as well as professional associations, law school courses, and even ethical codes.[1]

An essential CL element has come to be the disqualification provision, or "Participation Agreement," where the lawyers for both sides agree in writing to work toward a negotiated resolution and, if the case proceeds to court, clients must engage other counsel. Another CL hallmark is the "four-way meeting," in which the parties and counsel participate. Parties also agree to good-faith negotia-

---

* Kathy A. Bryan is the President and CEO for the International Institute for Conflict Prevention and Resolution (CPR Institute), an international nonprofit coalition of corporate counsel, top law firms, judiciary, and academics, dedicated to providing resources and information in commercial conflict prevention and dispute management. Prior to taking the helm at CPR, Ms. Bryan led worldwide litigation for Motorola Inc. and was in private practice in Boston and Phoenix, where she concentrated in commercial litigation. Special thanks to John T. Souvlis, law student at Benjamin N. Cardozo School of Law for his assistance.

1. *See, e.g.,* Colorado Bar Ass'n Ethics Comm., Formal Op. 115 (2007), *available at* http://www.cobar.org/index/cfm/ID/386/subID/10159/CETH/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts.-02/24//; Int'l Acad. Coll. Prof., *Standards, Ethics and Principles* (May 2005), *available at* http://www.collaborativepractice.com/_t.asp?M=8&MS=5&T=New-Ethics.

tion, cooperative information exchange, and to consider jointly hiring neutral experts.[2]

This non-adversarial approach promotes resolution that is fundamentally different from the traditional negotiation occurring in the context of a lawsuit. Pauline Tesler, a leading CL practitioner, describes it as when:

> [S]killed dispute resolution professionals committed to seeking a negotiated outcome work together at the same table with their clients to forge imaginative resolutions, resulting in a concentration of creative intellectual power upon the single goal of settlement that is unmatched by other dispute resolution modes.[3]

As CL has evolved into a formal family-law process, offshoots, including some, but not all, of the CL processes also have emerged. What has been dubbed as "CL-lite," or "Cooperative Law," remains a formal process but lacks the disqualification agreement, which has been a sticking point for some.

On a continuum from the most to the least prescriptive, pure CL is at one end, moving to Cooperative Law, then use of settlement counsel, then, simply, interest-based negotiation. Each technique, however, seeks the same end: a negotiated resolution by eliminating or reducing adversarial bargaining as much as possible.

While U.S. businesses and their in-house counsel have come to embrace mediation as a settlement mechanism, relatively few have adopted CL techniques into their day-to-day practices.[4] Instead, most prefer using positional bargaining and court-oriented solutions, most likely resulting in a settlement after a long discovery process, heavy motion practice, and, rarely, trial.

CL techniques should be added to the business dispute resolution toolbox. This article examines the types of cases where CL techniques may be appropriate. It also discusses the potential benefits of using settlement counsel in particular.

III. ADVANTAGES

A. Preserving Relationships

An often-cited factor for the CL movement's success in family law is the need to preserve relationships in the interests of children, which overrides the parents' openly adversarial mode. Clearly, relationships can be equally critical in business conflict. Companies that create a culture focused on building and enhancing relationships tend to flourish.[5] True, there are competitive situations where all out legalistic war seems more appropriate, but much of U.S. companies'

2. *See, e.g.*, David A. Hoffman & Juliana Hoyt, *CL Agreements for Business Cases,* 2:1 COLL. L. J. 7 (Summer 2004), *available at* http://www.massclc.org/pdf/cljsummer2004.
3. Pauline H. Tesler, *Collaborative Law Neutrals Produce Better Resolutions,* 21 ALTERNATIVES TO HIGH COST LITIG. 1, 9 (Jan. 2003).
4. *See* David A. Hoffman, *Collaborative Law in the World of Business,* 6:3 THE COLLABORATIVE REVIEW (Winter 2003), *available at* http://blc.qwips.quoininc.com/live/documents/2005-09-CL-World-Business.pdf.
5. *See generally* JIM COLLINS, GOOD TO GREAT: WHY SOME COMPANIES MAKE THE LEAP AND OTHERS DON'T (2001).

litigation portfolios concern employees, customers, vendors, suppliers, contractual partners, etc., where continuing relationships are paramount—especially when conflict erupts. In fact, when surveyed, corporate counsel describe the need to preserve relationships as one of the top reasons for using mediation.[6]

Collaborative practices create an environment where relationships can be repaired and healed—as opposed to litigation, arbitration and, sometimes even mediation, with winners and losers often defaulting to a "zero sum" approach. Claims of personal harm in medical error, employment, and torts all hold promise for benefits from using CL or settlement counsel.[7] Particularly when the dispute involves systemic harm, solutions to a common problem rather than finding fault should be explored at the outset.

B. Reducing Cost and Time to Resolution

Collaborative Law processes can significantly reduce the time to resolution. In family law, the CL process makes it harder for the parties to end the negotiations. It also creates an incentive to keep the parties working to avoid impasse. In particular, the disqualification provision gives the lawyers substantial financial incentive to negotiate a resolution. Many describe this as an "essential feature" of CL.[8] CL is thus an extremely powerful tool to promote early settlement.

For commercial cases where protracted litigation seriously threatens business interests, using a pure form of CL at the outset has real potential. Putting aside for the moment the challenge of convincing the opposing party to use CL, (which is discussed more below) imagine the power of an early four-way meeting with the parties and their lawyers, all taking time out from the oppositional conflict dialogue to engage in structured discussions focused on interests and solutions.

Several other CL techniques hold additional promise for cost savings. Jointly hired neutral experts and truncated information exchange could drastically reduce time and cost. Corporate counsel recognize that the most significant cost savings occurs when the matter is resolved at the earliest possible stage, preferably before expending the costs of discovery and motion practice.[9] When time is critical, and if relationship building overcomes the tendency to maximize adversarial advantage, CL offers an unmatched tool to explore solutions and reach early resolution.

---

6. The CPR Survey on Alternative Dispute Resolution Trends (2007), http://www.cpradr.org/pdfs/surv_apr07.pdf (The CPR Institute conducted survey of its members at its 2007 Annual Meeting).

7. See, e.g., Kathleen Clark, *The Use of Collaborative Law in Medical Error Situations,* 19:6 HEALTH LAWYER (June 2007); Michael A. Zeytoonian, *Getting to Collaboration in Business and Employment Disputes,* 2 COLL. L. J. 24 (Summer 2004), *available at* http://www.massclc.org/pdf/cljsummer2004.pdf.

8. *See, e.g.,* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1372 (2003).

9. DVD: Early Case Assessment (CPR Institute 2007) (http://cpradr.org/pubs2004.asp?M=12.1#dvd-07) (instructional DVD illustrating tools for Early Case Assessment Protocol developed by a CPR Institute committee, which recognizes the importance of early resolution to cost savings).

C. Overcoming Adversarial Bias

Adversarial bias—essentially the human tendency to need "to be right" in a dispute—affects everything in litigation.[10] As lawyers, our adversarial training becomes a part of our intellectual DNA. We are so accustomed to positional thinking that we define the dispute in legal terms and forget problem solving in the heat of the conflict. By the time a suit is filed, the parties' relationship has become so strained, and the trust so broken, that both sides are in full riot gear. Worse yet, we don't even recognize it. As Malcolm Gladwell described in his thoughtful book, *Blink*, bias tends to be unconscious.[11]

One reason that CL has grown so quickly in family law probably is that its techniques overcome unconscious adversarial bias and actually create new resolution possibilities. CL acts as a sort of an imposed cooling-off period, allowing parties, and especially their lawyers, to think more clearly and creatively.

What does this mean for business disputes? By the time lawyers become involved in the dispute, conflict is usually entrenched and the role of the lawyer is to define the legal position and begin the legal process. The typical question put to the lawyer is, "How strong is our legal claim?" In addition to the answer to that question, the most innovative counsel also concentrates on an interest-based analysis.[12]

In-house counsel generally keep business issues front and center better than outside counsel, who quite naturally view their role as a zealous advocate. Nevertheless, it is difficult for the same lawyer to maintain both mindsets at the same time. Having a set of lawyers solely devoted to overcoming the culture of adversarial negotiation presents the best opportunity to find interest-based solutions.

IV. OVERCOMING BARRIERS

A. Opponents' Acceptance

When mediation was in its infancy, it was common to hear the concern that hiring a mediator would be interpreted as weakness by the opposing counsel. Thanks to the broader use and acceptance of mediation, court direction, and in no small measure the International Institute of Conflict Prevention and Resolution's "CPR Pledge©,"[13] that refrain is heard less often. CL seems to be in the same nascent stage. As is typical in adversarial situations, the concern is with losing leverage. Several techniques can be employed to lessen this impression.

---

10. *See e.g.,* ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 207-20 (2000).

11. *See generally* MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

12. *See* Kathy Bryan, *When 'Winning' Is the Expensive Solution*, LEGAL TIMES, Apr. 16, 2007 at 32.

13. "More than 4,000 operating companies have committed to the Corporate Policy Statement on Alternatives to Litigation©," and more than "1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation ©, including 400 of the nation's 500 largest firms." Under the CPR Pledge, as well as under six industry-specific commitments, signers vow to attempt negotiation and mediation before arbitrating or going to court. The pledges are not binding, but serve to help bring signers together before court papers are filed. CPR: International Institute for Conflict Prevention & Resolution, http://www.cpradr.org/Landing.asp?M=11.0 (last visited Oct. 16, 2007).

First and foremost, in-house counsel's demand for CL or settlement counsel has the most power to diffuse an unintended signal of weakness. Providing the neutral statement that it is the business policy, or otherwise the standard practice, removes the impression that CL is needed because of factual or legal weakness in the matter at hand. Additionally, the in-house lawyer is uniquely positioned to emphasize the importance of cooperation and good-faith negotiation, which could ring hollow when coming from outside counsel engaged to "defend" the matter. Finally, the in-house counsel can commit to have the right business executives present and can demand the opponent do the same.

Another reasonable approach is to expressly designate in-house lawyers as settlement counsel. While the implicit strength of the disqualification agreement would not apply, in-house lawyers could use the other interest-based negotiating techniques to reduce the effect of ego, open up communication, and broaden the potential resolution options.[14] CL practitioners have found that early focus on interests reduces parties' tendency to become entrenched in their positions.

Second, pointing to an established protocol, practice guidance, or pledge helps define the process, provides legitimacy, and, again, takes the focus away from the particular case to a broader company-wide approach. A newly formed CPR Institute committee is developing a business-oriented process to address this need in the commercial context.

Third, when settlement counsel are deployed, it can be done in conjunction with and complementing an aggressive litigation track. For example, settlement counsel need not break off communications just because one side or the other decides to commence litigation. It is difficult for the litigator to say convincingly, "We filed suit this morning, but we still want to talk this afternoon."[15] Settlement counsel can say, "The litigation team started suit this morning, but my job is still to continue to talk settlement this afternoon."[16]

In situations where the potential for good-faith negotiation is low, a dual-track approach has less risk, although clearly it also is more costly and potentially time consuming.

B. Lack of Sufficient Information

Throughout my career, I have heard litigation lawyers explain that they cannot evaluate a case's strengths and weaknesses, complete a reasonable budget, negotiate a resolution, or recommend mediation, until they have sufficient information about the facts and the law. It is certainly true that information is needed, but today this attitude has become a slippery slope into a rabbit hole of endless discovery.

In the majority of cases, probably more than 80% of the most relevant information is obvious in the first month of a case evaluation, and most of the trial documents already are identified and analyzed. In the business world, significant decisions are routinely made with much less information, and the "80/20 rule" is

---

14. *See generally* ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., Houghton Mifflin 2d ed.1992) (1981).

15. James E. McGuire, *Why Litigators Should Use Settlement Counsel,* 18 ALTERNATIVES TO HIGH COST LITIG. 107, 120 (2007).

16. *Id.*

often invoked. How much more certainty is enough in the legal context? How much "hiding the ball" actually benefits the clients?

In comparison, CL agreements typically provide for "complete and honest" information exchange. In the context of family law disputes, the universe of relevant information may be reasonably defined. The opposite is true in commercial litigation. The mediator's toolbox provides some guidance because mediators sometimes request categories of information after the parties have outlined the issues. These requests are far from the typical discovery request. They are tailored to disclose information helpful to identifying interests and developing mutual gain.

Settlement counsel similarly can define a reasonable information exchange process shielded from disclosure in litigation.[17] Document exchange shrinks significantly when information exchange is designed to identify business interests, rather than strengthen legal claims, and when it is focused on what is needed to evaluate settlement proposals. Therefore, it is possible to exchange documents and engage in the equivalent of the four-way meeting much earlier in the process.

C. *Lack of Trust*

Today, most commercial litigation is conducted in an atmosphere of mutual distrust, not an atmosphere of trust and good-faith negotiation, to say the least. In many business disputes such as class actions, claims between competitors, failed business ventures, patent infringement actions, etc., there is little likelihood that negotiations can proceed on the basis of mutual trust. In some cases involving longstanding relationships, however, trust can and should be built. How can trust be built in those cases where the potential exists, and how can those cases be identified? Or, alternatively, do we need trust to conduct good-faith negotiation, or just a different mindset?

Since the legal system and legal training is based on the adversarial model, it may be more important to change our mode of thinking than to require trust be present. Just as civil procedure rules were defined in the context of the adversarial system, CL practices are being defined in the context of interest-based negotiation. As these practices evolve and become more refined, it is possible to simply redefine the procedure, without the need to develop trust at the outset. Good-faith negotiation will follow that process.

V. IDEAS AND PROPOSALS FOR FUTURE DIRECTION

Reflecting on the development of U.S. mediation practices, there appear to be a number of parallels with the current perspective on CL techniques and the use of settlement counsel in commercial disputes. Both began with understandable skepticism. Both require significant hands-on experience with the tools to shape them to fit the business context. Modifications and adaptations are necessary and should be encouraged.

CL in family law arose as a lawyer-led movement. If CL is to be adopted in commercial matters, it must be client or corporate counsel driven. The economic

---

17. *See* FED. R. EVID. 408(a).

incentives in law firms simply do not encourage CL or settlement counsel practices.[18] Just as with mediation, it will take demand by general counsel or the judiciary before widespread acceptance by law firms.

A broader dialogue supporting the use of CL techniques in business should include the following:

1. A range of options allowing flexibility in the process, such as borrowing from Leonard Riskin's "grid" concept to refine the range of CL options.[19]
2. Exploring the importance of the disqualification provision in the commercial context, including ethical considerations.
3. More settlement counsel practitioners who are trained in interest-based negotiation and mediation advocacy skills.
4. The use of tiered dispute resolution clauses with an initial step that includes some CL elements, such as the equivalent of a four-way meeting with settlement counsel before the next step, which could be mediation, arbitration, or filing suit.
5. Using different techniques with settlement counsel such as:
   a. For a range of matters within a business. Often settlement counsel can see patterns among classes or types of cases that allow them to maximize settlement opportunities.
   b. Unilaterally. When opposing counsel refuses to engage parallel settlement counsel, even one side's settlement counsel can effectively negotiate directly with litigation counsel.
   c. With and without the disqualification provision. The "pure" form of CL is not always necessary.
   d. With alternative fee arrangements and other economic incentives. Many settlement counsel are adept at using creative fee arrangements with incentives since they are confident that the overall transaction cost will be lower with early and effective settlements.
   e. Designating and developing a modified settlement counsel position, where appropriate, on in-house legal staffs. In-house counsel frequently view themselves as settlement counsel and, when they can be objective about the matter, can be highly effective in that role.
6. More defined information exchange procedures applicable to business settings.
7. Client education on preventive legal counseling and interest-based negotiation.
8. Continuing to increase awareness about educational institutions' tendency to emphasize adversarial training.
9. Promoting graduate legal and business curriculums on problem solving and collaborative methods of dealing with conflict.

---

18. *See* Hoffman & Hoyt, *supra* note 2, at 9.

19. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

VI. CONCLUSION

There is natural resistance to radical new ideas. Given the rapid growth and stunning impact of CL in family law, it is time to experiment with CL concepts in the business setting. Corporate counsel should take the lead and experiment with using separate settlement counsel and with more pure forms of CL. If successful, CL will begin to take root.