Protecting Communications Made Prior to Signing a Collaborative Participation Agreement.

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One of the cornerstones of collaborative family law is the confidentiality of communications made during the collaborative process. N.J.S.A.2A:23-D sets forth the legislative findings regarding the statute, and states, "In order to facilitate full and fair disclosure by the parties to the family collaborative process, the parties must have an evidentiary privilege to protect them from disclosure of any collaborative law communication." This privilege is to apply to nonparty participants as well as to the parties and their attorneys. N.J.S.A. 2A:23D-2.c.

The statute defines a family collaborative law communication as " 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." N.J.S.A.2A:23D-3.3. It defines "Record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Communications made within the collaborative process by a party or any nonparty participant are privileged under the statute, are not subject to discovery, and are not admissible in evidence.[1] N.J.S.A. 2A:23D-12 and 13.

As the statute makes clear, the collaborative process does not begin until the parties have signed the participation agreement, N.J.S.A.2A:23D-6.a. Thus, communications made among the parties and counsel, as well as any non-party participants *prior* to signing the participation agreement are not protected within the scope of the statute.

[1] Certain exceptions apply, as with any other privileges, but these are not the focus of this article.

In determining whether a case is appropriate for collaborative, clients and counsel will have several discussions. They may exchange information orally and in writing, and they may even discuss aspects of the case with potential experts. Those communications often touch on the core issues of a case both financially and with regard to the care and custody of children, involving much the same information that is exchanged once the parties sign a participation agreement. None of those communications are protected under the statute.

The statute includes a provision by which parties may agree to exempt or exclude certain communications from the evidentiary privilege. N.J.S.A. 2A:23D-14.a; N.J.S.A. 2A:23D-15.f. It also includes a provision that the parties can agree on the extent to which collaborative communications will be accorded confidentiality and will be subject to an evidentiary privilege. Nothing in the statute appears to be a barrier, then, to parties defining and *including* communications within the scope of what they consider to be protected and privileged, even if those communications occurred prior to signing the participation agreement.

To the extent there are pre-signing communications that the parties wish to protect, the participants should consider expanding the definition of collaborative communications in the participation agreement, either within the text of the basic agreement or as a signed addendum. This should specify communications between counsel, among counsel and the parties, and with any nonparty participants who were involved before the participation agreement signing. While there are no guarantees that a court will uphold this language, it is an appropriate mechanism for protecting what may be considered to be the entire collaborative process, including the efforts made by those involved to assess the appropriateness of the case and assist the parties in making the decision whether or not to sign the participation agreement.