Collaborative Law: A Brief Overview

Collaborative law, a consensual, non-litigation model of conflict resolution, has been practiced in Illinois for more than 15 years. The Illinois Collaborative Process Act, which takes effect January 1, formally recognizes the model and its use in family law and other settings.

BY SANDRA CRAWFORD

THE INTERDISCIPLINARY MODEL OF CONFLICT RESOLUTION KNOWN AS COLLABORATIVE LAW, also referred to as collaborative practice or collaborative process, has developed over the past 27 years. It is actively practiced in an estimated 24 countries and in every state in the U.S., including Illinois.[1]

This article describes the elements of the collaborative model and how it differs from mediation, briefly reviews the development of and the scholarship around the practice, and explains how Illinois lawyers can retool their practices to include collaborative law as an additional service to offer to clients.

1. Information about the professional practice model around the world can be found on the IACP website at https://www.collaborativepractice.com/_t.asp?M=7&T=PracticeGroups.

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Collaborative practice defined

Collaborative practice (CP) is a consensual non-litigation process in which parties in conflict and their chosen professionals (attorneys, mental health, and financial professionals) enter into a written agreement to focus all efforts, energies, and resources on problem solving without reference to a third-party adjudicator (judge or arbitrator). CP is a form of limited-scope representation.[2] In this article the focus will be on the application of the CP model to family law, although it also is used in areas such as probate and business disputes.

Some other basic elements of CP are:

• Informed consent by all participants in the process;

• A commitment by the professionals to withdraw if either client chooses to go to litigation or threatens litigation;

• Voluntary, good faith, and honest exchange of all information needed to resolve the conflict; and

• A commitment to strive for solutions that take into account the interests of all the stakeholders.

One question repeatedly posed by lawyers is "how is this different from mediation?" The key difference: in mediation, the mediator is a neutral professional (not necessarily a lawyer) who does not dispense advice but rather facilitates communication and negotiation between the parties directly. CP lawyers act as advocates, legal advisors, negotiators, drafters, and consultants.

CP calls on lawyers to think differently about their place on the conflict resolution continuum. It calls on them to use interest-based negotiation skills, not positional bargaining techniques.[3] The model also calls on lawyers to partner with their clients and with other specially trained professionals (e.g., mental health or financial experts) to help craft solutions that will keep the parties out of court now and in the future. As a leading scholars in this area, Pauline Tesler, so eloquently states, "When lawyers think differently, they behave differently and counsel their clients differently."[4]

Historical background

Collaborative law is the brainchild of Minnesota attorney Stu Webb. In the 1980s Webb, then a long-time practicing family law litigator, had grown weary of the contentious and bitter nature of trial practice. On January 1, 1990, he declared himself a "collaborative lawyer."

For Webb, this meant that if the attorneys are "settlement lawyers" and the case does not settle, those attorneys have to get out and turn it over to the trial lawyers. This resembles the British solicitor-barrister model in which the solicitors work up the case for settlement and the barristers take it to trial if it does not settle.[5]

Just as Webb is considered the "godfather" of the movement, San Francisco attorney Pauline Tesler and mental health professional Peggy Thompson are considered the "god-mothers." Tesler's book, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*,[6] published by the American Bar Association, is now in its third edition. This book is a must-have for any lawyer contem-

2. Limited Scope Representation is already permitted in Illinois. Ill. S. Ct. R. 1.2 (eff. Jan. 1, 2010).

3. For more on interest-based negotiations, see Roger Fisher & William Ury, Getting to Yes: Negotiating Agreements Without Giving In, Penguin Books (Third Edition, 2011).

4. Pauline H. Tesler, Collaborative Law: Achieving Effective Resolutions in Divorce Without Litigation (ABA 3rd Ed. 2013).

5. J. Kim Wright, Lawyers as Peacemaker: Practicing Holistic, Problem-Solving Law 52-53 (ABA 2010).

6. Tesler, *supra* note 4.

TAKEAWAYS >>

• Collaborative practice is a consensual non-litigation process in which parties in conflict and their chosen professionals (attorneys, mental health, and financial professionals) enter into a written agreement to focus all efforts, energies, and resources on problem solving without reference to a third-party adjudicator (judge or arbitrator).

• Professionals engaging in collaborative process must commit to withdraw if either client chooses to go to litigation or threatens litigation.

• Professionals wishing to offer this model of dispute resolution must first educate themselves about its nuances so as to be able to adequately identify cases, clients, and circumstances that are appropriate and inappropriate for the process.

A MEDIATOR IS A NEUTRAL, NON-ADVISING PROFESSIONAL WHO FACILITATES NEGOTIATION BETWEEN THE PARTIES. CP LAWYERS ACT AS ADVOCATES, LEGAL ADVISORS, NEGOTIATORS, DRAFTERS, AND CONSULTANTS.

plating CP. Tesler and Thompson have also written a book to educate the public about collaborative law as a consumer option.[7]

From a small handful of disheartened litigators and mental health professionals has grown a worldwide organization, The International Academy of Collaborative Professionals (IACP).[8] Thanks to direct advocacy from many within IACP, the Uniform Collaborative Law Act (UCLA) was formulated and adopted by the Uniform Law Commission in 2010.

The UCLA has now been passed into law in more than a dozen states. In 2016 and 2017 a specially appointed committee within the ISBA worked with the UCLA to fashion the Illinois Collaborative Process Act, SB 0067, which passed both houses, was signed by the governor, and became Public Act 100-0205.[9] It will take effect January 1, 2018.

Standards of practice and training

The IACP sets forth "Standards for Collaborative Practitioners" and "Ethical Standards for Collaborative Practitioners." Both echo the years of continuous efforts to cultivate, revise, and adopt common practices among CP professionals.

A clear understanding of the principles of CP is an essential first step for any professional looking to become a collaborative practitioner. A 15-hour introductory training in CP and additional communications skills training (generally in the area of mediation) are the recommended first steps. Such training educates professionals in the core elements of collaborative law and how these are different from settlement negotiations in the context of conventional litigation.

The collaborative model is uniquely client driven. At the center of the model is the understanding that each client has the support, protection, and guidance of his or her own lawyer and from the other professionals who form the interdisciplinary team around the parties. The other professionals can include a neutral child specialist, a financial neutral, or a collaborative divorce coach (sometimes referred to as a communications or process coach).

Professional teams are configured to fit the particular circumstances of each case. Introductory training in CP law is essential for all the professionals, not just the lawyers. Clients benefit throughout the process from the assistance and support of their professional team. The team by virtue of its common training in the model and in mediation speaks the common language of CP.

With the help of an understanding and responsive professional team (which can address all facets of their dispute – legal, financial, and emotional) clients are better able to negotiate their own agreements honestly and in person and to create arrangements that are voluntary, durable, future-focused, and mutually beneficial. It is critical to recognize the need to better address all dimensions of the client's problem. CP provides an effective mechanisms for turning to appropriate professionals to help address the client's challenges, interests, and goals, especially when they are outside the education and competency of one's primary profession (e.g., a lawyer would turn to a mental health professional when the client's needs are emotional or psychological).

Along with the minimum standards, the IACP has developed ethical standards for collaborative practitioners.[10] Confidentiality is another critical aspect of the collaborative practice. A practitioner's own ethical and professional standards for confidentiality and privacy still apply and are not trumped by the IACP standards. For example, although the practitioner may believe that the collaborative process is the best for a client, a collaborative lawyer is still obliged to inform the client about all available options for resolving disputes, including litigation, arbitration, mediation, and negotiation.

ISBA RESOURCES >>

- Matthew Hector, *Collaborative Law Proposal Approved by ISBA Board, Assembly*, 104 Ill. B.J. 10 (Dec. 2016), https://www.isba.org/ibj/2016/12/lawpulse/collaborativelawproposalapprovedbyi.
- Tiffany M. Alexander, *Collaborative Conflict*, 104 Ill. B.J. 32 (Aug. 2016), https://www.isba.org/ibj/2016/08/collaborativeconflict.
- Sandra Crawford, *A Tale of Two Communities: Bringing Pro Bono Collaborative Law to Illinois National Guard Veterans*, Family Law (Dec. 2015), https://www.isba.org/sections/familylaw/newsletter/2015/12/taletwocommunitiesbringingprobonoco.

7. See generally Pauline Tesler & Peggy Thompson, Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move On With Your Life (Regan/Harper Collins 2006).
8. International Academy of Collaborative Professionals, http://www.collaborativepractice.com.
9. Illinois Collaborative Process Act, http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=SB&DocNum=67&GAID=14&SessionID=91&LegID=99519.
10. See IACP Principles of Collaborative Practice, *available at* https://www.collaborativepractice.com/lib/Ethics/IACP Principles of Collaborative Practice.pdf.

Choosing and educating clients

Collaborative law is most often used in family law cases, but it can also be applied in small business dissolutions, contested probate cases, and other matters. While individual attorneys in these and other areas might describe their styles of practice as "cooperative" or "collaborative," CP is not just a philosophy. It is a distinct and formal model of dispute resolution with particular protocols and safeguards that must be carefully studied before they are put into practice.

Just as attorneys who have never filed a bankruptcy or adoption should not do so before becoming competent, attorneys should not take on CP matters without studying the model and the distinct commitments they are undertaking for a client. Practitioners also need to assess clients to determine if they are good candidates for CP.

Rule 14 of the Uniform Collaborative Law Act was not adopted as part of the Illinois version. However, attorneys who have been trained in and practice CP in Illinois commit to Rule 14 guidelines:

> APPROPRIATENESS OF COLLABORATIVE LAW PROCESS.
> Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:
> (1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;
> (2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and
> (3) advise the prospective party that:
> (A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;
> (B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and
> (C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Rule 9(c), 10(b), or 11(b).

The Collaborative Law Institute of Illinois (www.collablawil.org) recommends that there be a formal reading – sometimes line by line but usually in summary fashion – of the participation agreement at the first four-way meeting of parties and their counsel. After that, the clients are asked to acknowledge, before each other and the attorneys, that they are voluntarily and affirmatively agreeing to (1) enter into the process, (2) make full and complete disclosure of all information, (3) act with integrity and in good faith, (4) keep the interests of all the stakeholders (including the children in family law matters) in the forefront, and (5) allow the withdrawal of both their attorneys if one of the parties' threatens to or files litigation.

A proposal is pending before the Illinois Supreme Court to adopt rules of professional conduct that address the CP model. Those may incorporate all or part of UCLA Rule 14. Including this language would underscore the duty of attorneys to obtain informed consent from clients prior to proceeding. That helps clients understand the commitment they are making.

UNDER THE COLLABORATIVE-LAW MODEL, LAWYERS COMMIT TO WITHDRAW IF EITHER CLIENT CHOOSES TO GO TO LITIGATION.

Generally, the best practice from the very first contact with potential CP clients is to make sure they are provided with hard copies of materials about the model. Attorneys need to educated clients about the different models of dispute resolution – be they litigation, mediation, arbitration, or CP. The "best client" for any process is an educated client. Under the CP model, attorneys go the extra step of educating and getting informed consent from both clients before proceeding.

Conclusion

CP is a rapidly evolving area of practice which has at its core the aspiration to "do no harm," whether it is being used in family law, business law, or probate law or other disputes. Professionals wishing to offer this model of dispute resolution must first educate themselves about its nuances so as to be able to adequately identify cases, clients, and circumstances that are appropriate and inappropriate for the process.