

THE DEVELOPMENT OF COLLABORATIVE LAW

By Lawrence R. Maxwell, Jr.*

This article will detail the history of the development of the collaborative dispute resolution process (referred to as collaborative law) from the birth of the process in 1990, and highlight significant events in Texas and worldwide that have given momentum to an exciting, revolutionary new process for resolving disputes. Victor Hugo, the nineteenth century French novelist, poet, statesman, and human-rights campaigner once said, "Nothing is more powerful than an idea whose time has come." In just a few years, the rapid worldwide development of collaborative law has borne out Victor Hugo's belief.

The Birth of Collaborative Law

In the late 1980s a Minnesota lawyer, after practicing traditional civil law for eight years and family law for seventeen years, was approaching burnout. 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."¹

Legal and ethical questions needed to be answered about the process. Webb contacted colleagues and a justice on the Minnesota Supreme Court 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 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 hear 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, and 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.

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, and to reflect its international reach, the name of the organization was changed to the International Academy of Collaborative Professionals (IACP). The IACP now counts over 3,000 members, and its quarterly publication, *The Collaborative Review*, is distributed worldwide to members in Canada, the United Kingdom, Switzerland, Austria, New Zea-

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land, and Australia. The historical development of IACP is chronicled on the IACP website, .

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

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.²

Texas Leads the Way in Civil Collaborative Law

The year 2000 was a “tipping point” for collaborative law, especially in Texas. Dallas attorneys John McShane and Larry Hance attended a collaborative law presentation of Pauline Tesler’s, and promptly asked her and Stu Webb to come to Dallas. The newly formed Collaborative Law Institute of Texas brought Stu Webb and Pauline Tesler to Dallas, and collaborative law was off and running in Texas.

In 2001, Houston family law attorney Harry Tindall and others, with the able assistance of Rep. Toby Goodman of Fort Worth, had great success in the Texas Legislature. Collaborative law was for the first time validated by statute, when the Family Code was amended to add collaborative law procedures (Sections 6.603 and 153.0072 of the Texas Family Code). Similar statutes have been enacted in North Carolina and California³, and collaborative law bills are pending in the legislatures of a number of states.

In 2004, Dallas family law attorney Janet Brumley published *Divorce without Disaster: Collaborative Law in Texas*.⁴ Endorsing the book, Stu Webb, the father of collaborative law, commented: “Wow! Texas has done it again - the first state to publish a comprehensive guide for lawyers and consumers on the practice of collaborative law in their state.”

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. The collaborative process is expanding in a variety of areas of law, and Texas is once again leading the way.

In the summer of 2004, with the blessings and invaluable support of the Collaborative Law Institute of Texas, a group of lawyers⁵ in Dallas organized a 501(c)(3) non-profit corporation, the Texas Collaborative Law Council, Inc. (TCLC). The mission of TCLC is to expand the use of the collaborative process for resolving civil disputes, 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 assistance of the Collaborative Law Institute of Texas, TCLC has developed Protocols of Practice for Civil Collabora-

tive Lawyers, a Participation Agreement and other documents for collaborative practitioners. The documents are available on the TCLC website: www.collaborativelaw.us

Sherrie R. Abney, TCLC’s Vice-President for Training and CLE, has become an internationally recognized author and trainer in the civil collaborative process. In 2005, she authored the first book published on civil collaborative law, *Avoiding Litigation: A Guide to Civil Collaborative Law*.⁶ Enthusiastically endorsing the book, Rita Pollak of Boston, the current president of IACP and a strong supporter of the expansion of the collaborative process, commented, “Here it is. The definitive book on civil collaborative practice.” Ms. Abney regularly conducts trainings for lawyers and other professionals around the country and has been invited to conduct a training in Australia in the civil collaborative process in Fall 2007.

In December 2005, TCLC Founding Directors Larry Maxwell and Robert Matlock joined Ms. Abney to introduce civil collaborative law in the United Kingdom. At the invitation of the ADR Group of the U.K.,⁷ the largest mediation network in the U.K., they were keynote speakers at the organization’s annual conference held at Oxford University. Michael Lind, chief executive of the ADR Group, in his opening remarks to the conference attendees stated, “Despite the growing recognition of mediation as a more cost-effective alternative to litigation, and the ADR Group’s many successes this year, we decided to focus firmly on the future rather than our past achievements.”

As in the U.K. and around the world, the growth and widespread use of the mediation process has been nothing short of amazing. Many lawyers, once they become familiar with the collaborative process, believe the use of collaborative law will grow and expand in much the same manner as has occurred with mediation.

Following the success in amending the Family Code in the 2001 Session of the Texas Legislature, a group of dedicated Texas collaborative lawyers set about the task of expanding the statutory validation of the process by adding a similar collaborative law provision to the Texas Civil Practice and Remedies Code.⁸ Collaborative law bills were introduced in the 2005 (C.S.H.B 205) and 2007 (S.B. 942) legislative sessions. In 2005, the ADR Section of the State Bar of Texas supported the bill, and in 2007 the Section included the Collaborative Law Procedures bill in its legislative proposals.

In each legislative session, the only opposition came from the Texas Trial Lawyers Association and the Texas Association of Defense Counsel. Even with the tenacity of Rep. Toby Goodman of Tarrant County in 2005, and Sen. John Carona of Dallas in 2007, the bills did not pass. On a positive note, collaborative law demonstrated its effectiveness in bringing people to common ground. Two organizations of trial lawyers that historically have not been able to agree on the time of day, *collaborated* in a common cause - to prevent passage of the collaborative law bill. One can only speculate as to their reasons.

The many trial and transaction lawyers, judges, associations, individuals, and businesses that support the collaborative law legislation will be back in 2009, and perhaps the third time will be a charm.

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The Houston and Dallas Bar Associations have established Collaborative Law Sections. The sections present outstanding speakers at regular monthly, well-attended luncheon meetings. Norma Trusch and her group of collaborative lawyers in Houston have expanded their collaborative training to include probate law.

For the past three years, TCLC and the Collaborative Law Section of the Dallas Bar Association have sponsored two-day programs to train lawyers and other professionals in the civil collaborative process. The backgrounds of those attending the programs demonstrate the breadth of interest in civil collaborative law: in-house litigation counsel, solo practitioners, partners in large international law firms, lawyers practicing in the areas of probate, real estate, employment, construction, securities, and intellectual property law, lawyers with plaintiff and defendant personal injury practices, business transaction lawyers, law school professors, sitting judges, full-time mediators and arbitrators.

In 2005, Anne Shuttee, in-house litigation attorney with Electronic Data Systems Corp., an international corporation with headquarters in Dallas, attended the initial TCLC training in civil collaborative law. She went away realizing the benefits of maintaining ongoing relations in the collaborative process, which are not possible in litigation, and the potential for reducing the enormous costs in the litigation process. EDS is presently in the process of determining how and in what context to incorporate a collaborative law process into its contracts. The support of EDS for the process was outlined in an article by Debra Branom, manager of their U.S. and Latin American Business Support, in the September 2006 issue of *Martindale-Hubbell's Counsel to Counsel*.⁹

In 2005, the IACP established a Civil Committee with the mission of expanding the organization beyond family law to various areas of civil law. Texas collaborative lawyers Sherrie Abney and Stacey Langenbahn serve on the committee. The committee, in its first face-to-face meeting in Chicago, established sub-committees and identified four areas in which a concerted effort is being made to expand the process: probate, employment, medical error, and faith-based communities.

At the request of the IACP's Civil Committee, several Texas collaborative lawyers have drafted Protocols of Practice for Civil Collaborative Lawyers. The Protocols, which are patterned after TCLC's Protocols, have been circulated among Board members for comments.

Collaborative Law is Gaining Traction Nationally and Worldwide

Nationally

Notwithstanding the slow pace of the Texas Legislature in the area of civil collaborative law, the concept is on the verge of taking a giant step toward national acceptance, and two Texans are again at the forefront.

This year, the National Conference of Commissioners on Uniform State Laws (NCCUSL) established a Drafting Committee

to draft an act on collaborative law. The committee is chaired by Commissioner Peter K. Munson (from Sherman, Texas), and Commissioner Harry Tindall (from Houston) is a voting member of the committee. The process will take two years, and Professor Andrew Schepard of Hofstra University School of Law, the Reporter for the Drafting Committee, will be responsible for translating the committee's deliberations into a proposed statute for submission to various state legislatures.

After the first meeting of the Drafting Committee, the Commissioners appear to be divided as to whether the proposed act should address all areas of civil law or only family law. Civil collaborative lawyers around the country believe it would be short-sighted and a setback to the worldwide collaborative law movement to limit the proposed uniform act to family law.¹⁰

In February 2007, the American Bar Association's Section on Dispute Resolution established a Collaborative Law Committee chaired by David Hoffman of Boston, former chair of the Section on Dispute Resolution. The section held its first in-person meeting in April 2007, at the Section's annual conference in Washington, D.C. Texas collaborative lawyers Ruth Rickard, Stacey Langenbahn, Sherrie Abney, and Larry Maxwell serve on the committee.¹¹ Collaborative law organizations from coast to coast, which were initially established as organizations of family law attorneys, are expanding their membership to include attorneys practicing in a variety of areas of law, including probate, employment, real estate, construction, business and commercial. The Massachusetts Collaborative Law Council (www.massclc.org), Washington Collaborative Law (www.washcl.org), and Collaborative Law Council of the Redwood Empire (www.collaborativecouncil.org) have active training programs and regularly publish articles on collaborative law.

Internationally

In March 2007, the First European Collaborative Law Conference sponsored by the IACP and other European collaborative law organizations was held in Vienna, Austria; and in October the IACP's Eighth Annual Networking Forum will be held in Toronto, Canada.

In the Province of Alberta, Canada the Family Law Act has recently been amended to add a section entitled "Duty of Lawyer," which provides that every lawyer who acts on behalf of a party in an application under the Act has a duty:

- (a) to discuss with the party alternative methods of resolving the matters that are the subject of the application, and
- (b) to inform the party of collaborative processes, mediation facilities and family justice services known to the lawyer that might assist the parties in resolving those matters .

Granted, it may be some time before we see black-letter law such as this in Texas or anywhere else in our country, but it is interesting to speculate as to when, and in what form, legisla-

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tion such as the Alberta statute will be enacted imposing a duty on lawyers to advise clients of the collaborative process and other *alternate* methods of resolving disputes. Perhaps some day, the word “*alternate*” will refer to litigation.

In Australia, IACP member Robert Lopich of New South Wales reports that collaborative law is moving ahead at a rapid pace in family and other areas of law. Family, civil, and commercial lawyers are being trained in the process throughout the country. Collaborative Law has been embraced by the Federal Government of Australia. Earlier this year, the federal Attorney General conducted the launch of collaborative law websites by groups in New South Wales (www.liv.asn.au), Victoria (www.liv.asn.au), Queensland (www.liv.asn.au), and other states and territories.

Academia's Interest in Collaborative Law

It is a sure sign that a new and revolutionary movement such as collaborative law is here to stay, when the academic world begins to take notice. In the past few years, a number of scholarly articles have been published on collaborative law.

In 2004, Larry Spain, currently a Professor of Law at Texas Tech University School of Law, reflected on ethical considerations in a collaborative law practice in an article entitled, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*.¹² In 2005, Christopher Fairman, Associate Professor at the Ohio State University Moritz College of Law, published an article on ethical considerations in the collaborative process, and he believes a new model is needed for collaborative law.¹³ This year John Lande, Associate Professor and Director, LL.M Program in Dispute Resolution at the University of Missouri School of Law, published a thorough analysis and set of principles for policymaking about alternate dispute resolution.¹⁴ Professor Lande argues that a new rule regarding collaborative law is not necessary and that adopting such a rule prematurely may actually inhibit useful innovations in collaborative practice. The article further points out that many ethical rules already regulate collaborative lawyers' services, and five state bar associations have applied these rules to collaborative law.

ABA, Five Favorable State Ethics Opinions and One Maverick Opinion

Ethics opinions supporting collaborative law have been issued by state bar associations of five states: Minnesota (1997), North Carolina (2002), Pennsylvania (2004), Kentucky (2005) and New Jersey (2005) and the ABA (2007).

In February 2007, after Professor Lande's article was published, the Ethics Committee of the Colorado State Bar issued an *advisory opinion* - the first and only such opinion in the U.S. - stating that Colorado attorneys cannot sign a collaborative law participation agreement without violating Colorado Rules of Professional Conduct. Colorado is not among the majority of states, such as Texas, that have an “integrated” bar, which is a public organization, integrated with the judi-

ary. Ethics Opinions are issued for advisory purposes only, are not binding on the Colorado Supreme Court or any attorney regulatory and disciplinary committees of the state.

The IACP Ethics Task Force has published a response to the Colorado opinion: *The Ethics of the Collaborative Participation Agreement: A Critique of Colorado's Maverick Ethics Opinion*. The conclusions of the IACP's Task Force are (1) that the Colorado opinion is inconsistent with the fundamental principle of legal ethics that clients are entitled to make informed decisions about the scope of their representation; and (2) the potential impact of the Colorado opinion is quite limited because the opinion applies only in Colorado and relies heavily on a section of the Colorado Rules of Professional Conduct - Rule 1.7(c) describing circumstances in which “a client's consent cannot be validly obtained” that is unique to Colorado and is not present in the ABA Model Rules or the disciplinary rules of any other state.

Later this year, the Collaborative Law Committee of the ABA Section of Dispute Resolution will publish a position paper stating its point of view and analyzing the subjects that have been addressed in the ethics opinions to date.

The recent favorable ABA opinion, the IACP's critique of the Colorado opinion and all state opinions issued to date may be found on the webpage of the ABA Collaborative Law Committee.¹⁵

The Future of Collaborative Law is Bright

Conflict inevitably arises among individuals and in the business world. Business executives and professionals are starting to realize that costly and time-consuming litigation does not need to be the first option for resolving disputes. Light bulbs are starting to light up in law firms and corporate executive offices.

The collaborative process may be the business imperative of our time. Interest-based negotiation, as opposed to positional bargaining, really does capture the exponential power of cooperation. Working together in a non-adversarial manner to meet the goals and interests of the parties is a quick, inexpensive way to resolve a dispute. When conflict arises, parties want to resolve disputes quickly, control costs and scheduling, control outcomes, maintain relations, and avoid unnecessary publicity, which is rarely possible in litigation.

Interestingly, today the naysayers' objections to the collaborative process are almost a perfect echo of the objections to the mediation process when it was getting started in Texas in the late 1980s. Mediation has progressed quite nicely in the past twenty years.

We must be aware of Clark's Law of Revolutionary Ideas. Every revolutionary idea -- in Science, Politics, Art, Law or Whatever -- evokes three stages of reaction. They may be summed up in three phrases:

1. It is impossible, so don't waste my time with it.
2. It is possible, but it is not worth doing.
3. I said it was a good idea all along.

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Many dedicated lawyers and other professionals around the country and the world believe the collaborative process is good for their clients, and that belief gives us assurance that the future of collaborative law is bright.

Worldwide, successful businesses and professional organizations maintain relations over the long run by resolving conflicts promptly and economically. Rarely can such be accomplished in the litigation “arms race.” Granted, the collaborative process is not for every dispute, or every party, or every lawyer. However, when parties and lawyers fully understand the process and its benefits, more times than not, the collaborative process will likely be used as the first option for resolving the dispute.



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ENDNOTES

¹ The “collaborative commitment” is also known as the disqualification or withdrawal provision. This requirement focuses the parties and the lawyers one hundred percent on the settlement process.

² Norma Levine Trusch, *Texas Leads the Way in Collaborative Law*, ALTERNATIVE RESOL. at 22 (Summer 2006).

³ The Texas, North Carolina and California statutes may be found at the web page of the ABA Section on Dispute Resolution Collaborative Law Committee: www.tinyurl.com/yrog77.

⁴ Janet P. Brumley, *Divorce without Disaster: Collaborative Law in Texas* (Lori Fairchild ed. 2004).

⁵ The founding directors of the Texas Collaborative Law Council are Sherrie R. Abney, Hon. Ted Akin, Robert J. Matlock, Lawrence R. Maxwell, Jr., Michelle Leek Sutton, and Travis E. Vanderpool.

⁶ The book is available at the author’s website, www.fourcornerssolutions.com or at the publisher’s website, www.trafford.com.

⁷ www.adrgroup.co.uk

⁸ Texas Legislature Online: www.capitol.state.tx.us “Search Legislation - 2007 - SB 942.”

⁹ The EDS article may be found on the website of the Texas Collaborative Law Council: www.collaborativelaw.us - “Articles and Papers.”

¹⁰ Those who have views on the issue may express their opinions to Professor Schepard at lawazs@hofstra.edu (Subject: NCCUSL Collaborative Law Drafting Committee).

¹¹ Information concerning the Collaborative Law Committee may be found on the committee’s web page. See ABA Section on Dispute Resolution Collaborative Law Committee: www.tinyurl.com/yrog77.

¹² 56 Baylor L. Rev. 141 (2004). In 2005, Professor Spain’s article was recognized by the Texas Bar Foundation as the most outstanding article published in a Texas law review in the previous year.

¹³ Christopher Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO STATE J. ON DISP. RESOL. 73 (2005).

¹⁴ John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 OHIO STATE J. ON DISP. RESOL. 619 (2007).

¹⁵ www.tinyurl.com/yrog77

THE ASSOCIATION OF ATTORNEY-MEDIATORS: STEVE BRUTSCHÉ’S INSPIRATION AND LEGACY *continued from page 19*

Mediation for our membership—and, I submit, for the State of Texas and elsewhere—took off because we had a statute that permitted courts to order litigants, over objection within reasonable discretion, to conduct a mediation session and pay a reasonable fee to a committed mediator knowledgeable in the context of the dispute. As a result, an institutional change in the manner in which litigation is conducted has been possible, all at no expense to the public. AAM’s mission remains to support and promote professional and qualified attorney-mediators who are committed to the proposition that the existing system can fulfill its intended purpose through the use of voluntary and court-annexed mediation.

Conclusion

To conclude, it seems only right to grant Steve Brutsché’s wish, which he mentioned as he closed his last presentation, his terminal condition then being well-known. He said,

Many of you have asked what you can do for me. I’m going to tell you what you can do for me: you can take what you have been given and use it well. And share it, and spread it, and be sources of good in your community. And share it with others, and get them to be aware of it. You can make

our system come closer to fulfilling its purpose than it was before you got involved. That’s what you can do for me. It’s take what you have been given and make it grow.

Henry Simpson, one of our long-time members from Dallas who has continued his practice of law while mediating, told me recently, “Brutsché, whom I didn’t know well—never even had a case with him—came up to me in 1990, and said, ‘Simpson, you need to check this out. It’s for you.’” It’s been good for Simpson, good for me, good for the Bar, the courts, and—most importantly—the clients we serve. The world of mediation is very large, and hearts beat to other drummers, but Steve Brutsché was *our* drummer.



** Mike Amis was trained in the initial Dallas Bar training class in 1989, and has been a full-time attorney-mediator since 1990. Board certified in civil trial law since 1983, Mike has built a mediation practice that has paralleled his variety of civil cases as a trial advocate. Since 1989, Mike has been active in promoting the use of mediation through the Association of Attorney-Mediators and the American Academy of Attorney-Mediators, Inc. He serves as one of the mediators of Burdin Mediations of Dallas.*