DISPELLING THE SEVEN DEADLY MYTHS REGARDING CIVIL COLLABORATIVE LAW

©By Sherrie R. Abney*

Family Collaborative Law and Civil Collaborative Law are two similar yet distinctly different forms of dispute resolution. Both dispute resolution procedures employ interest-based negotiation and participation agreements (contracts) containing provisions requiring the collaborative lawyers to withdraw if the parties do not settle, require voluntary disclosure of relevant information, and permit the parties to employ professionals able to provide neutral opinions and information regarding the issues in dispute. Despite these similarities, several differences must be taken into consideration when the collaborative process is used to resolve a civil dispute. The application of Collaborative Law to civil cases is a relatively new idea; consequently, many confused or inexperienced people have arrived at a number of incorrect conclusions regarding the civil collaborative process. The purpose of this article is to shed light on some of these misconceptions.

Myth Number 1: Interdisciplinary Teams are Mandatory

The first misconception applies to both family and civil collaborative disputes. This misconception is that an "interdisciplinary team" is required for all "true" collaborative cases. Interdisciplinary teams are used in many family collaborative cases and, in appropriate circumstances, these teams can be extremely beneficial for the parties and their children. There has been much discussion among the family collaborative community as to exactly who should be included in an interdisciplinary team. Generally, the team will have at least one mental health professional (MHP) and one financial person. If the parties have children, the team may also include a child specialist. The MHP may serve as a communications coach and/or assist in developing parenting plans for the children. The financial professional assists in devising plans to divide the parties' assets and help the parties determine how existing financial responsibilities will be handled.

There are many configurations for teams in various parts of the country. Some collaborative lawyers require a MHP for each party. If one of the parties requires therapy, a MHP may work with that person "off line" (outside the collaborative meetings). The MHPs who participate in the face-to-face collaborative meetings are neutrals, and they do not engage in therapy with any of the parties. The insistence of some attorneys that a full team be used in every case has resulted in many people believing the collaborative process is too expensive. Although the services of a full interdisciplinary team can provide added value to the parties and their children, some people simply may not be able to afford that luxury.

This author believes there are many other advantages to the collaborative process that should still be available to low- and middle-income clients. Collaborative Law began with only the attorneys and the parties working as a team, and there is no reason this model cannot continue to be used when necessary—or when the parties desire it, since the dispute is theirs and they are paying the bills. Those who cannot afford a Mercedes can still arrive at their destinations by way of a compact car. The ride may not be as smooth, but it is certainly better than walking. An "attorneys only" model of Collaborative Law will not have all of the bells and whistles of a Mercedes, but it sure beats navigating through litigation.

That all being said, there are times when addiction, mental illness and/or physical or verbal abuse will require the assistance of an MHP whether or not the parties want that type of help or can afford it. In those instances, every effort should be made to use professionals trained to deal with these difficult issues; otherwise, whether the dispute is family or civil, the case will have very little chance of a peaceful resolution.

In the civil collaborative process, the use of a team requires considerations that do not exist in the area of family disputes, and the team will likely not be composed of the same professionals found in family cases. A mediator or MHP will be helpful as a facilitator—especially when there are more than two parties. A room full of lawyers and their clients usually requires a neutral to keep everyone on track. A MHP may also be helpful by coaching one or more parties off line to assist them in communicating in a more productive manner during the collaborative sessions. If the case involves serious injury or death, one or more parties may require off line counseling to cope with anger or grief associated with the issues in the dispute. Financial professionals normally employed in family cases may or may not be qualified for a particular civil case. Financial areas of expertise in civil disputes may include business appraisals, forensic accounting, estimates of economic damages, and tax advice on settlement proceeds. Personal injury cases will employ experts regarding structured annuities and special needs trusts. Other roles for MHPs and financial professionals will emerge as the civil collaborative process grows, but there will be many civil cases that will not employ an MHP or financial professional since other types of expertise may be necessary to address the parties' issues.

Thus far, civil collaborative cases have included partnership dissolutions, several disputes in probate courts regarding

continued on page 9

DISPELLING THE SEVEN DEADLY MYTHS REGARDING CIVIL COLLABORATIVE LAW©
continued from page 8

guardianships, trusts, and the administration of estates, and other cases involving sexual harassment and retaliation. One of the cases involved the participation of in-house counsel, who acted as one of the collaborative lawyers, and this case also involved a contingent-fee arrangement with the plaintiff's collaborative lawyer. All of the above cases have settled successfully in the collaborative process.

Other cases have been settled using collaborative skills, but due to no written participation agreements or withdrawal provisions, the cases cannot be considered Collaborative Law cases. These cases may be referred to as cooperative cases.

Cooperative cases have included business disputes, debt collection, and a dispute involving a construction defect. The construction case included a representative from an insurance company. The insurance policy covered the damages caused by a foundation defect. However, the adjuster agreed to make a gratuitous payment above the amount covered under the policy to assist the parties in correcting the defect that caused the damage, if the parties agreed to settle and avoid litigation. The parties settled and the home owner was able to get his home's foundation repaired in a matter of months instead of years. Although this was not a collaborative case, it was done cooperatively, the parties applied the steps of the collaborative process, and they relied on interest-based negotiation. The cost to the insurer was far less than the cost of litigation.

These types of collaborative and cooperative cases require a very different type of expertise from team members than what is required in family disputes. A sexual harassment/retaliation case might use an MHP, economic damages expert, and/or opinions of a labor lawyer. The construction case required an engineer. A medical-error case may require a physician and/or an expert on patient safety. With the wide variety of possible needs for expertise in civil cases, it is unlikely that a particular model will emerge that lawyers will attempt to apply to all civil cases. The important point to remember is that all teams should be designed to meet the needs of the parties and their dispute rather than contrived according to a preconceived idea of what comprises a "team" without consideration for the parties or the specific issues—including the parties' ability to pay.

Myth Number 2: The Withdrawal Provision Coerces Clients into Settling

Although some attorneys view the withdrawal provision as a disadvantage, most lawyers who have actually experienced the collaborative process believe the withdrawal provision is an advantage. The withdrawal provision requires a one hundred per cent focus on settlement. Lawyers are not required to keep changing hats all during the process—working to settle part-time and preparing for litigation part-time. In addition, the parties also have a greater incentive to settle.

Some critics of the collaborative process have considered the withdrawal provision in the participation agreement a negative incentive. They believe parties may feel coerced to settle if they cannot afford to leave the process and hire litigation lawyers. Question: is there a difference in the situation of a party in the collaborative process described above and that of a party in litigation when the retainer is exhausted? There is generally a point in litigation when the client is told his/her choices are to settle or come up with another $10,000.00 (or more) to go to trial. In reality, clients are in the same situation in any dispute resolution process when they run out of money.

The participation agreement is also useful as a road map to guide the parties and their lawyers through the collaborative process. In addition, the lawyers may use this agreement to terminate the process unilaterally without giving any explanation should they believe one of the participants is not proceeding in good faith or if their clients determine they do not wish to continue in the collaborative process. If a decision to terminate is made, none of the parties may march directly to the courthouse. Written notice must be given to all participants, and the parties have thirty days to obtain litigation counsel under the terms of the participation agreement. Without a written participation agreement, none of these protections is guaranteed.

Myth Number 3: Contingent Fee Contracts Are Impossible

As mentioned above, there has already been at least one collaborative case in which the plaintiff's attorney had a contingent fee employment agreement with the client, so contingent fee cases are not impossible. This author has always been amazed that humans have gone to the moon, but few believe that two lawyers are capable of figuring out how to share a fee if a case does not settle in the collaborative process and goes to litigation.

There are two obvious choices for the lawyers: First, if a collaborative lawyer fails to settle a contingent fee case, the collaborative lawyer is treated the same as a litigation lawyer who loses at trial and gets nothing. Second, a collaborative lawyer may, with the permission of his/her client, have a fee-sharing arrangement with a litigation lawyer with whom the collaborative lawyer is not associated in the practice of law or otherwise financially connected. This arrangement requires the collaborative lawyer to keep track of the time s/he works on the case. If the case settles, the collaborative lawyer keeps the entire fee. If the case does not settle and goes to litigation, the litigation lawyer must keep time slips. If the case settles or the litigation lawyer wins at trial, the lawyers share the contingent fee according to the amount of work each has performed on the case. If the case is lost at trial, neither lawyer is compensated.

Many collaborative lawyers are currently engaged in limited representation, also known as "unbundled" representation. Their employment agreements provide that they will withdraw if the dispute goes to litigation; consequently, those lawyers will not represent their clients in an adversarial proceeding whether or not there is a withdrawal provision or a participation agreement. If these lawyers formed relationships with litigation lawyers, each could take advantage of the others' skills. The litigation lawyers could refer cases that have opportunity and reason to settle quickly, remain private, and preserve on-going relationships to the collaborative lawyers. If a

continued on page 10

DISPELLING THE SEVEN DEADLY MYTHS REGARDING CIVIL COLLABORATIVE LAW©
continued from page 9

case did not settle or the collaborative process was not appropriate for the dispute, the case would be referred back to the litigation lawyers. The clients of these attorneys would have the best of both worlds—saving time and money when possible and experienced representation in the courtroom when necessary.

Applying Collaborative Law to contingent fee cases involving accident and medical-error claims for amounts under $100,000 is an excellent way to serve many clients who are often ignored by litigation lawyers due to the cost of discovery and expensive experts. Voluntary discovery and jointly retained experts used in the collaborative process significantly reduce the amount of time and money required for representation in these matters. Many hospitals are realizing this benefit and have abandoned their former positions of "deny and defend" imposed on them by their insurers. They are now freely disclosing information and settling cases when errors may have been made by them or a medical provider in their facility.

The collaborative process is especially appropriate for medical-error and product-liability cases since the process is able to provide relief that a judge is not able to order. The courts cannot order apology, nor can they order medical providers, manufacturers, or service providers to change their procedures in a particular way to avoid future injuries to other people. These matters are sometimes more important to parties than a money judgment, and they often play a significant role in settling disputes.

Myth Number 4: Voluntary Disclosure is too Risky

There have been questions regarding the ability of dishonest parties to commit fraud due to the absence of formal discovery in the collaborative process. Question: what guarantees are there in litigation that a party is truthful? In litigation, there is no guarantee that any party will produce all of the requested documents or tell the truth when answering interrogatories or while testifying in court or depositions. There would appear to be a greater likelihood that fraud or lying could be detected in a series of face-to-face collaborative meetings with the other parties and their lawyers than in litigation, where the parties and lawyers have little direct contact. The face-to-face meetings provide opportunity for the parties and their lawyers to question anything that is unclear or that becomes a concern. Moreover, the participation agreement is a contract that may be the basis for a fraud or breach action if any party fails to proceed honestly.

Although formal discovery is not part of the collaborative process, it is possible to use sworn documents to provide a party who may have been treated dishonestly by the other side with a sense of security. In most family cases, the parties provide notarized inventories and appraisements of their community and separate property to ensure that both parties are truthfully disclosing all of their assets. There is no reason a party to a civil case could not guarantee his/her word or a disputed fact in an affidavit with the understanding that the affidavit would later be admissible in court if the information averred to was found to be false. Affidavits or other formal discovery methods are not recommended as a common tool for the collaborative process, but if a simple affidavit will satisfy one of the parties, it is better than having the case go to full-blown litigation.

Myth Number 5: Business Lawyers Might Be Required to Give up Their Clients

In family collaborative cases, the collaborative lawyers agree they will not represent a collaborative client in an adversarial proceeding in the future. An assumption has been made by some lawyers that a civil collaborative lawyer who has had a long-term relationship with a business client would be required to permanently give up that client to another lawyer if the collaborative case did not settle. This assumption is not true. The collaborative lawyer would not be able to represent that client in a litigated dispute concerning the same party and the same subject matter of the collaborative case, but that is the extent of any limitations on future representation. If there were other cases pending against the same party that participated in the collaborative process, and the issues in the other cases were not the ones addressed in the collaborative process, the collaborative lawyer could litigate on behalf of the client unless the parties had agreed otherwise during the prior collaborative case.

There is much to be learned regarding the use of the collaborative process by large corporations. Although in-house counsel may act as collaborative lawyers for their employers, this may not be advisable in some situations. Before in-house counsel participates in a case as a collaborative lawyer, consideration should be given to the amount of involvement counsel has had in the events leading up to the dispute. If counsel was substantially involved in these events, the involvement could affect in-house counsel's ability to step outside the situation and be objective in regard to the other parties. In this instance, in-house counsel might behave more as a pro se party would behave rather than as an advocate. It is certainly not impossible for in-house counsel to participate in the collaborative process, but in some situations, an outside collaborative lawyer might be the better choice for a number of reasons too numerous to discuss in this article.

Myth Number 6: Multi-party Disputes Cannot Be Resolved in Civil Collaborative Law

There have already been multi-party cases successfully completed in Texas, Massachusetts, and Australia, so the question whether it is possible to have multi-party cases in the collaborative process is moot.

There are several ways to handle a multi-party dispute. The method chosen should be determined by the parties in light of the dispute's facts. Assume there are four parties; three wish to use the collaborative process, but one does not. Since the process is voluntary, no one can be forced to participate. These parties have the following options: the nonparticipating party may agree to hold off filing suit or agree to abate a previ

continued on page 22

DISPELLING THE SEVEN DEADLY MYTHS REGARDING CIVIL COLLABORATIVE LAW©
continued from page 10

ously filed case until the other three parties have an opportunity to settle. Why would the non-participant do that? Depend ing on the circumstances, it might be to the nonparticipant's advantage to see what the others are able to accomplish before proceeding in litigation. If the nonparticipant refuses to wait, the other parties have the choice of proceeding with litigation alone or to proceed with litigation and the collaborative process simultaneously.

If all parties agree to use Collaborative Law to attempt resolution, the parties may incorporate the terms of their involvement in the participation agreement. For example: the parties may decide that if one of them should withdraw from the collaborative process, the withdrawing party will not initiate any adversarial proceeding for a specified period of time to allow the other parties an opportunity to arrive at an agreement.

Myth Number 7: Collaborative Law is a Threat to Litigation Lawyers and the Courts

There have always been—and will continue to be—people and disputes requiring third-party decision makers to resolve their differences. Many people, both attorneys and clients, are not suited to the requirements of the collaborative process, and the collaborative process is not suited to them. The process requires a great deal of hard work by both the lawyers and their clients. Many clients will not want that responsibility. Moreover, many lawyers and clients do not have the patience or inclination to sit through two-hour face-to-face meetings. It is easier for some people to just let the judge or jury decide their fate.

When mediation was introduced in the 1980s and 1990s, rumors ran rampant that litigation would be replaced with mediation. That certainly did not happen. Collaborative Law is filled with many unexplored possibilities, but it will never replace litigation. Nonetheless, Collaborative Law is an important tool for attorneys who desire to serve the needs of their clients, and clients should be informed regarding all dispute resolution processes available to them—including Collaborative Law. After all, it is the clients' dispute, and they should have a choice regarding the services they purchase.

**** Sherrie R. Abney** is a collaborative lawyer, mediator, arbitrator, and collaborative trainer. She has served as chair of the Dallas Bar Association's ADR and Collaborative Law Sections and is a founding director of the Texas Collaborative Law Council. Sherrie is member and past secretary of AAM, presenter and trainer for the International Academy of Collaborative Professionals, and a member of the Civil Committee of the Dispute Resolution Section of the ABA. She recently began a three-year term on the ADR Section's Council.*

Chair's Corner
continued from front page

Our Council will approach TexasBarCLE to allow members of our Section to speak on ADR topics during the programs of the major Sections such as Litigation, Family, and Appellate. To that end, we need your help with any personal contacts you may have in introducing us to the leaders of these Sections or the course coordinators of upcoming programs. We will persist in making the broader legal community aware of the trends in ADR and correcting any misconceptions. As an example of a misconception, a speaker at a recent family law conference said there is no code of ethics for mediators!

The Council is assembling an ADR survey to be presented to state and federal judges, seeking their views on the acceptance and effectiveness of mediation and arbitration in their courtrooms.

Finally, after months of work, your CLE committee has assembled an outstanding program in Houston for Friday, January 30, 2009. It promises to be outstanding. In a first-of-its-kind arrangement, our Section, TexasBarCLE, and the American Arbitration Association are collaborating to host Randy Lowry and Peter Robinson, both associated with the Straus School of Dispute Resolution at Pepperdine University. These nationally preeminent practitioners will conduct an intensive one-day interactive course in cutting-edge dispute resolution techniques using non-traditional parties and fact situations. This program is designed to energize experienced practitioners.

I particularly want to thank Talmage Boston, Director of the State Bar and liaison to our Section, for his attendance at the recent Council meeting and his constructive suggestions for heightening our visibility and effectiveness.

As a reminder, our next Council quarterly meetings are: January 29, 2009 (Houston), April 18, 2009 (San Antonio), and June 25 or 26, 2009 (Dallas).

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

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