

FREQUENTLY ASKED QUESTIONS

What is the goal of collaborative law?

The goal or purpose of collaborative law is to offer attorneys and their clients a structured, non-adversarial alternative to an adversarial system of dispute resolution. It guarantees consumers of legal services high quality, skilled legal counsel to assist in the evaluation and resolution of a problem, without litigation.

For whom is collaborative law a good idea?

Not every attorney will want or be able to practice collaborative law. Not every client will be willing to give up the adversarial contest. For many attorneys, however, their trial court experience has led to a belief that the commitment of their skill and time to a litigated case often does not achieve an outcome which is cost effective or even a good solution for their clients' problems. Similarly, many clients are looking for experienced legal counsel, knowledgeable guidance and skilled advocacy, but do not want litigation. For these attorneys and for these clients, Collaborative Law is an excellent option.

Can an attorney represent a client zealously if it is agreed in advance not to go to court?

By entering into a collaborative law participation agreement attorneys and their clients have thoughtfully agreed to limit the attorney's role within the contractual relationship to that of providing representation for settlement purposes, only. Nothing in the Canons of Ethics precludes such a limitation. In stepping out of the adversarial process, the collaborative attorney does not give up the role of advocate for his or her client. The collaborative law attorney is representing his or her client zealously, not only to achieve a short term goal, but to realize the best result in the long run.

Can a party terminate the process?

Nothing in the participation agreement precludes a party from terminating the collaborative law process and deciding to litigate. However, the clients will have been advised at the outset that doing so will require them to hire other counsel. The other party also will be trading his or her collaborative attorney for a litigator.

How does an attorney's assessment of the likely outcome of the client's case were it to be litigated affect the way the attorney approaches a collaborative law case?

While the participation agreement prohibits threatening litigation, the attorney's advice to his or her client as to the strengths and merits of various claims will always include an assessment of the likely outcome if the case had to be litigated. Consideration of the law and one's legal rights is always appropriate in analyzing what a fair outcome in a collaborative process might be. Along with this assessment will be consideration of all of the costs and risks of litigation.

What are the Association of Collaborative Law Attorneys' requirements for participating lawyers?

1. Attorneys must have been in practice for a minimum of five years.
2. They must complete a two-day Collaborative Law Center training program and such additional training as the Association requires.
3. They must be members in good standing of the New York State Bar.
4. They must commit themselves to faithfully observing all of the elements of the collaborative law participation agreement.

Is everybody in the attorney's firm precluded from participating in litigation in the event the collaborative law process is unsuccessful?

Yes. Only in this way can parties be assured that there is no benefit to be gained by counsel in failing to succeed with settlement.

Why must an attorney resign if the other party decides to go to court?

The requirement that all attorneys be disqualified in the event of a breakdown guarantees that all participating counsel will be totally and exclusively motivated to have the process succeed. This way, all participants are equally and fully invested in finding the solutions to all problems. In addition, it is believed that the way people participate in negotiation, and especially the way attorneys participate, is affected by the certainty that that attorney will never litigate the case. Openness, mutual trust, and cooperation replace guardedness, secrecy, and threats as the techniques most likely to achieve ultimate success.

How is an attorney's relationship with a client different in the collaborative law process, and how do attorneys prepare clients for participating collaboratively?

First, the attorney never ceases to be the client's advocate and the client is so assured. By entering into the participation agreement, the client has already decided and declared the intent to neither threaten nor pursue litigation (an entitlement, however, which the client never waives). Now the objective is to discern and attempt to satisfy the interests of both (all) parties. To that end, all parties and counsel must cooperate. Counsel will encourage their clients to speak clearly about their own needs and desires, and to listen carefully to those expressed by others. Collaborative law attorneys remind and reassure their clients that by treating the other participant's interests with respect, they are serving their client's goals and interests. Collaborative attorneys are trained in communication skills and will assist the parties in this endeavor.

Can one attorney practice collaborative law if the other participant has not signed a participation agreement?

We will proceed on a collaborative law basis only when all attorneys and clients have signed the participation agreement. Clients and their attorneys may decide that they will use collaborative principles and use their best efforts to settle the case, however, the members of the Association of Collaborative Family Law Attorneys will term this non-adversarial process "working cooperatively". Unless the participation agreement is signed and there is a contractual obligation on the attorneys' part not to proceed with litigation for the clients, we are not truly working for our clients "collaboratively".

How is collaborative law different from mediation?

Mediation involves the use of a single neutral person (who may be an attorney, a mental health professional, or someone who has an interest in mediating) to facilitate the negotiation and settlement of a dispute between the parties. The mediator's goal is for the parties to reach agreement and, to that end, the parties usually are responsible for negotiating for themselves. The mediator cannot give legal advice to either of the parties; the parties may or may not be advised to seek independent legal counsel during their mediation. In New York, mediators are not required to be licensed.

How do you deal with courts' case management deadlines?

It is anticipated that most collaborative law cases will be resolved prior to and without any court filings. However, for cases that have already been filed at the time the participation agreement is signed, stay motions have been developed for use pending completion of the collaborative law process.

How do you deal with Statutes of Limitation?

In collaborative law cases counsel and parties will cooperate with each other fully to prevent the necessity of any court filings while the collaborative case proceeds. This may involve agreements to toll the Statute of Limitations when possible. The participation agreement provides for some limited court filings, as agreed upon and as necessary to protect the parties' interests, while the collaborative law case proceeds.

How does the practice of collaborative law affect attorney fees?

Representation and fee agreements between attorney and client are not directly affected by the participation agreement.

What can collaborative attorneys do if negotiations reach an impasse?

Attorneys participating in the Association of Collaborative Law Attorneys have agreed to act as mentors for each other to assist in reviewing problem cases or situations. Additionally, collaborative attorneys and their clients can agree to employ experts to advise both participants as to disputed facts or law and hire a mediator or arbitrator at any time.

What happens if a participant doesn't fulfill his/her disclosure obligation under the participation agreement?

Participation in the collaborative law process is based on the assumption that the parties to the participation agreement (both attorneys and clients) have acted in good faith and have provided accurate information as required. Thus, while not automatically ending the collaborative law process, a party's refusal to fulfill his/her disclosure obligation under the participation agreement will, as a practical matter, probably make it impossible for the participants to reach a fair resolution. As with any instance in which a participant fails to fulfill the participation agreement, the other participant can elect to waive the violation and let the collaborative law process continue. When an attorney learns that his/her client has withheld or misrepresented information that should have been disclosed, the participation agreement requires the collaborative lawyer to withdraw.

What if, sometime after entering into a settlement as a result of a collaborative law process, a collaborative attorney discovers that the other party failed to disclose information that should have been disclosed?

In this respect, a settlement agreement reached via a collaborative law process is no different from any other negotiated settlement agreement, and the former is no more or less susceptible to being annulled for such a reason than the latter. To address this concern, the participation agreement states that, in any settlement agreement reached during the collaborative law process, the attorneys and the parties may wish to recite the material facts upon which the settlement is based.