DEBUNKING THE MYTHS OF COLLABORATIVE LAW

By
David S. Bouschor, II
and
Camille Milner

Webster's New World Dictionary defines "myth" as an "imaginary or fictitious story." There are many more myths about collaborative law than can be debunked in the time allotted for this talk or the pages of this paper. Six of the myths are being targeted in this presentation. A myth is only a myth for so long as it is misunderstood. As the collaborative movement progresses, one of our most important jobs as the trailblazers of this movement is to debunk those "imaginary or fictitious stories" about collaborative law so that more and more people can enjoy its benefits.

Myth #1: Middle class clients cannot afford collaborative law.

Fact #1: Even middle clients can afford the collaborative process if they utilize the team approach.

The collaborative practitioners should control the process from the very beginning. Part of their job is to encourage clients that the team model is the most cost efficient approach to the resolution of their divorce, regardless of whether they are wealthy or middle class.

Often, when the collaborative lawyer begins talking about bringing in allied professionals the clients' eyes begin to glaze over at the thought of any additional expense. However, when the clients fully understand that with the use of mental health professionals and financial professionals their family law matter will have a more satisfying and cost efficient resolution, most are very willing to venture into this new cutting edge area of the law.

Prior to the first joint session, the attorneys should have pre-meetings with each other and with each of their clients to determine what professionals would be beneficial to that particular case.

How many attorneys are as skilled at teaching clients how to communicate in the collaborative manner as a trained collaborative mental health professional? And while lawyers regularly assist their clients in budgeting or dividing their estates, are financial professionals not better trained for that task than lawyers?

The first joint session should be a quick one-hour review of the process, the participation agreement and the role of the communications coach, with at least the communications coach present. If there are financial issues, then the parties and their attorneys should also consider

bringing a financial professional in to the first meeting. If there are children's issues, then the parties and attorneys should consider utilizing a parenting coordinator.

Following that initial joint session, the parties should meet "offline" with the communications coach to learn how to communicate in the collaborative method. In almost every case, a communications coach will enhance the satisfaction level of the parties in their divorce.

The parties are also sent to meet "offline" with financial professionals and parenting coordinators to learn how to formulate macro goals regarding the division of their assets and liabilities and custody and possession of their children, as applicable.

If the parties spend two hours with the mental health professional(s) and the financial professional, they have only spent approximately $600.00. On the other hand, if the parties have a two-hour four-way session with the lawyers who charge $250.00 per hour, the attorneys' fees for that one meeting are going to be $1,000.00.

After the parties meet with the allied professionals offline, the product of these offline sessions is that the foundation has now been laid for the attorneys to choreograph the goals and options stage of the case in half the time as would have previously been spent in those joint sessions. Therefore, by using the team model, all the professionals' talents are maximized at the lowest total hourly rate.

This obviously takes a high degree of trust in the allied professionals so that the attorney is comfortable turning the client over to the allied professional for the offline meetings. This approach may cause concern that the attorneys will lose billable hours by bringing in allied professionals to do some of the work the attorneys were doing before. However, the trade off is well worth it. The time spent by the attorneys with the clients is more efficient, and the time spent by the allied professional and the client is more effective. Therefore, the overall product and experience makes the collaborative team method the superior choice for most clients, **including** middle class clients. It must not be forgotten that a satisfied client is the lawyer's best referral base. This relationship with the various disciplines of allied professionals also creates a pool of allied professionals who will refer cases to you and your fellow collaborative colleagues.

Myth #2: Only clients in touch with their "softer side" will make good collaborative clients.

Fact #2: Even the Marlboro Man can be a good candidate for collaborative law.

Janice Green, who is also a speaker in this panel, says that lawyers commonly adjust their terminology with clients so that their legalese is custom-fitted to the clients' level of sophistication. That same thought is appropriate when dealing with the language of

collaborative law. As sexist as it may seem, women are more open to collaborative terminology than most men; therefore, to avoid discouraging some men from the collaborative process, a different approach may need to be taken.

For instance, if an attorney has a client who is the owner of a successful rock-crushing business, that client could benefit greatly from collaborative law. When the attorney begins talking to the client about a "paradigm shift," "comfort zone," or the "safe place," he will be thinking, "Where's the door?"

There are several different approaches to attract stereotypical males as collaborative clients:

1) Cost. A typical collaborative case is less expensive than a full-blown, litigated case. For instance, if custody is an issue in a litigated case, the client should be warned that it can cost $30,000.00-$40,000.00 per side before the case is concluded. In a collaborative case, while "custody" may be molded to fit both parties, it is almost inconceivable that, even with allied professionals, the cost would reach $30,000.00 for the entire case. Talk to their wallet.

2) Time. Unlike traditional litigation, in collaborative cases the clients are in complete control of the time it takes to conclude their case. Often, during the collaborative law process, one party can become anxious about the pace at which the case is progressing. When it is explained to them that all they have to do is to offer the other party something to which they will agree, then the case will move along. By making the client understand that they are in control of the speed of the process they become empowered (and quit complaining). In Medicine Hat, Alberta, all of the physicians' divorces in the past five years have been resolved collaboratively because collaborative meetings do not wreak havoc with their calendars such as court dates and depositions would.

3) Privacy. Unlike traditional litigation, in collaborative cases, there is never a gallery of people in the public courtroom overseeing the private details of the clients' family law case. Those clients for whom privacy matters, and that includes everyone who isn't vying for a spot on the Jerry Springer show, collaborative is the better option.

4) Control. "Nothing is going to happen in here that you do not agree to." (paraphrased from Chip Rose). The stereotypical male is scared to death of losing control. (He won't tell you that, but you can count on it) A stereotypical male does not think about, nor does he have, a "safe place." In his mind, he has a "protected place" (men build walls around their emotions and they protect those walls by whatever means available) In reality, these two "places" amount to the same thing, but the stereotypical male is unable to see it as a place where he goes to be safe because he is too busy walking the parameters of his wall in an effort to protect it. If collaborative jargon and/or metaphors are forced onto a stereotypical male, he is not going to "get it," but if he is introduced to the concept in terms that he can understand, not only will he

"get it," but he will also embrace it because he has the control not to let anything happen that he doesn't agree to.

Basically, the challenge for the collaborative lawyer is to go to the client on their level instead of expecting the client to come to them.. The attorney should speak to the client in a language comfortable to the client, which will enable the client to understand and accept the basic concept of collaborative law before being forced to adapt to the language of the "new paradigm."

Myth #3: Only "wimpy lawyers" practice collaborative law.

Fact #3: Collaborative lawyers are not wimpy lawyers.

Right or wrong, public perception has historically been that a successful lawyer is a "Rambo lawyer." Likewise, because the collaborative process uses a different skill set than the Rambo lawyer, the public and some lawyers have developed the misconception that NOT going to battle in the courtroom means that collaborative lawyers are "wimpy lawyers."

Contrary to this misconception, most collaborative lawyers still have an active litigation practice. While it is difficult to shift gears from litigator to collaborative lawyer, this remains the reality of the mainstream collaborative lawyer because only a few lawyers in Texas have been able to convert to a full-time collaborative practice. Even those lawyers who now have a full-time collaborative practice have probably all been litigators in the past.

Are there advantages to combining a collaborative and litigation practice? Richard Kelsey, a long-time Denton trial lawyer once said, "When you begin practicing law, you must go to the courthouse and try your cases because once the other side realizes that you are not afraid to do that you will receive better settlement offers." If you are a Rambo trial lawyer or at least you have done some litigation, you will be able to speak with greater authority to lawyers and clients when proposing that collaborative is the better way. You have been to the "other side" and therefore have a point of reference to compare litigation to collaborative law.

Unlike in many western movies in which the Clint Eastwood-type strength is the most glamorized conflict resolution, Chip Rose describes the ineffectiveness of meeting force with force to resolve conflict. By definition, in collaborative cases lawyers are required to open themselves up and trust the other side. That is not how lawyers were historically trained nor how they have historically practiced. The collaborative lawyer must be secure enough not to be threatened by walking out of the fortress of tradition and meeting the other side with a handshake rather than a subpoena. This is not a question of being a "wimp," but evolving into a lawyer with a new skill set.

If the message sent to the public is that only wimpy lawyers practice collaborative law, there will be thousands of potentially great collaborative lawyers who will never consider this process as an option. It is up to us to change this mythical image.

Myth #4: **Collaborative cases can only be done with lawyers and parties you can "trust."**

Fact #4: **Traditional litigation offers nothing more to guarantee the honesty of the lawyers and parties than the collaborative process offers.**

Whether in traditional litigation or collaborative, if one of the parties has an account in Wisconsin or Switzerland or the Caribbean, and wants to hide it, your odds of discovering it by either method are unlikely. There is nothing that discovery can offer that cannot be independently verified by a party armed with appropriate releases.

In the collaborative participation agreement each party contractually agrees that if any party intentionally fails to disclose any property then when that property is discovered it will be awarded 100% to the other party. There is nothing that traditional litigation can offer that is more effective at guaranteeing full disclosure than a collaboratively settled case backed up with a sworn inventory and appraisement and language in the decree that will punish a party for failing to disclose property. There is no need to rely on the judge to make that a term of the order as would be necessary in traditional litigation.

The informal exchange of discovery is a protocol in the collaborative process. Any information, or the ability to get that information, is going to be freely shared between parties and counsel on each side; any releases that are necessary to gather the information requested are provided by each side to the other. In the collaborative process, it is not necessary to rely on the other side "giving" it to you or your knowing exactly how to ask the "right" question in discovery in order to glean the information that is needed or being sought. One other advantage of this method is that the lawyers are protected in the collaborative law agreement by the parties reciprocally relinquishing their right to formal discovery in exchange for the informal method of collaborative law protocols.

Myth #5: **If the collaborative method does not get the case settled, the collaborative lawyers must be fired and litigation counsel must be hired in order to resolve the case.**

Fact #5: **Mediation can save a failing collaborative case from litigation.**

Ever since Collaborative Law came to Texas over six years ago, this myth has been the greatest impediment preventing lawyers and clients from opting into the collaborative method for resolving their family law disputes. After having accumulated some statistics that the likelihood of failure in the collaborative method is rare, some of this fear has been overcome. At some point the critical mass will be reached where this myth will statistically be proven false. In the meantime, the best way to overcome this myth is to explain that well over 90% of all traditionally litigated cases are settled prior to trial. In collaborative cases those statistics are

even much higher, but in those extremely rare collaborative cases that are not settled, mediation is the option that will almost surely resolve the case without need of hiring new counsel or transferring to traditional litigation. Coye Conner is a well-known family lawyer and mediator. He has mediated a number of those collaborative cases that hit "bumps" in the road to settlement; every collaborative case that he has mediated settled without the necessity of going to trial. While the reports of these successfully mediated collaborative cases remain anecdotal rather than statistical, the knowledge that there is another option to resolve their cases short of litigation will generally be sufficient encouragement for most clients to choose the collaborative process.

Myth #6: The collaborative process should not be used for cases with incapacitated clients.

Fact #6: With specialized collaborative training in the probate and family law area the collaborative process can be used in cases with incapacitated clients, and in fact offers options not available to the courts in traditional litigation.

This is the Medusa of myths, and therefore the collaborative process should only be used in cases involving incapacitated clients if the collaborative professionals have advanced training in probate, family law, and the collaborative process.

In a perfect world, the "for better or worse" marriage vow would mean staying together even if one of the spouses became incapacitated. However, in the real world when one party becomes incapacitated, the spouse who still has his or her capacity may choose to end the relationship for a host of reasons. Obviously, if you have a divorce ancillary to a guardianship, you may very well have one spouse who is ending the relationship primarily due to the stress put on them by the condition of the incapacitated spouse.

The authors have been involved in two different family law/guardianship cases that involved a mentally incapacitated clients; one case that was handled in the traditional litigation mode and the other that is being resolved using the collaborative method. The case that was litigated had over $100,000.00 in attorneys' fees before any temporary orders were even entered partially because of the acts of the incapacitated client; ultimately, the spouse that still had capacity gave up and filed for bankruptcy, paralyzing any efforts to resolve the case in a manner that would result in either spouse benefiting from the community estate. The resolution of this matter continues to be unresolved years into the divorce process and does not have a good prognosis for any positive resolution.

Contrary to the first scenario, consider a similar case that is being handled in the collaborative method. An allied professional could be brought in to advise both sides in the case as to the advantage of creating a special needs trust so that the incapacitated spouse will not be deprived of resources at the very time they are the most needy. Creating a "special needs trust" with the incapacitated spouse's portion of the community assets will enable that spouse to

qualify for Medicaid and have access to some funds for additional needs. Without such a trust, any of the community property awarded to the incapacitated spouse will either have to have a guardianship to manage or the spouse may be exploited by any number of con artists that they encounter.

In a collaborative setting, the spouse desiring the divorce can dissolve the marriage while creating a plan that will provide for the incapacitated spouse; such a resolution is unavailable within the limitations inherent in traditionally litigated cases, to say nothing of the fact that there may be no community estate remaining after a hotly litigated case. With the protective eye of the ad litem, the greatest amount of the community estate can be preserved, enabling the greatest proportion to be made available for the incapacitated spouse's future living expenses. Why will the non-incapacitated spouse be motivated to resolve the case in this fashion? First, because it will avoid the critical public cross-examination of the party wanting to end the relationship with an incapacitated spouse. Second, because it will preserve as much as possible of the community estate for both parties.

The less than obvious danger signs for an attorney in these type cases is when the incapacitated client is high functioning and only partially incapacitated. That client may have unreasonable expectations that he or she cannot be talked out of because of his or her incapacity. In some cases, the unreasonable position of the client only becomes apparent to the attorney months later when the client begins reporting such wild stories as "cameras and other surveillance devices being embedded in the walls of their home by [the opposing party]." To complicate matters, the stress of litigation exacerbates the already fragile mental condition of the incapacitated client. So why are these types of cases appropriate for collaborative law? Collaborative law is the only method in which all the parties and all of the people who care for the incapacitated person can sit together around a table and explore the best options for the incapacitated client.

CONCLUSION

We have picked but six of the many myths regarding collaborative law. In any new area of the law, one should guard against stereotypes and preconceived notions. Collaborative Law, by definition is anything that your client wants it to be and if anyone can say that all of their clients are the same, then that is the only person who doesn't have to be thinking outside of the box.