

Psychology and Family Law

The Misconception That Collaborative Attorneys Fail to Protect Their Clients



By Mark Baer, Esq.

I recently attended a conference for collaborative law practitioners, including many psychologists as well as lawyers in attendance. During a table discussion, a psychologist commented that, while Collaborative Divorce

and other forms of consensual dispute resolution seem like wise and valuable options to the adversarial process of litigated divorce, she herself refers patients to hard core litigators because she wants to “make sure that their rights are protected.”

I was troubled by this perspective--especially since fellow collaborative law practitioners had made similar comments to me at another meeting. In essence, psychologists (and others) fear that collaborative lawyers are too conciliatory, and will not well protect an individual in a divorce proceeding.

In reaching this conclusion, people are making the erroneous assumption that collaborative attorneys are somehow “weak,” “afraid to litigate,” or to otherwise advocate strongly for their clients. I certainly cannot speak on behalf of all collaborative attorneys. However, I know a number of very aggressive litigators who happen to also practice as collaborative law practitioners. They are savvy and capable of aggressive tactics, but they also acknowledge the crucial value of collaborative techniques in family law. Moreover, I recently had a consultation with someone who was referred to me by an attorney I litigated against several years ago, and who told him that I had been a very formidable opponent.

Here is an example of the difference in the way in which a collaboratively trained attorney, and a litigator never trained in mediation, might handle a situation. In a case I recently handled, the divorcing couple had a son (age 10) and a daughter (age 8). The family residence was located in a city which is reputed for having an excellent public school system. The parties agreed that the wife would have primary physical custody of the children, and

she wanted to receive the family residence in the divorce. My client, the husband, was insistent that the house be sold, on the grounds that it was too big for just his wife and their two children.

When I asked him if the children attended public or private school, he told me that they had moved to that city specifically because of the school district, so that the children could attend the public school. I then mentioned that if he were successful in forcing the sale of the house, it was possible that his wife would move to a different city with a less well-regarded school system. Would he want the children to attend public or private school if she moved to a city with a less well-regarded school district? He replied that he preferred the children to continue attending school in the same school district, or a private school in an inferior district. I then suggested that he calculate what it would cost his wife to rent a three bedroom house or apartment in that city, as well as private school costs, and compare it to the after-tax cost of her continuing to live in the family residence.

A couple of weeks later, my client modified his position and advised me that if his wife could afford to keep the house in the divorce, she could have it. Of course, he will consequently receive something of equal value in the divorce. However, I realize that I never argued over this issue with his wife’s attorney, or through the court system, saving countless dollars in legal fees, as well as the time and acrimony that would have been involved. Does the manner in which I handled this situation indicate that I am “weak,” “afraid to litigate,” or “unable to protect my client?” On the contrary, I think that the manner in which I handled this situation protected my client far more than if I followed his lead and argued over whether or not the house get sold.

I agree that litigation is necessary on occasion. However, people are very mistaken when they believe that the only attorneys able to adequately protect them are “pit bull attorneys.” Moreover, this widespread belief has contributed to the breakdown of families, negatively impacted the parties and their children, and has adversely affected society as a whole.

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