

Kluwer Mediation Blog

Collaborative Law – A paradigmatic change

Tania Almeida (Mediare) · Wednesday, January 25th, 2012

Cartesian philosophy encouraged the fragmentation of knowledge and made it possible for different subjects and their branches to appear. Such fact brought about the expansion of knowledge in a microscopic way.

Having become highly specialized man believed he had mastered all knowledge without realizing at first he had lost the perspective of the whole. Such social and academic approach built mono-focus paradigms like those in psychology and law. For a long time professionals in both fields were in charge of dealing with conflicts taking into consideration their emotional and legal aspects respectively.

The turn of the 21st century witnessed the outcome of interdisciplinary subjects – such as legal psychology and genetic engineering among other examples – and also the possibility of dealing with conflicts from a multifocal point of view. That enabled specialists to have a more adequate approach to conflicts due to their multifactor nature.

Some practices that appeared at the turn of the millennium agree with this proposition. Among them Conflict Mediation (in the 70's) and Collaborative Law (in the 90's).

Mediation takes into consideration the multifactor nature of conflicts and requires that mediators be qualified in a multidisciplinary way. That will enable them to evaluate the different components of the conflict pointing out to the parts what seems to be a priority for them and at the same time identifying the need of specialists so that the parts can reach more qualified decisions.

In Collaborative Law interdisciplinary professionals – lawyers and coaches, invariably; child therapists and, financial neutrals – get together in case the need arises. Guided by the principles of Mediation they advise their clients providing information that encourage qualified decisions in a scenario of negotiation and consensus building.

Collaborative Law is part of the field of Collaborative Practices which recommend that different disciplines contribute with their particular evaluations in order to deal with interactive issues specially with the conflicts that are brought about by such interactions. As in Mediation it is a kind of performance which demands a paradigmatic change in the field of conflict resolution – from the adversarial paradigm to the collaborative one.

Why do paradigms change? Due to their being insufficient at a determined point concerning social contacts. At that point they are no longer adequate. They are inefficacious whenever they are

unable to deal with new situations. Such situations create a gap between the application of a certain paradigm and the adequacy of its results.

On these occasions human beings show their dissatisfaction with the previous paradigm and move on in order to create new beliefs, expressed by theories, norms and behavioral changes. Until this new paradigm takes place and gains legitimacy, human beings oscillate between the old paradigm and the new one, showing curiosity and fear concerning the novelty.

These days we see a rights-based model encouraged by legal practice coexisting with an orientation focused on the interest and needs of the parts, a legacy of an interests-based model of negotiation – Harvard Negotiation Project.

The orientation based on rights enables lawyers to know what to say and do – the client’s claim is redefined so that it can be adequate to a “legal theory” and lawyers represent their clients taking over the conflict resolution concerning both its practical and emotional aspects. The interests-based orientation enables clients to know what to say and do. They speak for themselves and find their own solutions.

In the Collaborative Legal Practice dedicated to family issues, for instance, the lawyer and his/her client establish a partnership overlooking the traditional adversarial approach so as to find solutions that benefit the families (the professionals involved and the legal system as well). Such benefit is private – for those who are directly and indirectly involved in the conflict, and public once it includes present and future peaceful social contacts and the smallest amount of public money invested in the field of conflict resolutions.

Family lawyers that choose Collaborative Law give up the role of legal gladiators to become problem solvers. They focus on families and not on individual members of a family.

Law offices are usually the entrance into, or at least one important step towards, conflict resolution. Whenever a lawyer chooses Collaborative Law as an approach he or she plays a very important role in changing the conflict resolution practice.

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