

The Dance of Conflict

Introduction - Finding a New Metaphor for Conflict

I recently noticed an advertisement for continuing legal education workshop in Toronto, *Sharpening the Sword, Lock and Load Strategies for Litigators*. The traditional metaphor for conflict resolution has been, and, to a large extent continues to be, war.

Our legal training, the media, television and film, societal expectations, and the language we use, support an image of warring clients championed by hired guns and gladiators in a winner take all adversarial system. The pure zealous advocacy model encourages the use of all available strategies to win victory for our clients.

Julia McFarlane, in her book *The New Lawyer* argues this historical notion of adversarial client warriors and zealous advocacy is becoming obsolete. There is pressure for change from government, Justice Reform, dissatisfied clients and lawyers who have experienced the limitations of this approach to bringing peace and closure to our clients. Our understanding of advocacy is shifting away from protracted hostile litigation to focus on effective conflict engagement and resolution.

The hallmark of this new approach to conflict is client involvement and empowerment, a consideration of interests as well as the law, and an early focus on settlement. While her book is not solely about collaborative practice, these criteria describe exactly the process of collaborative negotiation.

Those who seek to understand what conflict is really about discover the importance of metaphor. Metaphors help us understand how disputants understand their own disputes, how they see those with whom they are in dispute, and how they experience the dispute resolution process in which they are engaged. Indeed metaphor is crucial if we seek to shift away from unproductive patterns of thinking.

And so we seek a new metaphor for conflict. To help our clients (and perhaps ourselves) let go of the metaphor of war, with its expectation of a win/lose outcome, the use of deception and dirty tactics, suspicion and mistrust, we can introduce the metaphor of dance.

Dance connotes the image of clients coming together, synchronizing their movements to honor their different styles and stories into a whole that respects both. This approach recognizes that conflict resolution is a blend of art as well as science. Artistry, creativity and intuition, helps us create a space for our clients to accommodate seemingly opposed truths, invites them to dialogue about their different perspectives and beliefs, and explore the rich possibilities available when they come together across their differences.

Collaborative practice, with its focus on the choreography of a collaborative file, from the initial client meeting to client preparation to the collaborative meetings - and the interest-based

negotiation process of exchanging information, uncovering interests and generating and assessing options - is indeed a dance.

This way of viewing conflict resolution can help our clients, and ourselves, reconfigure our expectations of conflict into a new framework. The metaphor of conflict resolution as a dance, as opposed to a war, profoundly impacts the way we define advocacy, understand the skills we now need, and how we interact with our clients and other professionals.

Redefining Advocacy

Much of our law school training supports the traditional values and norms of the legal profession. To prepare for a career working in a competitive environment, law schools focus on the acquisition of substantive and technical knowledge. Students acquire the *lawyers standard philosophical map*, which assumes that all issues will require third-party adjudication, that lawyers will control the process and be responsible for delivering the outcome, and that all non-legal and emotional considerations are irrelevant. There is little emphasis on teaching students conflict resolution or communication skills. Qualities such as creativity, empathy and the capacity to listen are ignored.

And most ongoing legal education is based on the expectation of adversarial advocacy, aggressive opening demands, positional arguments, a focus on legal rights and entitlements, disinterest in the other side, minimal communication and withholding information. This no longer makes sense given the reality that more than 98% of cases will settle without a trial.

Collaborative practitioners are Julie McFarlane's *new lawyers* and we are redefining the meaning of advocacy. They appreciate that clients have emotional, psychological and financial needs, as well as legal entitlements and obligations. Our clients prize the well-being of their children, they want to co-parent amicably and without conflict, most want to act with integrity, to be acknowledged and treated with respect. Collaborative lawyers understand that their key role is to empower clients to create their own best outcome, both within and beyond what the law can offer.

But, how do collaborative lawyers reconcile their commitment to the service of a single client *and* our commitment to promote peace and find a settlement acceptable to the other side? Sometimes it feels like standing up for our clients as a negotiation ally is contradictory to our duty to the process and building consensus. Perhaps this is a dilemma that dancers face - the need for self-expression and recognition with the overall goal of building a unified piece of work in which all participate.

Julie McFarlane argues that conflict resolution advocacy does not suggest that lawyers have a litigation lobotomy and let go of everything they we have learned and known. We still need our capacity to assess and analyze information, to know and explain the law and for critical thinking and complex problem-solving.

Most importantly, we do not let go of our primary loyalty to our client. While there are important roles for neutrals in collaborative work, lawyers are not neutral. Lawyers are not there for everyone

in the room. Lawyers as they are to advance their clients' interests. So how does this new advocacy actually work?

Conflict resolution advocates do not achieve resolution by attacking the other side, wearing them down until they capitulate, threatening or making winning legal arguments to a judge. Collaborative advocacy is about helping clients take a principled, wise approach to negotiation. Collaborative lawyers listen to what clients really want and ask them what they're prepared to trade to achieve their goals. Collaborative lawyers are in constant dialogue with their clients, helping them take a realistic approach to settlement, constantly realigning their goals in light of what is really possible and what the true costs are.

Collaborative lawyers find out their client process needs, manage timing and pacing of the negotiation, and provide resources and support to move through the emotional landscape of the separation process. They work with clients to develop a range of settlement options. They help clients evaluate their choices along the cognitive, emotional and legal dimensions important to that particular client. In short, Collaborative lawyers provide their clients with whatever support they may need-including the opportunity to work with other professionals, to understand the process and the issues and to make sound decisions without pressure or duress.

How else do collaborative lawyers reconcile their duty to the client in this process of consensus building?

Traditionally, lawyers place great emphasis on developing litigation skills and the capacity for legal analysis and persuasive argument. Settlements often come when the parties are worn out, after the exchange of one or two offers, with little client involvement or face to face meeting.

Collaborative lawyers, on the other hand, make the process of negotiation itself a priority. They know it is crucial that they become highly skilled in understanding and managing conflict and in the art of negotiation.

Collaborative negotiation begins with hello. From the very first contact with the client, collaborative practitioners ask what the client needs, provide the client with information about process choices, from traditional rights-based negotiation, court, mediation, to collaborative practice with lawyers only, to collaborative practice with family and /or financial professionals, and assist in designing a process customized for that client. Collaborative professionals devote time to building a working relationship with the other lawyer team members and the other client, addressing issues of trust between all participants and modeling respect and compassion. Collaborative lawyers develop the capacity to ask curious, non-defensive questions and to listen with empathy.

Collaborative lawyers learn the art of conflict analysis-they anticipate issues and concerns, learn the art of timing and pacing, when to raise challenging issues and how to strategize with the client and the other professionals to maximize the opportunities for achieving consensus.

Collaborative lawyers understand that people have a variety of negotiation styles-competitive, cooperative, moral and rational. These approaches can change over the course of the negotiation.

CP lawyers learn to be nimble, able to adapt to the clients approach to conflict and their unique emotional dynamic. Like dancers who can perform ballet, hip hop and salsa, conflict resolution lawyers have many approaches to negotiation in their conflict resolution repertoire.

Collaborative lawyers have an expansive approach to fact gathering and a reciprocal commitment to share all information that might impact on choices the parties need to make. This often takes us far beyond the traditional definition of relevance.

One of the most significant shifts conflict resolution lawyers make is to appreciate that the interests and perspectives of the other side must be understood and taken into account to help their own client get their best outcome. They help the clients let go of the need to be right or to change the other spouse. They teach clients that differences in what is important, what each can offer, and how each predicts the future and manages risk, can be rich opportunities for mutual gain. What is not important to one person can be traded for what is important to the other. If the goal is to persuade the other side to settle on our clients' best terms, we need to know what the other side needs to be able to settle.

Collaborative lawyers reimagine their understanding of *best outcome*. Traditionally victory has been framed solely in what the law can offer-primarily money judgments- which ignore many other interests. The cost of the process, financially and emotionally, often cancels out any gains.

Collaborative practitioners do not trade away their clients' practical concerns to be nice or avoid conflict. On the contrary, collaborative practitioners help clients achieve settlements that address financial security, are workable and realistic, and make sense in light of legal obligations and entitlements. However, they also recognize that the length and cost of the process, being treated with respect, emotional closure, recognition and acknowledgment, reputation, repairing and maintaining relationships, matter too.

How We Dance Together - Conclusion

In collaborative practice, we understand that our clients come to us with various degrees of capacity and skill. Some of our clients are content that we coach them from the side of the dance floor. Others need the collaborative lawyers, and some the whole collaborative team, to dance with them, holding tight, as they develop strength and confidence to dance alone and ultimately with their partner.

In the collaborative process, lawyers, family professionals and financial professionals, come together in a variety of ways, to support the dancers and enrich the outcome. To work together gracefully and cohesively, collaborative professionals make time to get to know each other and to build trusting working relationships, no small feat given busy schedules, and the training that lawyers have to be lone warriors. To deliver a graceful collaborative process, collaborative professionals must set aside substantial time to prepare together, stay on top of the progress of the conflict with pre-meetings and schedule debriefs after each meeting to learn what worked, what

didn't work and how to do better next time. We know that when we skip these steps, the dance falters.

The journey from the field of war to the dance floor is often challenging, and from time to time we may feel like turning back. And while the metaphor of the dance may be too intimate for some of our clients, it will make sense to many. Letting go of the metaphor of war and embracing the metaphor of dance can help us evolve our understanding of conflict, and how we can best guide our clients, with dignity and grace, to their own best agreement.