A tale of hegemony in play -- how that worked out -- and of hegemony to come

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In the first half of the twentieth century, our legal system was a stable, long-term reflection of the hegemony of our Anglo-Saxon, propertied and largely male forebears, institutionalized through centuries. After the second world war, the concerns of the rising middle class, consumerism, the growth of a distaste for conflict and authoritarian structures, and a variety of other, newer forces began to compete with those older, hegemonic influences. Ideas about alternate methods of dispute resolution began to stir and take hold. A very small group of people began to teach and write, and mediation became a subject of discussion.

But in 1985, there still was no mediation practice in Ontario – no practicing mediators, no skills training programs, no credentials to be earned, no court programs, no fraternal associations – a mediation wasteland.

Then, in 1992, a committee was formed to create a mediation program in the Ontario Superior Court of Justice, which would be the first program of its kind. The committee had more than 30 members, and was closely related to the Rules Committee, a body of technically-minded litigation lawyers that oversees additions and changes to the court's procedural rules (the *"Rules of Civil Procedure"*) under the Ontario *Courts of Justice Act*.

The members of the committee could not have had any substantial training in mediation – no such training existed in Ontario at the time. The committee will have been concerned as to how mediation would work in practice – or whether it would work at all. And there will probably have been an unexpressed concern that mediators would compete for funds otherwise available to pay lawyers. But most importantly, because the members of the committee were proceduralists, they will have been thinking in terms of rules, by which I mean procedural rules. That was their area of expertise, and litigation is a dense construct of procedural rules – but mediation is not. Mediation has a minimal procedural framework – in fact, it is probably more accurate to say that the "rules" governing mediation are ethical rather than procedural. As we will see in the critique below, these limitations in training, insight and experience played out in the mediation program the committee created – which is to say that, as they worked to create something new, the old hegemonic influences played out in it, too.

An acquaintance – one of the very few people developing a mediation practice on the arid frontier of what was then the field of ADR in Ontario – was concerned to learn that there was no mediator serving on that committee, and asked to meet the judge who was the Chair. He agreed to meet, and listened long enough to understand that this person was advocating for participation of one or more mediators on the committee – at which point he became stiff in the rump and said something to the effect of "mind your own business" and "get lost".

And that is how we got a mediation program created by litigators.

The single best thing about the work of the committee is that they did create a mediation program: thanks to their initiative, the mandatory mediation program came into effect on January 4, 1999, in Toronto and Ottawa, and in Windsor on December 31, 2002.

Having said that, the program was poorly designed in many of its particulars. I do not intend to dwell on them, but will address only the following two features:

A. The mandatory mediation program is coercive:

For the kinds of cases to which the mandatory mediation program applies, the court rules make mediation mandatory, and provide that the case cannot be listed for trial until a mediator certifies that a mediation has been conducted.

This structure reflects the hegemony of the dominant litigation culture in that it is coercive, just as litigation is coercive. I have never understood why it was thought to be useful to force mediation upon parties who didn't want it. However, since it takes a court order to dispense with the requirement of mediation, and that takes money, most parties go through with mediation anyway – sometimes resentful and halfway out the door before the session starts. On occasion, they succeed in settling their cases in spite of themselves.
But a coercive intake process is not the process a true mediator would ever choose – the fundamental nature of mediation is that it is voluntary and consensual.

Was there no way to create a program that wasn't coercive? The draftsmen could simply have provided that disputants could use mediation or not, as they chose.

Had the courts, the Law Society and organizations such as CBA and OBCA launched a barrage of economical training options in support of the mediation program, people would have begun to try the new method without being forced. Incentives could have been designed to attract them to the process: for example, the Law Society could have encouraged mediation by giving a discount in annual fees to those lawyers who took such training; disputants who chose to mediate without starting litigation could be offered a 6- or 9-month stay of any limitation period, thereby extending the period within which they could mediate without the pressure of a pending expiry forcing them to litigate; or parties who mediated voluntarily could be given the option to move their case to the top of the pre-trial list, or perhaps an opportunity to choose their pre-trial judge.

In short, had they chosen to do so, the committee could certainly have come up with something better than a coercive intake structure for the mediation project. They chose coercion because coercion was what they knew; it is the default setting of the hegemony with which they were working. The fact that mediation does not employ coercion was either unrecognized or dismissed as unimportant.

"When the only tool you have is a hammer, everything looks like a nail".

B. Limiting the program to Toronto, Ottawa & Essex was a mistake (at best):

At the outset, it may have made sense to limit operation of the new program to those 3 regions, while cost-economy and results were being reviewed. But 20 years later, in spite of the manifest success of the program, the only changes that have been made to the original program relate to various estates, trust and substitute-decision matters, to which the mandatory mediation rules became applicable in Toronto on Sept 1/99, in Ottawa on Jan 1/01 and in Essex on Jan 1/05, by operation of Rule 75.1.

Today, there is no program akin to the mandatory mediation program in force in any Ontario jurisdiction other than those original three – and no mediation program of any other kind, either. With no court-based support for the development of mediation practice by lawyers, and no market to foster the growth of a local community of mediators to serve it, the spread of mediation has been sluggish in jurisdictions other than those original three – the other regions are effectively one generation behind in the development of this important dispute-resolution process.

The decision to exclude all Ontario jurisdictions other than the original three from court-based development of mediation skewed the mediation "market". Because the mediation program was implemented in Toronto, Ottawa and Windsor, that is where training and practice opportunities for would-be mediators arose, and that is where mediators flourished. Today, the mediators practicing in these three cities dominate the market for provision of mediation services in Ontario. This dominance is in keeping with the tendency of the hegemony to harness and monopolize assets and opportunities for those aligned with its values.

Contemporary mediation practice:

Figure 1, below, represents the customary timing of mediation as it is now practiced in the Ontario Superior Court of Justice in the jurisdictions that have mandatory mediation programs. The programs relate to mediations conducted in litigation cases that are already in progress. The black line on the diagram is a timeline representing the conventional steps in litigation. As shown by the blue Ms, mediation is ordinarily conducted after documentary production, either before or after examinations for discovery. This accords with the requirement in the Rules that mediation be conducted before a case can be listed for trial.

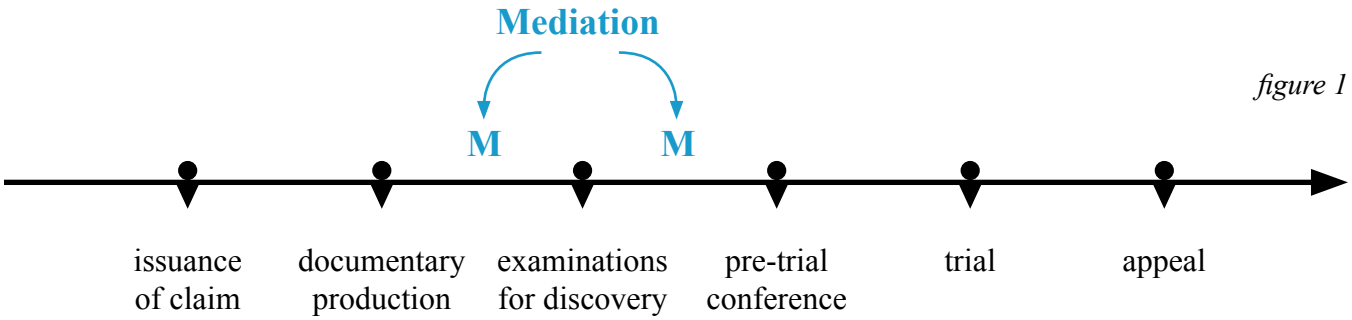


figure 1

As illustrated by this graphic, mediation in the existing system is treated as a sort of patch stuck on the main process, which is otherwise unchanged and retains the characteristics of litigation – that is to say, mediation is conducted in a limited way in the service of litigation.

Because the litigation character is dominant, the models of action in litigation – "combat" and "parenting", as discussed in the first article of this series – also tend to be dominant. But the combat and parenting models are antithetical to the values of mediation, as reflected in collaborative behaviors such as empathy, constructive listening, candour and goodwill. These models of action are not merely different from the dominant models of combat and parenting, they are opposites. They are not integrated into the hegemonic system, they are treated as being of a lower order.

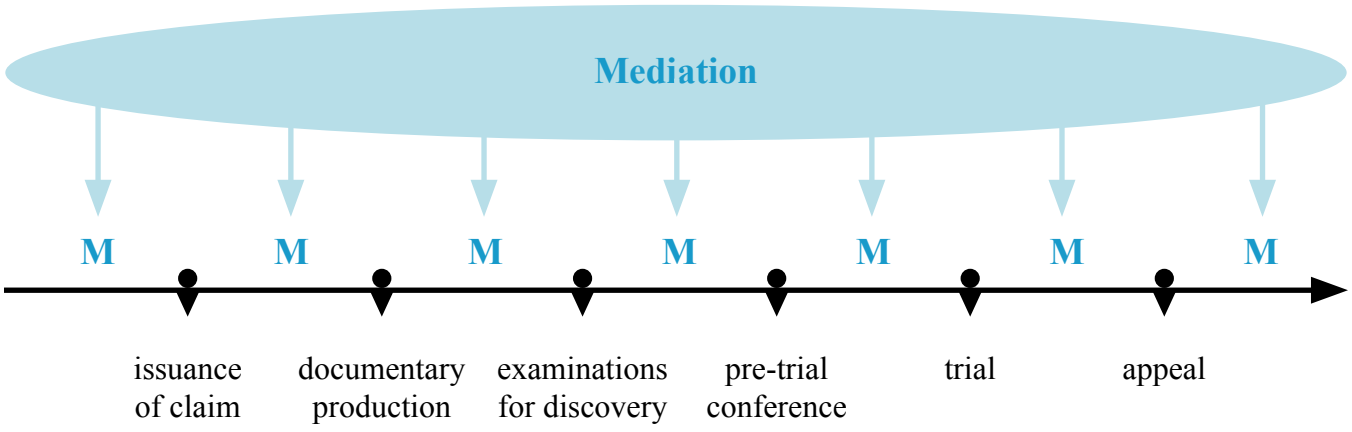
This is the hegemony in play, automatically assuming the dominant role and ascribing a minor role to mediation, without considering whether there may be other circumstances in which it may serve. While that may have been a useful start, I say that this process is backward and wasteful, and that we can now do better.

Because of the hegemonic belief that mediation exists in the service of litigation, we tend not to think of it as a stand-alone remedy in its own right. In a jurisdiction where a staggering proportion of cases settle before trial, there is no reason for this: it would make more sense for the system to be geared towards mediation, which more closely resembles what will actually happen in a lawsuit, than to be geared towards trial.

Furthermore, mediation is generally thought to be a process directed at settlement of the whole substance of the case, but it can be used in many other ways. *All that is required for mediation is agreement to work together toward a joint objective by informed and willing parties*. If they are willing to work cooperatively, they can mediate virtually any issue between them, including procedural issues, at any stage of the dispute.

Some suggestions as to how mediation could be more usefully employed:

figure 2



As shown on *figure 2*, on the previous page, mediation could be used to inform every stage of a case. Examples:

(a) mediation before issuance of a Statement of Claim:

The *Rules of Civil Procedure* do not contemplate mediation occurring before litigation begins. That may simply be because the Rules themselves begin with the commencement of litigation, and, because the draftsmen were litigators doing their work with reference to the Rules, that assumption as to timing was carried into the mediation project without further consideration.

In fact, mediation before the commencement of litigation is a great idea, if the parties and counsel are committed to the process. Costs have not begun to mount, and tempers have not yet been frayed by litigation processes. The evidence is fresh. The parties will not have been embarrassed or compromised by publication of litigation between them, which is now standard in credit reporting, and can still manage their dispute in privacy if they wish to do so.

Where mediation is conducted before litigation, a contract between the parties to govern their process is advisable. It may be useful to set out a timetable. An acceptable evidentiary basis for the mediation can be negotiated – typically including documentary production and the exchange of "will-say" statements, at a minimum. Provision for the preparation and delivery of Statements of Issues would also be included.

The only caveat to this practice is more a matter of concern for counsel than for the clients: that is the competent management of relevant limitation periods, so that no client suffers a loss of legal rights or remedies by reason of choosing to pursue mediation first – and no counsel attracts liability by permitting a period to lapse.

(b) mediation after issuance of a claim, before documentary production:

The following are some examples as to how the parties could manage their case so as to keep things from "blowing up" while mediation is undertaken:

(i) in appropriate circumstances, they could mediate to suspend pursuit of one of the legal issues in the case -- such as quantification of damages pending an agreement on liability -- until after mediation is conducted;

(ii) they could mediate to suspend a motion for security for costs until after mediation is conducted;

(iii) they could mediate to suspend issuance of third-party litigation until after mediation is conducted.

In situations in which the parties choose to collaborate, rather than litigating through force, choices (ii) or (iii) might be motivated by a concern for fairness, as the party targeted by such a motion would be relieved of its coercive effect while mediation is undertaken. Such an agreement might not appeal to an old-school litigator looking for tactical leverage by pressing such an advantage, but here the party with the upper hand is extending that hand to assist the more vulnerable party to come to mediation on a more equal footing, thereby maximizing the chance of working cooperatively to solve their clients' problem. This is an example of what a dispute process based on collaborative values can look like.

(c) mediation after documentary production, before discoveries:

At this stage, counsel could make it quicker and cheaper to take oral evidence by mediating for the exchange of will-say statements, or by mediating for limited-purpose cross-examinations, or a combination of the two. Diehard litigators may not like the idea of cutting back the oral discovery procedures in this way, but mediation is not a fact-finding process, so the pursuit of a detailed case on credibility is rarely of assistance in the context of mediation anyway.

(d) mediation after discoveries, before a pre-trial conference is held:

In many cases, once documentary production and discoveries are complete, it becomes clear that the most important evidence in the case will be that of experts. In such situations, counsel could mediate for an expedited and more useful assembly of expert evidence, for example:

(i) by agreeing to retain one expert, only, on behalf of the parties, and examining him or her together in amplification of his or her report; or

(ii) where both parties hire their own expert, by arranging for the experts to attend together with both counsel, for questioning by both counsel and by each other.

An agreement could also be made for the attendance of the parties' single expert, or their separate experts, to attend a mediation session, as resources available to everyone involved.

Such agreements with respect to the deployment of expert witnesses will not work if counsel, the parties and/or the expert(s), are from the "dueling experts" school of litigation. But if counsel and the parties are of the practical, cooperative, problem-solving school – and they retain like-minded experts – such arrangements can satisfy the parties' needs as to expert evidence, and may save time and money, too.

(e) mediation after a pre-trial is held, before trial:

The obvious advantage to mediation after pre-trial – or even a second mediation after pre-trial – is the fact that the parties will have heard what the pre-trial judge had to say. Either or both parties may wish to revise their views about the case based on that input. Of course, there is considerable variety in the ways judges use pre-trial, or fail to use it, and it is quite possible that the parties will have come away without the benefit of any new insights. But that in itself can be reason for a further mediation: the parties know that no further help is coming from the court, and that the only thing left before them is trial – maybe taking another run at mediation will be more attractive than throwing the dice and heading down that rabbit hole ....

(f) mediation behind the scenes while trial is in progress:

When I mention this possibility to lawyers, some react as though there is something wrong with mediating behind the scenes during trial. There is not. A civil dispute belongs to the parties, and they are entitled to decide its outcome at any time up until the trial judge pronounces a decision.

Why might parties decide to do this? Knowing what they know from the trial that is in progress, either or both parties may have changed their estimation of their case, with the result that bargaining could play out differently. Also, they may prefer to take the decision back into their own hands because they don't like the direction they see the court taking as the trial progresses.

(g) mediation after trial, pending appeal:

Again, a civil dispute belongs to the parties. It is within their joint power to vary or disregard a judgment as long as they are entirely in agreement about doing so. Mediation before appeal is a great way to clean up a botched trial, not just to repair the result now, but to head off an appeal which may be of no assistance. Are the reasons for judgment of the trial judge flawed? Has new evidence emerged that may change the game – maybe even send the case back for a second trial? Is one party becoming judgment-proof, and would the other rather negotiate a more modest deal than they hoped for, so as to avoid watching the whole works go down the drain?

In thinking about this section, I realized that mediation is sometimes too big a process for what I have in mind – mediation may be too formal, and the involvement of a neutral in some of these processes may not be necessary. In fact, some of these issues could be dealt with by agreement in a conference call. On the other hand, in some cases, the parties may wish to put a mediator on retainer from the outset, to consult with the parties as various issues, both procedural and substantive, arise. "Collaboration" is a better term for what I have in mind. My point is that counsel and their parties could cooperate in making more constructive choices for the management of their dispute by adopting some form of collaborative approach, with or without a neutral, rather than the old combat model.

It will not have been lost on the reader that these examples, while they represent a shift from combat- and parenting-model litigation, are a far cry from an entire dispute resolution system based on collaborative values, but the broder use of mediation in aid of litigation is a start.

What engine will propel a truly collaborative hegemony into being?

Ekhart Tolle has been writing and speaking about what he calls the end of the age of ego. He believes that our circumstances have been governed by ego for several thousands of years, shaped by negative states of mind such as anger, resentment, fear, greed, envy, and jealousy, which are products of the ego and are dysfunctional, and which foster greed, competitiveness and aggression. He is referring to the cumulative impact of egoic dysfunction in our societies, rather than egoistic behavior in individuals, arguing that the collective egoic thinking and action of humankind as a whole have brought about most of what has caused our suffering throughout history, including slavery, intolerance, imperialism, capitalism, communism, holocausts, war and damage to the air, soil, water, fauna and floral of the natural world, culminating in the horrors of the 20th century, when such miseries were amplified through science and technology.

Tolle believes that the damage the human race has done collectively to itself and our world is reaching critical mass, and that sweeping changes are necessary if we are to avert global calamity. The sweeping change he has in mind is a flowering of consciousness. He believes that an awakening of consciousness must take place if humankind is to get another shot, and he describes that awakening as an *evolutionary step*. Governance by the ego is the principal thing that will pass as this new global consciousness takes root – that is to say, as the hegemony of the new consciousness gains dominance, egoic thinking and action will increasingly be seen as archaic, destructive and incompatible with the new order, and people will turn away from ego. As societal beliefs that have supported the egoic world of litigation begin to shift toward collaborative thinking, litigation will decline and die. (That last wasn't Tolle speaking, that was me -- but I know he would agree).

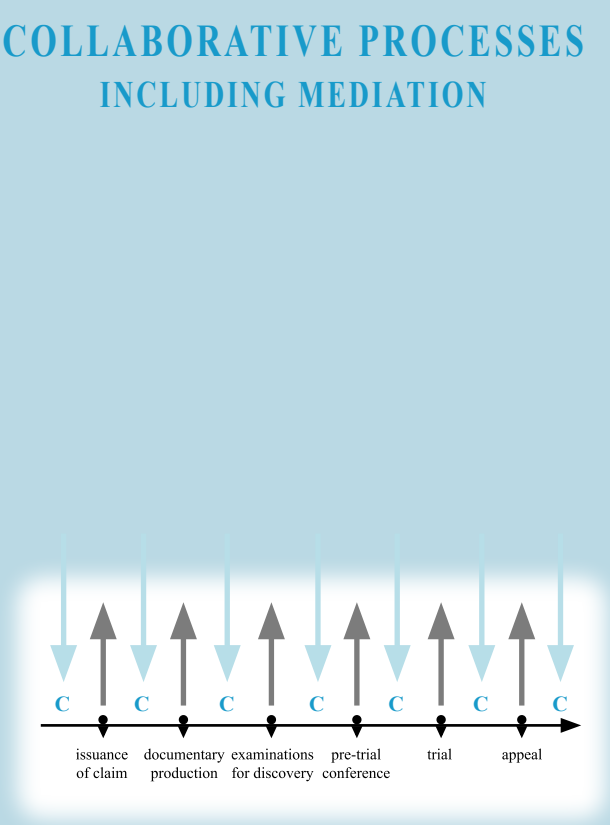
What would a dispute resolution system look like if Tolle's idea about a new age of consciousness comes into being? What would a dispute resolution system look like if the hegemony shifted and it were no longer animated by the egoic thinking and action of decision-makers, counsel and parties, but rather by the values of conciliation?

My answer is that – if such an evolution did take place – the dominant mode of dispute resolution would become collaborative. Combat-model litigation – what I call "Rambo litigation" – would die away because it would no longer be aligned with prevailing cultural values. Parenting-model litigation would also wither, because juvenile forms of participation would no longer satisfy parties – "conscious" disputants would wish to inform themselves, participate and make decisions in their process, rather than being passive to a system in which their affairs are decided for them by strangers. Some sort of government-based dispute resolution system would continue to serve in those matters that actually require it (eg. national security / civil rights), but otherwise, to the extent that it continued to exist, litigation would fall out of favour, and disputants would turn to it only as a last resort, when other processes had been exhausted. Disputants would not see success in litigation as a triumph; rather, they would regret that they were obliged to resort to litigation at all, so much more valued would be a collaborative result.

Figure 3, on the next page, is my attempt to depict what our justice system would look like after the shift in hegemony brought about by Tolle's evolution of consciousness.

On this diagram, the large, pale blue field represents collaborative processes, including mediation. They are the dominant form of dispute resolution in this system. As with figures 1 and 2, the black line here represents the conventional sequence of steps in litigation. Litigation is now a smaller part of the system, and it is intimately connected to the collaborative processes. Rather than mediation being conducted in the service of litigation, as was the case before, mediation and litigation work together in this system: the blue and black arrows going back and forth between collaborative process and litigation reflect this interchange – each system now works in service of the other. Because of the dominance of the collaborative processes, a collaborative mindset has evolved, with the result that any particular litigation steps that may become necessary will be conducted with civility and fair-mindedness, in order to protect the collaborative relationship already growing between the parties. This kind of litigation has little in common with combat-model litigation, and it will have a place in a new system that is predominently collaborative.

figure 3



[Note: I am not being naïve about the continued existence of combat-style litigation. Such litigation will survive for some time because:

> *(a) the egoic instinct towards combat-style litigation will be slow to pass, and some litigants will continue to experience that urge for some time to come;*

(b) combat-style litigation is part of the business strategy of some businesses, such as insurance; and

(c) some parties are exempt from the pressure of the costs of their litigation, because they do not pay it – we pay it, by subsidy through our tax dollars, and through the costs of their goods in the marketplace.

Although combat-model litigation may persist, it will no longer be in step with the prevailing hegemony – that is, the collaborative character of the justice system that will have come to prevail after Tolle's consciousness evolution. It will be recognized that combat-style litigation does not serve the interests of the public, and that its continued existence is an indulgence serving a privileged elite – and public dollars will no longer be available to support it. I believe a separate, stand-alone institution will arise to serve these litigants, and that they will pay not only for the legal costs of the disputes they conduct in that institution, but also for the expenses of the institution itself. This may not be a public body at all, but rather a private arbitral body, created and operated separately from the institutions of the public justice system, with its own constitution and procedural rules.]

How do I know this shift in our justice system will occur?

I know because it is already happening.

This is an astonishing story. In 1990, an American family law lawyer named Stuart Webb, frustrated with the suffering, delays and expense caused by conventional family law processes, devised a new method for handling such cases, singlehanded, and in a matter of days. He just sort of sat down and wrote it up.

The process Webb created is known as "collaborative family law". It is a voluntary process. It is initiated when the couple signs a contract binding them to the collaborative process and disqualifying their counsel from representing them in any future family-related litigation. This disqualification eliminates any conflicting interest of counsel in the revenues and ego-engagement that accompany litigation.

Once thorough documentary and financial disclosure have been made, the process is conducted through a series of meetings attended by the couple and their respective lawyers. The clients act as their own advocates at these meetings. The lawyers participate at the meetings as resources – acting variously as advisors, teachers, coaches and, when necessary, referees – but they do not act as advocates for their clients.

This structure requires extensive client learning and preparation. In private meetings with their respective clients throughout the process, counsel teach their clients in detail about the strengths and weaknesses of their own case and the case of their spouse, and help them to become effective advocates for their own interests.

Notice that a collaborative family law process is structured so that the participants are working together for settlement, rather than working separately in furtherance of old, combat-style litigation objectives such as proving themselves to be "right" and the other "wrong", establishing their narrative and undermining that of the other, attacking credibility, springing surprises (ambush), causing delay and creating leverage (coercion), any of which would cause them to work at cross-purposes. Rather than pitting the spouses against one another, the collaborative process is characterized as one in which they work together to solve a common problem (the dispute itself). They are on the same team.

A collaborative family law lawyer told me a story from her practice about how a couple had gone completely off the radar after their sixth or seventh meeting, neither of them contacting counsel for several months. Then one day her client, the husband, showed up. He told her that the couple had reconciled and were living together again, quite happily. He told her that the process of those collaborative meetings – sitting face-to-face with his spouse, hearing her speak knowledgeably and confidently about the issues between them – had made him see her in a new light, and he had fallen in love with her all over again. He said he had not believed such a thing was possible ...

I find this story thrilling: as lawyers we are under a professional obligation to do what we can to bring about reconciliation in family law cases, but when do we ever succeed? Can you imagine the existing family law legal system bringing about a result like this?

In the 30 years since he invented it, Stuart Webb's collaborative family law method has caught on like wildfire. There are fraternal organizations teaching and training in the method throughout the world. Many of the family law lawyers who work with it ultimately close their practices to conventional family law litigation in order to work exclusively with the collaborative model: it deals more usefully with family law issues, does less damage to families, and is less frustrating and exhausting for family law lawyers.

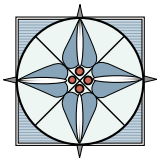
I have been waiting to see collaborative law catch on in other fields. Because they also have a strong factor of relationship, estate disputes strike me as a particularly likely field in which to see collaborative law take hold. But there really is no limit to the areas in which it could serve. The requirements are simple. There must be:

- parties who are willing to work together towards a negotiated solution;
- lawyers who are willing to serve those clients in a different capacity, not as advocates, but as advisors, teachers, trainers, coaches, referees.

I expected to see collaborative law sweep into non-family law subject areas, but it has not.

Why has collaborative law not taken hold in legal fields outside family law? The answer most generous to the Bar and the public is that they don't know that the method exists. The second most generous answer is that they know, but are not interested in learning more about it, or are not interested in change. The darker answers reflect maladaptive ego: perhaps the parties are more invested in combat than resolution, driven by preoccupation with being "right" and belief that the other side is "wrong", and fantasizing about punishment; their counsel may be ego-invested in the process itself, through which they seek performance opportunities, power and notoriety.

Collaborative law serves the parties better, and is a healthier process for society as a whole. It may not be happening yet, but if Tolle's evolution of consciousness occurs, I believe we will see collaborative law methods being used in a wide variety of subject areas, and collaboration will become the dominent hegemony. It's just a question of time.



This article is dedicated to the memory of my father, Clifford R. Demaray (1926 - 2019).

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