

In collaborative law, litigate and you lose

CHRIS MERRITT THE AUSTRALIAN SEPTEMBER 05, 2014 12:00AM



Victoria Smith in Sydney. 'Most clients want us to be problem solvers'. picture: John Feder Source: News Corp Australia

FOR most lawyers, the adversarial nature of the traditional legal process is drummed in at law school.

But for Victoria Smith's students that concept is anathema.

She teaches collaborative practice — an approach that views litigation as evidence of failure — at Canada's Osgood Hall Law School in Toronto.

Collaborative law was developed in the 1990s by Stuart G. Webb, a family lawyer who is based in Minneapolis. And, while it is primarily used in family law matters, it is starting to be used in commercial disputes.

Ms Smith described the concept as an alternative to mediation that is perfectly suited to clients who want to resolve their disputes out of court while retaining control over their affairs.

"We don't get the easy cases," she said. "We get the challenging cases. The easier cases often go to mediators or are sorted out over the kitchen table."

The concept has four key requirements.

The voluntary, free and open exchange of information

The promise not to litigate and the mandatory withdrawal of both solicitors if either party litigates.

The commitment by lawyers to help reach an agreement without resort to the courts.

A balanced commitment to respect both parties' shared goals.

Ms Smith said lawyers trained in the adversarial tradition frequently found it confronting when they began to retrain in the collaborative technique.

They needed to adopt a different mindset.

But she said collaborative law was attracting an international community of lawyers who were committed to the evolution of advocacy from the traditional adversarial approach to a more settlement-oriented approach.

"That's what lawyers need to offer clients today. Most clients want us to be problem solvers.

"Most want us to maintain or rehabilitate important relationships in their lives at the same time.

"Lawyers drawn to collaborative practice are feeling dissatisfied with the traditional adversarial process — particularly for families.

"They know that process is not serving clients well."

However, she believed there was no conflict between collaborative law and the requirement for all lawyers to give priority to the interests of their clients.

"I believe I can serve my client best if I can find a solution that meets my client's highest prioritised interest. Nobody gets everything."

She said those cases that were not suitable for a collaborative approach were those affected by basic dishonesty.

"When someone is not paying their taxes, is not honest with anybody or has their money — as we would say in Canada — in the Caymans, those guys or women are not appropriate for collaborative law.

"Someone who has no goodwill to the other spouse and is out to be vindictive and has no wish for their wellbeing, they are probably not OK for collaborative law."

Ms Smith was speaking at the end of a two-week visit during which she ran training courses for lawyers.

She was a guest of Queensland Collaborative Law, an association of professionals trained in the approach.

×

Share this story

Facebook ([http://facebook.com/sharer.php?u=http://www.theaustralian.com.au/business/legal-affairs/in-collaborative-law-litigate-and-you-lose/story-e6frg97x-1227048061868&t=In collaborative law, litigate and you lose](http://facebook.com/sharer.php?u=http://www.theaustralian.com.au/business/legal-affairs/in-collaborative-law-litigate-and-you-lose/story-e6frg97x-1227048061868&t=In%20collaborative%20law,%20litigate%20and%20you%20lose))