

PROPOSED REVISIONS TO THE DOMESTIC RELATIONS RULES

The Domestic Relations Rules Committee has recommended adoption of proposed new Domestic Relations Rules 1-128 to -128.13 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed new materials set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourtclerk@nmcourts.gov/> or sending your written comments to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before April 6, 2016, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

[NEW MATERIAL]

1-128. Uniform collaborative law rules; Short title; Definitions; Applicability.

A. **Short title.** Rules 1-128 to 1-128.13 NMRA may be cited as the Uniform Collaborative Law Rules.

B. **Definitions.** The following definitions shall apply in these rules.

(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

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

(2) "Collaborative law participation agreement" means an agreement by persons to participate in a collaborative law process.

(3) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons,

(a) sign a collaborative law participation agreement; and

(b) are represented by collaborative lawyers.

(4) "Collaborative lawyer" means a lawyer who represents a party in a collaborative law process.

(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which is described in a collaborative law participation agreement and arises under Chapter 40 NMSA 1978, including,

(a) marriage, divorce, dissolution, annulment, and property distribution;

(b) child custody, visitation, and parenting time;

(c) alimony, maintenance, and child support;

(d) adoption;

(e) parentage; and

(f) premarital, marital, and post-marital agreements.

(6) “Law firm” means,

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

(b) lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision or agency.

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

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

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

(10) “Proceeding” means a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery.

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

(12) “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.

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

(14) “Sign” means to create a signature in accordance with Rule 1-011(A) NMRA.

(15) “Tribunal” means a court, arbitrator, 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.

C. **Applicability.** These rules apply to a collaborative law participation agreement that meets the requirements of Rule 1-128.1 NMRA.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.1. Collaborative law participation agreement; requirements.

A. **Requirements.** A collaborative law participation agreement shall be in a record, signed by the parties, and must include the following:

(1) a statement of the parties’ intention to resolve a collaborative matter through a collaborative law process under these rules;

(2) a description of the nature and scope of the matter;

(3) the name of each collaborative lawyer who represents a party in the process;

and

(4) a statement by each collaborative lawyer confirming the lawyer’s representation of a party in the collaborative law process.

B. **Other provisions.** Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with these rules.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.2. Initiation of collaborative law process; Voluntary participation; Conclusion; Termination; Notice of discharge or withdrawal of collaborative lawyer; Continuation with successor collaborative lawyer.

A. **Initiation.** A collaborative law process begins when the parties sign a collaborative law participation agreement.

B. **Voluntary participation.** A tribunal shall not order a party to participate in a collaborative law process over that party's objection.

C. **Conclusion.** A collaborative law process shall conclude upon the occurrence of any of the following:

- (1) resolution of a collaborative matter as evidenced by a signed record;
- (2) 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;
- (3) any other method provided in a collaborative law participation agreement for concluding the collaborative law process; or
- (4) termination of the process.

D. **Termination.** A party may terminate a collaborative law process with or without cause, provided that a collaborative law process shall terminate upon the occurrence of any of the following:

- (1) when a party gives notice to other parties in a record that the process is ended;
- (2) when a party begins a proceeding related to a collaborative matter without the agreement of all parties;
- (3) in a pending proceeding related to the matter, when a party
 - (i) initiates without the agreement of all parties a pleading, motion, order to show cause, or request for a conference with the tribunal; or
 - (ii) takes similar action without the agreement of all parties requiring notice to be sent to the parties; or
- (4) except as otherwise provided by Paragraph F of this rule, when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

E. **Notice of discharge or withdrawal of a collaborative lawyer.** A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

F. **Continuation with successor collaborative lawyer.** Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than thirty (30) days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by Paragraph E of this rule is sent to the parties,

- (1) the unrepresented party engages a successor collaborative lawyer; and
- (2) in a signed record,
 - (a) the parties consent to continue the process by reaffirming the collaborative law participation agreement;
 - (b) the agreement is amended to identify the successor collaborative lawyer; and
 - (c) the successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.3. Proceedings pending before tribunal; Status report; Dismissal.

A. **Abatement of pending proceeding.** 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. If an agreement is signed, then the parties shall file promptly with the tribunal a certificate or stipulated order of abatement, which shall toll all deadlines in the proceeding. The certificate or stipulated order shall include the following:

(1) a statement that the parties are making significant progress toward settlement or are attempting reconciliation and wish to toll the running of the time periods provided in the Rules of Civil Procedure for the District Courts;

(2) a statement of the present status of the case, including a list of all documents which have been filed as required by the Rules of Civil Procedure for the District Courts; and

(3) the signatures of counsel for both parties and of both parties themselves. Any certificate or stipulated order filed which does not include all required signatures shall be of no effect.

B. **Notice to tribunal of conclusion of collaborative law process.** Unless a final order or decree is entered by the tribunal, the parties shall file promptly with the tribunal and serve on the other party notice when a collaborative law process concludes, including when a party wishes to terminate the period of abatement and the collaborative law process. The period of abatement of the proceeding under Paragraph A of this rule is terminated when the notice is filed. The notice may not specify any reason for termination of the process.

C. **Status report.** A tribunal in which a proceeding is abated under Paragraph A of this rule may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information about whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

D. **Effect of prohibited communication.** A tribunal may not consider a communication made in violation of Paragraph C of this rule.

E. **Dismissal.** A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a certificate of abatement is filed based on delay or failure to prosecute.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.4. Emergency order. Notwithstanding a pending collaborative law process, a tribunal may issue any order under the Family Violence Protection Act, Section 40-13-1 to -12 NMSA 1978.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.5. Adoption of agreement by tribunal. A tribunal may adopt as an order of the tribunal any agreement resulting from a collaborative law process.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.6. Disqualification of collaborative lawyer and lawyers in associated law firm.

A. **Disqualification of collaborative lawyer.** Except as otherwise provided in Paragraph C of this rule, a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

B. **Disqualification of law firm.** Except as otherwise provided in Paragraph C of this rule, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under Paragraph A of this rule.

C. **Exception; Adoption of agreement.** A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party before a tribunal to seek an order adopting an agreement resulting from the collaborative law process.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.7. Disclosure of information. Except as provided by law other than these rules, during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.8. Standards of professional responsibility and mandatory reporting not affected. These rules do not affect,

A. the professional obligations and standards applicable to a lawyer or other licensed professional; or

B. the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the laws of New Mexico.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.9. Appropriateness of collaborative law process. Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall do the following:

A. assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

B. 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 the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, or arbitration; and

C. advise the prospective party of the following:

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

(2) participation in a collaborative law process is voluntary and any party has the right to terminate a collaborative law process 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 proceeding related to the collaborative matter, except as authorized by Rule 1-128.6(C) NMRA. [Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.10. Coercive or violent relationship.

A. **Reasonable inquiry.** Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.

B. **Continuing assessment.** Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.11. Confidentiality of collaborative law communication. A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by law of this state other than these rules.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.12. Privilege against disclosure for collaborative law communication; admissibility; discovery.

A. **Scope of the privilege.** A party has a privilege to refuse to disclose, and to prevent any other person from disclosing, a collaborative law communication, provided that evidence or information that is otherwise admissible or subject to discovery does not become privileged solely because of its disclosure or use in a collaborative law process.

B. **Who may claim the privilege.** The privilege may be claimed by

- (1) a party;
- (2) a party's guardian or conservator;
- (3) the personal representative of a deceased party; or
- (4) a nonparty participant, but only with respect to a collaborative law communication of the nonparty participant.

C. **Waiver of privilege.**

(1) The privilege may be waived in a record or orally during a proceeding if it is expressly waived by all parties.

(2) A party who discloses a collaborative law communication for which the privilege has not been waived under Subparagraph (1) of this paragraph shall be deemed to have waived the privilege, but only to the extent necessary to permit any other party to respond to the unauthorized disclosure.

D. **Exceptions.**

- (1) There is no privilege for a collaborative law communication that,
 - (a) is required by law to be made public or otherwise disclosed;
 - (b) is threatening or leads to actual violence;

(c) reveals the intent of a party to commit a felony or inflict bodily harm to the party's self or another person;

(d) relates to whether the parties reached a binding and enforceable agreement in the collaborative law process; or

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

(2) Disclosure or admission of evidence excepted from the privilege under Paragraph B or C does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

1-128.13. Authority of tribunal in case of noncompliance. Notwithstanding a failure to comply with Rules 1-128.1, -128.9, or -128.10 NMRA, a tribunal may enforce an agreement, apply the disqualification provisions of Rule 1-128.6 NMRA, or apply a privilege under Rule 1-128.12 NMRA when the tribunal concludes that the parties intended to enter into a collaborative law participation agreement and to participate in a collaborative law process. Such a conclusion shall be based upon the following findings:

A. the parties signed a record indicating an intent to enter into a collaborative law participation agreement;

B. the parties reasonably believed they were participating in a collaborative law process;
and

C. the interests of justice require finding that the parties were participating in a collaborative law process.

[Approved by Supreme Court Order No. _____, effective _____.]

TINDALL ENGLAND PC

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March 24, 2016

Joey D. Moya, Clerk
New Mexico Supreme Court
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Santa Fe, New Mexico 87501

Via Fed Ex Delivery

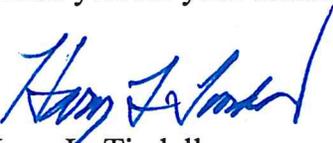
Re: Proposal: 2016-46; Domestic Relations Rules 1-128 to -128.13 NMRA

Dear Mr. Moya:

I am writing to urge the adoption of proposed new Domestic Relations Rules 1-128 to -128.13 NMRA. I was a principal promoter of the Uniform Collaborative Law Act as approved by the Uniform Law Commission in 2010. Collaborative law provides an alternate way for individuals to settle their disputes without resorting to formal litigation, which is often costly and emotionally draining. It has proven highly successful in family law litigation, as it inflicts less harm on children in custody cases and allows parties to craft a settlement agreement which addresses the specific needs of their family.

I urge this court to adopt Uniform Collaborative Law Rules. It has already been enacted in 14 states, including nearby states Arizona, Texas, and Utah. The Supreme Court of Arizona adopted the Uniform Collaborative Law Rules in the past year, and the Uniform Collaborative Law Act is awaiting the Governor's signature in Florida.

Thank you for your attention.


Harry L. Tindall

SUPREME COURT OF NEW MEXICO
FILED

MAR 28 2016



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LITTLE
GILMAN-TEPPER
& BATLEY P.A.

April 1, 2016

SUPREME COURT OF NEW MEXICO
FILED

APR 01 2016

VIA FAX to 505-827-4837
Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Re: Adoption of Uniform Collaborative Law
Rules 1-128 to 1-128.13 (Uniform Collaborative
Law Act)

Dear Mr. Moya:

Having practiced family law in New Mexico for over 37 years, I am in favor of adopting the Uniform Collaborative Law Act as part of our Rules. The Act, as adopted in the Rules, will help to standardize the practice of collaborative law in New Mexico. The provisions contained in the Act are well reasoned and have been tested in other states.

Without a Court sanctioned Collaborative Process, most individuals facing a divorce, basically have 2 choices: litigation or mediation. Inherent in the litigation process, when two attorneys are opposing each other in an adversarial stance, is the tendency to create even greater polarization of positions. While at the beginning of a case, pre-lawyers, the parties might have been able to agree on whether to sell the marital residence; once lawyers get involved, often both parties become more rigid and entrenched in their opposing positions. "The house MUST be sold" vs "The house MUST NOT be sold." So much of the parties' assets are consumed in a costly litigation process that at the end neither has a choice and the house and other assets are depleted by the end of the divorce. The other choice of mediation is particularly helpful when both spouses have equal power levels. However, often in marriages there are unequal power levels. In a collaborative process, with a lawyer at each spouse's elbow, the power levels often become more equal because the more powerful spouse is now negotiating with their spouse plus their lawyer. Combining equal power levels with a process based upon respectful and interest based negotiation, allows spouses to respectfully consider their choices in dividing up their property and making decisions for their children.

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Sandra Morgan Little
Jan B. Gilman-Tepper
Roberta S. Batley
Randy W. Powers Jr.

Adopting this Act is a step in the right direction for New Mexico. Officially approving this alternative process strengthens the position of attorneys handling divorces outside the Court system in this humane, respectful and individually tailored process. We find that parties who have used this process tend to continue to use the respectful and civil approaches they have learned in the process to negotiate solutions to problems as they arise post the divorce. Practiced at its best, collaborative law process is both an alternative dispute resolution process and a teaching tool where lawyers and other professionals working with the spouses have the opportunity to model problem solving skills and negotiation techniques which once learned, may be used in the future to the benefit of the children and for the spouses themselves.

Very truly,



Jan Gilman-Tepper

From: "Gordon E Bennett" <estdgeb@nmcourts.gov>
To: "Joey D. Moya" <supjdm@nmcourts.gov>
Sent: Wednesday, April 6, 2016 4:23:37 PM
Subject: Proposed new Rule 128.6 NMRA

SUPREME COURT OF NEW MEXICO
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APR 06 2016



Sir,

I do not understand why collaborative law attorneys should be disqualified from representing their clients in adjudicative proceedings on the same issue. The rules for mediation cover privileged information disclosed in mediation, so could not a similar restriction allow clients to keep an attorney they have a good relationship with for representation in a hearing when the collaborative proceedings fail? I think this rule would unnecessarily create a hardship on litigants by having them retain another attorney in the event that the collaborative proceeding fails. If they are unhappy, then they would be free to hire another attorney. To force it seems to deny them the choice.

—
Gordon E. Bennett
Staff Attorney
7th Judicial District Court
(505) 384-2974, Ext. 33

Proposed Rule Changes Comment Form.

APR 06 2016

Name: **Laura Bassein**
Phone: **505-277-1083**
Email: **bassein@law.unm.edu**



Rule No: 1-128 to 1-128.13

Comments:

Thank you for the opportunity to comment on proposed Supreme Court rules, specifically the collaborative law rules (1-128 through 1-128.13). I am writing from my experience in working at the intersection of domestic violence and various dispute resolution mechanisms.

In many respects the proposed New Mexico collaborative law rules follow the Uniform Rules found at <http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act>. However, I note that in the proposed New Mexico collaborative law rules, portions of the Uniform Rules regarding domestic violence are omitted. These omissions cause me concern.

First, Uniform Rules 9(c)(2) and 9(d) are omitted from the New Mexico proposed rule 1-128.6. The omission of this language results in no exception to disqualification, for the limited purpose of obtaining a domestic violence protective order if no successor lawyer is immediately available. Due to the potential emergency nature of the need for a protective order, this omission could result in a domestic violence victim being left without representation at a critical moment. Thus, I request that this language from Rules 9(c)(2) and 9(d) be included in the New Mexico rules.

Second, Uniform Rule 15(c) is omitted from the New Mexico proposed rule 1-128.10. This omitted language reasonably follows from the language that is already included in New Mexico proposed Rule 1-128.10. The omitted Uniform Rule 15(c) language is as follows:

“If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

- (1) the party or the prospective party requests beginning or continuing a process; and
- (2) the collaborative lawyer reasonably believes that the safety of the party or

prospective party can be protected adequately during a process.”

This Uniform Rule language provides important protections for persons involved in domestic violence situations. Thus, I request that this language from Rule 15(c) be included in the New Mexico rules.

Finally, I want to express my support for the specific domestic violence language that is already in the proposed rules; however, I do strongly believe that the entirety of the domestic violence language from the Uniform Rules should be included as described above.

If it would be helpful, I would be very willing to engage in discussion regarding the collaborative law rules, and particularly the domestic violence provisions.

Again, thank you for the opportunity to comment on these rules.