

# An Update

## Uniform Collaborative Law Act

### Uniform Collaborative Law Rules

### Texas Uniform Collaborative Law Act

By Lawrence Maxwell\*

The Uniform Law Commission (ULC) provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law. Now in its one hundred and nineteenth year, the Commission has drafted more than 250 uniform laws on numerous subjects and in various fields of law where uniformity is desirable and practicable.

The Uniform Commercial Code, the signature product of the ULC working in conjunction with the American Law Institute, has recently been revised, updated and enacted in whole or in part in all jurisdictions. The Uniform Commercial Code is a prime example of how the work of the ULC has simplified the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state.

In 2006, with the use of the collaborative dispute resolution process (“Collaborative Law”) becoming widespread throughout the country, the ULC identified a need for uniformity in the practice of collaborative law and established a Drafting Committee to codify the process in a uniform act.

The UCLA Drafting Committee included eight Commissioners, four ABA Advisors and several Observers. The State of Texas was represented in the drafting process. Peter Munson of Sherman, a voting Commissioner, served as Chair of the Drafting Committee; Harry Tindall of Houston, co-author of Sampson & Tindall’s *Texas Family Code Annotated*, a voting Commissioner served as Chair of the Executive Committee; Norma Trusch of Houston, past president of the International Academy of Col-

laborative Professionals, served as an Observer on behalf of the IACP, and Lawrence R. Maxwell, Jr. of Dallas, a co-founder and president of the Global Collaborative Law Council, and co-chair of the ABA Section of Dispute Collaborative Law Committee, served as the Section’s Advisor.

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.”

#### Overview of Collaborative Law

Collaborative law is a part of the movement towards the delivery of “unbundled” legal representation, as it separates by agreement representation in settlement-oriented processes from representation in adjudicatory processes. The organized bar has recognized unbundled legal services like collaborative law as useful options available to clients. The ABA Model Rules of Professional Conduct, Rule 1.2 (c) states: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

As is the case with mediation, collaborative law has its roots in family law, and is expanding into many areas of civil law. The International Academy of Collaborative Professionals was established in 1999, as an organization of family collaborative lawyers. The organization has recently established a Civil Collaborative Committee and membership is expanding with members practicing in various areas of civil law. In 2004, the Texas Collaborative Law

Council (now Global Collaborative Law Council) was established to promote the use of the collaborative process for resolving disputes in all areas of civil law. In 2007, the ABA Section of Dispute Resolution established a Collaborative Law Committee to educate ABA members and the public as to the benefits of the collaborative process.

The collaborative process is a structured, voluntary, non-adversarial approach to resolving disputes wherein parties seek to negotiate a resolution of their matter 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. The collaborative process enables individuals, families, businesses and organizations to maintain control over their relationships with others by empowering them with the ability to resolve their disputes peacefully.

### **The Need for Uniformity from State to State**

The collaborative process is initiated by the parties signing a "Participation Agreement." Research shows that most participation agreements will contain the core elements of the process: a stay of court proceedings while parties are in the collaborative process, confidentiality, a commitment to voluntary disclosure of relevant information and a requirement that attorneys withdraw in the event the process terminates without resolution. However, these fundamental provisions and other terms of the agreement vary widely from state to state.

Three states presently have collaborative law statutes in the area of family law--Texas, North Carolina and California. The State of Utah recently enacted a uniform collaborative law act applicable to all areas of law. State and local court rules governing the collaborative process are in place in a number of jurisdictions. Collaborative law participation agreements are crossing jurisdictional boundaries and there is no uniformity in the existing statutes or in court rules.

As more and more individuals and businesses in different states utilize the collaborative law process, it will become increasingly unclear which state law applies to transactions. Further, without uniformity in the collaborative process, parties in the process cannot be assured of the enforceability of participation agreements, the evidentiary privilege against disclosure, the stay of court proceedings or the confidentiality of communications in the process.

### **Chronological Development of the Uniform Collaborative Law Act**

Beginning in February 2007, the UCLA Drafting Committee conducted a series of conferences to codify collaborative law procedures into a uniform act. In July 2009, at its Annual Meeting in Santa Fe, New Mexico the ULC in a unanimous vote approved the Uniform Collaborative Law Act. The Collaborative Law Committee of the ABA Section of Dispute Resolution drafted an Executive Summary of the UCLA, which includes a section-by-section analysis of the Act.

The ULC customarily submits its uniform acts to the ABA for approval. In February 2010, the UCLA was before House of Delegates at the Mid-Year Meeting in Orlando, Florida. The Act was supported by number of ABA entities: including the Sections of Dispute Resolution, Individual Rights & Responsibilities, Family Law Section, Standing Committee on Delivery of Legal Services and many members of the House of Delegates.

However, in view of certain objections voiced by the ABA Judicial Division and the Litigation, Trial and Insurance Practice and Young Lawyers Sections, due primarily to lack of knowledge about the process and a stream of misinformation, the Uniform Law Commission, in consultation with proponents of the UCLA, decided to withdraw the Act from consideration by the ABA at that time.

In March 2010, in an effort to meet the objections that had been raised at the ABA Meeting in Orlando, the UCLA Drafting Committee reconvened and made certain amendments to the Act:

- (1) The Committee drafted court rules that

mirror the statute, thereby giving states the explicit discretion to adopt the Act, or adopt court rules, or any combination thereof.

(2) The amended Act and Rules provide states with the option of limiting their application to matters arising under the family laws of a state, or imposing no limitation on matters that can be submitted to the collaborative process.

(3) The amendments provide that courts have discretion to approve stays of pending proceedings. The original Act creates an automatic stay when a court is notified that parties are in the collaborative process.

The amendments and court rules have been approved by the ULC. The Uniform Collaborative Law Act and Uniform Collaborative Law Rules (UCLA/UCLR) with amended Prefatory Note and Comments dated October 12, 2010, are available for introduction in state legislatures. The Collaborative Law Committee of the ABA Section of Dispute Resolution has prepared an Updated Executive Summary of the UCLA/UCLR, highlighting the revisions to the original 2009 UCLA.

States now have several options: to enact the original 2009 UCLA, or the amended 2010 UCLA, or the UCLR, or any combination thereof. The ULC has prepared a Legislative Activity Map tracking introductions and enactments in the various states. The map will be updated.

In February 2011, at the ABA Mid-Year Meeting in Atlanta, the UCLA/Rules will be submitted to the ABA House of Delegates for approval. Although ABA approval of products of the ULC is not required for introduction or enactment by states, the many supporters of the UCLA/UCLR are optimistic that the amendments to the 2009 UCLA and addition of court rules will satisfy objections voiced in Orlando, and the UCLA/UCLR will be endorsed by the ABA.

## **History of Collaborative Law Legislation in Texas**

Texas was the first state to enact collaborative law provisions and such provisions have been a part of the Texas Family Code since 2001. Bills were introduced in the 2005 and 2007 Sessions of the Texas Legislature to include similar provisions in the Texas Civil Practice & Remedies Code, thereby expanding the statutory benefits of the collaborative process to all areas of civil law.

In the 2005 Session, the bill as unanimously passed in the Senate but died in conference committee with the House. In the 2007 Session, the collaborative law bill did not make it out of the Senate Jurisprudence Committee. In each Legislative Session the bills had broad based support and the only opposition to the bills came from two trial lawyer organizations, the Texas Trial Lawyers Association and the Texas Association of Defense Counsel. Since the UCLA was in the works, collaborative law legislation was not introduced in the 2009 Session.

## **Texas Uniform Collaborative Law Act in the 2011 Legislative Session**

The growing number of Texas lawyers engaged in the collaborative practice are hoping that “the third time will be a charm.” A lot has been learned in their legislative efforts over the past five years, and collaborative law practitioners welcome the opportunity to better educate the client community and legal profession as to the benefits of the process. Family and civil collaborative law practitioners have come together to draft legislation that will benefit all clients participating in the collaborative process and the entire legal profession.

The Texas version of the UCLA, which will be introduced in the 2011 Session of the Texas Legislature is essentially the original 2009 UCLA with certain modifications to the privilege and confidentiality provisions. The Texas UCLA incorporates the existing collaborative law provisions in the Texas Family Code, making them applicable to proceedings filed under Titles 1 or 5 of the Texas Family Code.

## **Final Thought: *The Promise of Collaborative Law***

The collaborative dispute resolution process is well established in family law and the use of the process is rapidly expanding in other areas of law. The process can be tailored to the needs of the parties in the context of the unique characteristics of their dispute. Enactment of the Uniform Collaborative Law Act will encourage and support the continued growth of a voluntary, non-adversarial process for managing conflict and resolving disputes outside of the courthouse.

In our fast moving, complex and demanding world, a process which captures the exponential power of cooperation may be the business imperative of our time. Resolving disputes in litigation is simply too costly, too painful, too ineffective and too destructive. It just makes sense to focus on the interests and goals of the parties, have a full and complete disclosure of relevant information, avoid costly discovery fights and communicate face to face rather than through intermediaries.

The collaborative process encourages early and peaceable settlement of disputes, allows parties to

maintain ongoing relationships, and to avoid the significant expense that will be incurred in any adversarial process. The process increases client satisfaction and promotes a more civil society. Collaborative Law has a bright future.

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