Re-imagining collaborative law, as well as dispute resolution itself

By Michael Zeytoonian

I first heard about collaborative law (CL) in 2002 as it began to spread around Massachusetts. It is an inspiring, rational approach to resolving disputes and it was good getting to know and learn from local people involved in teaching, promoting and using CL. I met like-minded lawyers nationally and beyond by joining the Massachusetts Collaborative Law Council (MCLC), the International Academy of Collaborative Professionals (IACP), and later the Global Collaborative Law Council (GCLC). I participated in trainings and grew in my understanding and use of CL. For a smaller minority of us lawyers who used CL in business, employment, probate and other non-divorce disputes, this was a road less traveled.

Like any new movement, there were many discussions about CL: What should its name be? Is it an area of law like employment law or a “practice” like facilitative mediation? What is CL and what is not CL? Many, like new converts, became very dogmatic about CL, insisting that the CL process needed to include certain key elements. There were debates about the essence of CL, its indispensable element(s) and the need to clarify CL’s “brand”; all important considerations.

As CL grew, different “models” evolved: the original “four-way meeting” model, the deluxe “interdisciplinary team” model, and other hybrids and variations that were used in the shadows of “dogmatically correct” CL. Like organized religions that sometimes lose sight of their spirit when they become larger denominations, many in the CL movement focused on following the letter of the law. Some who were more led by the spirit of CL gave it some breathing room to organically evolve further in the approaches they used, allowing it to be flexible, agile and creative. Those CL tinkerers and explorers were guided more by the essential principles and approach of CL, rather than hard and fast protocols, models and rules. Theirs was a road even less travelled.

Nearly 30 years have passed since CL was initiated by a single lawyer in Minneapolis, and CL finds itself at a critical crossroads. In recent years, some CL groups have experienced a decline in membership and in attendance at programs and meetings. Also missing are the new ideas, some luster and the vibrant spirit of setting idealistic, big, hairy audacious (“think big”) goals within the CL movement. While there are exceptions like the new hotbed of CL in North Carolina, much of the earlier energy, passion and enthusiasm have not been seen, felt or expressed as they were in the go-go years from 1990 to 2015.

Are there other reasons for the reduced numbers? Is the “honeymoon period” over? Is CL, outside of its increased use in divorce matters, a passing trend? A solution in search of a problem?

While there may be some truth to these, I don’t think the recent trend signals the demise of this worthy movement, but rather is a harbinger of a reinvention of CL. The approach to dispute resolution reflected by CL, especially in non-divorce disputes, has been ahead of its time, but certainly one for which the time is quickly coming.
Can we consider the possibility that the key to CL’s future and greater success as well as a reason for the temporary slowdown is because it may have set goals and identified a featured ingredient (the disqualification clause) that weren’t big, audacious and inspiring enough to energize people to act with stronger zeal?

What if the fault line CL drew between litigation and CL is in the wrong place? Imagine litigation not as an enemy or competitor of CL but rather a fellow traveler, a potential subset of the collaborative approach. The seminal question is not which process parties choose to resolve disputes, but rather whether the approach committed to by parties in the dispute is adversarial or collaborative in nature. Is the goal to win and beat the other side (there must be a loser in order to have a winner in an adversarial contest) or to solve the problem by resolving the dispute quickly, efficiently and completely? If people take the adversarial/win-lose approach, it really doesn’t matter whether the parties use CL, arbitration, mediation or litigation. The zero-sum game goal dictates what the process must do and more importantly what its character will be. Likewise, a collaborative, non-adversarial approach will allow the goals, interests and needs of the parties to dictate what to do and how the process should be designed. A collaborative approach can include (baseball-style) arbitration as part of its process; it can use certain elements of litigation (injunction; declaratory action) as part of it, as long as the arbitration and litigation components serve the collaborative approach and are consistent with it.

The original stated mission of the IACP was “to transform the way disputes are resolved worldwide.” If CL wants to achieve success on the scale of Apple and truly transform the way all (not just divorce) disputes are resolved worldwide, it cannot limit itself or promote itself as an overly dogmatic dispute resolution process. Apple would not have succeeded if it promoted itself as a maker of great computers or dwelled on how much better their computers work. Apple didn’t limit itself by saying “we make more efficient, less expensive, less draining and more creative computers than the others (making its potential audience yawn and look elsewhere). It reached out, touched people’s emotions and attracted their attention, so that people identified with Apple’s message: Think Differently.

If CL were to follow Apple’s lead, CL’s message would not be that it is a type of “Law,” “Process”, “Practice”, but that it calls on all of us – lawyers, clients and neutral professionals – to approach disputes in a way that is completely different from the others. It has to be responsive and perfectly aligned with what people in a dispute are seeking, thinking, feeling, desiring, hoping for, wanting, and needing. It is the answer, one that achieves their goals and satisfies their needs, including their emotional needs! No one in a dispute wondering what to do or what kind of lawyer to hire cares about or is energized by CL’s “disqualification clause” (a rule that if the CL process does not result in a resolution, the CL lawyers cannot continue to represent the parties but must withdraw from representing their clients in any future litigation or arbitration). For those people seeking to have their problem solved and their needs met – including their emotional needs - this notion is a non sequitur at best, irrelevant at first glance, a non-starter and a turnoff at worst. It doesn’t tell people anything about the approach itself, but only about what happens if things don’t work out. The potential market audience doesn’t have the attention span or interest to keep listening to understand why the disqualification clause is important. The opportunity has passed.
The saving grace here is the awesome power and creative beauty of the essential idea of the CL idea and its principles! If we can redefine, reimagine and recalibrate CL for its grander mission and larger scale, we make it relevant and appealing to those who seek solutions in a way that also resonates with their “Why,” as Simon Sinek suggests in his insightful book and TED talk “Start with Why.” Any declarations that litigation or arbitration are inherently bad processes and enemies of a collaborative approach are unnecessary judgments. Think of litigation and arbitration like nuclear energy; how we use them determines whether they will be productive or destructive, serving to connect us or divide us.

Now about the “paradigm shift” that CL people talk about, here’s the thing: Because the fault line was misplaced, the paradigm shift was incorrectly and narrowly defined. If the fault line is the choice between adversarial and non-adversarial approaches, then the paradigm shift that is called for is our own personal, professional and hopefully internal transformation from adversarial warriors to non-adversarial, collaborative problem solvers. This shift is not limited to the way we design the process but also what is happening inside of us – in the mindset of each lawyer and CL professional. We can be trained in CL or mediation, follow the steps and use the models faithfully, but unless we feel and are open to the call to internalize the collaborative, problem solving mindset and approach, we are susceptible to defaulting back to what we were taught in law school, reinforced by the society around us – the adversarial mindset of we vs. them, and of “I’m right so you must be wrong.”

The paradigm shift suggested by CL was not idealistic or audacious enough to attract the massive following it deserves. It was devalued and on too small a scale because the fault line was set in an unimportant place, instead of in a game-changing place. Very few lay people care about a shift from one legal process to another and very few lawyers would get pumped up about this shift. CL’s proposed paradigm shift is interesting in theory, in training workshops and discussions amongst practitioners, but not powerful enough emotionally to either move clients to demand it or inspire enough lawyers to utilize it and more so to internalize it. In the words of the great Jerry Maguire, “That is not inspiring.”

As a result, the trembling on the Richter scale of the legal profession was not powerful enough to throw lawyers out of their comfort zones and into the earnest pursuit of achieving our highest good; it only shook the ground enough to get around 8,000 practitioners to make an adjustment in their practice and add new CL tools and models to their toolboxes. What was missing was a quake seismic enough to convince us that it’s time for a different kind of legal toolbox!

At the outset of a dispute, lawyers and the clients we serve need to ask ourselves whether we are going to approach this dispute in an adversarial, zero-sum game way, or are we going to work together collaboratively as problem solvers to resolve this dispute? This is a challenge vital enough to get people aroused and thinking about why we do what we do and strong enough to define what the parties, their lawyers and every other professional involved in the case will do next. It is powerful enough to make us rethink who we are and what our profession is called to be. Either the goals, interests and needs of those we serve dictate that the approach will be collaborative and problem solving and will be able to mold and shape a well-tailored solution, or
the choice to use an adversarial process will render those goals, interests and needs incidental byproducts and likely collateral damage in a “take no prisoners” war.

This is the choice to be made. If we choose the collaborative approach (non-adversarial), we will apply the principles and elements of CL and utilize them as appropriate and responsive to the goals, interests and needs of the parties. Elements of other dispute resolution processes might also be utilized if they contribute productively to the goal of achieving the best result. The limitations of the dogmatic CL model can be removed so that the collaboration of the parties, lawyers, experts and other professionals will be allowed to breathe, adapt, and respond to every interest and need and yes - change the way (all kinds of) disputes are resolved worldwide.

I believe that people, including those in the legal profession, dispute resolution community, and the clients we serve, are inherently good, want to achieve our highest purpose, and do our best work to come up with excellent solutions. I think that the spirit of the collaborative approach arose from this inherent quality we all have, an inner voice that told us that the approaches we were taking to resolve disputes weren’t good enough. When the fault line is reset in a more impactful and inspiring place and the paradigm shift is far more prodigious, the time for choosing the principles and applying the elements of a collaborative approach to dispute resolution will have come. It will answer our desire to make an important choice, one that both reflects our “why” and also helps us define ourselves, not only as lawyers and as a profession, but more importantly, as human beings.

“People will come, Ray; people will most definitely come.”
(Movie character Terrence Mann urging farm owner Ray Kinsella to take a risk and keep an illogical baseball field, from the movie, Field of Dreams)

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