

Common Misconceptions About Cooperative Legal Practice

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Pauline Tesler, a prominent leader of the Collaborative Practice movement, complained about critics using a “doubting game” to unfairly criticize Collaborative Practice. She cites Professor Deborah Tannen’s concept of a “doubting game” in which people are so focused on winning arguments that they oversimplify the situation, give selective portrayals of the facts, distort others’ views, and attack straw man arguments.¹ Tesler adopts Tannen’s prescription for dealing with the doubting game:

Tannen's recommended cure for scholars caught, like Bryan, in what she calls “the doubting game” is to try instead playing the “believing game”:
read the work of others first as if you believed, and see where it takes you, before going back to ask whether you want to accept or reject certain elements in the argument, or even the whole argument or idea.²

Unfortunately, some people don’t follow Tesler’s advice about Cooperative Practice and play the doubting game. Here are some common critiques and responses.

Cooperative Practice is not sufficiently defined. In effect, there’s no there there.

Cooperative Practice generally involves an agreement by lawyers and parties setting out a negotiation process to reach an agreement satisfying the interests of both parties. The participation agreements vary and may include terms committing to negotiate in good faith, act respectfully toward each other, disclose all relevant information, use jointly retained experts, protect confidentiality of communications, and refrain from formal discovery and contested litigation during negotiation. Participation agreements may provide for use of a mediator or a “cooling off” period before engaging in contested litigation. They may also state that if the parties do litigate, the lawyers would focus solely on the merits of the issues. The process generally begins before the parties file a lawsuit or soon afterward. The process typically involves “four-way meetings” with the parties and lawyers, though some negotiation may be directly between the lawyers or parties when appropriate.

All dispute resolution processes have some common elements along with many variations – including Collaborative Practice, mediation, arbitration, and trial. Cooperative Practice is relatively new and small. It is likely to grow and evolve over time.

¹Pauline H. Tesler, *The Believing Game, the Doubting Game, and Collaborative Law: A Reply to Penelope Bryan*, 5 PSYCHOLOGY, PUBLIC POLICY, AND LAW 1018, 1024-26 (1999).

²*Id.* at 1026.

Cooperative Practice is no different than regular legal practice. It's what lawyers do all the time – or what good lawyers regularly do, anyway.

Many lawyers are “small-c” cooperative, but this is not the same as “large-c” Cooperative Practice. Large-c Cooperative Practice involves an explicit agreement to systematically negotiate in a cooperative manner and to follow agreed procedures or principles. Small-c cooperation is typically a matter of acting reasonably and making ad hoc agreements. Although it is good when lawyers use small-c cooperation, it is not the same as Cooperative Practice.

Cooperative Practice isn't as good as Collaborative Practice because the disqualification agreement fundamentally changes the dynamics. In Cooperative cases, people won't be open or cooperative because they will always worry that the other side will take advantage if they go to court.

David Hoffman, who has handled cases with and without a disqualification agreement, argues that the “chemistry, intentions, and skill of the participants” is more critical to the success of a negotiation process than whether the parties use the disqualification agreement or not.³

This critique assumes that there is a “best” dispute resolution process that should be the norm that parties should use as a standard for comparison or default process. Each process has advantages and disadvantages, so that there is no single best process, especially considering that each process has many variations. Although some parties may find that a Collaborative process is optimal for them, it poses some risks and is not appropriate for all parties. Using a Collaborative procedure is no guarantee of achieving a good process or result.

Instead of assuming that any process should be the norm, lawyers should help clients make informed choices about which dispute resolution process to choose. The Model Rules of Professional Conduct define informed consent as the “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁴

³See David A. Hoffman, *Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation*, in *INNOVATIONS IN FAMILY LAW PRACTICE* (K. B. Olson & N. VerSteegh, eds., forthcoming 2008). Under the disqualification agreement (which is the essential feature of Collaborative Practice), if any party chooses to litigate (or threatens litigation), the lawyers are disqualified from representing the parties, who must hire new lawyers if they want legal representation.

⁴MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.0(e).

Cooperative Practice is just lawyers agreeing to play nice as long as it serves their needs. People can always go to court at the first sign of conflict.

Parties and lawyers use Cooperative Practice because it provides a framework to promote cooperation. Although they can go to court – and sometimes do – they normally try to resolve things without going to court, which is a last resort.

Going to court is inevitably adversarial, harmful, and inconsistent with cooperative negotiation.

When lawyers they go to court in Cooperative cases, it is generally intended to advance the Cooperative process. For example, one lawyer said that a party may need some “reality therapy” of hearing from a judge at a temporary order hearing and then get right back to negotiation for the permanent resolution.

The Cooperative process can also improve the quality contested hearings when they are needed. One lawyer said that when there are trials or hearings in a Cooperative cases, the dynamics tend to be more cooperative than in litigation-oriented cases. She said that in Cooperative cases there is often much more dialogue to develop a “mutual game plan” and to narrow the issues to be tried. Instead, the hearings have been very satisfying experiences where both sides presented good legal arguments about genuine differences of opinion and the hearings have not been personal or adversarial.⁵

Parties will be confused about Cooperative Practice. Lawyers should not call the process Collaborative Law because there is no disqualification agreement. Lawyers should not even use the name Cooperative Law because parties will confuse it with Collaborative Practice.

There has been a general understanding that the term “Collaborative” should be reserved for processes involving a disqualification agreement. Cooperative practitioners honor that understanding by using the term “Cooperative.” To use either process, parties should get sufficient information so that they can provide informed consent. Thus this terminology should not cause confusion for actual clients. Virtually all of the Wisconsin Cooperative lawyers reported in a survey that clients had no difficulty understanding any aspect of the Cooperative process after their initial consultation.⁶

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⁵John Lande, *Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. (forthcoming).

⁶*Id.*