

Executive Summary of the Texas Uniform Collaborative Law Act

By Lawrence R. Maxwell, Jr. *

This paper will provide an introduction to the collaborative dispute resolution process and address the future of the process in Texas, explain the reasons and benefits of codifying the process, describe the work of the Uniform Law Commission in drafting a Uniform Collaborative Law Act, provide a section-by-section analysis of the Texas Uniform Collaborative Law Act and encourage its enactment in the 83rd Session of the Texas Legislature.

Overview of Collaborative Law:

The collaborative dispute resolution process (commonly known as “Collaborative Law”) is a part of the movement toward the delivery of “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 wherein parties and their counsel seek to negotiate a resolution of the dispute without having a ruling imposed upon them by a court, arbitrator or other adjudicatory body. The process is based upon cooperation between the parties, teamwork, full disclosure, honesty and integrity, respect and civility, and parity of costs. As is the case with mediation, collaborative law has its roots in the area of family law, and the process is expanding for resolving disputes in many areas of civil law. The process is different from other dispute resolution processes due to its non-adversarial nature and ability to provide a prompt, cost effective resolution for many parties.

The Future of Collaborative Law in Texas:

The collaborative process is a rapidly developing procedure for managing conflicts and resolving civil disputes in all areas of law outside of the courthouse. 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.

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 5 of the Texas Family Code.

The 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 limitation on matters that can be submitted to the collaborative process and will be covered by the Act. Its enactment will expand the benefits of a collaborative law statute to parties who wish to use the process for resolving disputes in all areas of law.

The Need for Uniformity from State to State:

A number of states have enacted statutes of varying length and complexity that recognize collaborative law, and courts in several states have taken similar action through the enactment of court rules. Collabo-

rative 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 and make 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,
- Provide consistency from state to state regarding enforceability of collaborative law agreements,
- Provide automatic tolling and recommending of applicable statutes of limitations,
- Establish when the collaborative process begins and concludes,
- Assure confidentiality of communications in 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.

The Need for Uniformity for Resolving International Disputes:

Canada, Australia, several European countries including Ireland and 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 would provide parties in Texas an additional resource for managing and resolving transnational disputes.

The Uniform Law Commission's Drafting Process:

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 stated 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.” A Drafting Committee of the Commission conducted a series of conferences for the purpose of drafting an act to codify collaborative law procedures into a uniform act.

In July 2009, meeting in its one-hundred and eighteenth year, 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 which mirror the Act, and a provision whereby states would have alternatives as to the scope of the Act: (1) limit its application to matters arising under the family laws of a state, or (2) imposing no limitation on matters that can be submitted to the collaborative process.

The Texas Uniform Collaborative Law Act:

- a. The Texas UCLA is essentially the original 2009 UCLA with certain modifications that:
- b. strengthen the privilege and confidentiality provisions (Sec. 161.112 and 161.113),
- c. strengthen the enforceability of settlement agreements under the Act (Sec. 161.105), add a re-

quirement to include the disqualification provision, which is an essential element of the collaborative process, in a collaborative law participation agreement (Sec. 161.101(A)(7)); and, add a provision to address applicable statutes of limitations (Sec. 161.102(J)). **Section by Section Summary of the Texas UCLA:**

SECTION 1. – SUBCHAPTER A. APPLICATION AND CONSTRUCTION

Sec. 161.001 sets forth the policy of the State of Texas to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures.

Sec. 161.002 provides that in the event the Chapter conflicts with another statute or rule 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.

Sec. 161.003 emphasizes the need to promote uniformity of the law among states that enact a collaborative law process act.

Sec. 161.004 provides that the Chapter modifies, limits and supersedes federal statutes regarding electronic signatures.

SECTION 1. – SUBCHAPTER B. GENERAL PROVISIONS

Sec. 161.051 sets forth the title: Uniform Collaborative Law Act.

Sec. 161.052 sets forth definitions of key terms 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.

Sec. 161.053 makes the Chapter applicable to a collaborative law participation agreement meeting the requirements of Sec. 161.101, which is signed on or after its effective date.

SECTION 1. - SUBCHAPTER C. COLLABORATIVE LAW PROCESS

Sec.161.101 establishes minimum requirements for a collaborative law participation agreement, which is the agreement, that parties sign to initiate the collaborative law process.

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.

The Section further provides that the parties may include other provisions not inconsistent with the Chapter.

Sec.161.102 specifies when and how the collaborative law process begins, and how the process is concluded or terminated. 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.

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.

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.

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.

Sec. 161.103 creates a stay of proceedings before a tribunal (court, arbitrator, legislative body, administrative agency, or other body acting in an adjudicative capacity) once the parties file a notice of collaborative law with the tribunal. 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.

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.

Sec. 161.104 creates an exception to the stay of proceedings by authorizing a tribunal to issue emergency orders to protect the health, safety, welfare or interests of a party or nonparty; 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.

Sec. 161.105 makes a settlement under the Act enforceable in the same manner as a written settlement agreement under Sec. 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.

Sec. 161.106 sets forth the disqualification provision, 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 (**Sec. 161.104**) or to approve an agreement resulting from the collaborative law process (**Sec. 161.105**).

The disqualification requirement is further modified

regarding collaborative lawyers representing low-income parties (**Sec. 161.107**) and governmental entities as parties (**Sec. 161.108**).

Sec. 161.107 creates an exception to the disqualification for lawyers representing qualified, low income parties, 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.

Sec. 161.108 creates a similar exception to the disqualification requirement for lawyers representing a party that is a government or governmental subdivision, agency or instrumentality.

Sec. 161.109 sets forth another core element of collaborative law process. Parties in the process must, upon request of a party, make timely, full, candid, and informal disclosure of non-privileged information substantially related to the collaborative matter 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.

Sec. 161.110 affirms that standards of professional responsibility 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.

Sec. 161.111 sets forth requirements that collaborative lawyers fully inform prospective parties 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.

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. Further, a prospective party must be informed of the effect of the disqualification requirement in the event the matter is not settled.

Sec. 161.112 provides that collaborative law communications developed in the collaborative process are confidential to the extent agreed by the parties, or as provided by state law other than the Chapter.

This 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.

This Section further provides for *in camera* inspection of communications, records or materials to determine disclosure issues which cannot be resolved by the participants.

Sec. 161.113 creates a broad privilege 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.

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.

This 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.

Sec. 161.114 sets forth a number of exceptions to the

privilege and confidentiality 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.

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.

Sec. 161.115 deals with enforcement of flawed settlement agreements, i.e., agreements made in a collaborative process that fail to meet the mandatory requirements for a participation agreement as set forth in Sec.161.101; and/or situations where a collaborative lawyer has not fully complied with the informed consent requirements of Sec. 161.014.

The 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.

Support Enactment of the Texas UCLA:

The Texas UCLA has the full support of the Uniform Law Commission, the ADR and Collaborative Law Sections of the State Bar of Texas, and many members of the judiciary, legal educators, individuals and organizations in Texas.

The future growth and development of Collaborative Law has significant benefits for parties and the legal profession, and codifying the collaborative process will make it a more accessible dispute resolution option for parties

Supporters of the Texas UCLA encourage its enactment in the 83rd Session of the Texas Legislature.



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