

Collaborative Law in 100 Years: Historic Relic or Cultural Icon?

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IACP Forum, October 24-28, 2007 ©

I. Introduction

From the late 1970's until sometime in 2004, the Smithsonian Institution's Arts and Industries Building housed many of the inventions that were unveiled at the Centennial Exposition of 1876 in Philadelphia. At that World Exposition, the United States celebrated both its 100th anniversary and the explosion of inventions that would give birth to the industrial revolution in the United States and around the world, that industrial revolution which led to the United States becoming the strongest nation in the world. Interestingly enough, the inventions at the 1876 World Exposition that ultimately failed are as fascinating as those that have become part of our way of life. Why? Why did some of those inventions become cultural icons that remain prominent in our way of life today while other inventions that seemed to have such promise in 1876 became nothing but historic novelties or relics? The answer to that question offers what may determine whether the collaborative movement becomes a cultural icon or just a historic relic one hundred years from now.

II. Historical Perspective

What can we learn from that "fork in the road" of innovation in 1876 that can help collaborative law become a cultural icon rather than a historic relic? The key is studying what made some of those promising inventions fail while others succeeded. And we must always be mindful of what we learned in every history class: Those who do not learn the lessons of history are doomed to repeat them.

Before DVDs became the industry standard, why did nearly every household in America have VHS recorders and not Betamax recorders? Why, in nearly every office in the world, are there IBM clones and not Apple Macintosh computers? In both instances, many would argue that the better product failed. But why?

There are basically four traits that have historically resulted in innovations and inventions being successful versus failing. Those four traits include: (1) Making the product or service affordable to the masses, including making it something they believe they can afford; (2) Guaranteeing the consumer a consistent experience, including enabling them to know what they are purchasing; (3) Making the product or service available to the masses, including not making it so proprietary that it is difficult for the consumer to find or have access to; and, (4) Marketing the product or service by educating the public. If one reviews the history of products or services, these four traits are found to be common among those products or services that became successful and withstood the test of time.

III. Historical Examples of the Four Traits of Successful Innovation/Inventions

A. Affordability

1. The Printing Press

One of the oldest inventions that became integrated into society and literally "changed the world" forever was the printing press. Prior to the invention of the printing press, most of the world was illiterate. Once the

printing press was invented, the majority of the world's population became literate amazingly quickly, particularly compared to the thousands of years prior to that time when the vast majority of the world was illiterate. As a result of the printing press, the world became literate, newspapers became affordable, were read by the masses, and therefore the invention of the printing press eventually played a critical role in the launching of a revolution in 1776 in the United States of America.

2. Ice Cream

Ice Cream was known only to the Courts of Europe prior to Thomas Jefferson bringing it to the United States when he returned from France in the late 1700s. Even then, its availability was limited in the United States to such venues as First Lady Dolly Madison's dinners at the White House.¹ Ice cream became known by word of mouth, was very shortly demanded by the public, and in 1846, a woman named Nancy Johnson patented the first wooden hand-cranked ice cream freezer, which eventually made ice cream available to households around the world.² By the twentieth century, with the growing availability of ice and mechanical refrigeration, ice cream became a favorite dessert that is now loved by "everyone" around the world.

3. The Assembly Line

When Henry Ford invented the assembly line, there were scores of automobile manufacturers, but cars were still a novelty item, used primarily for "Sunday driving." After Henry Ford implemented the assembly line into the automobile industry, it enabled the automobile to become affordable for "everyman." Except for possibly the invention of the printing press, the assembly line probably caused the most

drastic worldwide change of any invention or innovation in modern times. The invention of the assembly line effectuated mass production of the products and services of the industrial revolution so that they very quickly and permanently permeated nearly every aspect of society.

B. Consistency of Experience

1. The Systems Approach

In 1995, *The E-Myth Revisited* was published by Michael Gerber. This book was based upon Ray Kroc's innovation and implementation of a "systems approach," for the McDonald'sTM restaurants. Ray Kroc felt that if you set up "systems," you could recreate a consistency of experience for consumers that would make your business succeed and thrive.³ While many adults would consider the food at McDonald'sTM to be nothing more than basic, chances are, whenever you have been there your experience is consistent with what you expected it to be and what you experienced there in previous visits. Whether you are ordering a Big Mac in Toronto or Timbuktu, you know as a consumer what you are going to receive when you place your order.

2. Why Did the Systems Approach Work So Well For McDonald'sTM?

In addition to designing each restaurant to look similar, Ray Kroc developed and set in place systems in which the mechanics of each restaurant were, and are still, run virtually the same. Each manager and each employee is trained with the same training manual about the "systems," so that as managers and employees come and go through time, the systems remain in place so that their replacements can easily be trained, thus providing consistency within the organization even on the most basic level.⁴

3. Why Did the McDonald's™ Systems Approach Work So Well In Marketing?

When McDonald's™ began to franchise, it began a media blitz on a level not seen prior to that time. Virtually everyone in America knew the jingle, "Two all beef patties, special sauce, lettuce, cheese, pickles, onions on a sesame seed bun," some consumers knowing that jingle even prior to their community having a McDonald's™ restaurant. By using the same marketing campaign, including commercials, jingles, billboards, and promotional products across their entire consumer base, McDonald's was able to brand their product and services so that the company enjoyed an exponential return for their investment and effort.

C. Availability—Not Proprietary

1. Competitive versus Proprietary: Products

Success in any products or services industry has always meant being competitive. However, there is a fine line between being competitive and proprietary. Companies such as Betamax and Apple Macintosh failed to share their technology through the selling of licenses of their technology, which is called "Open Architecture," by Prof. Jim Utterback of MIT, author of *Mastering the Dynamics of Innovation*, (Harvard Business School Press, 1994)⁵ and as a result, their product was passed by other products that were willing to openly market their technology.⁶

2. Competitive versus Proprietary: Ideas

Ideas have had much the same historical fate. If one person, no matter how charismatic or popular, is the owner of the idea, the idea dies with them or their popularity. The political and social ideas that have endured for any length of

time have to be owned by the people or society as a whole, not just the idea's creator. The great social experiment called the Soviet Union, on a very simplistic level, was created by the teachings of Vladimir Lenin. Its attraction was not that it was Lenin's idea, but that "we are all comrades." That movement ended when the majority of the people figured out that there were comrades and then there were Comrades. Then we had that whole wall thing and ...well you get the point.

D. Marketing/Educating the Public

1. Historic Unveilings of Inventions

In the age before mass media, inventions were primarily unveiled at venues such as world's fairs. Alexander Graham Bell's telephone, the Remington Typographic machine (typewriter), and the Wallace-Farmer Electric Dynamo (precursor to the electric light) were all the rage at the 1876 World Exposition in Philadelphia,⁷ while the ice cream cone came into being as a result of an ice cream vendor running out of bowls at the 1904 World's Fair and entering into a joint venture with a waffle vendor who happened to be in a booth next to him.⁸

2. The Evolution of Mass Media Unveilings

With television, radio, the Internet and other forms of mass media, the method for great unveilings has changed in the last one hundred years. Electronics such as the iPod (iPod, Nano, Shuffle, and iPhone), the Wii, Xbox and Playstation have benefited from the media blitzes that prime the consumer public in anticipation of the sale of such products. Other examples of saturating the consumer market in modern media have included CD or DVD marketing and movie premiers such as Harry Potter.

3. Grass Roots or Word of Mouth Marketing Historically

Historically, grass roots marketing or by “word of mouth” was one of the most effective marketing tools available. But there are some interesting ironies in the history books about how that method of getting the word out did not always have a consistent outcome.

Neill Archer Roan, in his article *Living and Working in the Creative Sector*, explains that the Studebaker was irrefutably the better quality automobile and that it relied heavily on its marketing campaign of being the superior quality automobile available. Other auto manufacturers were marketing with more “glitzy” advertising campaigns, and at that time those glitzy campaigns sold more automobiles than a truthful (but dull) marketing campaign about quality. As a result, Studebaker went out of business in 1963, much to the disappointment of those who knew it was one of the highest quality automobiles ever made. One would think that “in the olden days” grass roots or word of mouth should have carried the day on most products, but as marketing and advertising expertise advanced, there was a time when grass roots and word of mouth fell short of flashy advertising campaigns.

On the other hand, while media can promote a product or service, if the product or service does not live up to its promotional campaign, eventually it will fade into the historical relic category. The Edsel automobile is a good example of the failure of promotion when the product did not match its marketing blitz. Despite all the money and effort on research and development and media “hype” surrounding the Edsel automobile, in the end the public decided that it was just an ugly car that

did not live up to its media created image.⁹

IV. How the Collaborative Law Movements’ Goals and Interests Will Be Met By Implementing the Four Traits of Successful Innovations/Inventions

A. Affordability

1. Efficient Use of Clients’ Resources

If the collaborative movement is unable to be affordable to the average income household, it will survive, if at all, only as the tool of the rich. The median salary for a one-breadwinner household in the United States, having 10 to 19 years of experience in the work force, is \$72,483.00 US per year. In Canada the same family has a median salary of \$62,604.00 CAD.¹⁰ These households cannot afford a \$20,000.00 divorce. If the cost is not affordable, the families may want it but they will not buy it. The most expensive part of a case, per hour, is typically the attorneys’ hours. If the collaborative case is handled using the team method, including implementing neutrals meeting outside of the joint sessions (offline) to assist the clients in developing the options for the children’s issues and the property issues, then having the joint sessions limited to evaluating and choosing the final options, the clients’ resources can be most efficiently used and preserved.

2. Educate and Empower the Public and the Parties with the Knowledge that Collaborative Law is Affordable to them

a. Educate the public and the parties as to the cost of the professionals in the collaborative process

b. Educate the public and the parties as to the general cost of the joint and offline sessions

c. Educate the public and the parties that they are in control of the cost of the process.

B. Consistency of Experience

1. Why Systems are Critical to the Growth and Success of Collaborative Law

For collaborative professionals, the fact that *The E-Myth Revisited* is an education on how Ray Kroc developed the successful McDonald's™ franchise might seem irrelevant. After all, we are not business people—we are “professionals.” Ah, think again. Like it or not, collaborative law is a product even if that product is a service, and collaborative professionals are business people who are selling that product to the consumer. If we, as collaborative professionals, who are at this time the guardians of the movement, fail to recognize that collaborative law is an industry that must be marketed as a product, the collaborative law movement will be left behind in the modern marketplace.

Those who are successful in any profession or business in today's marketplace have used (albeit possibly unknowingly) some form of the “systems” that made McDonald's™ successful. Have you ever used forms in any aspect of your practice? If so, you are already utilizing the very systems theory that has proved fundamental to successful businesses in modern times. The Collaborative Law Institute of Texas, for example, has literally dozens of forms that can be downloaded for the use of its members. Imagine if every time you had a case you had to start from scratch in creating each form; you would never have time to put your professional signature on anything else in the case because you would be

spending all your time recreating the basics.

Adopting and implementing a systems approach will provide collaborative clients with a consistent experience that will make this movement succeed and grow. And not surprisingly, the professional's signature style will have a greater opportunity to develop if the professional's time is not eaten up by mundane tasks that do not need to be recreated for each case.

2. Systemize training and forms

a. Systemize training

If the majority of collaborative professionals have received training that is similar, then the product that the parties and public receive will offer them that consistency of experience that gives the consumer a level of comfort in a very difficult time in their life when one of the most important things they need is to know what to expect.

b. Systemize Statutes and Rules

The IACP has adopted a philosophy that was led by Norma Trusch, former president of IACP, and Harry Tindall, Houston, Texas attorney, that a systemized and uniform statute would also play a major role in Collaborative Law becoming a permanent institution around the world. Texas was the first state in the United States to pass a statute implementing Collaborative Law as an accepted form of family law dispute resolution. The success of that statute has now grown so that there is a nationwide movement to make it a uniform statute across the United States as other statutes, such as the Uniform Child Custody and Jurisdiction Act, have been adopted. If the international movement can also implement similar uniform statutes, the movement will more likely take on a stronger and united

public “face,” if you will, around the world.

c. Systemize Protocols, Rules and Recipes for success

By continuing to make the “rules of the game” consistent by practice groups and organizations such as the Collaborative Law Institute of Texas and the IACP adopting promulgated protocols, rules and forms, the implementation of the process will be smoother for collaborative professionals and the consistency of the experience will continue to be improved upon for the public and the parties in each case.

While neither IACP nor members of the collaborative movement should impose or insist on any particular method of the process, i.e. attorney only model or the team approach, the movement and the members of the movement should continue to be open to the evolution of the process and what may become the generally accepted best method for this process. As described earlier, when some technology comes out first, such as some early automobile designs, but fails to change with the evolution of technology, or, in other words, if that invention or inventor stays firmly entrenched in the initial design, the original invention or idea will often be left behind as technology evolves.

While it is not a requirement for collaborative professionals to all use exactly the same forms and process, it will be beneficial to the clients and the movement generally if, to some extent, the process is consistent regardless of its locale.

It is only natural to look for order in the middle of chaos. A method of telling the parties in a Collaborative law case where they are going, then take them there, then show them where they have been, provides order and consistency

every step of the way of a case. Collaborative law has a methodic approach to the problem solving involved with a Divorce or other civil case. That methodic approach is being used by every collaborative professional in each collaborative case, which is handled by him or her. Stage one, the agreement: the parties must read, discuss, and sign an agreement. Stage two: help the parties in developing their interests and goals. Step three: information gathering; determine the parties’ needs, produce inventories, and establish values for the parties’ property. Stage four: options; assist the parties in developing options. Stage five: negotiating an agreement. And finally stage six: drafting, reviewing, and finalizing the agreement.

There is also a methodology for how the collaborative law case will deal with problems along the way. Step one: assess the problem. Step two: identify the choices and options. Step three: evaluate the consequences of all the choices. Step four: make the best choice, which will give the parties the best possible outcome.

This process continues until the case is over. The parties involved in a collaborative case are going to feel that there is more order and therefore more consistency in the system if they are educated about the system and given a “road map” to where they will go. Each time they reach the next step in the process they will recognize it and know where they are and they will see progress in the process. If there is a time where one or more of the parties become frustrated with the process, it will be easy for the professional to show the parties where they are, where they were, and where they are going. This will demonstrate to the party the consistency

in the system and it will build confidence in the system.

And of course, one additional by-product of teaching the parties this process of problem solving is that when problems arise after they have left the formal collaborative process, hopefully they will have learned the tools to effectively resolve those future issues without the need of professionals.

C. Availability — (Non-Proprietary)

1. Avoid the Mistakes of History

Those in the collaborative law movement should take care not to have controls too tight on who disseminates the product or the promotion of the product will be hampered.

Beware of the thinking that there is only one way to practice collaborative law or one way to “live” the collaborative lifestyle. As a movement, collaborative law must be competitive to the extent that it markets the product and service known as collaborative law to the general public. However, if factions within the movement become proprietary such that they say their method of collaborative law is the only legitimate method rather than promoting the movement generally, then the collaborative law movement may likely suffer the same fate as Betamax and Apple Macintosh. It is, and will continue to be, critical to break down any geographical, geopolitical, and inter-professional boundaries to see this movement reach its full potential.

2. The IACP Approach to Proprietary versus Competitive

The International Association of Collaborative Professionals made a conscious effort to opt for a competitive and not proprietary approach. As this movement was developing, it originally consisted of two factions: (1) the movement created by Stu Webb in

Minnesota known as “collaborative law,” primarily lawyer driven and not originally a team approach, and (2) the movement begun in California, in large part driven by the therapist profession, known as “collaborative divorce.” The California movement was created by Peggy Thompson and Pauline Teschler; it was a team approach from the outset, with two lawyers, each party having a communications coach and often a child specialist in addition to a financial professional. Initially, these two movements were somewhat proprietary, but the leaders in those parts of the movement decided very quickly that for the good of the movement as a whole the two methods should be under one umbrella known as the IACP. This wise and courageous decision on the part of the IACP leaders have helped jettison the movement forward with more momentum than if the two sections remained proprietary as separate movements.

3. The Collaborative Law Movement’s “technology” must be liberally “licensed” and released to the public.

Keep in mind that affordability and consistency must be maintained to avoid violating other traits, but there must also be easy access to the product. Professionals need to be trained and the attorneys need to make the paradigm shift, but you do not need to be “ordained” to be involved with the Collaborative Law movement. Attorneys do not have to be in charge. Logic would tend to show that because collaborative law is a method of communication in which the common self interests of the parties are used to acquire a compromise, using a communication method of “I” statements and a stated goal of openness and respect

for all parties' interests, the communication coach or mental health neutral is the logical leader of the process. While the lack of control as well as the rest of the paradigm shift is hardest on attorneys, because of their training and experience in the litigation world, the best collaborative attorneys usually have a vast litigation past. That means that all litigation attorneys can use this product. It does not have to be an exclusive choice, either. Most collaborative attorneys have an active litigation practice, and it is logical that most of the new attorneys coming to collaborative law will be litigators. Therefore, the idea that there should be separate collaborative attorneys and litigating attorneys builds a wall where none should exist. As long as the attorney is talented enough to shift mentally in and out of the collaborative mode, that attorney is going to bring more to the table, for use by the team, than one without that experience. Collaborative law is a product to be used by everyone. We just have to get it out there.

D. Marketing/Educating the Public

1. Taking Advantage of Modern Mass Media

a. Branding

Few people in the modern world are unfamiliar with the concept of "branding." Wikipedia defines branding as "...recognition and other reactions ... created by the use of the product or service and through the influence of advertising, design, and media commentary. A brand is a symbolic embodiment of all the information connected to the product and serves to create associations and expectations around it. A brand often includes a logo, fonts, color schemes, symbols, and sound, which may be developed to

represent implicit values, ideas, and even personality." Whether or not members of the public know the term, they are all familiar with the "golden arches," the "mouse ears," or the Nike logo, which all communicate information about a product without using the written word. While neither the IACP nor any other collaborative law group currently has the millions of dollars that would more easily effectuate worldwide branding of the collaborative movement, branding the product is still an effective technique in marketing the collaborative law movement. The creation and proliferation of various collaborative law logos in commercials, billboards, websites, brochures and promotional products will facilitate the branding of this movement.

b. Radio, Television, Newspaper, the Internet, Billboards, and other forms of Mass Media

The use of radio, television, newspaper, local, regional, and national magazines, the Internet, billboards, and other forms of mass media will enable the collaborative law movement to become known throughout the world. These forms of media advertising are available for purchase and in many communities they are available free of charge as public service announcements on radio, television, billboards and in newspapers or magazines. The Internet is also an extraordinarily effective tool for promoting the collaborative law concept, but optimization of a website is now a need, which is usually somewhat costly, that should be addressed when attempting to effectively use the Internet as a method for educating the public.

c. Efficient Use of Collaborative Professionals' Resources

As stated above, some media is available for no cost such as public

service announcements on radio, television, in newspapers and magazines and sometimes on billboards. However, as always, the saying, “You get what you pay for,” is also true when buying media. To truly effectively market the collaborative law movement, money will probably need to be spent to achieve the greatest return. If groups can pool their resources in market areas, such as the metropolitan areas, then even broadcast television, major market radio and billboards can be purchased; if the cost is spread among more members of a group, obviously what sounds unreachably expensive can become affordable. And in the areas where the populations are less, typically the media costs are also less expensive, so fewer collaborative professionals will need to consolidate their resources to afford media in those locations.

2. Speakers’ Bureaus

The old fashioned marketing tool of speaking to public forums is often underestimated and overlooked in publicizing a movement such as collaborative law. There are service clubs and professional clubs around the world that are constantly looking for interesting speakers for their weekly or monthly meetings. Newspaper, radio and television reporters welcome news stories that can be provided to them by press releases or interviews that they can use when they are looking for news on a “light” news day. The possibilities for utilizing this method of marketing are only limited by the creativity of those participating in the collaborative law movement; everyone in the movement should brainstorm and share what they find to be successful methods for further developing this method of marketing.

3. Grass Roots (or Word of Mouth) in Today’s Market

In an earlier section of this paper the Grass Roots or Word of Mouth approach to marketing was explored from the historic perspective. Ironically, with the availability of the Internet, the Grass Roots or Word of Mouth marketing has become monumentally more important and powerful than at any other time in history. Neill Archer Roan, continues in his article *Living and Working in the Creative Sector*, that in the early 1990’s “...marketing analysts started writing about marketplace power shifting from the seller to the buyer....Today most products aren’t sold. They’re bought...[C]onsumers are more likely to believe information they uncover themselves than information you direct at them in an amplified fashion.” Roan goes on to explain that with the Internet anyone can research products and services. Ironically, he distinguishes today’s Grass Roots or Word of Mouth marketing from word of mouth marketing in the days of the Studebaker automobile. Roan ponders whether today, when quality is important to the consumer, “...would the power of the buyer and forum of the internet have saved Studebaker?” Roan concludes his thoughts with the following: “The lesson: It’s a buyer’s world. Those of us in marketing who don’t adapt won’t survive.”

The points raised by Neill Roan emphasize the necessity to pay attention not only to how the public perceives the collaborative law movement, but to the incredible opportunity available to promote this movement by today’s strongest Grass Roots and Word of Mouth advertising—the Internet. As Neill Roan says, we are living in a buyer’s market and we must adapt to that market or fail.¹¹

V. Conclusion

Collaborative law is moving in the right direction as evidenced by this IACP Forum in Toronto. These forums must continue to enable the best minds involved in this movement can plan, sculpt and nurture collaborative law. We need to be vigilant that we strive to discover how collaborative law can become the norm for family law cases and in other areas of the law. There is a delicate dance between too much systemization and too little innovation. The idea that a process needs to be systemized in its training but innovative in its practice is unusual, to say the least. We have grown from two individuals in two different states, to four way meetings between attorneys and clients, to teams of professionals helping these same clients. Where this movement ends up will to a large degree be decided by the clients that make up and drive this market. It will also be up to the people that are on the crest of this wave to learn from history and guide the collaborative law process in a way that will ensure its place as a cultural icon for the future.