



NEW JERSEY STATE BAR ASSOCIATION

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January 29, 2019

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Hughes Justice Complex
25 West Market Street
Trenton, NJ 08625

RE: Proposed Evidence Rule – Collaborative Law Privilege

Dear Judge Grant:

The New Jersey Family Collaborative Law Act (N.J.S.A. 2A:33D-1 et seq.) was signed into law on Sept. 10, 2014, and took effect 90 days later. The Act includes provisions creating a statutory privilege for family collaborative law communications to enable participants to participate candidly in the process and thereby facilitate resolution of the family law dispute at issue. While the Act has been in effect for more than four years, an Evidence Rule acknowledging the privilege has not yet been adopted.

To remedy that, the New Jersey State Bar Association proposes the enclosed rule entitled the "Collaborative Law Privilege." The proposal tracks the statute and uses the same format that was used to create N.J. Evid. R. 519 regarding mediation communications.

On behalf of the NJSBA, I urge the Court to take the necessary steps to adopt this proposal to ensure that participants in the family collaborative law process are fully protected by the privilege granted them under the statute.

Thank you, as always, for your consideration. If you need any further information, please let me know.

Respectfully yours,

John E. Keefe Jr.
President

/sab

cc: Evelyn Padin, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director

Collaborative Law Privilege

(a) N.J.S.A. 2A:23D-13 provides:

- a. Subject to sections 14 and 15 of P.L. 2014, c.50 (N.J.S.A. 2A:23D-14 and N.J.S.A. 2A:23D-15), a family collaborative law communication made by a party or any non-party participant is privileged under subsection b. of this section and therefore not subject to discovery, and not admissible in evidence.
- b. In addition to application of the lawyer-client privilege provided under the laws of this State, the following privileges apply in a proceeding:
 - (1) A party may refuse to disclose, and may prevent the party's lawyer, or a nonparty participant, or any other person from disclosing, a family collaborative law communication.
 - (2) A nonparty participant may refuse to disclose, and may prevent a party, a party's lawyer or any other person from disclosing, a family collaborative law communication of the nonparty participant.
- c. The privilege created by this section may be claimed by the party or nonparty participant in person, or if the party or nonparty participant is incapacitated or deceased, by his guardian or personal representative. Where a corporation or association or other legal entity is the nonparty participant claiming the privilege, and the corporation, association or other entity has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.
- d. Evidence or information that is otherwise admissible, readily available from other sources, or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a family collaborative law process.

(b). N.J.S.A. 2A:23D-14 provides:

- a. A privilege under section 13 of P.L. 2014, c.50 (N.J.S.A. 2A:23D-13) may be waived in a record or orally during a proceeding if it is expressly waived by both parties and, in the case of privilege of a nonparty participant, it is also expressly waived by the nonparty participant.
- b. A person who discloses or makes a representation about a family collaborative law communication that prejudices another person in a proceeding is precluded from asserting the privilege under section 13 of P.L. 2014, c.50 (N.J.S.A. 2A:23D-13), and this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

(c) N.J.S.A. 2A:23D-15 provides:

- a. There is no privilege under section 13 of P.L. 2014, c.50 (N.J.S.A. 2A:23D-13) for a family collaborative law communication that is:
 - (1) made during a session of a family collaborative law process that is open to the public, or is required by law to be open to the public; or

- (2) sought, obtained, or used to threaten or plan to inflict bodily injury or a crime, or to commit or attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity; or
 - (3) in a settlement agreement resulting from the family collaborative law process, evidenced by a record signed by both parties to the agreement; or
 - (4) a disclosure in a report of suspected domestic violence or suspected child abuse to an appropriate agency under the laws of this State.
- b. There is no privilege under section 13 of P.L. 2014, c.50 (N.J.S.A. 2A:23D-13) if a tribunal finds, after a hearing in camera, that the party seeking discovery or other 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 family collaborative law communication is sought or offered in:
- (1) a court proceeding involving a crime; or
 - (2) a proceeding seeking rescission or reformation of a contract arising out of the family collaborative law process or in which a defense to avoid liability on the contract is asserted.
- c. The privileges under section 13 of P.L. 2014 c.50 (N.J.S.A. 2A:23D-13) for a family collaborative law communication, do not apply to the extent that a communication is:
- (1) sought or offered to prove or disprove a claim of professional misconduct or malpractice or the unreasonableness of a family collaborative lawyer's fee arising from or related to a family collaborative law process; or
 - (2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the appropriate protective services agency is a party to or otherwise participates in the process.
- d. If a family collaborative law communication is subject to an exception under subsection b. or c. of this section, only the part of the communication necessary for the application of the exception may be disclosed or admitted.
- e. Disclosure or admission of evidence excepted from the privilege under subsection b. or c. of this section does not make the evidence or any other family collaborative law communication discoverable or admissible for any other purpose.
- f. The privileges under section 13 of P.L. 2014 c.50 (N.J.S.A. 2A:23D-13) do not apply if the parties agree in advance in a signed record that all or part of a family collaborative law process is not privileged.

CHAPTER 50

AN ACT concerning family collaborative law and supplementing Title 2A of the New Jersey Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

C.2A:23D-1 Short title.

1. This act shall be known and may be cited as the "New Jersey Family Collaborative Law Act."

C.2A:23D-2 Findings, declarations relative to family collaborative law.

2. The Legislature finds and declares:

a. Since at least 2005, attorneys in New Jersey have participated in the dispute resolution method known as family collaborative law, in which an attorney is retained for the limited purpose of assisting his client in resolving family disputes in a voluntary, non-adversarial manner, without court intervention.

b. The family collaborative law process is distinct from other dispute resolution mechanisms because the parties intend to resolve their dispute without litigation. Instead, each party, represented by his attorney, meets together with the other party to the dispute, that party's attorney, and, as needed, one or more nonparty participants who are not attorneys but are professionals in their fields, such as certified financial planners, certified public accountants, licensed clinical social workers, psychologists, licensed professional counselors, licensed marriage and family therapists, and psychiatrists. All participants in the family collaborative law process understand and agree that the process is intended to replace litigation and that the process will terminate if either party or either attorney commences a proceeding related to the subject matter to be addressed through the family collaborative process before a court or other tribunal other than to seek incorporation of a settlement agreement into a final judgment.

c. In order to facilitate full and fair disclosure by the parties to the family collaborative law process, the parties must have an evidentiary privilege to protect them from disclosure of any collaborative law communication. The nonparty participants in the family collaborative law process, who serve as neutral experts, need a privilege from disclosure of communications made by them during the process similar to the privilege created for mediators in the "Uniform Mediation Act," P.L.2004, c.157 (C.2A:23C-1 et seq.). This will enable nonparty participants to participate candidly in the process and thereby facilitate resolution of the family law dispute.

C.2A:23D-3 Definitions relative to family collaborative law.

3. As used in this act:

a. "Family collaborative law communication" means a statement, whether oral or in a record, that is made in the course of a family collaborative law process and occurs after the parties sign a family collaborative law participation agreement but before the family collaborative law process is concluded.

b. "Family collaborative participation agreement" means a written agreement by the parties to participate in a family collaborative law process, in accordance with section 5 of P.L.2014, c.50 (C.2A:23D-5) in order to resolve their family law dispute.

c. "Family collaborative law process" means a procedure intended to resolve the family law dispute without intervention by a tribunal provided that the individuals in the dispute: (1)

sign a family collaborative law participation agreement; and (2) are represented by family collaborative lawyers.

d. "Family collaborative lawyer" means a lawyer who represents a party in a family collaborative law process and whom the party acknowledges is retained for that limited purpose.

e. "Family law dispute" means a dispute, claim or issue which is described in a participation agreement and arises under the family or domestic relations law of this State, including but not limited to:

(1) marriage, civil union, domestic partnership, divorce, dissolution, annulment, or property distribution;

(2) child custody, visitation, or parenting time;

(3) alimony, maintenance, or child support; or

(4) premarital, marital or post-marital agreements, or comparable agreements affecting civil unions or domestic partnerships.

f. "Nonparty participant" means a person, other than a party and the party's family collaborative lawyer, who participates in a family collaborative law process. This includes, but is not limited to, financial practitioners, including certified financial planners and certified public accountants, and mental health professionals, including licensed clinical social workers, psychologists, licensed professional counselors, licensed marriage and family therapists, and psychiatrists.

g. "Party" means an individual who signs a family collaborative law participation agreement and whose consent is necessary to resolve a family law dispute under P.L.2014, c.50 (C.2A:23D-1 et seq.).

h. "Proceeding" means a judicial or arbitral or adjudicative process before a tribunal.

i. "Prospective party" means an individual who discusses with a prospective family collaborative lawyer the possibility of signing a family collaborative law participation agreement.

j. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

k. "Related to the family law dispute" means involving the same parties, transaction or occurrence, nucleus of operative fact, claim, matter or issue as the family law dispute.

l. "Settlement agreement" means a signed agreement entered into by the parties to a family collaborative law participation agreement that sets forth a resolution of the parties' family law dispute.

m. "Sign" means, with present intent to authenticate or adopt a record to execute or adopt a tangible symbol; or attach to or logically associate with the record an electronic symbol, sound, or process.

n. "Tribunal" means a court, arbitrator, or administrative agency, as applicable, that after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter.

C.2A:23D-4 Application of act.

4. P.L.2014, c.50 (C.2A:23D-1 et seq.) applies to a family collaborative law process that is subject to a family collaborative law participation agreement, meets the requirements set forth in section 5 of P.L.2014, c.50 (C.2A:23D-5), and is signed on or after the effective date of this act.

P.L.2014, c.50 (C.2A:23D-1 et seq.) does not apply to any other collaborative law process or any other collaborative law participation agreement.

C.2A:23D-5 Family collaborative law participation agreement.

5. a. A family collaborative law participation agreement shall:

- (1) be in a record;
- (2) be signed by the parties;
- (3) state the parties' intention to resolve a family law dispute through a family collaborative law process pursuant to P.L.2014, c.50 (C.2A:23D-1 et seq.);
- (4) describe the nature and scope of the family law dispute;
- (5) identify the family collaborative lawyer who represents each party in the process;
- (6) contain a statement that a family collaborative lawyer's role is limited as defined in P.L.2014, c.50 (C.2A:23D-1 et seq.), consistent with the Rules of Professional Conduct promulgated by the Supreme Court of New Jersey;
- (7) set forth the manner by which a family collaborative law process begins and the manner by which it terminates or concludes in accordance with sections 6 and 7 of P.L.2014, c.50 (C.2A:23D-6 and C.2A:23D-7);
- (8) state that any family collaborative law communication of a party or a nonparty participant is confidential and subject to an evidentiary privilege under section 13 of P.L.2014, c.50 (C.2A:23D-13), and that the privilege may be waived only expressly and by both parties or in the case of a nonparty participant, by the nonparty participant having the right to exercise the privilege; and
- (9) state that the conduct of the family collaborative lawyer is governed by P.L.2014, c.50 (C.2A:23D-1 et seq.), the Rules of Court adopted by the Supreme Court of New Jersey, and the Rules of Professional Conduct promulgated by the Supreme Court of New Jersey and that P.L.2014, c.50 (C.2A:23D-1 et seq.) does not alter the family collaborative lawyer's responsibilities to the client under the Rules of Professional Conduct and any other applicable Rules of Court.

b. Parties may agree to include in a family collaborative law participation agreement additional provisions not inconsistent with P.L.2014, c.50 (C.2A:23D-1 et seq.) or other applicable law.

C.2A:23D-6 Beginning of family collaborative law process.

6. a. A family collaborative law process begins when the parties sign a family collaborative law participation agreement.

b. Participation in a family collaborative law process is voluntary and may not be compelled by a tribunal.

C.2A:23D-7 Conclusion of family collaborative law process.

7. a. A family collaborative law process is concluded by either:

- (1) resolution of a family law dispute as evidenced by a signed settlement agreement; or
- (2) termination of the process.

b. A family collaborative law process terminates when:

- (1) a party gives notice to other parties in a record that the process is ended, which a party may do with or without cause; or
- (2) a party files a document without the agreement of all parties that initiates a proceeding related to the family law dispute; or
- (3) either party is subject to, or obtains, a temporary or final restraining order against the other party in accordance with the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et seq.); or

(4) an action is commenced requesting that a tribunal issue emergency relief to protect the health, safety, welfare, or interests of a party or the defense against such a request is commenced; or

(5) except as provided by section 9 of P.L.2014, c.50 (C.2A:23D-9), a party discharges a family collaborative lawyer; or

(6) a party fails to provide information pursuant to section 10 of P.L.2014, c.50 (C.2A:23D-10) that is necessary to address the issues in dispute, and one of the parties chooses to terminate the collaborative process as a result; or

(7) a family collaborative lawyer ceases further representation of a party.

c. A family collaborative law process does not terminate if, with the consent of the parties, a party, or the party's family collaborative lawyer on the party's behalf, requests a tribunal to incorporate a settlement agreement into a final judgment.

d. A family collaborative law participation agreement may provide additional methods of terminating or concluding a family collaborative law process consistent with P.L.2014, c.50 (C.2A:23D-1 et seq.) and the Rules of Professional Conduct promulgated by the Supreme Court of New Jersey.

e. In the event the family collaborative law process does not result in a judgment resolving the family law dispute and the dispute is, instead, submitted to a tribunal for adjudication, the family collaborative lawyer and the lawyers in the law firm with whom the collaborative family lawyer is associated shall not continue to represent the party in that family law dispute.

C.2A:23D-8 Disqualification of family collaborative lawyer.

8. A lawyer in a law firm with which the family collaborative lawyer is associated in a partnership, professional corporation, sole proprietorship, limited liability company, or law association is disqualified from appearing before a tribunal to represent a party in a proceeding related to a family collaborative law matter if the family collaborative lawyer is disqualified from doing so in subsection e. of section 7 of P.L.2014, c.50 (C.2A:23D-7).

C.2A:23D-9 Notice of cessation of representation; continuation of process.

9. a. If a family collaborative lawyer ceases or is disqualified from representation of a party, prompt notice of the cessation of representation or discharge shall be given to all parties in a record.

b. Notwithstanding the provisions of paragraph (5) of subsection b. of section 7 of P.L.2014, c.50 (C.2A:23D-7), and subject to this subsection, if a family collaborative lawyer is discharged or ceases representation of a party, the family collaborative law process continues if, not later than 30 days after the date of notice of the discharge or cessation of representation is sent to the parties pursuant to subsection a. of this section, the unrepresented party:

(1) retains a successor family collaborative lawyer who is identified in an amended family collaborative law participation agreement; and

(2) in that amended family collaborative law participation agreement, the parties consent to continue the process and the successor lawyer confirms representation of the party.

C.2A:23D-10 Disclosure of information.

10. Except as otherwise provided by law, during the family collaborative law process a party shall, in good faith, provide timely, full, and candid disclosure of information related to the family law dispute without formal discovery. A party shall also promptly update

previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative family law process except as provided by law.

C.2A:23D-11 Certain responsibilities of lawyer unaffected.

11. P.L.2014, c.50 (C.2A:23D-1 et seq.) does not affect, waive or supersede:

a. The professional responsibility obligations and standards applicable to a lawyer or other licensed professional in this State, including but not limited to the Rules of Professional Conduct promulgated by the Supreme Court of New Jersey; or

b. The obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the law of this State.

C.2A:23D-12 Confidentiality.

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

C.2A:23D-13 Privileges.

13. a. Subject to sections 14 and 15 of P.L.2014, c.50 (C.2A:23D-14 and C.2A:23D-15), a family collaborative law communication made by a party or any nonparty participant is privileged under subsection b. of this section, is not subject to discovery, and is not admissible in evidence.

b. In a proceeding, and in addition to application of the lawyer-client privilege provided under the laws of this State, the following privileges apply:

(1) A party may refuse to disclose, and may prevent the party's lawyer, or a nonparty participant, or any other person from disclosing, a family collaborative law communication.

(2) A nonparty participant may refuse to disclose, and may prevent a party, a party's lawyer or any other person from disclosing, a family collaborative law communication of the nonparty participant.

c. The privilege created by this section may be claimed by the party or nonparty participant in person, or if the party or nonparty participant is incapacitated or deceased, by his guardian or personal representative. Where a corporation or association or other legal entity is the nonparty participant claiming the privilege, and the corporation, association or other entity has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.

d. Evidence or information that is otherwise admissible, readily available from other sources, or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a family collaborative law process.

C.2A:23D-14 Waiver of privilege.

14. a. A privilege under section 13 of P.L.2014, c.50 (C.2A:23D-13) may be waived in a record or orally during a proceeding if it is expressly waived by both parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

b. A person who discloses or makes a representation about a family collaborative law communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 13 of P.L.2014, c.50 (C.2A:23D-13), but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

C.2A:23D-15 Exemption from privilege.

15. a. There is no privilege under section 13 of P.L.2014, c.50 (C.2A:23D-13) for a family collaborative law communication that is:

(1) made during a session of a family collaborative law process that is open, or is required by law to be open, to the public; or

(2) sought, obtained, or used to threaten or plan to inflict bodily injury or a crime, or to commit or attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity; or

(3) in a settlement agreement resulting from the family collaborative law process, evidenced by a record signed by both parties to the agreement; or

(4) a disclosure in a report of suspected domestic violence or suspected child abuse to an appropriate agency under the laws of this State.

b. There is no privilege under section 13 of P.L.2014, c.50 (C.2A:23D-13) if a tribunal finds, after a hearing in camera, 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 family collaborative law communication is sought or offered in:

(1) a court proceeding involving a crime; or

(2) a proceeding seeking rescission or reformation of a contract arising out of the family collaborative law process or in which a defense to avoid liability on the contract is asserted.

c. The privileges under section 13 of P.L.2014, c.50 (C.2A:23D-13) for a family collaborative law communication do not apply to the extent that a communication is:

(1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice or the unreasonableness of a family collaborative lawyer's fee arising from or related to a family collaborative law process; or

(2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the appropriate protective services agency is a party to or otherwise participates in the process.

d. If a family collaborative law communication is subject to an exception under subsection b. or c. of this section, only the part of the communication necessary for the application of the exception may be disclosed or admitted.

e. Disclosure or admission of evidence excepted from the privilege under subsection b. or c. of this section does not make the evidence or any other family collaborative law communication discoverable or admissible for any other purpose.

f. The privileges under section 13 of P.L.2014, c.50 (C.2A:23D-13) do not apply if the parties agree in advance in a signed record that all or part of a family collaborative law process is not privileged.

C.2A:23D-16 Family collaborative law agreement, intention to enter into.

16. If a family collaborative law participation agreement fails to meet the requirements of section 5 of P.L.2014, c.50 (C.2A:23D-5), the parties may be found to have intended to enter into a family collaborative law participation agreement if they signed a record indicating an intention to enter into a family collaborative law participation agreement and reasonably believed they were participating in a family collaborative law process.

C.2A:23D-17 Application, construction of act.

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17. In applying and construing this act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact a family collaborative law act.

C.2A:23D-18 Severability.

18. If any provision of P.L.2014, c.50 (C.2A:23D-1 et seq.) or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of P.L.2014, c.50 (C.2A:23D-1 et seq.) which can be given effect without the invalid provision or application, and to this end the provisions of P.L.2014, c.50 (C.2A:23D-1 et seq.) are severable.

19. This act shall take effect on the 90th day after enactment.

Approved September 10, 2014.