

A Discussion About Collaborative Law: What Exactly is It?

by Adina Morse, July 2023



I am a trained collaborative lawyer, and when I say that in public, people ask what that is, and they ask about the process. The part of the process that people seem to struggle with the most is the open, honest, collaborative discourse and negotiation. They also struggle with the lack of traditional attorney client privilege, and the absence of the court from the process.

Just WHAT is Collaborative Law?

Collaborative law is a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator. [\[1\]](#)

Okay, but What does that really mean?

Collaborative law is resolution of a dispute through collaboration. The parties to the dispute, whether that is a divorce, or a civil matter, are represented by collaborative attorneys during the process.

Not every attorney is a collaborative law attorney: Collaborative attorneys have gone through a training and certification process. I went through a five-day course offered by the Collaborative Practice Training Institute in Rockville, Maryland.

At the start of the process, each party retains a collaborative law attorney for the limited purpose of acting as an advocate and counselor during the negotiation process.

Importantly, the parties agree in advance that these attorneys are disqualified from representing the parties if the collaborative process fails, in part or

in whole, and the dispute goes before a tribunal (usually a court).

So, if the process breaks down and the parties end up in court, the collaborative attorneys are disqualified, and the parties must find new attorneys to represent them.

One of the best things about the collaborative process is that it involves other specialists as the dispute requires. For example, in a divorce, the parties may want to have a financial expert and a child therapist to help them through the process. In a corporate divorce, the parties may want to have a specialist who can value the business, and someone who can advise on tax matters.

These specialists are called non-party participants.

What are the Benefits of Collaborative Law?

- Confidential;
- Problem solving;
- Preserve relationships;
- All specialists part of the dispute resolution;
- Faster than court proceeding;
- May be less expensive than litigation;
- Still offers protection to participants and family members: a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or a family or household member of a party.

How do I start the Collaborative Process? Does a Judge Order it?

The collaborative process begins with a Participation Agreement that is written and signed by the parties. A judge or other decision maker cannot order the parties to participate in the collaborative process.

The agreement must also describe the scope of the matter or dispute, and clearly state the parties'

intentions to resolve the dispute through the collaborative process.

It must also identify each collaborative lawyer in the process and contain a statement by these lawyers that they are representing a party in a collaborative process.

It is really important that at the outset, all participants know the ground rules, understand the process, and agree about what dispute/s they intend to resolve in the process.

Uhhmmm’ okay, but what does discovery look like in the collaborative process?

Collaborative law only works if the parties fully and truthfully disclose relevant information.

So, the discovery looks like this: On the request of another party in the collaborative law process, a party shall make timely, full, candid, and information disclosure of information related to the collaborative matter.

And attorney client privilege looks like this: Attorney client privilege remains in the collaborative process, however, if the collaborative attorney is instructed by her client not to tell the other side, and the attorney thinks her client is misleading the other side, the attorney must withdraw from representation.

Yikes! Okay, what if one party to the collaborative process asks the court to intervene by filing a petition or a motion?

The collaborative law process ends.

Other ways the collaborative law process ends:

- The parties have a resolution (or a partial resolution) of a collaborative matter as evidenced by a signed record
- When a party gives notice to other parties in the record that the process is ended;(Note: a party may terminate the collaborative process with or without cause.)
- The collaborative law process terminates when a party discharges her collaborative lawyer, or her lawyer withdraws from further representation of the party in the collaborative matter (Unless, the unrepresented party hires a successor collaborative attorney within 30 days.)

While certainly not for everyone, collaborative law is one more tool in the alternative dispute resolution toolbox for attorneys to consider; for the right case, it is a unique and effective way to resolve a dispute.

[1] National Conference of Commissioners of Uniform State Laws, April 24, 2020.

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