

# FAQs

## Collaborative Practice FAQs

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## What are my choices?

All family law matters involve decisions and choices. Choosing the professionals to help you, and which process to use, are

two very important decisions to make. There is a range of options, from completely resolving issues without professional guidance – hashing the issues out “at the kitchen table” and filing necessary court papers on your own – to drawn-out courtroom battles that can cost dearly in emotional and financial resources and can take considerable time to complete. Most people find that their needs fall between these extremes. Here’s an outline of choices you have:

**Reaching An Agreement With No Professional Assistance:** The couple takes full responsibility for resolving their family law issues. For example, the couple may work out their issues on their own, and go together to Family Court, without lawyers, to ask for a joint custody order.

**Reaching an Agreement With Limited Professional Assistance:** The couple takes primary responsibility for resolving their family law issues, making use of legal counsel on an “as needed” basis. For example, the couple may work out their divorce issues on their own, taking the result to their lawyers to draft the agreement for them, and file their divorce papers.

**Mediation:** A single neutral person, who may or may not be a lawyer, acts as a mediator for the couple. The mediator helps the couple reach agreement, but does not give individual legal advice. Some mediators, if they are lawyers, can prepare the necessary documents, but both parties should have their own individual lawyers outside of the mediation process to review these documents and advise them while the mediation process is going on. Mediators do not have to be licensed professionals in most jurisdictions.

**Collaborative Practice:** Each person retains his or her own specially trained collaborative lawyer to advise and assist in negotiating an agreement on all issues. All negotiations take place in four-way meetings that both clients and both lawyers attend. Settlement is the goal. Negotiations are focused on

the parties' needs and interests, and on achieving solutions that meet the most needs of all family members. The information necessary for the parties to make informed decisions is freely, honestly, and voluntarily exchanged. The lawyers cannot go to court or threaten to go to court. If either client chooses to go to court, both collaborative lawyers are disqualified from further participation. Each client has built-in legal advice and advocacy during negotiations, and each lawyer's job includes guiding the clients toward reasonable resolutions. Providing legal advice is an integral part of the process, but all the decisions are made by the clients. At the clients' request, the collaborative lawyers prepare and process the necessary documents.

**Conventional Representation/Going to Court** : Each person hires a lawyer. The lawyers may work towards the goal of settlement, but at the same time, they will also prepare for the possibility of a trial.

With this option, it is likely that your lawyer would advise you not to discuss your legal issues with the opposing party, and that any discussions about settlement would be conducted by or through the lawyers. Information is exchanged formally, through document requests generated by the lawyers and sometimes through formal, sworn out-of-court statements [i.e., affidavits and depositions]. The lawyers' focus is most often on getting the most for their respective individual clients, without concern for how that might affect the other family members. If your case did not settle and went to trial, the judge would decide all unresolved issues after hearing the evidence of both parties.

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# Why would I choose Collaborative Practice over other options?

**Collaborative Practice or Do-it-Yourself:** There are many legal aspects to divorcing, separating or even working out parenting arrangements that you may not be aware of. There is always a risk to negotiating issues that have legal implications without a good understanding of the applicable law. Even if you “work things out” and then take your agreement to a lawyer to “file the paperwork,” there may be significant issues that you did not address, or that have been resolved in a one-sided way. If there is a power disparity in the relationship, one party may be at a disadvantage right from the beginning. You may not know what information to ask “the other side” to provide, potentially resulting in decisions made on incomplete information, which may then lead to further disputes. You may not fully understand your legal rights, and may unwittingly give up important legal rights. While this may be the least expensive option, it runs the risk of resulting in an incomplete and potentially unfair resolution.

In the Collaborative process, each party is represented by his or her own attorney. The attorneys make sure that all the necessary issues are addressed, and all necessary information is obtained, with the final decisions being made by the clients. The clients have the benefit of their attorneys’ help and advice while maintaining their ability to set the pace and goals of the process. If there are questions that require the help of other professionals, such as financial specialists, mental health professionals or child specialists, these people can be brought in to work for the clients. The collaborative lawyers will file the necessary documents with the court at the end of the process with the clients’ consent.

**Collaborative Practice or Mediation:** In mediation, an impartial third party (the mediator) facilitates the negotiations of the disputing parties and tries to help them

settle their case. However, the mediator cannot give either party legal advice, and cannot be an advocate for either side. Mediation can be challenging when the parties are not on a level playing field with one another, are not able to clearly express their needs and interests, are not aware of all the relevant information, or are not willing or able to make decisions. If the mediator is not a lawyer, and the parties do not have separate legal counsel, the resulting agreement may be incomplete or unfair to one of the parties. For this reason it is always recommended that mediating parties hire their own consulting lawyers to advise them in the background while they are going through the mediation process.

Collaborative Practice was designed to allow clients to have their lawyers with them during the negotiation process, while maintaining the same absolute commitment to settlement as mediation. It is the job of the collaborative lawyers to work with their own clients and one another to assure that the process stays balanced, positive and productive. Once an agreement is reached, it is drafted by the lawyers and reviewed and edited by both the lawyers and the clients, until both clients are satisfied with the document.

Both Collaborative Practice and mediation rely on the voluntary and free exchange of information and a commitment to resolutions that respect the parties' shared goals. If mediation does not result in a settlement, the parties may choose to use their attorneys in litigation, if this is consistent with the scope of representation upon which the client and lawyer have agreed. Consulting experts used during mediation are not typically required to sign a contract limiting their work to the context of the mediation, and therefore they are not restricted from participating in litigation if the parties go to court. In Collaborative Practice, the lawyers and parties sign an agreement, which aligns everyone's interests in the direction of resolution, and specifically provides that the collaborative lawyers and

any consulting experts will be disqualified from participating in litigation if the collaborative process is terminated without an agreement being reached.

**Collaborative Practice or Conventional Representation/Going to Court:** In conventional representation, one party files legal papers with the court complaining of the other party's past behavior, and sets in motion a series of legal steps that dictate the process and progress of the case. This process may eventually result in a settlement, or if that fails, the clients then proceed to a trial and their issues are resolved by a judge. Unfortunately, parties in litigation often view each other as adversaries, adopting extreme, black and white positions: they may focus primarily on getting the most for themselves, disregarding the needs and interests of the "other side," and how failing to satisfy those needs and interests may impact the children. The courts have a restricted range of options for resolving the financial and custodial issues, and may take more of a "one size fits all" approach to the outcome than is likely in the collaborative process. Going to Court is often the costliest process, both emotionally and financially, and can be especially destructive for the children involved. Such cases can easily drag on for many years.

Collaborative Practice, by definition, is non-adversarial. The clients—and their lawyers—pledge in writing not to go to court. They negotiate in good faith, and achieve a mutually-agreed upon settlement outside of court, one that addresses all parties' and the children's needs and interests. Parties are free to brain-storm and make concessions, leading to more creative solutions that are tailored to the needs of the individuals and the family. Because of the confidential nature of the collaborative process, no one has to worry that what s/he says can or will be used against him/her in court. The cooperative nature of Collaborative Practice can greatly ease the emotional strain caused by the breakup of a relationship and promote the well-being of children. Collaborative Practice

is also much more likely to lead to a result where each party maintains respect and care for each other, which is important, especially if there are children involved.

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## **How can I tell if Collaborative Practice would be the best choice for me?**

Collaborative Practice isn't for every client, but you should consider it if some or all of the following are true for you:

- You want a civilized, respectful resolution of the issues.
- You would like to keep open the possibility of friendship with your partner down the road.
- You and your partner will be co-parenting children together and you want the best co-parenting relationship possible.
- You want to protect your children from the harm associated with litigated dispute resolution between parents.
- You and your partner have a circle of friends or extended family in common that you both want to remain connected to.
- You have ethical or spiritual beliefs that place high value on taking personal responsibility for handling conflicts with integrity.
- You value privacy in your personal affairs and do not want details of your problems to be discussed publicly, in court.
- You value control and autonomous decision making and do

not want to hand over decisions about restructuring your financial and/or child-rearing arrangements to a stranger (i.e., a judge).

- You recognize the restricted range of outcomes and “rough justice” generally available in the public court system, and want a more creative and individualized range of choices available to you and your spouse or partner for resolving your issues.
- Even though there may be difficult and complex issues to resolve, you both want a fair agreement, making the use of a single expert preferable to engaging in a “battle of the experts.”
- You place as much or more value on the relationships that will exist in your restructured family situation as you place on obtaining the maximum possible amount of money for yourself.
- You understand that conflict resolution with integrity involves not only achieving your own goals but finding a way to achieve the reasonable goals of the other person.
- Both of you want to commit your intelligence and energy toward creative problem solving rather than toward recriminations or revenge – fixing the problem rather than fixing blame.

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## **How is a lawyer different when practicing Collaborative Law from one practicing conventionally?**

In order to properly represent clients in the collaborative process, a collaborative lawyer must fulfill certain requirements. The requirements for membership of an attorney



in the Ithaca-based practice group of Ithaca Area Collaborative Law Professionals: Tompkins County Ithaca New York (IACLP) are: Completion of a 14 hour Collaborative Practice training program, a minimum of five years experience in matrimonial and/or family law, or participation in the IACLP mentoring program, completion of four hours of continuing Collaborative Practice training each year, commitment to upholding and maintaining the Principles of Collaborative Practice and belonging to the International Academy of Collaborative Professionals (IACP).

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## **Are my spouse/partner and I required to give financial information to each other in Collaborative Practice?**

Yes. Both parties will be required to fill out a financial disclosure form and to provide statements to confirm amounts in accounts. Although no one can give you an absolute guarantee that every asset or every bit of income will be disclosed, in the collaborative process both parties sign a binding agreement to disclose all documents and information that relate to the issues – early, fully, and voluntarily. If a collaborative lawyer learns that his/her client has withheld or misrepresented information that should have been disclosed, the participation agreement requires him/her to withdraw.

A client'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, but this will not automatically end the collaborative process. As with any instance in which a party

fails to fulfill the participation agreement, the other party has a choice: s/he can elect to end the collaborative process, or s/he can waive the violation and let the collaborative process continue.

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## **There is a lot of anger between us right now. Is Collaborative Practice only for “amicable” divorces or separations?**

Not at all. Anger is a natural response to the disruption of our primary relationships in life. We know that it is not easy to detach from a primary emotional relationship. This is true even if we are unhappy in that relationship. In Collaborative Practice, clients receive support and guidance to better understand and manage the delicate process of detachment, including the strong feelings—such as grief and anger—that often accompany it. Where emotions are running high and there is conflict between you, the collaborative process won't suppress or deny it, but the process can offer both of you effective support by giving you a place to deal with that conflict as you work through your issues.

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# How do I know whether it is safe for me to work in the Collaborative Process?

Oftentimes there are real issues of power disparity or even abuse between people seeking to end their marriage or partnership. While the collaborative process cannot guarantee that these issues won't arise, inappropriate behavior can be monitored and addressed in the four-way conferences by the collaborative lawyers, who will stop a meeting where one client is intimidating, talking over, belittling or ignoring the other client.

In the collaborative process, both clients must also agree to communicate in a respectful manner. Clients do not discuss their issues outside of the four-way conferences unless they both indicate a desire to do so. Communication coaches can be brought in to help clients engage in safe and effective problem-solving.

All four-way conferences are confidential. Should the negotiations fall apart and the collaborative process is discontinued and the parties then proceed to court – with different lawyers – discussions, disclosures or any concessions that may have been made during the four-way conferences cannot be used against either party in any subsequent court proceeding.

Ultimately you must be the judge of the other person's honesty and integrity, as well as be responsible for your own. Additionally, each collaborative lawyer is required to withdraw upon becoming aware that his/her client is being less than fully honest, or participating in the process in bad faith.

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## **Can either of us terminate the process?**

Yes. Either client can always choose to end the collaborative process and go to court. However, if the collaborative process terminates, both clients will be required to hire new lawyers.

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## **Why must the collaborative lawyers resign if one of us decides to go to court?**

Requiring the collaborative lawyers to resign if one party terminates the process protects the confidentiality of the collaborative meetings. The requirement that the collaborative lawyers be disqualified in the event of a breakdown also guarantees that all participating lawyers 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 lawyers participate, is affected by the certainty that the lawyer will never litigate the case. Openness, mutual trust, and cooperation replace guardedness, secrecy, and threats as the techniques most likely to achieve ultimate success.

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## **How are experts or other professionals used in Collaborative Practice?**

Other experts or professionals (“collaborative consultants”) are selected by the clients, with the help and guidance of the lawyers. IACLP includes financial and mental health professionals who have received training in collaborative law. The Collaborative Law group in Ithaca also maintains a list of other professionals who have worked successfully within the process or who have expressed an interest in doing so. Clients may also bring in their own collaborative consultants, however there must be agreement amongst all the participants.

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## **How can I get my spouse or partner to participate?**

Talk with your spouse or partner about the benefits you see in using the collaborative process. Give him/her this web site address, or print these FAQs and give them to him/her to read. Encourage him/her to contact a collaborative lawyer, either through the participating lawyers listed on this website or through the links on the links page. If it is difficult to talk to your spouse or partner, you might enlist the help of your clergy person, a psychologist/therapist, or a mutual friend to talk to him/her about Collaborative Practice.

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## **How long is the process likely to take; how much will it cost?**

There is no definitive answer to these questions. With respect to timing, the Collaborative Law process is flexible and can expand or contract to meet the clients' specific needs. Most couples need four to seven four-way conferences to reach an agreement, although it could be fewer or more depending on what the issues are, how difficult it is to gather the necessary information, and how engaged the clients are in the process. Most often, there are two-week intervals between each meeting, but this can be altered, depending on the clients' needs.

In Collaborative Practice, each client enters a written fee agreement (also known as a "retainer agreement") with his/her own collaborative lawyer. Hourly rates and billing practices vary from lawyer to lawyer. Your retainer agreement should include your lawyer's hourly rate and the amount of any retainer required. The source of payment for attorneys' fees is one of the issues that can be discussed and addressed during collaborative four-way meetings. Most collaborative consultants (financial and mental health professionals) also charge by the hour, and usually these costs are shared by the parties. No one can predict exactly how much you will pay in the collaborative process because every case is different.

What can be said is that the emotional costs are likely to be much less by engaging in this process. The value to both parties is reaching a final agreement that you are in control of and preserves your dignity. The process is also about moving forward, and is not mired in the pain of the past. Especially when children are involved, their future is a number one priority. As a more respectful, honest process,

Collaborative Practice helps families make a smoother transition to the next stage of their lives.

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