

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

House Bill 477
Judiciary

(Delegates Waldstreicher and Dumais)

Maryland Uniform Collaborative Law Act

This bill establishes the Maryland Uniform Collaborative Law Act and sets forth requirements for the collaborative law process. A collaborative law process means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons sign a collaborative law participation agreement and are represented by collaborative lawyers.

Fiscal Summary

State Effect: Potential minimal decrease in general fund expenditures for the Judiciary to the extent the collaborative law process is successfully utilized.

Local Effect: Potential minimal decrease in circuit court expenditures to the extent the collaborative law process is successfully utilized.

Small Business Effect: Minimal.

Analysis

Bill Summary:

Selected Definitions

A “collaborative matter” is a dispute, transaction, claim, problem, or issue for resolution described in a collaborative law participation agreement. A collaborative matter includes a dispute, claim, and an issue in a proceeding.

A “collaborative law communication” means a statement, whether oral or in a record, or verbal or nonverbal, that is made to conduct, participate in, continue, or reconvene a collaborative law process and occurs after the parties sign a participation agreement and before the process is concluded.

A “proceeding” means a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and posthearing motions, conferences, and discovery or a legislative hearing or similar process.

A “tribunal” is a court, an arbitrator, an administrative agency, or other body acting in an adjudicative capacity that, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party’s interests in a matter. A tribunal includes a legislative body conducting a hearing or similar process.

Appropriateness of Collaborative Law Process

Prior to a prospective party signing a collaborative law participation agreement, a prospective collaborative lawyer must:

- assess with the prospective party factors reasonably believed to relate to whether the process is appropriate for the prospective party’s matter;
- 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 other reasonably available alternatives for resolving the proposed matter, including litigation, mediation, arbitration, or expert evaluation; and
- advise the prospective party that (1) the collaborative law process terminates if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter after signing a participation agreement; (2) participation in the process is voluntary and any party has the right to terminate the process unilaterally with or without cause; and (3) 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 related proceeding, except as specifically authorized.

Participation Agreements

A collaborative law participation agreement must (1) be in a record and signed by the parties; (2) state the parties’ intention to resolve a collaborative matter through a collaborative law process; (3) describe the nature and scope of the matter; (4) identify the

collaborative lawyer who represents each party in the process; and (5) contain a statement by each of the collaborative lawyers confirming the lawyer's representation of a party in the process. The parties may agree to additional provisions for inclusion.

Beginning and Concluding a Collaborative Law Process

A collaborative law process begins when the parties sign a collaborative law participation agreement. A tribunal may not order a party to participate in a collaborative law process over the party's objection. A collaborative law process concludes by (1) a resolution of a collaborative matter as evidenced by a signed record; (2) a resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or (3) a termination of the process.

A collaborative law process terminates when a party gives notice to other parties in a record that the process is ended or when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party. The process also terminates when a party (1) begins a proceeding related to a collaborative matter without the agreement of all parties or (2) in a pending proceeding related to the collaborative matter, initiates a pleading, motion, an order to show cause, or a request for a conference with the tribunal, requests that the proceeding be put on the tribunal's calendar, or takes similar action requiring notice to be sent to the parties. A party may terminate a collaborative law process with or without cause.

A party's collaborative lawyer is required to give prompt notice to all other parties in a record of a discharge or withdrawal.

Even if a collaborative lawyer has been discharged or withdraws, a collaborative law process continues if, within 30 days after the date that the required notice of discharge or withdrawal of a collaborative lawyer is sent (1) the unrepresented party engages a successor collaborative lawyer and (2) in a signed record, the parties consent to continue the process by reaffirming the participation agreement, the agreement is amended to identify the successor lawyer, and the successor lawyer confirms the lawyer's representation of a party.

The process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part of the collaborative matter as evidenced by a signed record. A participation agreement may provide additional methods of concluding a collaborative law process.

Proceedings Pending

Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties must promptly file a notice of the agreement with the tribunal after it is signed. Unless otherwise specified, the filing operates as a stay of the proceeding. Notice must again be filed when a collaborative law process concludes. The stay of the proceeding is lifted when this notice is filed. The notice may not specify any reason for the termination of the process.

Status Reports and Emergency Orders

A tribunal in which a proceeding is stayed may require parties and collaborative lawyers to provide a status report, which may include only information on whether the process is ongoing or concluded. A status report may not include any other communication regarding a collaborative law process or matter.

During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a person eligible for relief. A “person eligible for relief” is an individual who meets specified relationship requirements and would be eligible to file a petition for a protective order under the Family Law Article.

Disqualification of Collaborative Lawyers

A collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter. A lawyer in a law firm with which the collaborative lawyer is associated is also disqualified if the collaborative lawyer is disqualified. However, a collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party (1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or (2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a person eligible for relief if a successor lawyer is not immediately available for representation. In an emergency order proceeding, a collaborative lawyer or associated lawyer may represent a party only until the person eligible for relief is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of that person.

Low-income Parties

The disqualification provisions apply to a collaborative lawyer representing a party with or without a fee. Once a collaborative law process has concluded, another lawyer in a law firm with which a collaborative lawyer who is disqualified under the bill’s provisions

is associated may represent a party without a fee in the collaborative matter or a related matter if (1) the party has an annual income that qualifies the party for free legal representation under the firm's criteria for free legal representation; (2) the collaborative law participation agreement so provides; and (3) the collaborative lawyer is isolated from any participation in the collaborative matter or a related matter through procedures within the firm that are reasonably calculated to isolate the lawyer from any participation in the matter.

Government Entities as Parties

The disqualification provisions apply to a collaborative lawyer representing a party that is a government or governmental subdivision, agency, or instrumentality. After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or governmental entity in the collaborative matter or a related matter if permitted in the participation agreement. The collaborative lawyer must also be isolated from any participation in the collaborative matter or a related matter through firm procedures reasonably calculated to isolate the collaborative lawyer from such participation.

Disclosures

Unless otherwise provided by law, during the collaborative law process a party must (1) on the request of another party, make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery; and (2) promptly update previously disclosed information that has materially changed. The scope of disclosure may be defined by the parties during the collaborative law process.

The provisions of the bill do not affect the professional responsibility, obligations, and standards applicable to lawyers or other licensed professionals. The provisions also do not affect the legal obligation of a person to report abuse, neglect, abandonment, or exploitation of a child or an adult.

Coercive or Violent Relationships

Before a prospective party signs a participation agreement, a prospective collaborative lawyer must make a reasonable inquiry as to whether the prospective party has a history of a coercive or violent relationship with another prospective party. A collaborative lawyer must reasonably and continuously assess this history throughout the process. If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults with the lawyer has a history of a coercive or violent relationship, the lawyer may not begin or continue the process unless the party or prospective party requests beginning or continuing the process and the collaborative

lawyer reasonably believes that the safety of the party or prospective party can be adequately protected.

Confidentiality and Privilege

A collaborative law communication is confidential to the extent agreed to by the parties in a signed record or as provided by State law.

Subject to specified limitations, a collaborative law communication is privileged, is not subject to discovery, and is not admissible in evidence. A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication and a nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant. Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.

A privilege may be waived in a record or orally during a proceeding if it is expressly waived by each party. A nonparty participant must also expressly waive any privilege. A person that makes a disclosure or representation about a collaborative law communication that prejudices another person in a proceeding may not assert a privilege under the provisions of this bill. This preclusion is only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

No privilege exists for a collaborative law communication that is available to the public under provisions of State law or made during a session of a collaborative law process that is open, or is required by law to be open, to the public. Threats or statements of a plan to inflict bodily injury or commit a crime of violence are likewise not privileged, nor are communications intentionally used in an effort to plan, commit, or conceal criminal activity. Additionally, there is no privilege for a collaborative law communication that is in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

The privileges do not apply to the extent that a communication is sought or offered to prove or disprove (1) a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or (2) abuse, neglect, abandonment, or exploitation of a child or an adult, unless the department of social services for the county in which the child or adult resides is a party to or otherwise participates in the process.

There is also no privilege if a tribunal finds after a hearing *in camera* (that is, a hearing closed to all except the parties, their attorneys, and the court), that the party seeking

discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in a court proceeding involving a felony or misdemeanor or a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.

If a communication is subject to one of the exceptions specified above, only the part of the communication necessary for the application of the exception may be disclosed or admitted. Such a disclosure or admission does not make the evidence or other collaborative law communication discoverable or admissible for any other purpose.

The privileges do not apply if the parties agree, as specified.

Authority of Tribunal in Case of Noncompliance

Even if an agreement does not meet the specified requirements or a lawyer does not comply with specified provisions, a tribunal may find that the parties intended to enter into a collaborative law participation agreement if the parties signed a record indicating an intention to enter into an agreement and reasonably believed they were participating in a collaborative law process. If a tribunal makes the findings specified above, and the interests of justice require, the tribunal may (1) enforce an agreement evidenced by a record resulting from the process in which the parties participated; (2) apply the disqualification provisions of the bill's provisions; and (3) apply the privileges specified.

Miscellaneous

The bill establishes that in applying and construing the bill, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. It modifies, limits, and supersedes specified provisions of the federal Electronic Signatures in Global and National Commerce Act. If any provision is held invalid for any reason, the invalidity does not affect other provisions or application of the bill which can be given effect without the invalid provision or application.

Current Law: There are no statutory provisions for a collaborative law process.

Background: Collaborative law is a voluntary process in which the lawyers and parties agree that the lawyers will represent the parties solely for purposes of settlement and that parties will hire new representation if the case does not settle. The collaborative law process is intended to provide lawyers and clients with an option for amicable, nonadversarial dispute resolution. As with mediation, it promotes problem-solving and permits solutions not possible in litigation or arbitration. The process is intended to

promote full and open disclosure, as information disclosed in a collaborative law process, if not otherwise discoverable, is privileged against use in any subsequent litigation.

The National Conference of Commissioners on Uniform State Laws originally promulgated the Collaborative Law Act in 2009 and made subsequent amendments in 2010. The Act has already been enacted in Nevada, Texas, and Utah.

State and Local Fiscal Effect: The Judiciary advises that the International Academy of Collaborative Professionals has estimated that over 90% of divorces handled through the collaborative law process settle out of court and require no further court intervention. It is estimated that the collaborative law process will allow more parties to reach out-of-court decisions, potentially minimizing State and local court resources that are associated with protracted hearings.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore City; City of Frederick; City of Havre de Grace; Howard, Montgomery, and Prince George's counties; Maryland State Department of Education; Department of Health and Mental Hygiene; Judiciary (Administrative Office of the Courts); Department of State Police; Office of the Public Defender; Department of Public Safety and Correctional Services; National Conference of Commissioners on Uniform State Laws; Department of Legislative Services

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