COLLABORATIVE LAW:

AN IDEA WHOSE TIME HAS COME

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by

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This Chapter[1] details a brief history of the development of the collaborative dispute resolution process (collaborative law). It discusses statutory validation of the process. Most importantly for practitioners, we cover ethical considerations in collaborative practice, explain how the collaborative process works, and give examples of using collaborative skills. We conclude with predictions on the future of the collaborative dispute resolution process.

I. The Birth and Development of Collaborative Law

In the late 1980s, a Minnesota lawyer was approaching burnout, after practicing traditional civil law for eight years and family law for 17 years. Stuart "Stu" Webb disliked the adversarial nature of his practice. He was finding it harder and harder to tolerate the schizophrenic nature of trial work, and the incivility that seemed to be increasing. Webb didn't like going to work in the morning. He was going to ditch his law practice unless he could come up with another way to continue his family practice.

Webb started thinking, and he came up with a model that would allow him to do the parts of his practice he liked, and eliminate the rest. He worked with a lawyer he trusted in face-to-face meetings to achieve settlement for clients. But the model fell apart. The two lawyers had not thought about getting out when disputes were not resolved.

The best learning sometimes comes from disasters, so Webb looked at the shambles of the experience and concluded lawyers needed to withdraw if their cases turned adversarial. Collaborative law was conceived in the mind of Stu Webb. The requirement that lawyers withdraw if the case is not settled has come to be known as the "collaborative commitment."[2] Legal and ethical questions needed to be answered about the process. Webb contacted colleagues and a justice on the Minnesota Supreme Court[3] who was an ardent supporter of the mediation process. Webb became satisfied that lawyers could legally and ethically engage in collaborative law as he envisioned it. Realizing that it

[1] We are pleased to dedicate this Chapter on collaborative law to Thomas Oren Arnold (1923–2009) and Gay Ellen Gayle Cox (1953–2013), two Texans who contributed so much to advancing the use of the collaborative process for managing conflict and resolving disputes peaceably. They were truly pioneers in the development of collaborative law.

In 2001, the State Bar of Texas published the first *ADR Handbook*. Tom Arnold authored the chapter *Collaborative Dispute Resolution—An Idea Whose Time Has Come?*. Seventeen years later, in writing this Chapter on collaborative law, the Authors have continued Tom Arnold's sub-title—An Idea Whose Time Has Come? deleting the question mark.

[2] The "collaborative commitment" is also know as the disqualification or withdrawal provision. This requirement focuses the parties and lawyers one hundred percent on the settlement process.

[3] Letter from Stuart G. Webb to The Honorable A.M. "Sandy" Keith, Justice, Minnesota Supreme Court (Feb. 14, 1990) http://globalcollaborativelaw.com/wp-content/uploads/2017/10/Webb_ltr_re_Collaborative_Law_1990.pdf.

would take two to tango, Webb started seeking other family lawyers in his hometown who would be willing to try the collaborative approach in appropriate cases. Needless to say, Webb and his peaceful, non-adversarial approach to resolving disputes did not receive universal acceptance.

Can't you just hear the comments?

> "It's the craziest idea I ever heard of—instead of going to court, opposing counsel should sit in a circle with their clients, hold hands, and sing *Kumbaya*."
>
> Or, "It will never work, and the courts won't like it."

Nevertheless, Webb persisted, and in 1990, he started a local "Institute" with four lawyers, which quickly grew to nine lawyers; they were off and running. Word of the "Institute" in Minnesota began to spread, and it was not long until they started hearing from lawyers around the country. Stu Webb had created a new area of law practice that continues to grow worldwide.

A. International Academy of Collaborative Professionals

In the early 1990s, the Minnesota lawyers presented the new model for the first time to a national audience at a conference in Washington, D.C. Pauline Tesler and a group of lawyers in the San Francisco area attended the conference and returned to California, taking up the cause with zeal. Under the leadership of Pauline Tesler, they formed the Collaborative Law Group. Webb, Tesler, and others developed and conducted training programs for lawyers around the country and in Canada.

The interdisciplinary approach to divorce resolution was developing on a parallel track. California family-psychologists Peggy Thompson and Rodney Nurse, along with a group of financial planners, were developing a model to work with divorcing couples. In the family arena, the Team Model, employing collaborative lawyers and mental-health and financial professionals, seemed to be an ideal fit to guide divorcing couples through troubling times in a supportive and constructive way.

As collaborative practice began to develop, it became clear that collaborative practitioners should work together to promote and improve the process, which was still in its infancy. In the mid 1990s, the California collaborative groups began to meet monthly. Out of their vision to form an umbrella networking organization to serve collaborative practice in its many forms, the American Institute of Collaborative Professionals (AICP) was born. The AICP began publishing a newsletter, and a forum for national networking was created. In May 1999, Stu Webb was the principal speaker at the first annual AICP networking forum held in Oakland, California.

By 2000, collaborative practice was developing exponentially across Canada. To reflect its international reach, the name of the organization was changed to the International Academy of Collaborative

Professionals (IACP).[4] The IACP now counts over 4000 members in 20 countries, and its quarterly publication, *The Collaborative Review*, is distributed worldwide.

B. Collaborative Law Institute of Texas

In 1999, Dallas attorneys Larry Hance and John McShane established the Collaborative Law Institute of Texas, Inc., a nonprofit Texas corporation.[5] The primary goal of the Institute is to create a culture in which collaborative law is the prevailing process for the resolution of family-law matters. The Institute brought Stu Webb and Pauline Tesler to Dallas to speak at the Advanced Family Law Course, a four-day educational seminar. Collaborative law was off and running in Texas.

Norma Trusch of Houston, president of IACP in 2004 and 2005, said in her article in the Summer 2006 issue of *Alternative Resolutions*:

> The greatest source of pride for me during my time at the helm of IACP, was seeing the leadership Texas brought to the organization . . . . The Collaborative Law Institute of Texas set the standard of service to its membership and the public that IACP was quick to recognize and emulate. Texas collaborative lawyers are recognized as the most creative, innovative and energetic practitioners in the world.[6]

C. Expanding the Collaborative Practice Beyond Family Law

Although the roots of the collaborative dispute resolution process are in family law, many lawyers and other professionals believe the process is not for family law alone. Creative lawyers in Texas and across the country are applying the collaborative process to civil disputes beyond family law.

In 2004, a group of Dallas lawyers organized a non-profit corporation, Texas Collaborative Law Council.[7] The mission of the organization is:

- to promote the use of the collaborative process for resolving civil disputes;

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[4] International Academy of Collaborative Professionals – www.collaborativepractice.com

[5] Collaborative Law Institute of Texas (now Collaborative Divorce Texas) https://collaborativedivorcetexas.com/

[6] Norma Levine Trusch, Texas Leads The Way in Collaborative Law, 15 Alternative Resolutions 22 (Summer 2006) available at http://globalcollaborativelaw.com/wp-content/uploads/2018/05/Tursch-article-summer-2006.pdf.

[7] Global Collaborative Law Council http://globalcollaborativelaw.com/

- to train lawyers and other professionals in the use of the process;
- to educate the public as to the benefits of the process; and
- to preserve the integrity of the process.

With the invaluable assistance of the Collaborative Law Institute of Texas, the new organization developed Protocols of Practice[8] for civil collaborative lawyers, a Participation Agreement,[9] and other documents for civil collaborative practitioners. In 2009, the organization expanded to serve attorneys and other professionals worldwide in the practice of civil collaborative law, and re-named itself the Global Collaborative Law Council (GCLC). Similar organizations supporting civil collaborative practice continue to be established from coast to coast. [10]

In 2007, the American Bar Association Section of Dispute Resolution established a Collaborative Law Committee.[11] The mission of the Committee is to expand the understanding and use of the collaborative law process nationally and worldwide.

Over the past decade, numerous books, articles, and papers have been written regarding the use of the collaborative process for resolving disputes arising in many areas of law:

- business and commercial disputes;
- family business and partnership disputes;
- probate, trust, estate, and guardianship contests;
- elder law and healthcare conflicts;

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[8] Global Collaborative Law Council, Protocols of Practice for Collaborative Lawyers, Collaborative Law (Nov. 2010 http://globalcollaborativelaw.com/wp-content/uploads/2017/06/GCLC_Protocols.pdf

[9] Global Collaborative Law Council, Participation Agreement, Collaborative Law (Aug. 2007), http://globalcollaborativelaw.com/wp-content/uploads/2017/10/GCLC_Participation_Agreement_With_Addendum.pdf.

[10] For example: Massachusetts Collaborative Law Council, http://www.massclc.org; King County Washington Collaborative Law, http://www.kingcountycollab.org; Collaborative Council of the Redwood Empire, http://www.collaborativecouncil.org.; Collaborative Practice California, http://www.cpcal.com/our-approach/civil-collaborative-solutions/

[11] See Section of Dispute Resolution: Collaborative Law Committee, American Bar Association (June 15, 2014), http://apps.americanbar.org/dch/committee.cfm?com=DR035000.

- employment, labor, and construction disputes; and
- conflicts in faith-based organizations.

A collection of articles and other resources are available on the website of the Global Collaborative Law Council.[12] Every year, trainings in the collaborative process and other collaborative law events are held nationally and internationally. Collaborative law courses are taught in law schools.

Nationwide, state and local bar associations are establishing collaborative law sections. In 2010, the State Bar of Texas created a Collaborative Law Section. The mission of the Section is to:

- educate legal and client communities about collaborative law;
- improve and enhance the practice of collaborative law;
- identify the practitioners of collaborative law for the benefit of the public; and
- provide a forum for interaction among collaborative law practitioners from all disciplines of the law.

To date, the Dallas, Houston, and Lubbock Bar Associations have created collaborative-law sections.

[12] See Global Collaborative Law Council: http://globalcollaborativelaw.com

II. Statutory Validation of the Collaborative Process

In 2001, Houston family-law attorney Harry Tindall, with the able assistance of Representative Toby Goodman of Fort Worth, succeeded in helping persuade the Texas Legislature to adopt a collaborative law statute. Collaborative law procedures were added to the Family Code.[13]

The Uniform Law Commission,[14] established in 1892, provides states with nonpartisan, well-drafted legislation that brings clarity and stability to critical areas of state law. In 2007, following extensive research, the Commission decided to codify the collaborative dispute resolution process, and so established a drafting committee. [15]

In July 2009, following a two-year drafting process, the Commission unanimously approved the Uniform Collaborative Law Act (UCLA).[16] The following year, the Drafting Committee made several revisions to the original UCLA to allow states more flexibility when adopting the legislation.[17] The revisions were unanimously approved by the Commission. In October 2010, the amended Uniform Collaborative Law Act/Rules became available for introduction in state legislatures.

In 2011, Harry Tindall and others were again successful in the Texas Legislature. The Legislature enacted the Collaborative Family Law Act, amending the Family Code. [18]

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[13] Tex. Fam. Code Ann. §§ 6.603, 153.072 (repealed 2011, with the enactment of the Texas Collaborative Family Law Act, infra, note 17).

[14] See Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Laws), http://www.uniformlaws.org/. The Uniform Commercial Code is the signature product of the Commission. It is a prime example of how the work of the Commission has simplified the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state.

[15] The Drafting Committee included eight Commissioners, four ABA advisors and several observers. The State of Texas was well represented in the drafting process. Peter Munson of Sherman, a voting commissioner, served as chair of the Drafting Committee; Harry Tindall of Houston, a voting commissioner and co-author of Sampson & Tindall's Texas Family Code Annotated, served as vice-chair; Lawrence R. Maxwell Jr. of Dallas, co-chair of the ABA Collaborative Law Committee, served as the ABA Section of Dispute Resolution's Advisor; and Norma Trusch of Houston, past president of the International Academy of Collaborative Professionals, served as an observer on behalf of the IACP.

[16] Uniform Law Commission, Uniform Collaborative Law Act, Uniform Law Commission (2009), www.uniformlaws.org/shared/docs/collaborative_law/ucla_final%20act_nov09.pdf.

[17] The Committee made three revisions:

(1) The Committee drafted court rules that mirror the statute, giving states options to enact the statute, adopt court rules, or a combination thereof.

(2) The definition of "collaborative matter" in Section 1 of the Act was modified to create an Alternate A, which limits the Act/rules to "matters" that arise under family laws of a state; and Alternate B, which places no limitation on matters that will be covered by the Act/rules.

(3) The Committee modified the automatic stay of court proceedings in Section 6 of the Act, providing that notice to a tribunal that the parties are proceeding in the collaborative process is an application for a stay, rather than an automatic stay, as provided in the original 2009 Act.

[18] TEX FAM. CODE ANN. §§ 15.001–15.116 (West 2014) (Collaborative Family Law Act).

Jurisdiction	Limitations	Citation
Alabama	limited to family and probate	Ala. Code 1975 §§ 6-6-26.1 to 6-6-26.21 (2014)
Arizona	limited to family	17B A.R.S. Rules Fam. Law Proc., Rule 67.1 (eff. 2016)
District of Columbia	limited to family law	D.C. Code §§ 16-4001 to -4022 (2011)
Florida	limited to family	Florida Statutes, SS 61.55-61.58 (2016)Florida Family Law Rule of Procedure 12.745, Florida Rule of Professional Conduct 4-1.19
Hawaii	no limit as to scope	Haw. Rev. Stat. §§ 658G-1 to 658G-22 (2012)
Illinois	limited to family law	Illinois Civil Statutes 750 ILCS 90/1 to 750 ILCS 90/70. (eff. 2018)
Maryland	no limit as to scope	Md. Code, Com. Law § 3-2001–3-2015 (2014)
Michigan	limited to family law	Mich. Comp. Laws § 691.1331-691.1354 (eff. 2014)
Montana	no limit as to scope	MT SB 272 (2015)
Nevada	limited to family law	Nev. Rev. Stat. §§ 38.400-38.575 (2013)
New Jersey	limited to family law	N. J. Rev. Stat. § 2A:23D-1-23D-18 (eff. 2014)
New Mexico	limited to family law	NMRA 1-128 - 128.13 (eff. 2016)
North Dakota	no limit as to scope	N.D.R.Ct. 8.10 (2016)
Ohio	limited to family law	Ohio Rev. Code Ann. §§ 3105.41-3105.54 (2013)
Texas	limited to family law	Tex. Fam. Code Ann. §§ 15.001-15.116 (2011)
Utah	no limit as to scope	Utah Code Ann. §§ 78b-19-101 to -116 (2010
Washington	no limit as to scope	Wash. Rev. Code §§ 7.77.010-7.77.902 (2013)

As of January 1, 2018, in addition to Texas, a version of the UCLA/Rules has been enacted in 17 jurisdictions:

The Uniform Law Commission anticipates that in coming years more states will be enacting the statute, adopting court rules, or a combination thereof.

Collaborative lawyers in Texas, and those who understand and acknowledge the benefits of the collaborative process, are optimistic that in the near future the UCLA will be enacted as a new chapter in the Civil Practices & Remedies Code. Doing so would extend the benefits and protections of the statute to individuals, businesses, and organizations that wish to use a non-adversarial process for resolving disputes in all areas of law.

III. Ethical Considerations in Collaborative Practice

In October 2009, the Collaborative Law Committee of the American Bar Association Section of Dispute Resolution published a discussion draft: *Summary of Ethics Rules Governing Collaborative Practice*.[19] The paper reviewed the ABA Model Rules of Professional Conduct and state ethics opinions and addressed ethical issues that the state ethics opinions had considered, including:

(1) limited scope representation, informed consent, and restriction on practice,

(2) conflict of interests,

(3) competence and diligence,

(4) mandatory withdrawal provisions, including withdrawal due to client behavior and withdrawal requiring the court's permission,

(5) zealous representation,

(6) confidentiality and disclosure,

(7) communications and advertising, and

(8) collaborative nonprofit organizations.

The ABA paper clearly establishes that Collaborative Practice is consistent with the rules of ethics for lawyers. The paper emphasizes that collaborative practice adds an alternative in the legal system that offers clients and attorneys an efficient, cost-effective procedure to achieve fair settlements without the expense, delay, and acrimony that are, unfortunately, all too common when disputes are resolved in the litigation process.

[19] Ethics Subcommittee of American Bar Association Section of Dispute Resolution Collaborative Law Section, Summary of Ethics Rules Governing Collaborative Practice, (Oct. 10, 2009 Draft) *available at* http://globalcollaborativelaw.com/wp-content/uploads/2017/10/Update_of_2009_Summary_of_Ethics_Rules.pdf.

When the Summary of Ethics Rules was published in 2009, Ethics Committees of eight states:

- Kentucky (2005)
- Maryland (2004),
- Minnesota (1997),
- Missouri (2008)
- New Jersey (2005),
- North Carolina (2002),
- Pennsylvania (2004), and
- Washington (2007)

had published ethics opinions supporting collaborative practice and finding that it was consistent with the Model Rules.[20]

Only one state, Colorado (2007), had opined that a form of collaborative practice violated the state's Rules of Professional Conduct.[21] The sticking point for the ethics committee was the agreement by participating lawyers to withdraw in the event that a settlement is not reached in the process. **The Colorado opinion further concluded that the agreement** created a conflict of interest that could not be waived by the client.

In response to the Ethics Opinion, collaborative practitioners in Colorado modified the collaborative law agreement (commonly known as a Participation Agreement) to provide that only the parties are signatories to the agreement. The lawyers are not signatories; rather, they acknowledge that they are collaborative lawyers for their respective parties.

In August 2007, in response to the Colorado opinion, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-477, which squarely supports collaborative law, with two provisos:

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[20] For links to state ethics opinions, see Global Collaborative Law Council (Dec. 2016), http://globalcollaborativelaw.com/ethics-opinions-on-collaborative-law/

[21] Ethics Comm. of the Colo. Bar Ass'n, Formal Op. 115 (2007) (Ethical Considerations in the Collaborative and Cooperative Law Contexts) *available at* http://globalcollaborativelaw.com/wp-content/uploads/2017/07/Ethics_Opinion_Colorado.pdf

- All parties have been informed about the benefits and risks of participating in the process, and
- All parties have given their informed consent.[22]

Although ABA Ethics Opinions are not binding on states, it is clear that ABA Formal Opinion 07-477 has been persuasive, since several state ethics opinions have been issued since the ABA Opinion. South Carolina (2010), Alaska (2011), and North Dakota[23] (2012) all quoted extensively from the ABA Ethics Opinion.

[22] ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-477 (2007) (Ethical Considerations in Collaborative Law Practice) available at http://globalcollaborativelaw.com/wp-content/uploads/2017/07/Ethics_Opinion_ABA.pdf

[23] S.C. Bar Ethics Advisory Comm., Advisory Op. 10-01 (2010); Alaska Bar Ass'n Ethics Comm., Op. 2011-3 (2011) (Ethical Considerations in Collaborative Law Practice); State Bar Ass'n of N.D. Ethics Comm., Op. 12-01 (2012).

IV. An Idea Whose Time Has Come

In 1976, over 200 judges, lawyers, and leaders of the bar gathered at the Pound Conference convened by the American Bar Association to examine concerns about the efficiency and fairness of the court systems. Addressing the Conference, Chief Justice Warren Burger, in his criticism of the lawyer-and-judge-operated litigation system, called for the exploration of an informal dispute resolution processes, and suggested that lawyers needed to return to their role as healers of conflict:

> Our litigation system is too costly, too painful, too destructive, too inefficient for civilized people.[24]

Derek Bok former Dean of Harvard Law School and the former President of Harvard University, reflected after the Pound Conference:

> Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations towards *collaboration* and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not the leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.[25]

Today, over four decades after the Pound Conference, ADR processes are widely used nationally and internationally, with mediation and arbitration being the ADR processes of choice. However, the collaborative dispute resolution process is gaining traction in the United States and worldwide.

[24] Adam Furlan Gislason, Demystifying ADR Neutral Regulation in Minnesota: The Need for Uniformity and Public Trust in the Twenty-First Century ADR System, 83 Minn. L. Rev. 1839, 1840 n.5 (1999).

[25] Derek C. Bok, A Flawed System of Law Practice and Training, 33 J. Legal Educ. 570, 583 (1983).

A. What is Collaborative Law?

The collaborative process is a very basic approach to dispute resolution that employs interest-based negotiation. Simply stated, a dispute is considered to be a collaborative case if the parties have:

(1) a written participation agreement (contract), and

(2) a statute or a clause in the agreement requiring the withdrawal of the collaborative lawyers if the dispute proceeds to an adversarial venue. If the case does not meet these two requirements, it is not a collaborative case, and should not be labeled as such.

In the collaborative process, the win/lose scenario of litigation must be replaced with win/win results arrived at by the parties, rather than a third-party decision-maker. Winning in the collaborative process means satisfying the interests and concerns of each one of the parties to the greatest possible degree. This aspect of the process is especially important in disputes that:

- involve parties who desire to continue business or personal relationships, or
- involve parties who have agreed upon a solution that requires one of the parties to perform over an extended period of time.

Parties who consent to perform are more likely to follow through, without additional pressures to perform, than parties who are mandated to carry out judicially imposed orders.

The practical application of collaborative skills is easy for some lawyers and impossible for others. The difficulty that many lawyers experience is often traced back to legal education, which teaches highly adversarial models; the collaborative law model emphasizes non-adversarial methods of resolving conflict. Lawyers' education and experiences in litigation often make them uncomfortable unless there is a statute or case law to back up their clients' positions.

Moreover, some lawyers believe that it is their duty to defend any position, realistic or not, that is in their client's favor, while completely ignoring the interests and concerns of the other parties. To participate in the collaborative process, lawyers must set aside these ideas and learn a completely new approach to resolving conflict. Clients in the collaborative process are advised of their legal rights under the law. However, the process is not rights-based, and the choices for resolution are not confined to legal remedies.

While litigation relies on the assessment of blame or the enforcement of the rights of the parties, the collaborative process eliminates these contests. Instead, collaborative lawyers must assist their clients in looking to the future for solutions, rather than

- looking at the past for reasons to blame each other; or
- attempting to avoid or to take advantage of the law.

Placing blame will not remedy what is wrong. It only increases anger and resentment. Solely relying on a party's rights under the law may win the battle but eventually lose the war. Instead of continuing to wage war, collaborative participants must focus their concerns on the responsibilities that each participant must assume to resolve the dispute.

To turn conversations from blame to responsibility, collaborative lawyers work with clients to help them state their concerns by asking for explanations. This creates more efficient communication, and improves understanding between the parties.

For example, the statement, "You lied to me," will usually elicit a denial and escalate arguments. The statement, "I could not believe what you told me," does not accuse the listener of being a liar; it calls for an explanation. Moreover, since no one but the speaker can truly say what the speaker believes or feels, the listener cannot say that the speaker's statement is untrue. Speaking in the first person is an invitation to the other parties to explain why the speaker's belief is incorrect, or why the other party actually did lie.

B. How Does the Collaborative Process Work?

No one can be ordered to sign a contract against their will, and it is unrealistic to believe that parties can be successfully ordered to go forward honestly and in good faith. Consequently, all parties to a dispute must voluntarily give their informed consent before taking part in the collaborative process. To obtain the informed consent of prospective clients, collaborative lawyers must explain the various options of dispute resolution that are available to clients. Options will generally include:

- litigation,
- arbitration,
- mediation,
- cooperative law, and
- collaborative law.

If the prospective clients select the collaborative process, the collaborative lawyers must be certain that the clients understand that:

- There is no guarantee the dispute will settle;
- Any party may terminate the process at any time;
- The parties will be expected to voluntarily disclose all information necessary to reach an informed decision; and
- If the parties fail to settle and proceed to an adversarial form of dispute resolution, they must retain new lawyers to represent them.

The three most important reasons that the collaborative lawyers may not go on to an adversarial venue are:

(1) Parties and lawyers who are not serious about settling via the collaborative process are eliminated;

(2) The lawyers' focus is 100% on settlement, and there is no financial incentive to go to the courthouse and prolong representation in the case; and

(3) The withdrawal provision creates a safe environment so that the parties can be more honest with each other; they all know that no lawyer in the room will ever be able to cross-examine any of them later, should the case not settle.

Once prospective clients have received all of this information and have indicated that they want to move forward in the collaborative process, collaborative lawyers have obtained their clients' informed consent.

After all parties have agreed to participate in the collaborative process, the lawyers must decide on the terms of the participation agreement. This agreement will act as a road map to guide the participants through the process. Next, the lawyers organize an agenda and prepare their clients for the first step in the collaborative process, which is discovering the interests, concerns, and goals of each party. The steps of the process require the parties and their lawyers to have face-to-face meetings. At these meetings, each party—not that party's lawyer—personally explains his or her concerns in a private, confidential setting. The face-to-face meetings allow participants to hear each party's interests from the original source, rather than funneling information through the parties' attorneys, formal pleadings, or third party neutrals.

As the parties' list their interests and goals, they can identify information they need to reach an agreement; consequently, gathering information is the second step in the process. Collaborative participants agree to voluntarily deliver necessary information to the other parties.

Many lawyers have difficulty with the idea of voluntary disclosure. Some lawyers prefer formal discovery, hoping that the other parties will not ask the right questions, and their clients can hide information that would be damaging to their positions. Other lawyers believe that discovery should be done under oath with the protection of statutes and court rules, due to fear that the other parties will try to conceal pertinent information.

These concerns appear to be based on the assumption that litigation will punish poor lawyering or prevent discovery problems with parties who try to hide information or lie under oath. Unfortunately, there is no dispute resolution procedure that can guarantee honest and complete disclosures necessary for an informed decision.

However, in the collaborative process, participants are sitting face-to-face, and are able to ask questions if anyone believes that there is pertinent information that has not been disclosed. No one can hide behind rules of procedure, or hearings on formal discovery disputes, in attempts to avoid responding to a relevant inquiry.

Requests for information in the collaborative process are informal and only include the information necessary for the requesting party to fully understand the issues in controversy. Moreover, when parties have information that has not been requested, but they know that the information will have a bearing on the outcome of the dispute, they have contractually agreed to provide it to the other parties. Failure to deliver the information is a violation of the spirit and integrity of the collaborative process.

The key to the success of collaborative law is transparency. Failure to be transparent will likely result in distrust and termination of the process. Serious infractions of the participation agreement could result in a lawsuit for breach of contract.

If the participants discover that they cannot interpret some of the information they have gathered, or that they need an expert appraisal or evaluation, the parties may agree to jointly hire a single expert to provide them with an objective opinion. If one of the parties is not satisfied with the jointly retained expert's opinion, that party is free to get a second opinion. Any party that obtains a second opinion must disclose the name of the expert providing the second opinion, since this expert will become privy to confidential information the parties have shared during the process. However,

the party obtaining a second opinion is not required to disclose the actual opinion to the other participants in the process unless that party chooses to do so.

Once the parties have gathered enough information to have an understanding of the facts pertaining to the issues in dispute, they will advance to step three of the collaborative process: developing options. The most efficient way to discover possibilities for resolution is by brainstorming each issue, to generate the maximum of options for each individual's concerns. The focus of brainstorming is quantity, not quality.

Participants should complete the list of options for each concern before moving on to the next. If the parties skip around from one issue to another, rather than focusing on each concern one at a time, they may overlook viable options that ought to be considered.

Participants often have a tendency to interrupt brainstorming by commenting on one of the options. Avoid the urge to evaluate options before brainstorming all of the issues.

Step three is not the time to consider whether an option is realistic, good, or bad. This step is simply the time to list everything anyone can throw on the table for consideration. Once all options are listed, the parties can proceed to step four and begin evaluating options.

Prior to step four, parties may wish to determine the criteria that the combined options must meet to be acceptable. A personal-injury case may require future medical care for the injured party. In a medical-error situation, the parties may agree that putting a patient-safety procedure into place is necessary to avoid recurrence of the problem; any final resolution must include appropriate provisions for the service provider to accomplish this.

Evaluation of options should begin with the elimination of any options that are impossible or unnecessarily burdensome for one of the parties. Once the parties eliminate unacceptable options, the advantages and downsides of each remaining option should be discussed. When all options have been evaluated, the parties begin negotiations and move toward resolution.

Many lawyers decide how a dispute should be resolved at the beginning of negotiations, rather than at the end. These lawyers should resist the temptation to advise their clients about what the lawyers think should be done, before knowing as many of the facts as possible. Lawyers also must resist the somewhat arrogant temptation of believing that they always know what is best for their clients. Advising clients of their rights under the law is necessary; but arguing for these rights when clients are willing—even desiring—to waive them is inappropriate in the collaborative process. The parties, not their lawyers, make final decisions in collaborative cases. Collaborative lawyers should remember that it is the parties, not the lawyers, who must live with the final results of their decisions.

C. The Absent Step

The collaborative process began in family disputes, where participants knew the questions that must be answered, such as marital property division and child custody. These problems were usually well defined at the onset of a family case. In other forms of civil disputes, the source of the problem may not be as obvious, and participants may need to insert the step of "defining the problem" between the steps of information gathering and developing options.

When an event takes place, humans look for a cause. People need to know the reason something has happened to make sense out of it. This may result in an incident being attributed to the wrong cause. In addition, personal background and experience will influence perceptions of other people. Consequently, to avoid personal biases or stereotypes influencing their reasoning, it is necessary for participants to be certain they have clearly defined the problem from the information that has been gathered, rather than preconceived notions.

D. Cures for Impasse

Reaching an impasse does not signify that the parties must completely surrender control over the resolution of the dispute. Participants in the process may make provisions to avoid going to an adversarial venue, even if they cannot agree on all of the matters in dispute. For example, the parties may agree at the beginning of the process to be bound by an opinion of a mutually selected expert, in the event of only one unresolved issue.

If resolution of the dispute requires a more wide-ranging evaluation, the parties may agree to go to mediation, arbitration, or a combination of the two. That way, they maintain control over scheduling and the third-party neutral conducting the procedure.

When the parties elect arbitration, they should agree in advance on the way the arbitration will be conducted. If participants:

- submit the information that has been gathered during the collaborative process to the arbitrator;
- allow the arbitrator to ask questions; and
- the collaborative attorneys make no arguments,

then the collaborative lawyers need not withdraw. However, if there will be arguments by the lawyers on behalf of the parties, the arbitration will be an adversarial procedure. The collaborative lawyers must then withdraw, and new lawyers must be retained for the arbitration.

Parties who are concerned about time and cost containment can also agree to the number of meetings or number of months that negotiations will continue. If the parties have not reached a final agreement at the end of the specified time, any issues that remain undecided will go to arbitration or another form of dispute resolution. The options in the collaborative process are limitless. Parties can agree to anything that is not illegal or against public policy.

V. How to Apply Collaborative Skills to Cooperative Cases

One reason the collaborative process has not spread as quickly as mediation is because the process is voluntary, and cannot be court-ordered. Courts can order mediation; however, judges cannot order parties to agree to enter into a contract to resolve their differences. Additionally, for the process to be successful, participants must agree to:

- go forward honestly and in good faith;
- voluntarily exchange information; and
- retain new attorneys if they must go to an adversarial forum for resolution.

As a result, collaborative practitioners often will be faced with opportunities to employ their non-adversarial skills in situations where the prospective clients have received demand letters or have been served with notices of lawsuits.

Rule 1.02 (b) of the Texas Disciplinary Rules of Professional Conduct states, "A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation." Since unbundled legal services have been declared ethical, there is no reason why collaborative lawyers cannot have employment agreements that limit their services to settlement negotiations. Many clients do not want to go to litigation or arbitration, and are happy to have a lawyer who is committed to helping to resolve the dispute in a non-adversarial process. Some lawyers who do not know or understand the collaborative process will refuse to participate in it; but they may agree to co-operate in getting the dispute resolved quickly and with less expense for their clients.

One example of a collaborative lawyer applying non-adversarial skills to avoid prolonged litigation was in a construction dispute. The general contractor went to the collaborative lawyer and explained that there was a problem with the foundation of a house he had built and that the homeowner was going to sue him. The collaborative lawyer contacted the homeowner's lawyer and told him that the contractor recognized that there was a problem and wanted to resolve the matter as quickly and amicably as possible. The homeowner's lawyer replied that he was on his way to file suit. The collaborative lawyer asked the homeowner's lawyer if he would like to get his client's house repaired immediately or wait two or three years until the case came up for trial. The collaborative lawyer's question persuaded the homeowner's lawyer to agree to the parties obtaining an engineer's report and to attend at least one face-to-face meeting.

The parties all had a common goal of getting the foundation repaired. The engineer's report indicated that the homeowner's landscaping had caused water to flow toward the foundation, which exacerbated the foundation problem, so an argument of partial liability could be made if the case went to litigation. The general contractor said the foundation defect was not his fault, but since he was the one who hired the subcontractor, he understood that there was a definite argument that he was also liable. In addition, the general contractor was concerned about his reputation among the homeowners in the area where the house was located, since he planned to build more custom homes there.

The subcontractor was very hesitant to participate in negotiations. He believed that

- he would be held solely responsible for the problem;
- it would be expensive to repair; and
- his insurance would only cover a portion of the costs.

The subcontractor's insurance company did not have in-house litigation counsel, so the adjuster was interested in getting the case settled out of court, to avoid hiring an outside law firm if the case proceeded to litigation.

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 on what each of them would contribute to the repairs. The insurance adjuster agreed to contribute $25,000 above the company's liability under the subcontractor's insurance policy. This money would be used to place piers under the house and level the foundation—a task that neither the general contractor nor subcontractor was able to perform. The additional contribution by the insurance adjuster was conditioned on the parties' promise to settle without filing suit. Her decision to make this offer was based on the fact that it would take $30,000 to retain a law firm to represent the insurance company in litigation, and the retainer would only be the beginning of legal expenses for the dispute.

Repairs began the week after the first meeting and were finished prior to when discovery would have been served if a lawsuit had been filed. There was a follow-up meeting of the parties and lawyers to be certain that the work had been completed. It was not necessary to put the final agreement into writing. The homeowner had his house repaired, the contractors had maintained a good reputation in the community, and the insurance company had not been forced to retain defense counsel.

A second example comes from a debtor–creditor situation. A managing partner who was supervising the partnership's rental properties did not pay the partnership's note at the bank for several months; then he disappeared with all of the rents he had been collecting. The silent partner had continued

communicating with the managing partner by email and had no idea that the managing partner was no longer in the area. The silent partner first received notice that there was a problem when the bank had him served with an original petition and discovery. Believing he was only responsible for one half of the amount owed, he contacted his collaborative lawyer who explained joint-and-several liability to him.

The collaborative lawyer asked the client to list all of his assets. Most of his assets were exempt, but he had a substantial savings account and some real property other than his homestead that was debt free. The collaborative lawyer immediately filed a general denial and contacted the bank's attorney. She explained that her client admitted that he signed the note along with the managing partner, and he understood that he owed the entire balance. She stated that if she responded to the formal discovery requests, it would likely cost her client $3,000 to $4,000 that could go towards repaying the bank. In addition, her client had agreed to voluntarily share his current financial information with the bank, and he wanted to reach an agreement to work out the problem as soon as possible.

The end result was the silent partner paid 60% of one half of what was owed to the bank, and the bank continued looking for the partner who disappeared to attempt to collect the balance. The attorney for the bank knew that he could get a judgment against the silent partner for the full amount of the balance of the loan. He also knew that the silent partner did not have the resources to pay the entire amount, and that he could declare bankruptcy and not pay anything. The silent partner knew that he must sell some of the real property he owned and lose some of his savings, but the terms the bank offered would not completely ruin him, and he wanted to protect his credit rating.

The secrets to settling both of these cases were

(1) the clients' willingness to accept responsibility; and

(2) the lawyers' efforts to keep the negotiations transparent.

There was no wheeling and dealing, or attempts at deception or concealment. The other parties recognized and appreciated this. All of the information in the above disputes eventually would have to be disclosed in formal discovery; the primary difference was the cost to the parties.

When a client is the one making the complaint, collaborative skills can be used to open and facilitate discussions. Instead of sending a demand letter, consider sending a letter stating that the lawyer has been retained to resolve the complaining client's problem. The letter can also say that the client wishes to resolve the situation as quickly and amicably as possible, and then request some times that the other lawyer and client can meet to discuss the problem.

A stronger approach would be to enclose an original petition with the letter, and state that the pleadings will be filed if no response is received in the next seven business days.

When it is necessary to file suit before contacting the other party, to protect a client's interests, it is still possible to immediately send a letter explaining why suit had to be filed, and inviting the other party to participate in negotiations.

A few lawyers will take an invitation of this sort as a sign of weakness. Other lawyers will see offers of early settlement negotiations as good lawyering on behalf of clients. Regardless of how the negotiation invitation is perceived, arranging a face-to-face meeting will gain lawyers a much better perspective on the other lawyers and parties. Plus, it will let the collaborative lawyers know if there is a possibility of pursuing interest-based negotiations.

IV. The Future of Collaborative Law

The legal community is undergoing change, and clients are looking for services that are less costly and time consuming. As the public is educated about the collaborative process, and the demand for interest-based negotiation grows, more people will begin to understand the advantages of employing a procedure that is strictly focused on the resolution of their disputes. Nevertheless, collaborative law will not entirely take the place of other dispute resolution procedures, since collaborative lawyers know and understand that the process is not appropriate for every client or situation.

One viable possibility for the future of the collaborative process lies in boutique collaborative-law firms forming relationships with litigation firms. When a litigation firm has a client with a dispute that the client wants resolved amicably, quickly, or privately, the litigation firm will refer the client to the collaborative firm. If the case does not settle, the client will go back to the litigation firm for resolution in arbitration or litigation. Conversely, when a client's situation is not appropriate for collaborative law, the collaborative law firm will refer the client to the litigation firm.

A relationship between a collaborative law firm and a litigation firm could be beneficial for both lawyers and clients, and it would certainly be in the best interests of clients to provide them with skilled experts in settlement negotiations, and if needed, expertise in the courtroom.

So long as the collaborative law firms and the litigation firms engaging in these kinds of agreements do not share fees for the clients that they refer to each other, they are within the parameters of collaborative practice. Best practices would indicate that the firms have agreements with more than one other law firm which would allow referred clients a choice of collaborative law firms and litigation firms.

Collaborative lawyers have no desire to litigate. Their skills lie in assisting parties in satisfying their interests and concerns, discovering creative solutions, and preserving important relationships. Hence, litigation lawyers should have no fear that collaborative lawyers will attempt to represent the litigation firms' clients for any purpose except settlement negotiations.

Not every lawyer should attempt participation in the collaborative process; however, all lawyers owe it to their clients to be educated about all forms of dispute resolution and to provide clients correct information regarding the options available to resolve the clients' disputes. Collaborative law is finding its way into the curriculums of law schools across the country; students are learning that litigation is

not a mandatory choice for client's disputes. In addition, collaborative-law sections in state and local bar associations are educating lawyers regarding the advantages of collaborative law for their clients, and the number of clients who have had success in the collaborative process is increasing.

Justice Sandra Day O'Connor observed that, "The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried." If this statement is correct, most lawyers are going about the business of representing clients backwards. Adversarial processes such as litigation or arbitration should not be the first option, but the last. Collaborative law is the new kid on the block, but it is growing into a responsible citizen of the legal community. Perhaps it should be considered for the first option.