

This article provides a brief historical perspective of the development of the Collaborative Dispute Resolution Processes (referred to as “collaborative law”), details how the process works and examines the similarities between the protocols and procedures of the collaborative process and the construction industry’s new ConsensusDOCS.

I. INTRODUCTION: A HISTORICAL PERSPECTIVE

Collaborative law is a new and exciting tool in the alternative dispute resolution (“ADR”) tool box. As is the case with mediation, collaborative law has its roots in the area of family law, and is expanding into many areas of civil law. The collaborative law process is a structured, voluntary and non-adversarial approach to resolving disputes based upon cooperation between the parties, team work, full disclosure, honesty, integrity, respect, civility and parity of costs.

The 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 *peaceably*. Victor Hugo, a nineteenth century French poet, novelist, essayist, statesman and human rights campaigner once said:

Nothing is more powerful than an idea whose time has come.

The collaborative dispute resolution process is just such an idea. The process builds on the tradition of lawyers as problem solvers and counselors. The idea of resolving disputes through negotiation and dialogue is certainly not new to lawyers. In 1850, Abraham Lincoln in his *Notes for a Law Lecture* advised young lawyers:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a

COLLABORATIVE LAW: IT’S HERE AND THE CONSENSUSDOCS ARE, TOO

real loser in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be enough business.³

In 1976, over 200 judges, lawyers and leaders of the bar gathered at the Pound Conference⁴ convened by the American Bar Association to examine concerns about the efficiency and fairness of the court systems. At the Pound Conference, Chief Justice Warren Burger, in his criticism of the lawyer and judge operated litigation system, called for the exploration of informal dispute resolution processes and suggested that lawyers needed to return to their role as healers of conflict:

Our litigation system is too costly, too painful, too destructive, too inefficient for civilized people.

At the invitation of the Chief Justice, Professor Frank Sander of Harvard Law School presented a paper entitled *The Pound Conference Perspectives on Justice in the Future*,⁵ which transformed alternate dispute resolution and the American legal system. The impetus of the presentation by Professor Sander was that virtually every state and the federal government had enacted legislation that provided for various procedures for resolving disputes outside of the courthouse. Courts also established rules encouraging early settlement of cases, mediation and arbitration clauses became common in many contracts, and Ombuds programs took effect in educational institutions, corporations, government agencies and other organizations.

Professor Sander readily acknowledged the need for an effective court system which would provide access to

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³ Stern, Philip Van Doren, *Abraham Lincoln, Life and Writings* 329 (1940).

⁴ Lee, Rex. E., *The Profession Looks at Itself - The Pound Conference of 1976*, available at <http://lawreview.byu.edu/archives/1981/3/lee.pdf>.

⁵ Sander, Frank E.A., “Varieties of Dispute Processing” in *The Pound Conference: Perspectives on Justice in the Future* (A. Levin & R. Wheeler eds., West, 1979).

justice for all, with this significant caveat:

to reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities . . .

Following the Pound Conference, former Dean of Harvard Law School and the President of Harvard University, Derek Bok, reflected on the significant events of the Conference and opined:

Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not the leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.

Today, over thirty years after the Pound Conference, ADR has been fully integrated into the dispute resolution systems in most jurisdictions,⁶ with mediation and arbitration becoming the ADR processes of choice. However, the collaborative dispute resolution process is gaining traction in the U.S. and worldwide.

In 2007, three significant milestones occurred in the collaborative law movement. The Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Law) established a Drafting Committee which is currently drafting a Uniform Collaborative Law Act.⁷ It is anticipated that this act will be available for enactment by state legislatures in 2010.

In February of 2007, the ABA Section of Dispute Resolution established a Collaborative Law Committee.⁸

The mission of this Committee is to educate both lawyers and the public on the benefits of collaborative law and to encourage the use of the collaborative process for resolving disputes in various areas of law.

In August of 2007, the ABA Standing Committee of Ethics and Professional Responsibility issued Formal Opinion 07-447 squarely supporting the practice of collaborative law, provided that clients are well informed about the benefits and risks of participating in the process when compared to the benefits and risks of other reasonably available alternative dispute mechanisms.⁹

The International Academy of Collaborative Professionals (IACP) was originally founded in the mid-1990s as an organization of family lawyers and other professionals. As the practice of collaborative law continues to expand beyond the family arena, the IACP has expanded its scope by establishing a Civil Collaborative Committee, whose members are publishing books and articles and making presentations worldwide.¹⁰ The robust organization now counts over 4,000 members in twenty countries.¹¹

More recently during May of 2008, the IACP sponsored the 2nd *European Collaborative Law Conference* in Cork, Ireland. Mary McAleese, the President of the Republic of Ireland, opened the Conference by announcing that collaborative law is now the preferred form of dispute resolution in Ireland.¹²

The Dallas, Houston and Lubbock Bar Associations have also established Collaborative Law Sections and collaborative law organizations around the country and internationally, originally established as family law practice groups, are now expanding to include lawyers practicing in various areas of civil law,¹³ and are giving rise to new civil Collaborative Law practice groups.¹⁴

⁶ State Bar of Texas, Section of Alternative Dispute Resolution, *Links*, available at www.adrtexas.org/links.

⁷ The current draft of the Uniform Collaborative Law Act, available at <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279>.

⁸ American Bar Association, Section of Dispute Resolution: *Collaborative Law Committee*, available at <http://www.abanet.org/dch/committee.cfm?com=DR035000>.

⁹ Texas Collaborative Law Council, ABA Standing Committee of Ethics and Professional Responsibility, *Formal Opinion 07-447*, available at <http://www.collaborativelaw.us/news.php>.

¹⁰ Dallas Collaborative Lawyer, Sherrie R. Abney has authored the first book published on civil Collaborative Law: *Avoiding Litigation: A Guide to Civil Collaborative Law*. The book is available at: www.trafford.com. or www.amazon.com. Articles and papers on civil collaborative law are available at: www.collaborativelaw.us.

¹¹ IACP website: www.collaborativepractice.com. The organization's quarterly newsletter is distributed to members throughout the U.S. and world wide to members in Australia, Austria, Bermuda, Canada, Channel Islands, Czech Republic, England, France, Germany, Hong Kong, Ireland, Israel, New Zealand, Northern Ireland, Netherlands, Scotland, Switzerland, and Uganda.

¹² Abney, Sherrie R., "An Entire Nation Endorses Collaborative Law As Its First Option, Continuing A Trend Toward Acceptance Around The Globe," Vol. 17, No. 3 *Alternative Resolutions* 18.

¹³ Boston Law Collaborative: www.bostonlawcollaborative.com

Collaborative Council of the Redwood Empire: www.collaborativecouncil.org

King County Collaborative Law : www.kingcountycollab.org

Collaborative Professionals (NSW) New South Wales, Australia: www.collabprofessionalsnsw.org.au.

¹⁴ In 2006, a group of civil Collaborative Lawyers in Dallas organized The Civil Collaborative Practice Group. The group, which is chaired by the Hon. Ted M. Akin, has grown to twenty members and meets monthly at the Dallas Bar Association's Belo Mansion.

II. WHY COLLABORATION? ARE LEARNED LAWYERS TRYING TO TELL US SOMETHING?

In spite of President Lincoln’s admonition and the long-standing concept of resolving disputes through negotiation and dialogue, lawyers will be lawyers. The Honorable Justice Oliver Wendell Holmes stated:

Lawyers are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties.

As lawyers, we too often assume a vested interest in our legal system, and rebel to basic change more so than any other group of professionals. Justice William O. Douglas stated:

Lawyers’ faces are turned to the past and precedents. The bar is apt to see grave dangers in the alteration of any of the so-called ‘absolutes.’ That is natural, since none likes to have the rules changed - especially when the change requires re-education.

Justice Felix Frankfurter, who was one of the Supreme Court’s headier writers, once threw a rope of aphorism to judges who reverse themselves:

Wisdom too often never comes, so one ought not to reject it simply because it has come late.

Justice Frankfurter’s terse formulation of a truth is equally appropriate to new and creative ideas in the legal profession. As leaders of thought and keepers of the rule of law, lawyers need to think and act creatively. While precedent is important, our vocation is more than tutoring clients in ways of using the law against other parties. A lawyer’s primary task should not be to protect clients from other lawyers.

Lawyers are problem solvers. A dispute is a problem to be solved, not a battle to be won. A lawyer’s primary task should be to assist clients in meeting their goals and interests, resolving disputes ethically, with civility and professionalism, as quickly, peacefully and economically as possible. Justice Sandra Day O’Connor sets forth the proper function of the courts and an appropriate time line for resolving disputes:



The courts of this country should not be the place where the resolution of conflict begins. They should be placed where disputes end, after alternate methods of resolving disputes have been considered and tried.

The collaborative process can be used as the first option for resolving many civil disputes, thus reversing the traditional dispute resolution time line. As a result, litigation will be the last option, rather than the first.

Essential Elements Of The Collaborative Law Process

- A. Identification of the goals and interests of the parties;
- B. Full and complete disclosure of relevant information;
- C. Efficient communications;
- D. Parties empowerment to make decisions on a level playing field;
- E. Confidentiality; and
- F. Good faith negotiations.

III. HOW THE PROCESS WORKS¹⁵

A. WRITTEN AGREEMENT TO COLLABORATE IN GOOD FAITH

An initial step in the collaborative process is the consummation of the Participation Agreement. The Participation Agreement is essentially a contract signed by the parties and their respective attorneys pursuant to which each agrees to negotiate face to face in good faith to resolve their dispute without resorting to a court imposed resolution, to disclose all relevant information and to engage neutral experts, as needed, for assistance in resolving issues. By agreeing to negotiate in good faith, the parties and their lawyers must make an honest commitment not to take advantage of a party through technicalities of law and to remain faithful to ones obligations under the Participation Agreement.¹⁶ Importantly, the Participation Agreement must provide that the lawyers shall withdraw if the process is terminated.

Remember, the collaborative process is completely voluntary, and it is solely the client’s prerogative to choose the collaborative process to resolve a dispute. While the collaborative process is a step forward in the realm of alternative dispute resolution, the process is not appropriate for resolving all disputes, nor are all lawyers

¹⁵ In 2004, a small group of Dallas lawyers established the TCLC, which is a 501(c)(3) Texas non-profit corporation. The mission of TCLC is to promote the use of the collaborative process for resolving civil disputes, train lawyers and other professionals in the use of the process, educate the public as to the benefits of the process, and to preserve the integrity of the process.

The TCLC revised and adapted to civil collaborative law the Protocols of Practice for Collaborative Lawyers, which had been developed by the Collaborative Law Institute of Texas. The Protocols are available at: www.collaborativelaw.us. This Section describing “How the Process Works” is based in part on comments to various sections of the Protocols.

¹⁶ Texas Collaborative Law Council, Collaborative Resolution of Civil Disputes, *Participation Agreement*, available at http://www.collaborativelaw.us/articles/TCLC_Participation_Agreement_With_Addendum.pdf

appropriate for the process.

B. UNDERSTANDINGS REGARDING THE UNIQUENESS OF THE PROCESS

Collaborative lawyers are obligated to provide sufficient information to prospective clients to enable them to make an informed decision about the material benefits and risks of the collaborative process as compared to the material benefits and risks of other reasonably available dispute resolution mechanisms, including litigation. By signing the Participation Agreement, parties understand that no attorney-client relationship exists between one party's lawyer and any other party. The lawyers are independent from each other and represent and advocate only for their respective clients. No legal duty exists that would require a lawyer to act on behalf of any other party to the Participation Agreement, other than his or her own client. The parties understand that unless the process is terminated, they are giving up the right to conduct formal discovery and the right to have their dispute decided in an adversarial proceeding. In addition, if the process is terminated, no lawyer involved may continue to represent his or her client going forward with respect to the dispute submitted to the collaborative process.

By submitting their disputes to the collaborative process, the parties and their lawyers follow the Protocols of Practice for collaborative lawyers. The collaborative lawyer is required to diligently and zealously represent the client in pursuit of the client's stated interests and goals. The parties and lawyers also understand the process will involve vigorous good faith negotiations in face to face meetings, and the negotiations will be interest-based as opposed to rights-based positional bargaining.

C. CONFIDENTIALITY

Each participant in the collaborative process, including their lawyers, agree to maintain the confidentiality of any oral or written communications relating to the subject matter of the dispute made during the collaborative process. In addition, all communications made during the collaborative process constitute compromise negotiations defined by Rule 408 of the Texas and Federal Rules of Evidence.

D. SUSPENSION OF JUDICIAL INTERVENTION

Upon initiation of the collaborative process, all judicial intervention shall be suspended. Further, no participant may file any documents that would initiate judicial intervention, except if necessary to preserve causes of action, defenses, or to maintain some extraordinary relief. However, all participants should endeavor to reach agreements thereby eliminating the necessity for any such filings. Also, participants are disallowed from setting any hearings except those that are required to submit agreed orders to the court.

E. FULL DISCLOSURE OF THE GOOD AND THE NOT SO GOOD

In light of the true purpose behind collaborative law, the collaborative process is not to be used as a subterfuge by clients with ulterior motives. A hallmark of the process, and the antithesis of litigation, is the honest and voluntary disclosure of all relevant documents and information. Only if the document or information would have been discoverable or admissible independent of the collaborative process, would such document or information be discoverable or admissible in an adversarial proceeding.

Further, the collaborative lawyer is not to take advantage of known mistakes, errors of fact or law, miscalculations and other inconsistencies. Such errors must be disclosed and corrected. Overcoming the win-lose, "one-upmanship" mentality of litigation, requires the greatest paradigm shift for lawyers. Collaborative lawyers must in good faith believe their clients are acting in a manner consistent with the objectives of the collaborative dispute resolution process; otherwise, the collaborative lawyer must terminate the process.

F. FACE TO FACE MEETINGS

A distinct feature of the process is face-to-face meetings of the parties and lawyers. Such meetings are the key to achieving a successful outcome. At the first meeting, the clients will define their goals and interests, recognizing and acknowledging other parties' interests and areas of common ground. A plan will be developed for gathering information, setting meeting agendas and scheduling meetings.

G. THREE CATEGORIES OF EXPERTS

(1) Retained Neutral Experts

In the next stage of the collaborative process, settlement options are developed and evaluated. At this stage, the parties may determine that retaining experts qualified by knowledge, skill, experience and training would be helpful in evaluating information, formulating options and evaluating options for resolution of the dispute. An additional feature of the collaborative process is that unless the parties agree otherwise, adversarial experts will not be engaged to counter each other's position. Rather, only neutral experts will be engaged. The cost savings to the parties can be enormous when the battle of the experts is avoided.

The neutral expert's work product, opinions, mental impressions and facts upon which they are based are available to all participants but are not discoverable or admissible in any adversarial proceeding resulting from the dispute addressed in the collaborative process. Neutral experts are seemingly insulated to ensure that a party cannot attempt to use the collaborative process to gain a tactical advantage in an adversarial proceeding should the collaborative process be unsuccessful. However, despite the ban on testifying in an adversarial proceeding, the

COLLABORATIVE LAW: IT'S HERE AND THE CONSENSUS DOCS ARE TOO

neutral expert's findings may be introduced by stipulation of all parties.

(2) Consulting-Only Experts

Parties in the collaborative process may privately engage consulting-only experts. However, these experts must not possess first-hand knowledge or factual knowledge of the dispute, except for what the expert has learned through consultations with the party and its attorney. While a party must disclose the identity of a consulting-only expert, that expert's work product and the communications between the client and their attorney are privileged, provided that such work product or communications are not reviewed by a retained neutral expert. If reviewed, the attorney-client privilege is waived and the consulting-only expert's work product and communications must be produced to all participants in the collaborative process. Further, the consulting-only expert loses their consulting-only status and becomes a retained neutral expert.

Also, the parties must decide if the consulting-only expert is disqualified as a fact or expert witness, and if the parties failed to reach an agreement during the collaborative process, the consulting-only expert may not represent a party in any adversarial proceeding arising from the dispute.

(3) Outside Legal Opinion

Prior to or during the collaborative process, a party or group of parties may privately engage a secondary attorney for the purpose of giving an outside legal opinion on a specific issue or issues. The identity of such lawyer must be disclosed to all parties, their work product and opinions are privileged and therefore need not be disclosed to other participants in the collaborative process.

All parties will determine whether this secondary attorney or any other lawyers engaged in the practice of law with this attorney, are disqualified from testifying as a fact or expert witness. If disqualified, the attorney will be prohibited from representing the engaging party in the dispute, or in any other adversarial proceeding among the parties. Despite having their work product and opinion subject to privilege, if an outside legal opinion is *jointly sought by all parties* in the collaborative process, their opinions must be disclosed to all parties and the attorney would then be considered a jointly retained neutral expert.

Expert	Jointly Retained	Separately Retained	Consulting Only	Outside Legal Opinion
Cost Shared by All Parties	Yes	No	No	No
Opinions and Reports Available to All Parties	Yes	Yes	No	No
Party Must Disclose Identity of Expert	Yes	Yes	Yes	Yes
Expert Has Access to All Parties	Yes	Yes	No	No
Expert Has Ability to Conduct Own Investigation	Yes	Yes	No	No
Expert Can Represent Party in Adversarial Proceeding	No	No	No	Decided by the Parties
Expert Can Testify in Adversarial Proceeding	No	No	Decided by the Parties	Decided by the Parties

H. TERMINATION OF THE PROCESS

A client or its collaborative attorney may terminate the collaborative process at any time for any reason. Upon termination, all attorneys in the collaborative process must withdraw from representing their respective clients. Neither the collaborative attorneys, nor any attorney associated in the practice of law with the collaborative attorneys, may serve as counsel during any adversarial proceeding regarding the subject matter previously submitted to the collaborative process. If the collaborative proceedings are terminated, the attorneys will assist their respective clients in transitioning their dispute to litigation attorneys to avoid any prejudice to the clients.

Upon notice of termination to all lawyers or parties, all adversarial proceedings are stayed for a period of thirty days (unless an emergency exists requiring court intervention), so that all parties may engage other lawyers and make an orderly transition.

IV. BENEFITS OF THE COLLABORATIVE PROCESS IN THE CONSTRUCTION INDUSTRY

When disputes arise within the construction industry, the parties generally want to resolve their issues quickly and economically so the project can be completed within budget and on time. This objective is not easily

accomplished with protracted litigation or even arbitration. The collaborative process offers a viable alternative which allows the parties to control cost and scheduling and most importantly, the parties control the outcome. As an added incentive, the confidentiality of the collaborative process allows parties to avoid any unwanted publicity.

In many instances, project owners, architects, engineers, general contractors, sub-contractors, suppliers and bonding companies, will be working together on future projects. By utilizing the collaborative process, relationships may be maintained by resolving disputes in a non-adversarial setting based on cooperation and teamwork as opposed to arbitration and trial.

As Professor Sander pointed out in his ground breaking paper delivered at the 1976 Pound Conference, courts should be reserved for those activities for which they are best suited and require their unique capabilities. In other words, the process should fit the fuss. A comparison of the features of litigation and the collaborative process is instructive in determining which process fits your fuss.

Which Method Would You Choose?

Litigation	Collaboration
Operates by assigning blame or fault and relies on coercion to obtain results.	Relies on problem solving and informed agreements.
Creates an atmosphere of intimidation and fear.	Provides a safe environment for the exchange of ideas and possible solutions.
Filters communications and negotiations by going through parties/attorneys using the “he said, she said” method of relaying information.	Employs face to face meetings with all parties and attorneys hearing the same information at the same time with the ability to instantly correct any misunderstandings.
Subjects parties to cross examination, depositions, subpoenas, written discovery, and unwanted hearings	Follows an agreed meeting agenda with no surprises, demands or court appearances.
Takes expenses out of your control and gives the other side the option of forcing you to spend money for depositions, hearings and unproductive discovery.	Allows the voluntary agreement of the parties to determine what documents and information are necessary to reach a resolution of the disputed matter.
Gives the Court control over the scheduling of the case.	Gives the parties control over scheduling of all meetings and deadlines.
Provides a public record of all court hearings	Employs private and confidential meetings.
Forces the attorneys to prepare for trial from the moment the case begins— creating unnecessary expenses if the case settles.	Allows the attorneys to focus 100% of their time and talent – as well as their clients’ money – on discovering the optimum solution.
Requires each party to obtain at least one “hired gun” who must be willing to testify in support of that party’s claims in court if an expert is needed.	Provides for a jointly engaged expert who will never testify; thus saving money as well as giving a greater selection of experts since some experts refuse cases which require a court appearance.
Promotes the abdication of responsibility for the resolution of the dispute by placing the task in the hands of the judge or jury.	Takes control of the dispute and actively seeks resolution providing a greater likelihood that the parties will be satisfied with the result.
Imposes no duty to correct misunderstandings or mistakes that a party may rely on to his/her detriment.	Requires the parties/attorneys to correct all misunderstandings and/or mistakes.
Requires no party to disclose any facts, documents or information unless specifically asked by another party.	Requires the full disclosure of facts, documents or other information which has any bearing on the resolution of the dispute.
Creates an imbalance of power when one party has greater financial resources than the other parties.	Levels the playing field by giving all parties control over the choice of experts and financial expenditures

Texas Collaborative Law Council, Inc. ©¹⁷

¹⁷ <http://collaborativelaw.us/comparison.html>.

V. CONSENSUSDOCS CONTEMPLATE COLLABORATION

The procedures and protocols of the collaborative process have yet to make significant inroads into the construction industry. The most likely explanation for this current situation is that the members of the industry simply have not had sufficient exposure to the collaborative process to have developed a comfort level that would induce its widespread use in construction dispute resolution.

However, the concept of collaborative effort as an approach to contracting for a construction project is, indeed, taking root in the industry with the arrival of the construction industry's ConsensusDOCS.¹⁸ Released in 2007, ConsensusDOCS is a comprehensive family of standard forms for design and construction that are intended to replace other standard form packages, including those published by the American Institute of Architects (AIA), Engineers Joint Construction Documents Committee (EJCDC), and Associated General Contractors (AGC), families of forms.

ConsensusDOCS were developed through the initial collaboration between the AGC and the Construction Owners Association of America (COAA) accompanied by support of various segments of the construction industry and the collaborative efforts of about twenty other endorsing construction industry trade associations.¹⁹

In essence, the AGC and COAA along with each of the participating industry trade associations compiled their contract documents into ConsensusDOCS in an effort to streamline the building process and to provide model language with industry-wide participation for the benefit of the entire industry.

The philosophy behind the development of ConsensusDOCS was to develop construction industry documents through the collaborative effort of entities representing a wide cross-section of the construction industry. The organizations endorsing the ConsensusDOCS believe they represent a more balanced allocation of risk and responsibilities on critical issues and concerns among the project participants.

For nearly 120 years, standard contracts of the construction industry have been the documents developed by the AIA. However, developers of the ConsensusDOCS believe the scope of the AIA documents does not adequately balance the wide range of interests in the construction process, which prompted the need for

new construction contract documents.

Thus far, ConsensusDOCS have been slow to gain a foothold in the market and have gained minimal endorsement. Specifically, the AIA, National Society of Professional Engineers, American Society of Civil Engineers, American Council of Engineering Companies, EJCDC, Design Build Institute of America, and Building Owners and Managers Association International have yet to endorse ConsensusDOCS. Further, since the ConsensusDOCS forms will directly compete with the AIA forms, there should be no surprise that neither the AIA nor the AGC will endorse the forms of each other.

Despite lacking this endorsement, proponents of ConsensusDOCS maintain they are intended to provide an improved balance of risks and responsibilities for all parties to the construction process than what is afforded by AIA contract documents.

ConsensusDOCS tend to focus on the ideals of good faith, collaboration and project results while fairly allocating risk. ConsensusDOCS also encourage parties to address contractual issues, rather than avoid them. Further, by virtue of the large industry cross section having input in ConsensusDOCS, their acceptance will likely significantly reduce costs associated with construction contract transactions. While the ultimate acceptance of ConsensusDOCS will stem from the willingness of industry participants to consider a new collaborative approach to conducting business, only time will tell if ConsensusDOCS gains industry wide acceptance.

Similar to the AIA forms, ConsensusDOCS include a multitude of contractual forms: industry owner-contractor, owner-designer, design-build, construction management, and subcontract forms. However, unlike the AIA forms, ConsensusDOCS include all forms and conditions in a single document eliminating the need for separate general conditions. Although they do not embrace the specific procedures and protocols of the collaborative process, ConsensusDOCS provide a rapid dispute resolution process absent from the AIA forms.

ConsensusDOCS emphasize the importance of a direct relationship between contractor and owner wherein the architect generally does not administer the contract. As a result, a sophisticated owner experienced in managing its construction projects or an owner which has a longstanding and successful relationship with a contractor or design professional may find ConsensusDOCS to be a particularly good basis for agreement.

¹⁸ Information concerning the use and purchase of the ConsensusDOCS is available at www.consensusdocs.org. The authors wish to acknowledge with gratitude that the comments in this article on the ConsensusDOCS draw liberally from papers presented in 2008 by Richard L. Reed (Coats Rose, San Antonio), David P. Benjamin (O'Connell & Benjamin, San Antonio), Bruce W. Merwin (Haynes and Boone, Houston), R. Craig Williams (HKS Architects, Dallas), and Rodney L. Moss (Balfour Beatty Construction, Dallas) which are available through those authors or the website of the State Bar of Texas Construction Law Section at <http://www.constructionlawsection.org>.

¹⁹ The industry trade associations are: the National Association of State Facilities Administrators, Construction Users Roundtable, Associated Specialty Contractors, Inc., Construction Industry Round Table, American Subcontractors Association, Inc., Associated Builders and Contractors, Inc., Finishing Contractors Association, Mechanical Contractors Association of America, National Electrical Contractors Association, National Roofing Contractors Association, Plumbing Heating Cooling Contractors Association, National Association of Surety Bond Producers, and Surety and Fidelity Association of America.

Significantly, ConsensusDOCS do have wide industry support, which suggests the premise for the name. But what does “consensus” really mean? Contextually, the word contemplates that major industry stakeholders have accepted and endorsed reasonable compromise and harmony. For instance, by a vote of its members, the American College of Construction Lawyers preferred the ConsensusDOCS over the AIA forms for Owner-Contractor and Owner-Architect/Engineer agreements.

The principles of collaboration are most clearly pronounced in the ConsensusDOCS Series 300 Tri-Party Agreement for Collaborative Project Delivery, which is the most unique of the ConsensusDOCS. The Tri-Party Agreement requires the owner, contractor, and designer make “reliable” commitments regarding the ability of each to perform and the willingness to be accountable for their respective responsibilities in the best interest of the project. The Tri-Party Agreement also forms a “Collaboration Project Team” and provides a collaborative structure for project construction, administration and claims resolution. The Collaboration Project Team manages the project similarly to a joint venture with shared responsibility for the outcome of their joint decisions, but with the owner included on the management team. Section 3.2 of the Tri-Party Agreement specifically states:

each party’s success is tied directly to the success of all other members of the Collaboration Project Team and encourages and requires the parties to organize and integrate their respective roles, responsibilities and expertise, to identify and align their respective expectations and objectives, to commit to open communication, transparent decision-making, proactive and non-adversarial interaction, problem-solving, the sharing of ideas, to continuously seek to improve the Project planning, design, and construction processes, and to share both the risks and rewards associated with achieving the Project objectives.

The clearly-stated principles of collaboration contained within the ConsensusDOCS echo the procedures and protocols of the collaborative process and indicate just how very similar the two concepts are to each other. It is apparent that the collaborative process is gaining traction nationally and internationally as the first option for resolving disputes in many areas of law. It is only a matter of time until the ConsensusDOCS find wide-spread acceptance throughout the construction industry.

VI. CONCLUSION - THE FUTURE OF COLLABORATION IS BRIGHT

A growing number of conflict management and dispute resolution specialists believe collaboration is the business imperative of our time. Interest based negotiation, as opposed to positional bargaining, really does capture the exponential power of cooperation. By working together in a non-adversarial manner to meet the goals and interests of all parties, relationships can be maintained, party satisfaction is increased by early settlement. Further, early settlement, reduces unnecessary expenditure of personal and business resources for dispute resolution and promotes a more civil society.

However, we must be aware of Clark’s Law of Revolutionary Ideas. Every revolutionary idea - in science, politics, art, law or any other field of endeavor - evokes three stages of reaction:

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

Interestingly, today the naysayers’ objections to the collaborative process are almost a perfect echo of the objections to the mediation process during its development in the late 1980s. As we are all aware, mediation has progressed quite nicely through the past twenty years.

Although roadblocks may be erected on the path, many dedicated lawyers and other professionals around the world believe that the collaborative process is good for their clients. That belief gives us assurance that the future of collaborative law is bright.

The further growth and development of collaborative and cooperative processes for resolving disputes has significant benefits for the legal profession. Lawyers, serving as *conflict management advocates*,²⁰ are helping their clients resolve disputes productively, thus fulfilling Lincoln’s vision of the lawyer “as a peacemaker” with the “superior opportunity of being a good man [or woman]” for whom “there will still be enough business.”

²⁰ MacFarlane, Julie, *The New Lawyer: How Settlement is Transforming the Practice of Law* (2007).