HOUSE . . . . . No. 39

So much of the recommendations of the Commission on Uniform State Laws (House, No. 31) as relates to establishing uniform collaborative law. The Judiciary.

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court
(2015-2016)

An Act establishing uniform collaborative law.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The General Laws are hereby amended by inserting after chapter 251 the following chapter:--

CHAPTER 251B

UNIFORM COLLABORATIVE LAW ACT

Section 1. This chapter may be cited as the Uniform Collaborative Law Act.

Section 2. In this chapter:

(1) "Collaborative law communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(A) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

11 (B) occurs after the parties sign a collaborative law participation agreement and
12 before the collaborative law process is concluded.

13 (2) “Collaborative law participation agreement” means an agreement by persons to
14 participate in a collaborative law process.

15 (3) “Collaborative law process” means a procedure intended to resolve a collaborative
16 matter without intervention by a tribunal in which persons:

17 (A) sign a collaborative law participation agreement; and

18 (B) are represented by collaborative lawyers.

19 (4) “Collaborative lawyer” means a lawyer who represents a party in a collaborative law
20 process.

21 (5) “Collaborative matter” means a dispute, transaction, claim, problem, or issue for
22 resolution, including a dispute, claim, or issue in a proceeding, which is described in a
23 collaborative law participation agreement.

24 (6) “Law firm” means:

25 (A) lawyers who practice law together in a partnership, professional corporation,
26 sole proprietorship, limited liability company, or association; and

27 (B) lawyers employed in a legal services organization, or the legal department of
28 a corporation or other organization, or the legal department of a government or governmental
29 subdivision, agency, or instrumentality.

30 (7) “Nonparty participant” means a person, other than a party and the party’s
31 collaborative lawyer, that participates in a collaborative law process.

32 (8) “Party” means a person that signs a collaborative law participation agreement and
33 whose consent is necessary to resolve a collaborative matter.

34 (9) “Person” means an individual, corporation, business trust, estate, trust, partnership,
35 limited liability company, association, joint venture, public corporation, government or
36 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

37 (10) “Proceeding” means:

38 (A) a judicial, administrative, arbitral, or other adjudicative process before a
39 tribunal, including related prehearing and post-hearing motions, conferences, and discovery; or

40 (B) a legislative hearing or similar process.

41 (11) “Prospective party” means a person that discusses with a prospective collaborative
42 lawyer the possibility of signing a collaborative law participation agreement.

43 (12) “Record” means information that is inscribed on a tangible medium or that is stored
44 in an electronic or other medium and is retrievable in perceivable form.

45 (13) “Related to a collaborative matter” means involving the same parties, transaction or
46 occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

47 (14) “Sign” means, with present intent to authenticate or adopt a record:

48 (A) to execute or adopt a tangible symbol; or

49 (B) to attach to or logically associate with the record an electronic symbol, sound,
50 or process.

51 (15) “Tribunal” means:

52 (A) a court, arbitrator, administrative agency, or other body acting in an
53 adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to
54 render a decision affecting a party’s interests in a matter; or

55 (B) a legislative body conducting a hearing or similar process.

56 Section 3. This chapter applies to a collaborative law participation agreement that meets
57 the requirements of section 4 signed on or after the effective date of this chapter.

58 Section 4. (a) A collaborative law participation agreement must:

59 (1) be in a record;

60 (2) be signed by the parties;

61 (3) state the parties’ intention to resolve a collaborative matter through a
62 collaborative law process under this chapter;

63 (4) describe the nature and scope of the matter;

64 (5) identify the collaborative lawyer who represents each party in the process; and

65 (6) contain a statement by each collaborative lawyer confirming the lawyer’s
66 representation of a party in the collaborative law process.

67 (b) Parties may agree to include in a collaborative law participation agreement additional
68 provisions not inconsistent with this chapter.

69 Section 5. (a) A collaborative law process begins when the parties sign a collaborative
70 law participation agreement.

71 (b) A tribunal may not order a party to participate in a collaborative law process over that
72 party's objection.

73 (c) A collaborative law process is concluded by a:

74 (1) resolution of a collaborative matter as evidenced by a signed record;

75 (2) resolution of a part of the collaborative matter, evidenced by a signed record,
76 in which the parties agree that the remaining parts of the matter will not be resolved in the
77 process; or

78 (3) termination of the process.

79 (d) A collaborative law process terminates:

80 (1) when a party gives notice to other parties in a record that the process is ended;

81 (2) when a party:

82 (A) begins a proceeding related to a collaborative matter without the
83 agreement of all parties; or

84 (B) in a pending proceeding related to the matter:

85 (i) initiates a pleading, motion, order to show cause, or request for
86 a conference with the tribunal;

87 (ii) requests that the proceeding be put on the tribunal's active
88 calendar; or

89 (iii) takes similar action requiring notice to be sent to the parties; or

90 (3) except as otherwise provided by subsection (g), when a party discharges a
91 collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

92 (e) A party's collaborative lawyer shall give prompt notice to all other parties in a record
93 of a discharge or withdrawal.

94 (f) A party may terminate a collaborative law process with or without cause.

95 (g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a
96 collaborative law process continues, if not later than 30 days after the date that the notice of the
97 discharge or withdrawal of a collaborative lawyer required by subsection (e) is sent to the
98 parties:

99 (1) the unrepresented party engages a successor collaborative lawyer; and

100 (2) in a signed record:

101 (A) the parties consent to continue the process by reaffirming the
102 collaborative law participation agreement;

103 (B) the agreement is amended to identify the successor collaborative
104 lawyer; and

105 (C) the successor collaborative lawyer confirms the lawyer's
106 representation of a party in the collaborative process.

107 (h) A collaborative law process does not conclude if, with the consent of the parties, a
108 party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as
109 evidenced by a signed record.

110 (i) A collaborative law participation agreement may provide additional methods of
111 concluding a collaborative law process.

112 Section 6. (a) Persons in a proceeding pending before a tribunal may sign a collaborative
113 law participation agreement to seek to resolve a collaborative matter related to the proceeding.
114 The parties shall file promptly with the tribunal a notice of the agreement after it is signed.
115 Subject to subsection (c) and sections 7 and 8, the filing operates as an application for a stay of
116 the proceeding.

117 (b) The parties shall file promptly with the tribunal notice in a record when a
118 collaborative law process concludes. The stay of the proceeding under subsection (a) is lifted
119 when the notice is filed. The notice may not specify any reason for termination of the process.

120 (c) A tribunal in which a proceeding is stayed under subsection (a) may require the
121 parties and collaborative lawyers to provide a status report on the collaborative law process and
122 the proceeding. A status report may include only information on whether the process is ongoing
123 or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or
124 other communication regarding a collaborative law process or collaborative law matter.

125 (d) A tribunal may not consider a communication made in violation of subsection (c).

126 (e) A tribunal shall provide parties notice and an opportunity to be heard before
127 dismissing a proceeding in which a notice of collaborative process is filed based on delay or
128 failure to prosecute.

129 Section 7. During a collaborative law process, a tribunal may issue emergency orders to
130 protect the health, safety, welfare, or interest of a party or family or household member.

131 Section 8. A tribunal may approve an agreement resulting from a collaborative law
132 process.

133 Section 9. (a) Except as otherwise provided in subsection (c), a collaborative lawyer is
134 disqualified from appearing before a tribunal to represent a party in a proceeding related to the
135 collaborative matter.

136 (b) Except as otherwise provided in subsection (c) and sections 10 and 11, a lawyer in a
137 law firm with which the collaborative lawyer is associated is disqualified from appearing before
138 a tribunal to represent a party in a proceeding related to the collaborative matter if the
139 collaborative lawyer is disqualified from doing so under subsection (a).

140 (c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer
141 is associated may represent a party:

142 (1) to ask a tribunal to approve an agreement resulting from the collaborative law
143 process; or

144 (2) to seek or defend an emergency order to protect the health, safety, welfare, or
145 interest of a party, or family or household member if a successor lawyer is not immediately
146 available to represent that person.

147 (d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which
148 the collaborative lawyer is associated, may represent a party or family or household member
149 only until the person is represented by a successor lawyer or reasonable measures are taken to
150 protect the health, safety, welfare, or interest of the person.

151 Section 10. (a) The disqualification of section 9(a) applies to a collaborative lawyer
152 representing a party with or without fee.

153 (b) After a collaborative law process concludes, another lawyer in a law firm with which
154 a collaborative lawyer disqualified under section 9(a) is associated may represent a party without
155 fee in the collaborative matter or a matter related to the collaborative matter if:

156 (1) the party has an annual income that qualifies the party for free legal
157 representation under the criteria established by the law firm for free legal representation;

158 (2) the collaborative law participation agreement so provides; and

159 (3) the collaborative lawyer is isolated from any participation in the collaborative
160 matter or a matter related to the collaborative matter through procedures within the law firm
161 which are reasonably calculated to isolate the collaborative lawyer from such participation.

162 Section 11. (a) The disqualification of section 9(a) applies to a collaborative lawyer
163 representing a party that is a government or governmental subdivision, agency, or
164 instrumentality.

165 (b) After a collaborative law process concludes, another lawyer in a law firm with which
166 the collaborative lawyer is associated may represent a government or governmental subdivision,

167 agency, or instrumentality in the collaborative matter or a matter related to the collaborative
168 matter if:

169 (1) the collaborative law participation agreement so provides; and

170 (2) the collaborative lawyer is isolated from any participation in the collaborative
171 matter or a matter related to the collaborative matter through procedures within the law firm
172 which are reasonably calculated to isolate the collaborative lawyer from such participation.

173 Section 12. Except as provided by law other than this [act], during the collaborative law
174 process, on the request of another party, a party shall make timely, full, candid, and informal
175 disclosure of information related to the collaborative matter without formal discovery. A party
176 also shall update promptly previously disclosed information that has materially changed. The
177 parties may define the scope of disclosure during the collaborative law process.

178 Section 13. This chapter does not affect:

179 (1) the professional responsibility obligations and standards applicable to a lawyer or
180 other licensed professional; or

181 (2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of
182 a child or adult under the law of this Commonwealth.

183 Section 14. Before a prospective party signs a collaborative law participation agreement,
184 a prospective collaborative lawyer shall:

185 (1) assess with the prospective party factors the lawyer reasonably believes relate to
186 whether a collaborative law process is appropriate for the prospective party's matter;

187 (2) provide the prospective party with information that the lawyer reasonably believes is
188 sufficient for the party to make an informed decision about the material benefits and risks of a
189 collaborative law process as compared to the material benefits and risks of other reasonably
190 available alternatives for resolving the proposed collaborative matter, such as litigation,
191 mediation, arbitration, or expert evaluation; and

192 (3) advise the prospective party that:

193 (A) after signing an agreement if a party initiates a proceeding or seeks tribunal
194 intervention in a pending proceeding related to the collaborative matter, the collaborative law
195 process terminates;

196 (B) participation in a collaborative law process is voluntary and any party has the
197 right to terminate unilaterally a collaborative law process with or without cause; and

198 (C) the collaborative lawyer and any lawyer in a law firm with which the
199 collaborative lawyer is associated may not appear before a tribunal to represent a party in a
200 proceeding related to the collaborative matter, except as authorized by section 9(c), 10(b), or
201 11(b).

202 Section 15. (a) Before a prospective party signs a collaborative law participation
203 agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the
204 prospective party has a history of a coercive or violent relationship with another prospective
205 party.

206 (b) Throughout a collaborative law process, a collaborative lawyer reasonably and
207 continuously shall assess whether the party the collaborative lawyer represents has a history of a
208 coercive or violent relationship with another party.

209 (c) If a collaborative lawyer reasonably believes that the party the lawyer represents or
210 the prospective party who consults the lawyer has a history of a coercive or violent relationship
211 with another party or prospective party, the lawyer may not begin or continue a collaborative law
212 process unless:

213 (1) the party or the prospective party requests beginning or continuing a process;
214 and

215 (2) the collaborative lawyer reasonably believes that the safety of the party or
216 prospective party can be protected adequately during a process.

217 Section 16. A collaborative law communication is confidential to the extent agreed by the
218 parties in a signed record or as provided by law of this Commonwealth other than this chapter.

219 Section 17. (a) Subject to sections 18 and 19, a collaborative law communication is
220 privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

221 (b) In a proceeding, the following privileges apply:

222 (1) A party may refuse to disclose, and may prevent any other person from
223 disclosing, a collaborative law communication.

224 (2) A nonparty participant may refuse to disclose, and may prevent any other
225 person from disclosing, a collaborative law communication of the nonparty participant.

226 (c) Evidence or information that is otherwise admissible or subject to discovery does not
227 become inadmissible or protected from discovery solely because of its disclosure or use in a
228 collaborative law process.

229 Section 18. (a) A privilege under section 17 may be waived in a record or orally during a
230 proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty
231 participant, it is also expressly waived by the nonparty participant.

232 (b) A person that makes a disclosure or representation about a collaborative law
233 communication which prejudices another person in a proceeding may not assert a privilege under
234 section 17, but this preclusion applies only to the extent necessary for the person prejudiced to
235 respond to the disclosure or representation.

236 Section 19. (a) There is no privilege under section 17 for a collaborative law
237 communication that is:

238 (1) available to the public under chapter 4, section 7 and chapter 66, section 10, or made
239 during a session of a collaborative law process that is open, or is required by law to be open, to
240 the public;

241 (2) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

242 (3) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal
243 an ongoing crime or ongoing criminal activity; or

244 (4) in an agreement resulting from the collaborative law process, evidenced by a record
245 signed by all parties to the agreement.

246 (b) The privileges under section 17 for a collaborative law communication do not apply
247 to the extent that a communication is:

248 (1) sought or offered to prove or disprove a claim or complaint of professional
249 misconduct or malpractice arising from or related to a collaborative law process; or

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

253 (c) There is no privilege under section 17 if a tribunal finds, after a hearing in camera,
254 that the party seeking discovery or the proponent of the evidence has shown the evidence is not
255 otherwise available, the need for the evidence substantially outweighs the interest in protecting
256 confidentiality, and the collaborative law communication is sought or offered in:

257 (1) a court proceeding involving a felony or misdemeanor; or

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

260 (d) If a collaborative law communication is subject to an exception under subsection (b)
261 or (c), only the part of the communication necessary for the application of the exception may be
262 disclosed or admitted.

263 (e) Disclosure or admission of evidence excepted from the privilege under subsection (b)
264 or (c) does not make the evidence or any other collaborative law communication discoverable or
265 admissible for any other purpose.

266 (f) The privileges under section 17 do not apply if the parties agree in advance in a signed
267 record, or if a record of a proceeding reflects agreement by the parties, that all or part of a
268 collaborative law process is not privileged. This subsection does not apply to a collaborative law
269 communication made by a person that did not receive actual notice of the agreement before the
270 communication was made.

271 Section 20. (a) If an agreement fails to meet the requirements of section 4, or a lawyer
272 fails to comply with section 14 or 15, a tribunal may nonetheless find that the parties intended to
273 enter into a collaborative law participation agreement if they:

274 (1) signed a record indicating an intention to enter into a collaborative law participation
275 agreement; and

276 (2) reasonably believed they were participating in a collaborative law process.

277 (b) If a tribunal makes the findings specified in subsection (a), and the interests of justice
278 require, the tribunal may:

279 (1) enforce an agreement evidenced by a record resulting from the process in
280 which the parties participated;

281 (2) apply the disqualification provisions of sections 5, 6, 9, 10, and 11; and

282 (3) apply a privilege under section 17.

283 Section 21. In applying and construing this uniform act, consideration must be given to
284 the need to promote uniformity of the law with respect to its subject matter among States that
285 enact it.

286 Section 22. This chapter modifies, limits, and supersedes the federal Electronic
287 Signatures in Global and National Commerce Act, 15 U.S.C. section 7001, et seq., but does not
288 modify, limit, or supersede section 101(c) of that Act, 15 U.S.C Section 7001(c), or authorize
289 electronic delivery of any of the notices described in section 103(b) of that Act, 15 U.S.C.
290 section 7003(b).

291 SECTION 2. This Act takes effect on July first, two thousand and sixteen.