

# Collaborative Law Promises a Kinder, Gentler Approach to Business Disputes

Collaborative law rejects the “scorched earth” approach to commercial cases taken by many attorneys. So guess who’s opposing it?

By by John G. Browning  
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For the past 20 years or so, a quiet revolution of sorts has been slowly taking place in the legal community. The movement known as “collaborative law”—in which all parties to a dispute agree to emphasize their priorities in a process that promotes transparency without court intervention—has been transforming family law.

Buoyed by the passage of a family collaborative law statute by the Texas Legislature in 2001, practitioners of collaborative law have preached an appealing gospel to litigants fed up with the raw emotions, uncertainties, and financial demands of a divorce system too often characterized by a lawyer-driven, “scorched earth” approach to cases. So far, the influence of collaborative law has been felt primarily in the family law realm, but its adherents are pushing for a wider audience, saying that its voluntary, non-adversarial nature makes it ideally suited for companies seeking to resolve a business dispute while salvaging an underlying relationship.

First, let’s understand a little more about the principles behind collaborative law. One core tenet is resolution without court intervention. Both sides and their attorneys agree in writing to work toward settling the case while keeping the court out of it; in the event that filing suit is unavoidable, both attorneys are disqualified from representing either client in any adversarial proceeding involving the dispute, and their work product usually becomes inadmissible. This provides an incentive for both the attorneys and clients to reach a resolution that makes the clients happy and gets the lawyers paid.

Another key principle of collaborative law is transparency. All information is freely exchanged pursuant to a contractual agreement to provide all relevant information to the other side—whether requested or not. This eliminates the need for formal discovery requests and costly disputes over what was produced or not produced.

Finally, collaborative law is also marked by interest-based negotiation; settlement discussions are driven not by a party’s position or desire for punitive measures, but by the highest priorities of the parties. In a divorce proceeding, for example, such an approach might lead to the rejection of what a court may regard as a fair community property split if it doesn’t maximize the benefit to both parties.

If a voluntary process that reduces legal costs, eliminates court intervention, and puts the clients’ interests first sounds like the answer to many companies’ prayers to you, you’re not alone. Proponents like Dallas attorney/mediator and arbitrator Lawrence Maxwell Jr. say that companies could save substantially on legal fees—and heartburn—by adopting a collaborative approach. “Probate, construction litigation, employment, business disputes—any of these can be well-suited for the collaborative process,” says Maxwell. He should know: the former litigator now serves as the president of the Global Collaborative Law Council and as the American Bar Association advisor to the Uniform Law Commission that’s in the process of writing a Uniform Collaborative Law Act for states to consider adopting.

However, efforts to give collaborative law the same statutory boost in other civil matters as it received in family law have met with stiff resistance from the group most likely to be affected: the legal profession. Efforts at extending collaborative law beyond family law to business disputes have been vigorously opposed by the Texas Trial Lawyers Association and the Texas Association of Defense Counsel, the groups for the plaintiff and defense trial bars. According to Maxwell, these strange bedfellows “usually can’t agree that the sun comes up in the east and sets in the west,” but they’ve been united in their opposition to collaborative law.

State Sen. John Carona of Dallas filed a bill in 2007 that would have amended the Texas Civil Practice and Remedies Code to allow for collaborative law procedures to be used on a voluntary basis in any civil dispute. Among other features, the proposed law would have required courts to suspend litigation as long as the parties were engaged in collaborative proceedings. However, the bill never made it out of the Senate Jurisprudence Committee. According to Barbara Salyers, general counsel and legislative director for Carona, the senator remains “very supportive of the concept,” but in light of the lack of support in the Legislature, he did not reintroduce his bill during this year’s legislative session.

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Even without being formally enshrined in Texas law, the collaborative concept is slowly finding a foothold in civil matters beyond the family law arena. Prior to its acquisition by Hewlett Packard, Plano-based Electronic Data Systems Corp. began using collaborative law to resolve contract disputes with its contractors. The approach was designed not only to save on legal costs, but to preserve long-standing business relationships as well.

Maxwell has witnessed firsthand the benefits of applying collaborative principles to other types of civil litigation. One case involved the sale of a closely held business, in which the parties purchasing the company (who were upset with the seller’s continued influence over customers) had fallen behind in their payments, which had been personally guaranteed by a single individual. The lawyers and parties crafted a solution in which the deal was restructured to provide more feasible, regular payments with a substituted guarantor and less involvement by the seller in the company’s business.

According to Maxwell, one of the keys to success was the parties' having exchanged enough information to talk openly and knowledgeably about their goals and interests, often accomplished through a "participation agreement," signed by all parties and their lawyers, governing the free exchange of information and even the use of shared experts like appraisers or accountants.

Nicole LeBoeuf of Dallas' Shackelford, Melton and McKinley has also seen collaborative law spread to other civil settings. She points to cases ranging from a sexual-harassment lawsuit to the dissolution of a business as examples of the collaborative process at work. Increasingly, she's seeing collaborative principles applied in construction litigation where the parties may have a pending dispute but are interested in continuing their business relationship.

In one recent case of hers, a Texas school building manufacturer, an Indiana-based grading subcontractor, and a Texas nonprofit corporation using the building for a federally funded early childhood education program were embroiled in a dispute over water damage to the structure. With the building's evacuation and the parties' attorneys debating everything from "the source of the water, the extent of the mold, the occupant's failure to mitigate, the proper parties to any litigation" and other issues, tensions quickly escalated, according to LeBoeuf. Although there was some resistance (particularly from the Indiana grading company), the Texas parties opted for a collaborative approach. The parties jointly hired an expert to investigate the source of the water accumulation, with access to and the cost of the expert shared equally. After disclosures of information "that might not have been discovered until long into the litigation, if at all" according to LeBoeuf, the parties came to settlement terms that included what LeBoeuf described as "items that would not have been within the purview of a judge or jury to award."

A lower cost, less combative approach that eschews "scorched earth" in favor of preserving business relationships? No wonder most lawyers are slow to embrace collaborative law.

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