

## FEATURES LAW AND BUSINESS

# I'll see you out of court: lawyers learn from Lincoln



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"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expense and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

No wonder Abraham Lincoln, whose words appear above, gave up his day job as a lawyer. "Blessed be the peacemakers" was scarcely the motto of American lawyers way back then, long before the litigation explosion of the late 20th century. But now, in the early 21st, the cult of peacemaking may be having a revival.

Companies, courts and individuals are all looking for ways to escape America's culture of litigation. For a couple of decades already, American courts have been pushing mediation and arbitration as alternatives to legal battle. But increasingly the focus is moving upstream: to settling disputes before they ever get near an arbitrator or mediator, not to mention a judge or jury.

Well over 90 per cent of American legal disputes already end in settlement – but only at the 11th hour, in the face of impending litigation. The new goal is to reach such deals more quickly and cheaply, and without destroying all hope of a future relationship between the adversaries.

The problem is to find lawyers who also think their role is to make peace promptly. The fundamental ethos of American law is adversarial: US lawyers want to win; theirs is not a culture of compromise. But now, at least in some areas of the law, there are frontier outposts of professional peacemakers: lawyers whose job is to find the quickest, cheapest, best deal for their clients – which may not be the best deal for the lawyer.

Most of them work, at the moment, in the field of divorce law: because marriage, especially with children, is just the kind of contract that ought to be kept out of court. A courtroom is no place to decide how best to split the baby: custody arrangements should be negotiated rather than imposed. So from the backwaters of divorce law has come a novel concept called "collaborative law": dealmaking, but with a difference. Attorneys who practise collaborative law promise that if they cannot make a deal, they will quit: if the client wants to litigate, they will have to find another lawyer.

True believers in collaborative law say this provides the ingredient missing from traditional settlement negotiations: lawyers have an incentive to settle early and often, because litigation represents failure. They are trying hard to export this concept to the business world, arguing that collaboration is the perfect technique for dealing with family-type matters such as disputes between companies and their suppliers, customers or employees: both sides may want confidentiality and they may want to continue the kinship after the battle.

Robert Rack is one of the pioneers of collaborative law in Cincinnati, where a colony of like-minded lawyers is particularly active. As the man who started the federal mediation programme for the sixth judicial circuit in Cincinnati, he has spent the past 20 years thinking about alternatives to litigation.

Taking the litigation option off the table fundamentally alters the search for a settlement, he says: lawyers in traditional settlement talks listen to ambush, rather than to understand; they intimidate rather than co-operate; they keep all options open for battle. In a collaborative

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law proceeding "that is all a waste of time", he says. "It completely changes the dynamic."

Mr Rack says collaborative law could be a great idea for businesses – if only companies can find lawyers willing to practise it. Most attorneys panic at the notion of losing their client if they cannot settle, he says. And unlike mediation or arbitration, courts cannot force litigants to try collaborative law: the only pressure will come from clients who insist on it.

That has been slow to happen so far, says Tom Stipanowich, head of the CPR Institute for Dispute Resolution, a coalition of

big companies and their lawyers dedicated to finding creative alternatives to litigation. But even if they do not call it collaboration, businesses are experimenting with new ways to speed up settlements, he says. Increasingly, they are using specialised "settlement counsel": lawyers who are committed to settling a dispute at the beginning, rather than at the end, in the shadow of the courthouse.

The goal is the same: to save money and salvage relationships, by whatever means. For in the end, Mr Stipanowich says, "many legal problems are really communication problems". And there are many ways to improve communication and short-circuit litigation.

After all, asks Doug Reynolds, a collaborative law practitioner in Massachusetts, "whose interests are being served" by lawyers who insist on combat rather than collaboration? He has recently used collaboration to settle a dispute between a small software company and an employee, and between a horse owner and a feed manufacturer. What works for them could also work for big business, he believes. "If clients really found out about this, it would take off," he says.

This may sound like a matter of Birkenstocks and bean sprouts – a touchy-feely kind of law that has no place in the business arena. But if it works, it is worth a try. The vast majority of American legal disputes settle anyway. Why not make that the goal right from the start?

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