

The Proposed Texas Uniform Collaborative Law Act: An Executive Summary

by Lawrence R. Maxwell, Jr.

You may have heard that the Uniform Law Commission has drafted a Uniform Collaborative Law Act (UCLA), but what does that mean for citizens of the State of Texas, lawyers, mediators and others who work in the ADR sphere?

This article will give an overview of the collaborative dispute resolution process, and show how the UCLA affords benefits and protections for those using the process for resolving disputes in all areas of civil law. The article will demonstrate the need for uniformity in the states, and highlight the benefits of the UCLA for pro bono and low-income clients, who are poorly served by the traditional approach of the adversarial legal system. The included chart analyzes the proposed Texas Uniform Collaborative Law Act section by section. The article concludes by encouraging support for the enactment of the UCLA in the 2017 Session of the Texas Legislature.



Collaborative Law in Texas So Far

The collaborative dispute resolution process (commonly known as Collaborative Law) is a part of the movement toward the delivery of so-called unbundled legal representation. It separates, by agreement, representation in settlement-oriented processes from representation in an adjudicatory processes. The organized bar has recognized unbundled legal services, like collaborative law, as useful options available to parties.

Parties are represented by counsel in the collaborative process. It is a voluntary, structured, non-adversarial approach to resolving disputes. In it, the parties and their counsel seek to negotiate a resolution of the dispute without having a ruling imposed upon them by a third party neutral. The process is based upon cooperation between the parties, teamwork, full disclosure, honesty and integrity, respect, civility, and parity of costs.

As is the case with mediation, collaborative law has its roots in the area of family law. In 2011, the 82nd Texas Legislative Session enacted the [Collaborative Family Law Act](#), which became effective September 1, 2011. The Collaborative Family Law Act applies only to matters arising under Title 1 or Title 5 of the Texas Family Code.

Now, the collaborative law process is a rapidly developing procedure for managing conflicts and resolving civil disputes in all areas of law. The process is different from other dispute resolution processes, due to its non-adversarial nature and its ability to provide a prompt, cost-effective resolution for many parties.

The Future of Collaborative Law in Texas

Voluntary early settlement increases party satisfaction, reduces unnecessary expenditure of personal and business resources for dispute resolution, and promotes a more civil society. The future growth and development of Collaborative Law has significant benefits for parties and the legal profession.

The proposed Texas Uniform Collaborative Law Act (Texas UCLA) does *not* apply to family law matters governed by the Collaborative Family Law Act, and its enactment will have no effect whatsoever on the Collaborative Family Law Act. The Texas UCLA will amend the Texas Civil Practices and Remedies Code by adding a new Chapter 161, entitled Uniform Collaborative Law Act.

The Texas UCLA has no limitations on matters that can be submitted to the collaborative process and can be covered by the Act. Its enactment will expand the benefits and protections of a collaborative law statute to parties who wish to use the process for resolving disputes in all areas of law.

As of this date the Uniform Collaborative Law Act and/or court rules (which mirror the Act) have been enacted/adopted in 14 states and the District of Columbia.

The Need for Uniformity

Prior to 2009, a number of states had enacted statutes of varying length and complexity that recognize collaborative law. Courts in several states also had taken similar action through the enactment of court rules. Collaborative Law agreements are crossing state lines as more individuals and businesses are utilizing the collaborative process.

As the use of the process continues to grow, the Uniform Collaborative Law Act will:

- Provide uniformity from state to state, thus making the collaborative process more accessible;
- Assure that the process is voluntary;
- Assure that prospective parties are informed as to the material benefits and risks of the process;
- Protect against parties inadvertently or inappropriately entering into the process;

The Uniform Law Commission

The [Uniform Law Commission](#) (formerly the National Conference of Commissioners on Uniform State Laws) has drafted more than 250 uniform laws on numerous subjects and in various fields of law where uniformity is desirable and practicable. The signature product of the Commission, the Uniform Commercial Code, 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.

In 2007, the Commission determined that uniformity would bring “clarity and stability” to the collaborative process, and set about the task of codifying the process. The purpose of the Uniform Collaborative Law Act is “to support the continued development and growth of collaborative law by making it a more uniform, accessible dispute resolution option for parties.”

In July 2009, the Commission unanimously approved a [Uniform Collaborative Law Act](#). In March 2010, the UCLA Drafting Committee reconvened and made several additions to the original Act, including the addition of court rules that mirror the Act. The drafting committee also added a provision giving states alternatives as to the scope of the Act:

(1) they could limit its application to matters arising under the family laws of a state; or (2) they could impose no limitation on matters that can be submitted to the collaborative process.

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- Provide consistency from state to state regarding enforceability of collaborative law agreements;
 - Provide automatic tolling and recommence running of applicable statutes of limitations;
 - Establish when the collaborative process begins and concludes;
 - Assure confidentiality of communications during the process;
 - Provide a stay of court and other adversarial proceedings while parties are in the process;
 - Make provision for obtaining emergency orders;
 - Provide a privilege with appropriate limitations, should the process not result in settlement; and
 - Eliminate choice of law determinations.



Benefits for Pro Bono and Low Income Clients

Pro bono legal service organizations frequently refuse to assist parties in contested disputes that may last for months or years, since volunteer attorneys often are unwilling to become involved for that length of time. Because the nature of the collaborative process allows cases of this nature to be resolved quickly, collaborative lawyers in Houston and Dallas have agreed to provide legal services for these contested disputes.

Unfortunately when it comes to providing justice for all, a large percentage of Texas citizens fall between the cracks. They have enough income to be disqualified from

receiving pro bono services, yet they do not have the means to hire a lawyer at lawyer's regular rates. The Dallas Lawyer Referral Service and collaborative lawyers are developing a sliding scale program to satisfy this need. It is expected to be in place before the end of 2016. The Texas UCLA will provide statutory benefits and protections for collaborative lawyers representing pro bono and low income clients.

Collaborative Law Practice Beyond Family Law

Creative lawyers in Texas and across the country are applying the collaborative process to civil disputes beyond family law. It is difficult to name an area of the law that cannot

benefit from the collaborative process. Many hospitals have found that they are able to settle questions of medical error quickly, maintain a positive relationship with patients, and provide psychological relief for medical providers who know that patients and their families have been properly attended to after a medical event. Other areas which can benefit include

- breach of contract,
- business disputes,
- construction,
- discrimination,
- guardianship and elder law disputes,
- disputes in faith-based communities,
- intellectual property,
- LGBT disputes,
- partnership dissolution,
- personal injury,
- probate, and
- sexual harassment.

These types of disputes can be quickly and privately resolved while maintaining, rather than destroying, important relationships. The UCLA will guarantee confidentiality, provide structure, and assure that the process is voluntary.

Resolving International Disputes

Canada, Australia, Ireland, the United Kingdom, and countries in South America have embraced Collaborative Law, and many other countries have shown an interest in the collaborative

process. The nature of Collaborative Law makes it ideal for resolving international disputes, since it allows the parties a great deal of flexibility when determining choice of law and scheduling.

Passage of the Texas UCLA will provide parties in Texas an additional resource for managing and resolving transnational disputes.

The Texas Uniform Collaborative Law Act

The Texas UCLA is essentially the original 2009 UCLA with certain modifications that:

- ◆ strengthen the confidentiality and privilege provisions (§§161.112 & 161.113);
- ◆ strengthen the enforceability of settlement agreements under the Act (§161.105);
- ◆ add a requirement to include the disqualification provision, which is an essential element of the collaborative process, in a collaborative law participation agreement (§161.101(a)(7)); and,
- ◆ add a provision to address applicable statutes of limitations (§161.102(j)).

For a detailed, section-by-section analysis of the UCLA, see the tables at the end of this article.

Support for Enactment of the Texas UCLA

The Texas UCLA has the full support of the Uniform Law Commission, the ADR and Collaborative Law Sections, and other Sections of the State Bar of Texas, and many members of the judiciary, legal educators, individuals, businesses, trade associations and non-profit organizations in Texas.

The future growth and development of Collaborative Law has significant benefits for both parties and the legal profession. Codifying the collaborative process will make it a more accessible dispute resolution option for parties who wish to resolve disputes promptly, economically, and in a non-adversarial manner.

Supporters of the Texas UCLA encourage its enactment in the 85th Session of the Texas Legislature in 2017.



Lawrence R. Maxwell, Jr., is an attorney, mediator, arbitrator and practitioner of collaborative law in Dallas. He was the ABA Section of

Dispute Resolution Advisor to the Uniform Law Commission's drafting committee that drafted the original Uniform Collaborative Law Act, and was chair of the committee that drafted the Texas Uniform Collaborative Law Act. Larry was a co-founder and is a past chair of the State Bar of Texas Collaborative Law Section. He has authored numerous articles and has made presentations on collaborative law nationally and internationally. He may be reached at 214-739-8900, or imaxwell@adr-attorney.com. *The author wishes to acknowledge the valuable contributions made by a number of Texas attorneys in drafting the original UCLA, the Texas Family Collaborative Law Act, and the Texas UCLA. Thank you: Peter K. Munson, Harry L. Tindall, Norma L. Trusch, Jack Emmott, Kevin R. Fuller, Kristen Algert, Thomas L. Ausley, Winifred "Winnie" Huff, Sherrie R. Abney, Anne Shuttee, Robert C. Prather, Jr., Harry L. Munsinger, and Gay Ellen Gayle Cox (1953-2013).*

Texas Uniform Collaborative Law Act
 New Chapter in the Texas Civil Practices &
 Remedies Code
 Section-by-Section Analysis

Section Subchapter A: Application and Construction	
161.001	Sets forth the <i>policy of the State of Texas</i> to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures.
161.002	Provides that in the event the Chapter <i>conflicts with another statute or rule</i> that cannot be reconciled, the Act prevails, and that the Chapter does not apply to family law matters governed by the Collaborative Family Law Act.
161.003	Emphasizes the need to promote uniformity of the law among states that enact a collaborative law process act.
161.004	Provides that the Chapter partially modifies, limits and <i>supersedes federal statutes regarding electronic signatures</i> .

Section Subchapter B: General Provisions	
161.051	Sets forth the title: Uniform Collaborative Law Act.
161.052	Sets forth <i>definitions of key terms</i> used in the Act, including Collaborative law communication, Collaborative law participation agreement, Collaborative law process, Party, Non-party and Prospective party, Law firm and Proceeding and Tribunal.

Section	Subchapter C: Collaborative Law Process
161.101	<p><i>Establishes minimum requirements for a collaborative law participation agreement</i>, which is the agreement that parties sign to initiate the collaborative law process.</p> <p>The agreement (1) must be in a record, (2) signed by the parties, (3) state the parties intention to resolve the matter through collaborative law, (4) describe the nature and scope of the matter, (5) identify the collaborative lawyers, (6) confirm the engagement of each collaborative lawyer, and (7) state that the collaborative lawyers are disqualified from representing their respective parties before a tribunal relating to the collaborative matter, except as otherwise provided in the chapter.</p> <p>The section further provides that the parties may include other provisions not inconsistent with the chapter.</p>
161.102	<p><i>Specifies when and how the collaborative law process begins, and how the process is concluded or terminated.</i> The process begins when parties sign a participation agreement, and any party may unilaterally terminate the process at any time without specifying a reason. The process is concluded by a negotiated, signed agreement resolving all of the matter, or a portion of the matters and the parties' agreement that the remaining portions of the matters will not be resolved in the process.</p> <p>Several actions will terminate the process, such as a party giving notice that the process is terminated, beginning a proceeding, filing motions or pleadings, or requesting a hearing in an adjudicatory proceeding without the agreement of all parties, or the discharge or withdrawal of a collaborative lawyer.</p> <p>The section provides that under certain conditions the collaborative process may continue with a successor collaborative lawyer in the event of the withdrawal or discharge of a collaborative lawyer. The parties' participation agreement may provide additional methods of terminating the process.</p> <p>The section further provides that a tribunal may not order a party to participate in the process over that party's objection and contains a provision to address applicable statutes of limitations.</p>

Section	Subchapter C: Collaborative Law Process
161.103	<p>Creates a <i>stay of proceedings before a tribunal</i> (court, arbitrator, legislative body, administrative agency, or other body acting in an adjudicative capacity) once the parties file a notice of collaborative law participation agreement with the tribunal.</p> <p>A tribunal may require status reports while the proceeding is stayed; however, the scope of the information that can be requested is limited to insure confidentiality of the collaborative law process.</p> <p>Parties must notify a tribunal when the collaborative process concludes or terminates. Two years after the date of the stay, after giving the parties an opportunity to be heard, a tribunal may dismiss a proceeding based on delay or failure to prosecute.</p>
161.104	<p>Creates an <i>exception to the stay of proceedings</i> by authorizing a tribunal to issue emergency orders to protect the health, safety, welfare or interests of a party or non-party; which would include the financial or other interests of a party in any critical area in any civil dispute. However, the granting of such emergency orders must be agreed to by all parties; otherwise, the process is terminated.</p>
161.105	<p><i>Makes a settlement under the Act enforceable</i> in the same manner as a written settlement agreement under §154.071 of the Civ. Prac. & Rem. Code, provided that the settlement agreement is signed by each party and their collaborative lawyers and clearly states that it is not subject to revocation.</p>

Section	Subchapter C: Collaborative Law Process
161.106	<p>Sets forth the <i>disqualification provision</i>, which is a core element and the fundamental defining characteristic of the collaborative law process. Should the collaborative law process conclude or terminate without the matter being settled, the collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated, are disqualified from representing a party in a proceeding before a tribunal relating to the collaborative matter, except to seek emergency orders (§161.104) or to approve an agreement resulting from the collaborative law process (§161.105).</p> <p>The disqualification requirement is further modified regarding collaborative lawyers representing low-income parties (§161.107) and governmental entities as parties (§161.108).</p>
161.107	<p>Creates an <i>exception to the disqualification for lawyers representing qualified, low income parties</i>, such as in a legal aid office, law school clinic; or, a law firm providing free legal services to low income parties. If the process terminates without settlement, a lawyer in such organizations or law firms with which the collaborative lawyer is associated may represent the low income party in an adjudicatory proceeding involving the matter in the collaborative law process, provided that the participation agreement so provides, and the representation is without fee, and the individual collaborative lawyer is appropriately isolated from any participation in the collaborative matter before a tribunal.</p>
161.108	<p>Creates a similar <i>exception to the disqualification requirement for lawyers representing a party that is a government or governmental subdivision</i>, agency or instrumentality.</p>
161.109	<p>Sets forth another core element of collaborative law process. Parties in the process must, upon request of a party, make timely, full, candid, and <i>informal disclosure of non-privileged information substantially related to the collaborative matter</i> without formal discovery, and promptly update information that has materially changed. Parties are free to define the scope of disclosure in the collaborative process, provided that limits on disclosure do not violate another law, such as an Open Records Act.</p>

Section	Subchapter C: Collaborative Law Process
161.110	Affirms that <i>standards of professional responsibility</i> of lawyers and child and adult abuse reporting obligations of lawyers and all licensed professionals are not changed by their participation in the collaborative law process.
161.111	<p>Sets forth <i>requirements that collaborative lawyers fully inform prospective parties</i> regarding the specifics of the collaborative process prior to signing a participation agreement. A collaborative lawyer is required to discuss with a prospective client factors that the collaborative lawyer reasonably believes relate to the appropriateness of the prospective client’s matter for the collaborative process, and provide sufficient information for the client to make an informed decision about the material benefits and risks of the process as compared to the benefit and risks of other reasonably available processes, such as litigation, arbitration, mediation or expert evaluation.</p> <p>A prospective party must be informed that the collaborative process is voluntary and any party can unilaterally terminate the process without cause, and of the other events that will terminate the process. A prospective party must be informed of the effect of the disqualification requirement in the event the matter is not settled.</p>
161.112	<p>Provides that collaborative law <i>communications developed in the collaborative process are confidential</i> to the extent agreed by the parties, or as provided by state law other than the Chapter.</p> <p>The section provides that the conduct and demeanor of participants in the process is confidential; and, if agreed by the participants, confidentiality may relate to communications occurring before a participation agreement is signed. The section provides for in camera inspection of communications, records or materials to determine disclosure issues which cannot be resolved by the participants.</p> <p>Should a party engage successor counsel in the process, the Section permits party and non-party participants to disclose confidential communications to such successor counsel, subject to the confidentiality terms in the participation agreement.</p>

Section	Subchapter C: Collaborative Law Process
161.113	<p>Creates a <i>broad privilege</i> prohibiting disclosure or the admission into evidence or testimony before a tribunal of communications developed in the process in legal proceedings. The privilege applies to party and non-party participants in the process and the collaborative lawyers.</p> <p>An oral communications or written material in the collaborative process is admissible or discoverable if it is admissible or discoverable independent of the collaborative law process, or obtained outside of the process.</p> <p>The section further provides for in camera inspection of communications and written material to determine disclosure or admissibility issues which cannot be resolved by the participants.</p>
161.114	<p>Sets forth a number of <i>exceptions to the confidentiality and privilege</i> based on important countervailing public policies such as preventing threats to commit bodily harm or a crime, abuse or neglect of a child or adult, or information available under an open records act, or to prove or disprove professional misconduct or malpractice or that a settlement agreement was procured by fraud or duress, or to challenge or defend the enforceability of a settlement agreement.</p> <p>The section provides that all participants may agree in advance in a signed record that all or part of the process is not privileged or confidential. The section further provides under certain circumstances, that there is no privilege or confidentiality if, after a hearing in camera a tribunal finds that the evidence is not otherwise available and the need for the evidence substantially outweighs the interest in protecting privilege or confidentiality.</p>

Section	Subchapter C: Collaborative Law Process
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161.115	<p>Deals with <i>enforcement of flawed settlement agreements</i>, i.e., agreements made in a collaborative process that fail to meet the mandatory requirements for a participation agreement as set forth in §.161.101; and/or situations where a collaborative lawyer has not fully complied with the informed consent requirements of §.161.011.</p> <p>This section provides that when the interests of justice so require, a tribunal is given discretion to enforce an agreement resulting from a flawed participation agreement, if the tribunal finds that the parties intended to enter into a participation agreement, and reasonably believed that they were participating in the collaborative process.</p>
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Section 2	
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	Makes the Chapter applicable to a collaborative law participation agreement signed on or after the effective date of the Act.
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