

A Recent Innovation, 'Cooperative' Negotiation Can Promote Early and Efficient Settlement through Joint Case Management

BY JOHN LANDE

What can you do if you want to negotiate cooperatively with the other side from the beginning of a case?

Of course, in some cases, businesses do negotiate successfully at the outset. Some parties use settlement counsel, who work exclusively on negotiation in a matter. Although these ad hoc or unilateral negotiation approaches work well in some cases, they may not be sufficient to overcome the adversarial dynamics that sometimes occur in litigation.

Though most cases eventually settle, too often the process is more expensive, time-consuming, and contentious than necessary.

"Cooperative practice" is a recent innovation using an agreement by the parties that structures a negotiation process to produce early and efficient settlements. In essence, Cooperative negotiation is a joint early case management process. It is similar to Collaborative practice but does not include the customary Collaborative practice provision limiting lawyers' representation to negotiation, as described below.

Typically, Cooperative negotiation agreements involve a commitment to negotiate in good faith, provide relevant information, and use joint experts as appropriate. Cooperative processes have been used in divorce and employment cases and can be used in virtually any civil matter. For example, Garvey Schubert Barer, a Seattle-based law firm with four U.S. offices and one in China, uses a Cooperative process it calls "Win²"—that is, Win Squared—in employ-

ment cases (see www.gsblaw.com/practice/area.asp?areaID=131&groupID=53).

The Boston Law Collaborative, a Boston law firm focusing on ADR practices, offers a Cooperative negotiation process in family, business, and employment cases (available at www.bostonlawcollaborative.com in the Resources area, under "Forms, Statutes, Rules, and Other Material.")

In addition, members of the Divorce Cooperation Institute, a Wisconsin family

ADR PROCESSES

lawyers' professional group, use a Cooperative process in divorce cases.

The bottom line is that the Cooperative process is highly adaptable, so businesses and their lawyers can readily modify the procedures for their cases.

AN EXPLICIT AGREEMENT

This article presents findings from a study this author conducted about how Divorce Cooperation Institute members handle Cooperative cases, based on in-depth interviews and surveys conducted in 2007.

DCI is an organization of more than 70 Wisconsin lawyers that was founded in 2003. (See <http://cooperativedivorce.org>.) DCI's approach generally involves an explicit process agreement at the outset, which may be written or oral. The agreement is based on principles of: (1) acting civilly, (2) responding promptly to reasonable requests for information, (3) disclosing all relevant financial information, (4) obtaining joint expert opinions before obtaining individual expert opinions, and (5) good-faith negotiation sessions, including four-way sessions where appropriate, to reach fair compromises based on valid information. (For the full version of

the principles, see cooperativedivorce.org/about/principles.cfm.)

When the parties reach an impasse, Cooperative lawyers typically turn to mediation as the next step in trying to resolve the case.

DCI members report that their Cooperative process differs from traditional litigation-oriented representation in terms of mindset and procedures, and that a Cooperative process generally produces greater predictability and confidence in negotiation.

One DCI member said that in litigation-oriented cases, the lawyer's focus is "hunkering down with the client, strategizing, making decisions in your office, and then taking it to the other side." There is more "laying in the weeds and holding your cards close to the vest," the lawyer added.

Another said that in some litigation-oriented cases, parties have a mindset that represents, basically, "I need to get what I can now because I don't know what will happen." This lawyer said that in a litigation context, the parties—and often their lawyers—tend to be more desperate, panicked, narrow-minded, greedy, and worried about what they will get out of the case.

DIFFERING EXPECTATIONS

DCI lawyers say that the orientation and approach in Cooperative cases differs markedly.

One said that in Cooperative cases, people start with an expectation that they are going to cooperate, so they are less likely to litigate. The negotiation process begins in the first four-way meeting and everyone "lays things on the table." Another lawyer contrasted litigation-oriented and Cooperative practice by saying that the latter "allows attorneys and other participants in the legal system to highlight their ability to solve problems, not create more problems for the parties."

Cooperative lawyers also identified various procedures that distinguish litigation-oriented and Cooperative practices. Traditional litigation practice normally does (continued on next page)

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Cooperative Negotiation

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not involve an explicit process agreement and is not based on a pre-established set of negotiation principles. One lawyer said that in “litigation mode,” lawyers routinely send interrogatories, take depositions, and file motions.

DCI members said that a Cooperative process encourages cooperation due to lawyers’ modeling of positive behavior and using procedures that promote cooperation. One lawyer said that “more care is taken to have communications be respectful[, and] fewer sharply-worded letters are written.”

Cooperative lawyers retain the option of using litigation as a resource in advancing a Cooperative negotiation process. Although DCI members sometimes use litigation procedures, such as formal discovery or contested hearings, in Cooperative cases, they are a last resort, and generally intended to advance the Cooperative process.

For example, one lawyer said that a party may need some “reality therapy” 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 of litigation when contested hearings are needed. One lawyer said that when there are trials or hearings in Cooperative cases, the dynamics tend to be more cooperative than in litigation-oriented cases. She said that in Cooperative cases there often is much more dialogue to develop a “mutual game plan” and to narrow the issues to be tried. As a result, the hearings were satisfying experiences where both sides presented good legal arguments about genuine differences of opinion, and the hearings were not personal or adversarial.

One lawyer said that the Cooperative process formalizes how attorneys should practice law, but often don’t.

As a result of these differences, DCI members believe that parties in Cooperative cases generally are more engaged, cooperative, and satisfied with the process than in litigation-oriented cases, and that the parties’ interests generally are better satisfied with less time and cost.

COMPARED WITH COLLABORATIVE

Cooperative practice is similar to Col-

laborative practice except that it does not involve a disqualification agreement, an essential element of Collaborative practice which precludes lawyers from representing clients in litigation.

About half of DCI members use Collaborative practice in some cases because they believe that the disqualification agreement can contribute to a positive negotia-

produces good outcomes as efficiently as possible.

COOPERATIVE NEGOTIATION IN BUSINESS DISPUTES

A Cooperative process is appropriate only when both sides believe that there is a good chance that it would be productive.

DCI members identified several criteria for determining whether cases are appropriate to be handled as Cooperative cases. In general, they believe that Cooperative process is appropriate when the lawyers and parties are willing to be reasonable, and that there are no problems that would inhibit the parties’ ability to negotiate with confidence—for example, serious suspicion of fraud, mental health problems, or substance abuse.

DCI members also highlighted the importance of the identities of the people on other side in determining whether a case is appropriate. For example, one lawyer said that it is hard to know what is appropriate until he knows “who is on the other side and what the [other] spouse will be like.”

Parties and lawyers in business disputes should consider a Cooperative process when they think that it might be more productive than other processes such as litigation-oriented representation, settlement counsel, or Collaborative Law.

Using a Cooperative process enables parties to jointly manage a case from the outset, somewhat similar to the process of developing scheduling orders and holding pretrial conferences under Rules 16 and 26 of the Federal Rules of Civil Procedure.

With an eye toward settling the case as efficiently as possible, the parties can decide what information and expert input is needed to engage in serious negotiations and plan the case accordingly. Parties doing this privately have much greater flexibility in managing the timing and content of the process than if they do so under legal rules administered by judges.

Of course, using a Cooperative process does not preclude the use of litigation procedures, including formal discovery and motion practice. But as some DCI members have found, when parties use litigation procedures in the context of a Cooperative process, it can be narrowly focused on the merits, and avoid some of the adversarial tensions in traditional litigation.

Structuring Negotiation

The buzz: A new and effective way to reach agreement saves time and money and reduces contentiousness.

The mindset: You’re not preparing for litigation. You are preparing to settle the case. They’re not the same.

For lawyers? For real? In fact, some already are doing it. And adapting the processes to your negotiation setting is doable. Are you ready to change the way you practice?

tion process. About half of DCI members do not use Collaborative practice, concerned that the disqualification agreement causes parties to fear that they will feel too pressured in negotiations and that their lawyers may be forced to abandon them under the terms of the Collaborative practice retainer agreement.

DCI members value Cooperative practice because they can tailor the process to the parties’ needs. In Cooperative cases, lawyers use many of the same elements as in Collaborative practice, such as four-way meetings, joint experts, and individual coaches.

But many DCI members—including many who do Collaborative cases, believe that Collaborative practice sometimes involves more of these elements than needed to satisfy the clients’ interests.

DCI members report that in their Cooperative cases, they use process elements only as needed. As a result, they say that they believe that the process generally

On the other hand, if the parties and lawyers cannot cooperatively manage the process on their own, using a third party—mediator, neutral evaluator, arbitrator, or court—would be preferable.

WHY NOT SETTLEMENT COUNSEL?

Parties might prefer a Cooperative process over settlement counsel for several reasons.

First, a Cooperative process involves an explicit process agreement which may not be used with settlement counsel.

Second, a Cooperative process involves a mutual, rather than unilateral, process. Although negotiation with settlement counsel requires that each side designate someone to negotiate, the other side need not designate someone who is highly committed to negotiation, whereas a Cooperative process requires such a mutual commitment.

Third, a Cooperative process may be more efficient if the parties might need to engage in some litigation activities, as they would not need to hire separate litigation and settlement counsel.

On the other hand, parties may prefer a settlement counsel if they want separate lawyers to focus on negotiation and litigation without having the same lawyers combine these functions. If both parties are willing to make a binding commitment not to use the lawyers who handle negotia-

tion to do any litigation, the parties would presumably prefer a Collaborative process.

USING A COOPERATIVE PROCESS

The first step in using a Cooperative process is assessing the case to determine whether it would be appropriate and preferable to other dispute resolution processes.

Alternatives' publisher, the CPR Institute, has developed an early case assessment protocol, and many CPR Institute members routinely conduct such assessments of their cases. (See www.cpradr.org.)

These protocols focus on factors such as the parties' interests and goals, the amount at stake, an initial factual and legal analysis, likely litigation outcomes and expected risks, the procedural posture, key individuals who would be involved, any insurance coverage, and cost-benefit analysis.

Following such an analysis, a party and its counsel would consider the range of processes that might be most advantageous under the circumstances. If they determine that a Cooperative process would be most appropriate, they would suggest it to the other side.

If both sides decide to use a Cooperative process, then the lawyers would draft a Cooperative negotiation agreement. The agreement might address procedures for exchanging information, engaging experts, confidentiality, interim agreements during the negotiation process, and use of mediation or other processes for dealing with impasse.

The Boston Law Collaborative has developed a model Cooperative negotiation agreement form for business disputes, which is accessible at the Web path indicated above.

Frank G. Evans, a retired Texas appeals court judge known as the father of ADR in the state, describes a comparable process, called "ADR management agreements," which involve similar provisions. See www.thehoustonlawyer.com/aa_sep07/page10.htm.

Savvy dispute resolution professionals who keep up to date about the full range of dispute resolution processes should add Cooperative process to their repertoires.

Cooperative process fills an important niche for cases where the parties want to jointly manage a dispute efficiently and do not need a third party to coordinate, mediate, or adjudicate the case. It is a new and flexible process that parties can tailor to suit their needs, borrowing techniques from case assessment, settlement counsel, court case management, and Collaborative processes.

When signers of the CPR Institute's ADR pledges or industry commitments under which signers consider using ADR in their cases, a Cooperative process should be on the list of options they consider. ■

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Insulting Offers

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Strong emotions: Parties often enter negotiation in the grip of intense feelings, making it hard for them to bargain effectively. One of a lawyer's key tasks—not taught in law school—is to help clients work through anger, grief, loss and other difficult emotions. Taking an extreme position can sometimes help by giving parties at least the momentary feeling of holding out for real justice: "This signifies what you've done to us!" or "That's what my case is really worth!" Making a tough offer, or calling one insulting, in other words, can allow players

to vent difficult feelings provoked by the settlement process.

Mis-evaluation of the legal case: To this point we've treated insulting offers as a deliberate tactic or expression of feelings, but negotiators also make such offers unintentionally. A lawyer who evaluates a case poorly, for example, is likely to make offers that appear realistic to the lawyer but strike opponents as out of the ballpark.

For example, a plaintiff's attorney believes that the likely recovery in a contract case is \$1.2 million. The local custom is to start negotiations with a demand two to three times one's actual goal; the lawyer therefore begins with a \$2.9 million demand.

Defense counsel, however, values the same case at only \$500,000, making the

plaintiff's opening demand seem much too high. The defense ordinarily would open at one-fourth of its case value estimate, or \$125,000, but instead offers only \$60,000 to "jolt the plaintiff into a zone of reality."

The plaintiff's lawyer, who expected a first offer well into six figures, reacts bitterly at the other side's presumed bad faith.

A poor bargaining decision. Even when parties assess case value consistently, they may encounter difficulty if they use different assumptions about bargaining.

In an auto accident case, a plaintiff's lawyer made an opening demand of \$1.1 million. Local custom was for tort plaintiffs to open at three to five times their

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