

# COLLABORATIVE RESOLUTION OF CIVIL DISPUTES: NEW OPPORTUNITIES FOR MEDIATORS

*By Sherrie R. Abney\**

Some five years ago, collaborative law began to make its way into the Texas scene in family disputes. Since that time, the collaborative process has been accepted by many family attorneys as a superior method of handling cases. In 2001, the Texas legislature enacted sections 6.603 and 153.0072 of the Family Code, which outline the collaborative process as used in family matters.

Attorneys practicing in other areas of civil law have realized that the same principles that brought relief to family disputes are applicable to many civil situations. As a result, collaborative-law supporters across the state have worked to have civil collaborative law added to the Civil Practice and Remedies Code. This addition to the Civil Practice and Remedies Code would allow parties up to two years to participate in the collaborative process without court intervention. The same proposed legislation would provide for confidentiality in both family and civil collaborative cases.

Perhaps collaborative law will be found in the Civil Practice and Remedies Code in 2007. In January of this year, Representative Toby Goodman sponsored HB 205, which contained a proposed collaborative-law statute, which was to be effective in September 2005. The House bill was referred to the Civil Practices Committee, where the Texas Trial Lawyers Association ("TTLA") and the Texas Association of Defense Counsel ("TADC") opposed it. Representative Joe Nixon, chair of the Civil Practices Committee, did not allow the bill to come to a vote, so it died in committee. The proposed collaborative-law statute was then attached to HB 260 as an amendment by Senator Royce West and was unanimously passed in the Senate. When HB 260 went back to the House for final approval, it again died in Nixon's committee. It never reached a vote on the floor of the House. Joe Nixon, the TTLA, and TADC were the only opposition to the civil collaborative legislation.

Collaborative law cannot be court-ordered, and it costs the state nothing. It is a swift and economical alternative to litigation that could free court dockets and save the parties money. Since it can do no harm to the public, one wonders about the motivation of those who oppose the civil collaborative process.

Collaborative law has many advantages over other types of alternative dispute resolution. It is a highly structured, voluntary, process that relies on the honesty and

good faith of participants working together in joint meetings crafting solutions to achieve the greatest possible benefit to each party. Should the parties fail to settle and the collaborative process terminate, the collaborative lawyers must withdraw, and the parties must hire new litigation counsel who are not associated with the collaborative lawyers in order to go forward with the lawsuit. For all of the above reasons, all participants are motivated to seriously commit to settlement.

Face-to-face meetings of all participants eliminate most of the misunderstandings that occur with the "he said, she said" method of filtered communication found in traditional litigation, and this serves to further expedite resolution. In addition, discovery is speeded and simplified by the terms of the Participation Agreement. This contract requires complete, prompt, and full disclosure of all relevant information and tangible things that would have an impact on the final resolution of any issue in the dispute.

When an opinion is needed in the collaborative process, the parties are encouraged to jointly retain a neutral expert. The benefits of jointly retained experts are threefold: costs are cut in half; more experts are available since they will never be required to testify in court; and the expert is not put in the position of justifying the retaining party's position. Parties receive an objective and relatively inexpensive professional opinion.

What has this got to do with mediators? Just as in ordinary litigation, there will be times that the participants in the collaborative process will need assistance in resolving certain issues. The process is designed to employ all forms of dispute resolution, and mediation is one of the first alternatives the parties will visit. The good news is the parties will not be coming to the mediator due to court order; they will be coming because they sincerely desire to avoid their "day in court" and resolve their differences.

There is also other news. It has become apparent to collaborative lawyers that mediators who are not trained in the collaborative process are not efficient in resolving issues. In fact, some mediators have caused harm because they did not understand the collaborative process and were unfamiliar with the participation agreement and protocols. The nature of the process is such that trained mediators are necessary, and the simple solution to this problem is — get trained.

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For those of you who are not full-time mediators, the collaborative process offers an opportunity for relief from the schizophrenic task of preparing for trial and attempting to settle at the same time. In the collaborative process, it is possible to concentrate fully on discovering solutions as all participants move from positional bargaining to exploring options based on the interests and goals of the parties. When all attorneys and parties are truly participating in the collaborative process, each client and attorney is able to function with less stress, more efficiency, and greater satisfaction than is possible in an adversarial setting. Part-time or full-time mediator, you owe it to yourself and your clients to learn about the collaborative process, so you can make an informed decision as to whether you want to enter the brave new world of dispute resolution or stick to the traditional world of litigation.

Should you feel the urge to venture into the unknown reaches of dispute resolution, The Collaborative Law Study Group of the Dallas Bar Association meets every third Tuesday at the Dallas Bar Association (1 hour CLE). The Houston Bar Association has recently created a Col-

laborative Law Section. For more information on their meeting schedule, go to [www.hba.org](http://www.hba.org). The Texas Collaborative Law Council, The Texas Center for Legal Ethics and Professionalism, and the Collaborative Law Study Group of the Dallas Bar Association will present the second local civil collaborative-law training on September 15 & 16, 2005. ( A total of 12 hours of CLE, including 6 hours of ethics, is pending.) Additional information may be found at [www.collaborativelaw.us](http://www.collaborativelaw.us) or by contacting Larry Maxwell at (214) 265-9668 or [lm Maxwell@adr-attorney.com](mailto:lm Maxwell@adr-attorney.com) or Sherrie Abney at (972) 417-7198 or [sra169@comcast.net](mailto:sra169@comcast.net).

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