Chapter 10

Expanding the Collaborative Process Beyond Family Law

Lawrence R. Maxwell, Jr. and Harry L. Munsinger

"It is not good enough for things to be planned—they still have to be done, for the intention to become a reality, energy has to be launched into operation."

Pogo Possum[1]

Creative lawyers in Texas and across the country are applying the collaborative process to civil disputes beyond family law. After seeing the benefits collaborative law brings to family law matters, these pioneer lawyers are adapting collaborative and cooperative procedures to disputes involving adverse medical events, estates, trusts, employment, business, construction, elder law, and guardianships.

This chapter explores how the collaborative process can be applied to these areas, describes actual disputes in which it's been done, explains the benefits of civil collaborative law outside the family law realm, reviews the history of the collaborative process in family and nonfamily civil disputes, and explains why Texas needs a broad uniform collaborative law statute to protect the process in nonfamily civil cases and make it more efficient and effective. In this chapter, the term *civil collaborative law* refers to cases other than family law ones.

Family law cases in Texas have been settled successfully for over a decade using the collaborative process. Because the parties involved in collaborative family law cases share similarities with the parties in other civil areas, the collaborative process should be effective in resolving these disputes as well, and this is proving to be true. For example, consider the similar emotional, familial, and financial issues in estate disputes and divorces. The settlement rate for Texas collaborative divorces is around 96 percent, and we should expect similar success in other civil collaborative matters.

Currently, there is no collaborative statute in Texas that applies to civil disputes outside the family arena, so extending collaborative practice beyond family law is not for the fainthearted practitioner. But innovative collaborative lawyers are adapting

1. Pogo Possum was the central character in a long-running American comic strip that was created by cartoonist Walter Crawford Kelly, Jr., a/k/a Walt Kelly, in 1941. Pogo was an amiable, humble, philosophical, personable everyman possum.

collaborative procedures to these new areas by agreement. However, practitioners should proceed with caution.

Differences Between Family and Other Civil Collaborative Cases

Collaborative practitioners in civil disputes face different challenges compared with collaborative family law practice, but there are solutions. These challenges include multiparty disputes, in-house counsel, regular outside counsel, inability to stay court intervention, and contingent fee cases, all of which are discussed below.

Multiparty Disputes. Family law disputes generally involve two parties, but collaborative lawyers working in other areas often deal with multiple parties. For example, when a construction project goes bad, all the stakeholders, including the owner, subcontractors, and the general contractor, want the problem solved quickly so the project can be completed on time and within budget. However, when there are several parties involved in the dispute, finding agreement to settle the issues collaboratively can become complicated.

There are several ways to handle a multiparty dispute in the collaborative process. The method selected will depend on the parties and facts. For example, assume four parties are involved. Three parties wish to use the collaborative process, and one does not. The nonparticipating party may be persuaded to delay filing suit or agree to abate a pending suit until the remaining parties, who want to use the collaborative process, have settled their issues or terminate their negotiations and move to litigation. Why would the nonparticipant agree to wait? Generally, it will be to the nonparticipant's advantage to see what the collaborative parties accomplish before proceeding with litigation.

If the nonparticipant refuses to wait, the other parties can either abandon the collaborative process and proceed with litigation or proceed simultaneously with litigation and the collaborative process by drafting a joint litigation agreement that allows them to share information and discuss settlement of their dispute among themselves while litigating with the outside party.

If all parties agree to use the collaborative process to resolve a dispute, they need to define the rules of the road through a collaborative participation agreement. For example, the parties may decide that if one of them should withdraw from the collaborative process, the withdrawing party may not initiate any adversarial proceeding for a specified interval so the other parties have an opportunity to settle the case prior to going to court.

In-House Counsel and Regular Outside Counsel. Many businesses, including insurance companies, have in-house counsel. They may also regularly retain outside counsel to provide ongoing legal services. Because of their ongoing relationships with the business, these attorneys would be adversely impacted by the requirement that the collaborative attorneys must withdraw if the process terminates. Insurance companies

and businesses also have in-house counsel on staff to advise management about litigation issues. In addition, these organizations routinely retain outside counsel to provide ongoing legal services. The withdrawal and disqualification provision in a standard collaborative participation agreement would prohibit in-house counsel from advising the employer in an adversarial proceeding if the dispute was not resolved through the collaborative process. Moreover, regular outside counsel would be reluctant to enter a collaborative participation agreement because they could not continue representation if there were no settlement and the matter went to litigation or arbitration.

This is a serious dilemma for any organization that wants to use the collaborative process. A creative Australian collaborative lawyer developed a solution for this problem. He approached a large Sydney law firm that wanted to use the collaborative process for some of its clients in order to prevent damage to ongoing business relationships. However, the firm wanted to continue to represent those clients if the case did not settle collaboratively. The collaborative attorney proposed that he represent clients referred to him by the firm for collaborative law settlement only. He also agreed not to represent the firm's clients in any other cases. The attorneys all agreed that if the cases were not settled in the collaborative process, the firm could step in and resume representation.

Another solution is to delete the disqualification provision from the participation agreement. This modified collaborative process has been described as "cooperative law" or "collaborative law light." However, this solution dilutes the attorney's incentive to settle the case, and, for that reason, many collaborative lawyers oppose it.

A third solution may be found in the original 2009 Uniform Collaborative Law Act (UCLA), which contains exceptions to the disqualification provision for lawyers representing low-income parties on a pro bono basis and lawyers representing governmental entities. These exceptions could be extended to in-house counsel and lawyers in a regularly retained firm. The Act provides that other lawyers in the pro bono collaborative lawyer's law firm or the governmental agency can continue representation if the participation agreement authorizes the representation, and the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter. In addition, procedures must be established within the law firm or governmental agency reasonably calculated to isolate the collaborative lawyer from such participation. The Texas UCLA drafting committee is considering a similar provision in the Texas UCLA regarding in-house and outside counsel.

A Court Might Not Honor the Stay Provision Without Statutory Authority. Another difference between practicing collaborative family law under the Texas family law statute and using collaborative procedures to settle other civil disputes is that courts might not honor the stay of court intervention provision without statutory authority.

The Texas Collaborative Family Law Act (TCFLA) creates a stay of all proceedings before a tribunal once the parties give notice they have signed a participation agreement. Amending the Civil Practice & Remedies Code by adding the UCLA, which contains a similar provision, will solve this potential problem for nonfamily

civil collaborative lawyers. In the absence of the UCLA, parties can file agreed motions to stay proceedings. Unless extraordinary circumstances are present, Texas courts will generally honor the stay provision in a participation agreement or an agreed motion without a statute. District courts in some Texas counties have established a procedure to "administratively dismiss" cases in the collaborative process, in a way similar to the stay granted when the court is notified that a party has filed bankruptcy. However, without the protection of a statutory stay, there is no guarantee a court will stay a civil case simply because the parties agree to use the collaborative process. This is a strong argument for passing the UCLA so parties can be certain courts will honor a stay.

Contingent Fees in the Collaborative Process. Another difference between family law and other civil cases is the contingent fee contract, which cannot be used in family law disputes. Contingent fee contracts are used extensively in civil litigation but never in family law cases. There is no reason collaborative nonfamily civil disputes cannot be handled under a contingent fee agreement. Because there is a chance the dispute would not settle and litigation counsel would be engaged, the collaborative lawyers need to have a clear fee sharing arrangement with the litigation lawyers in advance or they might not get paid. Of course, the clients must be informed of and consent to this arrangement.

The collaborative process is especially appropriate for cases involving adverse medical events and product liability cases, which are typically handled under contingent fee contracts. Voluntary discovery and jointly retained experts used in the collaborative process could significantly reduce the time and money required for these matters by eliminating the battle of the experts. Many hospitals have focused on these savings and abandoned the "deny and defend" positions imposed by their insurers. These progressive hospitals now freely disclose information and settle cases when errors may have been made using a procedure similar to the collaborative process.

Successful Civil Collaborative Cases

Real-life case stories are the best way to demonstrate how collaborative or cooperative processes can be applied to civil cases. Prominent attorneys around the country who are using collaborative and cooperatives processes in their civil practice described their cases for this chapter. We thank our colleagues for sharing their comments and case stories, which include adverse medical events; estate, probate, and trusts matters; employment disputes; business and construction disputes; and elder law and guardianship matters.

Adverse Medical Events. Kathleen Clark is a solo practitioner in the San Francisco area. She relates the story of a difficult medical malpractice case. While not technically a collaborative case, Clark's example shows the benefits of taking a cooperative, transparent approach to settlement in the collaborative spirit.

"In 2009, actor James Woods and his family settled an acrimonious medical malpractice case arising out of the death of his brother, Michael, in the emergency room at Kent Hospital, Warwick, R.I. The decision to proceed to trial was made by Kent's attorneys, based on an assessment that causation between the error and the outcome was not clear.

"As the Woods case unfolded and headed toward trial, Sandy Coletta, CEO of the hospital, observed a shift of focus among health care providers at Kent from concentrating on healing patients to defending their hospital against malpractice allegations. The health care providers stopped listening, lost their understanding and empathy, and bad-mouthed the patient and his family. Because of these destructive effects on the health care providers, the Woods family, and the community, Coletta decided to take a different approach to resolving the bitter, counterproductive situation.

"Coletta, a nonlawyer in the equation, later said, quite simply, 'It wasn't about causation; it was about how we did something wrong.' The case settled in the third week of trial when Coletta, Woods, Woods's mother, and their attorneys met over dinner to discuss the case. The dinner meeting took place at the insistence of Coletta, even while Kent Hospital's attorneys, locked into the prevailing legal culture, advised Coletta that '[i]t [sitting down with the other side in the middle of trial] just isn't done.' Coletta ignored Kent's attorneys and met with the Woods family. She acknowledged the medical error and apologized to Woods and his mother. Coletta and Woods agreed to a confidential financial settlement and to establish the Michael J. Woods Center to create new approaches to hospital and emergency room care. Woods said at the time, 'This remarkable action of accountability has turned a bitter event into a landmark opportunity for hope.'

Woods later emphasized that ideas from collaborative practice, establishment of improved protections for future patients, and compensation led to settlement. Additionally, the Woods family established a working relationship with Kent for helping people who, according to Woods, are 'bleeding to death emotionally' in the face of 'unimaginable tragedy.'"

Estate, Probate, and Trust Matters. Gary Ashmore is a partner and managing attorney in the Ashmore Law Firm, PC, in Dallas, Texas. He describes a difficult situation involving four siblings who began fighting after the deaths of their parents. Gary believes many estate and probate disputes are good candidates for the collaborative process because families who choose collaborative solutions will save time and money and preserve their relationships.

"Dad and Mom were married for forty-five years and had four children, Greg, Peter, Marcia, and Jan.[2] Five years ago, Dad died of cancer. Mom died last year. Peter and Marcia live in Dallas near their parents' home. They were there for their Mom, especially during the year before Dad passed away. Jan lives in Houston, and Greg

2. These names are fictional.

lives in Lubbock. Greg and Jan were not around much before Dad died, and, even after Dad's death, they didn't visit Mom often. The four children began to grow apart after the deaths of their parents. Resentment started because Peter and Marcia felt Greg and Jan were never around to help their parents.

"The parents' wills left their estates to the children equally and selected Greg as their executor. Greg didn't keep his siblings informed about the status of the estate. The only sibling he shared any information with was Jan. Understandably, Peter and Marcia became distrustful of Greg. In addition, after the probate attorney sent Peter and Marcia the inventory and appraisement (list of assets and liabilities and their values), they thought there were some discrepancies and that not all the assets were listed.

"Peter and Marcia contacted me to determine their rights and find out what could be filed to either remove Greg as independent executor or force distribution. I explained the procedures if they chose to follow the litigation route. Peter and Marcia understood that they had a number of options and each one required an attorney, would take time, and would be costly. If the matter went to litigation, attorney's fees could quickly grow into the tens of thousands of dollars. Peter and Marcia made it clear that they had strong feelings about the situation, but they wanted to heal their relationships with their brother and sister, and they didn't see how that would be possible in litigation.

"It seemed that most of the issues were related to communication. We discussed the possibility of presuit mediation, a settlement conference, and the collaborative process. Peter and Marcia felt the issues could best be resolved through the collaborative process. Peter and Marcia were attracted to the savings in time and money, and they believed their brother and sister would be willing to resolve the conflict in a collaborative way. They all signed a participation agreement, and an expert appraiser was engaged. Under the collaborative process, all issues were resolved within three months, and Greg remained as independent executor of the estate."

William M. Andrews has been in private practice in northern California for over thirty-five years with an emphasis on estate, probate, and trust matters and he is advancing the use of collaborative practice in that arena. He shares his comments and observations based on his experience in a trust administration case.

"We have learned that the collaborative model used must be flexible and adjusted for the particular case and parties in the probate arena. Although sharing the underlying emotional conflicts of family law cases, probate cases are different from their family law brethren. These differences include multiple parties, case specifics, and broad-ranging legal issues and factual contexts, interaction with third-party creditors and taxing authorities, and differing time deadlines and court procedures.

"However, collaborative professionals applying the key collaborative practice components are providing promising new alternatives to traditional probate litigation. For example, in one collaborative trust case, the surviving spouse and children were embroiled in what promised to be a nasty, emotional litigation. My client and her children faced a probate court continuation of decedent's divorce litigation and complex

trust disputes. There were many legal and factual issues about ownership of assets held in a family trust and a family business that had to be sold. They faced the prospect of very expensive and lengthy probate and related trust proceedings. The traditional legal and mediation processes were fully explained to the clients, who needed to know what lay ahead. We were able to also explain and offer a collaborative process as an alternative.

"The clients were receptive to the collaborative process, which offered a quicker and less costly resolution of their disputes. All the clients shared the classic public view of probate as a futile, never-ending legal process benefitting only lawyers and consuming fortunes—their own real-life version of *Bleak House* by Charles Dickens. The prospect of having the whole ordeal over faster, without the staggering expense and delays of estate and trust litigation, was a key advantage of the collaborative approach. They signed a collaborative practice agreement, and we began.

"Legal counsel were amazed at the faster pace of the estate and trust administrations. Probate pleadings were filed pursuant to agreement, and court orders were obtained quickly by stipulation. The synergy of working together in an interest-based collaborative process achieved what the clients held as their top priorities—speed and control of the process. Difficult issues about valuation, management, and division of estate assets were presented to the parties informally and quickly, rather than in probate hearings. Instead of traditional discovery, information was shared among all parties as received. At joint collaborative sessions, shared neutral appraisers and experts explained valuations, complex tax decisions, and alternatives to the parties.

"The parties, rather than a judge, made decisions about family matters as they evolved. Individual delays and emotional breakdowns were handled carefully and respectfully, without being exacerbated by inflammatory pleadings, attorney's letters, or verbal hyperbole. Despite the emotionality of the clients and the complex legal matters involved, counsel and the parties managed to complete the probate and related trust administration within nineteen months with no estate tax payable in a substantial and potentially taxable estate. The family business was managed and then sold. There were no appeals of the estate, and trust distributions to the parties happened according to agreement. Fees were high—but nowhere near the level of traditional litigation fees and expenses—with fee sharing and tax deductibility issues part of the overall estate and trust settlement."

Employment Disputes. Michael A. Zeytoonian, founder and director of the Dispute Resolution Counsel, LLC in Wellesley Hills, Massachusetts, believes the advantages of collaborative law make it a natural option for many kinds of employment and workplace disputes. The speed of the process coupled with lower costs, streamlined discovery, confidentiality, and the ability to create solutions tailored to the needs and interests of the parties are particularly useful in employment matters.

"In discrimination and sexual harassment matters, the employee is often still working for the firm, and there is a need to preserve and improve relationships while constructively and creatively addressing the problem. Protracted litigation damages or destroys employment relationships, and a court or an arbitrator can only offer money

damages and injunctive relief. Collaborative law offers options for resolution that can preserve and strengthen employer-employee relationships and improve the workplace environment. By incorporating preventive training, counseling, and diversity training and reassigning employees, the collaborative process can transform a toxic workplace into one where employees feel safe and take pride in their jobs. A collaborative solution can satisfy the needs of both employee and employer.

"Protracted formal discovery in workplace disputes also creates problems for employers, especially in the age of electronic discovery. The cost of a forensics information technology person, the issues that arise in trying to separate private from work email, and the drain on employee time and energy responding to discovery requests can be devastating to small businesses and nonprofit organizations. By contrast, collaborative law's streamlined discovery, in which parties agree to voluntarily and transparently exchange all relevant information, avoids the pitfalls and collateral damage of traditional discovery. The confidentiality and creativity of collaborative law works well in employment situations where matters need to be resolved quickly and privately.

"For example, in a sexual discrimination case that involved a prominent and highly visible nonprofit organization, the employee/victim of the harassment welcomed the confidentiality, which also prevented any adverse impact to the organization's reputation in the community and its ability to do effective fund-raising. The creative elements of collaborative law allowed the employee to work from home while the matter was being negotiated. The settlement contained needed disciplinary actions tailored to the unique circumstances of the case."

Business and Construction Disputes. Douglas C. Reynolds, founder of The New Law Center LLC in Cambridge, Massachusetts, kept asking himself what makes collaborative law work? Several years ago, Doug discovered that respect is not an essential element in the successful resolution of a case. Rather, he discovered that settlement is motivated by the parties' and professionals' commitment to resolve their dispute voluntarily, instead of appealing to a court or arbitrator. This example shows the benefits of cooperation and transparency when the alternative was mutually assured destruction.

"I represented a sub-subcontractor on a public construction project. He had not been paid. The client tried direct negotiation, but the subcontractor had not been paid either and was asserting back charges to reduce my client's claim. We filed a claim notice with the general contractor, which halted any further payments from the general contractor to the subcontractor. The general contractor's position was simple: the subcontractor and sub-subcontractor had to reach a settlement and present it to the general contractor for payment, with full releases. Or, everyone could proceed in court, but that could put the subcontractors out of business.

"Under these conditions, litigation was not an option, so the subcontractors were committed to finding an agreement. However, they neither trusted nor respected each other, and they made that very clear in the first session. For hours we went over contracts, letters, invoices, work records, receipts, and the verbal exchanges that had

taken place during the course of the project. Each party asked for and received records and information that would otherwise have been mired in discovery proceedings. Several times, one party or the other walked out of the session, but they always returned because the options were to agree or go down in flames. The relative bargaining power was roughly equal, and the parties recognized their mutual interdependence. They could settle and get some needs met, or both could fail. We reached an agreement that was good for both parties. However, only the professionals shook hands at the end—the parties still hated each other."

Sherrie Abney, an experienced collaborative lawyer in Carrollton, Texas, used her skills to find a quick and inexpensive resolution of a construction dispute about to go to litigation. While this case also wasn't technically collaborative, it was similar because the parties were cooperative, held joint meetings, and a neutral expert was hired.

"A general contractor came to me about a problem with the foundation of a house he built. The homeowner had hired a lawyer who was going to file suit. I contacted the homeowner's lawyer and told him the contractor recognized there was a problem and wanted to resolve it quickly and amicably. The homeowner's lawyer said fine, but he was on his way to file suit. I asked him if he would like to get his client's house repaired immediately or wait two years for trial. The homeowner's lawyer agreed to get an expert opinion and attend one meeting before filing suit.

"The parties had a common goal—to get the foundation repaired. The engineer's report showed that the homeowner's landscaping caused water to drain toward the foundation and had exacerbated the original foundation problem, so they were both at risk. The general contractor was concerned about his reputation because he planned to build more custom homes in the area. The subcontractor was hesitant to negotiate because he feared sole liability. The insurance adjuster was interested in getting the case settled to avoid an expensive trial.

"At the first meeting, the homeowner agreed to change the landscaping so water would drain away from the foundation. The general contractor and the subcontractor agreed they would each contribute to the repairs. The insurance adjuster for the subcontractor agreed to contribute $25,000 *above the company's liability under their policy if the matter was settled without suit*. This money would be used to place piers under the house and level the foundation—a task neither the general contractor nor subcontractor was willing to perform. The adjuster offered the excess funds to avoid litigation costs. The matter was settled, repairs began a week after the meeting, and were completed prior to the time discovery would have been served if a lawsuit had been filed."

Elder Law and Guardianship Matters. Jamie Clausen is an attorney in Seattle, Washington who works in the area of elder law.

"Elder law addresses intensely personal rights and issues where family members often cannot agree on what help is needed. Disputes are painful and may be damaging to long-term family relationships. Family members may disagree over the use of powers of attorney, advanced health care directives, or long-term trusts. Issues may arise

regarding guardianship, capacity, and care. For example, does the parent have the ability to drive or live independently? Also, does she or he need protection from abuse or financial exploitation? A collaborative approach to these issues can improve communication, facilitate open sharing of information, generate creative and durable solutions, reduce cost, and preserve family harmony, privacy, and dignity.

"A recent case illustrates how difficult issues can successfully be resolved using the collaborative process in an elder law situation. Friends of an incapacitated person received reports that the guardian was late with payments and bouncing checks. She was new, and the prior guardian had not had these problems, so the friends suspected financial exploitation. They contacted us and wanted to make reports to Adult Protective Services and the Certified Professional Guardian Board and have the guardian removed. We explained that the investigations by the agencies would be confidential and slow, and the information the friends had was not sufficient to remove the guardian.

"We suggested they approach the guardian to see if she would agree to a collaborative solution. They were skeptical because she had been unwilling to give information before. We approached the guardian's attorney with a proposed participation agreement. He had never done a collaborative law case, but was willing to try the process. With the agreement in place to protect confidentiality, the guardian was willing to open up about what was going on. It turned out that the prior guardian had not been collecting her fees because there was not enough income. However, she had demanded payment in full at the transition. The new guardian was left with court orders to pay bills and no money to pay them. She had not wanted to share the situation with the friends because she didn't want to acknowledge she was intentionally paying court-ordered bills late and writing checks she knew were not supported by sufficient funds.

"After understanding the situation and seeing records supporting the explanation, we reduced costs to get things on a solid financial footing. If the incapacitated person's assets had been compromised by litigation, that outcome might have become impossible. It is likely the guardian would have been removed or would have resigned leaving the incapacitated person with neither a guardian nor resources for care."

These true stories from colleagues around the country show that the collaborative process is being used successfully to resolve disputes in many areas of civil law. The collaborative process could be used to manage conflict and resolve disputes in any area in which maintaining relationships is important, such as landlord-tenant, real estate buyers and sellers, vendors and customers, shareholder complaints, and disputes within businesses partnerships. The range of applications for collaborative law is vast.

A special advantage of the collaborative process is providing unusual relief a judge can't order. For example, a court can't order a party to make an apology, nor can it order medical providers, manufacturers, or service providers to change their procedures to avoid future injuries. These remedies are sometimes more important than a money judgment, and they often play a significant role in settling collaborative dis-

putes because agreements can be tailored to meet the unique goals and interests of the parties.

Is Civil Collaborative Law Ethical?

The ethical obligations of lawyers practicing civil collaborative law are similar to the obligations of collaborative family lawyers. The American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-477 in 2007, which squarely supports collaborative law provided that the client has been informed about the benefits and risks of participating in the process and has given his or her informed consent. The ABA opinion stated that collaborative law practice is a permissible form of limited legal representation. This opinion can be found at **www.collaborativelaw.us/articles/Ethics_Opinion_ABA.pdf**.

Before and after the ABA opinion, ethics committees in several states published opinions addressing various issues relating to collaborative practice, including limited scope representation, unbundled legal services, zealous representation, confidentiality of information and duty to disclose, conflict of interest, and mandatory withdrawal. With the one exception of Colorado (2007),[3] ethics opinions from the states of Minnesota (1997), North Carolina (2002), Pennsylvania (2004), Maryland (2004), Kentucky (2005), New Jersey (2005), Washington (2007), Missouri (2008), South Carolina (2010), Alaska (2011), and North Dakota (2012) support the collaborative process.

Although the ABA opinion is not binding, it continues to be persuasive among state ethics committees. Practitioners can be confident collaborative law is an ethical process they can recommend to appropriate clients.

History of the Collaborative Process in Family and Civil Disputes

Texas, a pioneer in collaborative law, in 2001 was the first state to codify the collaborative process for family law. In 2007, with the collaborative process being used widely in family law, the Uniform Law Commission identified a need for uniformity in the practice of collaborative law and recommended the development of a uniform collaborative law act. The Commission approved the Uniform Collaborative Law Act (UCLA) at its Annual Meeting in 2009 in Santa Fe, New Mexico, by unanimous vote. The purpose of the UCLA is to support the development and growth of collaborative law by making it a more uniform and accessible dispute resolution process.

3. The ABA Ethics Opinion issued in August 2007 disagrees with the Colorado opinion and squarely supports lawyers' participation in the collaborative law process as an ethical form of limited-scope representation.

The UCLA supports the long-standing policy of the state of Texas to encourage peaceful resolution of disputes and early settlement of pending litigation. In 2011, Texas enacted the Collaborative Family Law Act (CFLA) as chapter 15 of the Texas Family Code under the new title 1-A, Collaborative Family Law, which applies only to matters arising under titles 1 or 5 (marriage relationship and parent-child relationship) of the Code. The 2011 CFLA is a modified version of the original 2009 UCLA.

Interestingly, current objections to the collaborative process mirror earlier objections to mediation when it was first introduced in Texas in the late 1980s. For example, critics said mediation is unethical, it deprives clients of their day in court, and it can't possibly work because the sanctions of a court are not behind it. In spite of these criticisms, over the past twenty-five years mediation has benefitted our civil justice system and our clients. Today, mediation is a process of choice in the ADR toolbox.

We believe the collaborative process will enjoy similar status in the near future if the UCLA is passed in Texas and collaborative law is applied to a broad range of civil disputes. Passage of the UCLA in Texas will guarantee confidentiality, provide a broad evidentiary privilege, make the collaborative process more uniform and accessible, assure that the process is voluntary, provide structure, and guarantee that prospective parties are informed of the risks and benefits of the collaborative process. The UCLA will provide for a stay of court proceedings, allow the securing of emergency orders, provide automatic tolling of statutes of limitations, clearly establish when the collaborative process begins and ends, assure enforceability of collaborative settlement agreements, and eliminate choice-of-law issues.

Without the UCLA, confidentiality in civil collaborative cases is provided solely by the participation agreement signed by the parties or alternative dispute resolution using a mediator.

The UCLA, if passed in Texas, would provide protection for negotiations in the collaborative process with specific confidentiality provisions and broad statutory privileges. Virtually all communications within the collaborative process would be confidential and privileged, and any settlement agreement, properly written and executed, would be enforceable; a party would be entitled to judgment on the settlement agreement.

Many dedicated lawyers and other professionals around the country believe the growth and development of the collaborative process has significant benefits for the legal profession and our clients, and that belief gives us assurance that the future of collaborative law is bright.

Several years ago, Chief Justice Warren E. Burger, in a not-so-subtle criticism of our litigation system, reminded us that lawyers need to return to their role as peacemakers. "Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of

resolving conflicting claims is a mistake that must be corrected."[4] Extending collaborative solutions beyond family cases to civil cases is entirely consistent with Chief Justice Burger's sentiments.

4. Chief Justice Warren E. Burger, "The State of Justice," American Bar Association Journal, April 1984, 66. Burger was instrumental in founding the Supreme Court Historical Society and was its first president. Burger is often cited as one of the foundational proponents of Alternative Dispute Resolution (ADR), particularly in its ability to ameliorate an overloaded justice system.