

Expanding the Collaborative World to Civil Practitioners

By John Sarratt

Collaborative law began as a way for couples to go through divorce in a manner that might meet both of their interests as well as the needs of their children, preserving enough of a relationship with each other that they could continue to work together on their common problems going forward. Recently, civil collaborative law practice – that is, collaborative law applied to all types of civil disputes – has been gaining ground, motivated by the same concerns as in family law: to resolve disputes in a way that maintains important relationships; except that with civil collaborative law, the relationships to be preserved might be between employer and employee, between businesses, or in a disputed probate situation.

Rather than being adversarial and position-based, collaborative law is non-adversarial and seeks to find common ground and to develop mutually beneficial agreements based on the needs and interests of the disputants. There is no third-party decision maker. Instead, the parties sit at the table together, along with their trained collaborative lawyers, and work on a common solution to their common problem.

The steps taken in collaborative sessions are: 1) determining the interests and concerns of the parties; 2) exchanging relevant information and determining if a neutral expert is required to make any factual determinations; 3) developing options for solutions (“brainstorming”); 4) evaluating the best options that all parties are willing to consider; and 5) arriving at the final terms of settlement which are reflected in a binding written settlement agreement. These steps can be taken at a fraction of the time and cost of other forms of dispute resolution. The result is more than a compromise, but rather a shared solution that all parties have helped create.

A signature element of collaborative law is that in the event of impasse, the collaborative lawyers withdraw, and the parties must select other counsel to proceed to litigation. In most models, this withdrawal also applies if the parties pursue arbitration, but not if they wish to first mediate their dispute. While this withdrawal requirement may involve additional expense, that cost may be offset by agreeing to preserve in litigation the progress made in exchanging information and narrowing the issues during the collaborative process. And, of course, considerable savings of time and money are realized if – as most often occurs – the matter is successfully resolved using the collaborative process.

The benefits of the withdrawal requirement include insuring the process will not be used in bad faith or by those who are not serious about pursuing this non-adversarial approach; focusing the energy of the parties and their counsel on finding the best solution to a common problem without concern for how something might “play in court”; and creating a safe environment where there is a free and open exchange of relevant information.

The Global Collaborative Law Council (GCLC) – Application to non-family civil disputes

An international organization founded in 2004 whose focus is on non-family civil collaborative law is the Global Collaborative Law Council (GCLC),

www.globalcollaborativelaw.com. While it was founded as the Texas Collaborative Law Council, GCLC soon attracted members throughout the United States and abroad and changed its name in 2009 to reflect its broader mission, which is to advance the use of the collaborative process in resolving all types of civil disputes. GCLC trains lawyers and other professionals in the use of the process, educates the public on benefits of the process, and preserves the integrity of that process. GCLC's broader geographic reach is reflected in the fact that its current president and president-elect are both from outside of Texas, and its board is comprised of representatives from nine states and four continents.

GCLC carries out its mission in part through an annual three-day conference and training. For the first part of its history, these conferences were held each year in Texas; but with its expanding membership and focus, those conferences have been scheduled in 2017 in Tampa, Florida; in 2018 in Las Vegas, Nevada; and in 2019 in North Carolina. Members of GCLC and attendees at its conference each year have been from around the United States as well as from Australia, Brazil, Canada, the Czech Republic, Italy, Mexico, the Netherlands, and Spain. Several states now have organizations devoted to promoting civil collaborative law practice. The focus and mission of GCLC going forward will include providing support in any way it can to these state organizations.

Statutory, Bar, and Law School Recognition

In 2009, the Uniform Law Commission promulgated a Uniform Collaborative Law Act which eighteen states have adopted. Two other states passed legislation regulating family collaborative law prior to promulgation of the Uniform Act. Nine more states have efforts underway to consider adoption, plus the two that passed family collaborative statutes prior to 2009 are considering expanding application to all civil disputes. The exact application of the Act is in fact not uniform, with some states limiting application to family law or with other variations; but there is a trend developing for a uniform law governing all civil collaborative matters.

The expansion of civil collaborative law is also demonstrated by its recognition by the organized bar as well as law schools. The ABA Dispute Resolution Section created a Collaborative Law Committee in 2006. Many state bar organizations now have a committee under their Dispute Resolution Section, or even an independent collaborative section, committee or task force. Also, in 2007, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-477 validating the use of collaborative law, including its withdrawal requirements, so long as the client has given informed consent to the process. Again, many states have issued similar supportive ethics opinions. Only Colorado has taken an opposing position, finding that the withdrawal requirement creates a non-waivable conflict of interest.

To date, regular courses in collaborative law have been offered at several law schools, including Harvard, SMU and Wake Forest.

The North Carolina Approach

The path that has been followed in North Carolina to expand collaborative law from divorce to resolution of business and other civil disputes may provide a useful roadmap for others. Late in 2013, I sat down with a family collaborative lawyer to learn more about the process and talk about how it might apply to business disputes. From that beginning, a Collaborative Law Committee was formed by the North Carolina Bar Association which attracted as members faculty from each one of the seven law schools then based in North Carolina, experienced family collaborative lawyers who were interested in expanding their own practice or merely willing to support the expansion of collaborative law to other areas, and liaison from other Bar Association Sections such as litigation, construction, labor and employment, estate planning, corporate counsel, and business. This was an important step in getting various interests on board and addressing directly any concerns those interest groups might have.

Speakers were sent to each one of the law schools to address faculty and students regarding the collaborative process through a variety of means, from actual class participation to more informal “lunch and learn” type presentations. At the Wake Forest University School of Law, a full class in collaborative law was taught in the spring of 2017, and an article on collaborative law published in the Wake Forest Law Review.

Numerous presentations were also made at North Carolina Bar Association CLE programs, Inns of Court, and local bar associations throughout 2014 and 2015 and provided an environment where lawyers were familiarized with the collaborative process and most opposition to that process successfully addressed. This laid the groundwork for a series of biannual two-day 14-hour training sessions in the collaborative process. Starting in 2016, five such training sessions have been held in various parts of the state, with a total of about 150 lawyers now being prepared to act as civil collaborative attorneys in addition to those previously trained as family collaborative attorneys. Working through the North Carolina General Statutes Commission, the Uniform Act has been introduced into the North Carolina Legislature. It passed the House 112-1 and is pending in the Senate.

The final step in development of civil collaborative law practice was formation of a non-profit: the North Carolina Civil Collaborative Law Association (NCCCLA). Its web site is www.nccivilcollaborativelaw.org. It is hoped that all trained civil collaborative lawyers in North Carolina will join NCCCLA, and that it will become both the site where prospective clients go to find trained civil collaborative lawyers and also a resource and support for those lawyers as they develop their collaborative practice.

As the president of NCCCLA and the president-elect of GCLC, I hope to use those joint positions to share with other state collaborative organizations the resources that have been developed in North Carolina, including training materials, a law school syllabus, guidance on adopting the Uniform Collaborative Law Act, and help in forming a non-profit to assist both clients and lawyers in using the collaborative process.

John Sarratt is president-elect of the Global Collaborative Law Council; president of the North Carolina Civil Collaborative Law Association – a nonprofit whose mission is to assist its members as well as educate the public regarding collaborative law; and co-chair of the Collaborative Law Committee of the North Carolina Bar Association's Dispute Resolution Section. In the latter capacity, John has been course planner for five training sessions preparing lawyers in North Carolina to resolve any civil dispute using the collaborative process. John is also a certified mediator in North Carolina and has served as an American Arbitration Association panel arbitrator. John has been a business litigator for over 45 years and has been recognized in the area of business litigation by Business North Carolina Magazine's Legal Elite, Best Lawyers in America, and North Carolina Super Lawyers. John earned his undergraduate degree summa cum laude from UNC-CH and his J.D. cum laude from Harvard.

Contact jsarratt@hshllp.com if you have questions or would like the assistance of GCLC or NCCCLA in developing and promoting the use of civil collaborative law practice in your jurisdiction.