

Adding Cooperative Practice to the ADR Toolkit

John Lande

Engaging Conflicts Blog - <http://engagingconflicts.com/>

April-May 2008

Part 1

There is a growing interest in adding “Cooperative Practice” to the ADR toolkit. Cooperative Practice is related to – but somewhat different from – mediation and Collaborative Practice. All three processes encourage parties to resolve disputes by negotiating agreement, but they have different ways of doing so.

In mediation, an impartial third party helps parties to negotiate an agreement. In Collaborative Law, at the beginning of a case, lawyers and parties sign a “participation agreement” to negotiate in good faith and disclose all relevant facts. The participation agreement includes a “disqualification” clause which provides that if any party decides to litigate, the Collaborative lawyers are disqualified from representing the parties, who must hire new lawyers if they want representation in litigation. The formal difference between Cooperative Practice and Collaborative Practice is that Cooperative Practice participation agreement does not include the disqualification provision.

Each of these processes has advantages and disadvantages. I do not suggest that Cooperative Practice is necessarily preferable to the others. Rather, I think that some parties may prefer it in some cases – and that it is useful for the dispute resolution field to include this in the “toolkit” of desirable processes. At the end of this series, I will describe how individual practitioners can add Cooperative Practice to the set of services you offer – and how it can be useful for mediators.

Mediation generally is a very good process. Many parties like it because it is managed by an impartial party who may diffuse adversarial tensions when both parties (or none of the parties) are represented by lawyers. It is very flexible and has been used in virtually every kind of dispute. Some people may prefer another process, however, for several reasons. In some situations, the parties may each want lawyers to manage the process and would not feel secure if a mediator is primarily in charge. Mediation may not be appropriate when one party wants to take advantage of a power imbalance and a weaker party does not have a lawyer. Abuse of power may be a particular concern in cases involving serious domestic abuse. In the litigation context, mediation is often used late in the case, after much time, money, and emotion have been spent, so some parties may want a process that focuses on negotiation from the outset.

The next part describes Collaborative Practice and why some parties may prefer it to mediation.

Part 2

Collaborative Practice is generally a very good process. It offers a valuable alternative for parties who want lawyers to manage the process and to start negotiation from the beginning of a case. The disqualification agreement provides comfort for parties who want a barrier making it hard to use litigation and security that Collaborative lawyers will not plan how to use the process against them in court.

The Collaborative movement has developed detailed practice protocols as well as an infrastructure of professional standards, local practice groups, trainings, and publications. Many Collaborative groups normally use an interdisciplinary model in which it is expected that parties will use individual coaches and joint child development and financial experts. Collaborative Practice is thus particularly desirable for people who want a highly-defined process which may regularly involve multiple professionals. For more information about Collaborative Practice, visit the [International Academy of Collaborative Professionals](#) website.

Like mediation, Collaborative Practice is not for everyone. Despite great efforts to use Collaborative process in non-family cases, very few parties or lawyers have been willing to use the process outside of family law. Some parties do not want to use a process in which they risk suddenly losing their lawyer – especially since the other side can unilaterally “fire the other side’s lawyer” by terminating the process. Some parties may also prefer a process that does not have relatively prescribed procedures and that may encourage them to use more professionals than they would like.

The next part describes Cooperative Practice and why some parties may prefer it to Collaborative Practice.

Part 3

Cooperative Practice is relatively new and provides a desirable alternative for some parties. The [Divorce Cooperation Institute](#) in Wisconsin started offering it in 2003. The [Boston Law Collaborative](#) and the [Mid-Missouri Collaborative and Cooperative Law Association](#) began offering it in 2005.

Although a Cooperative process is often used in family cases, the lack of a disqualification agreement makes it attractive in non-family cases. For example, the Garvey Schubert Barer law firm offers a form of Cooperative Practice called [Win² \(Win Squared\)](#) in labor and employment cases.

Parties may prefer a Cooperative process over a Collaborative process when they (1) trust the other party to some extent but are uncertain about that person's intent to cooperate, (2) do not want to lose their lawyer's services in litigation if needed, (3) cannot afford to pay a substantial retainer to hire new litigation counsel in event of an impasse, or (4) fear that the other side would take advantage of the process, particularly in cases involving serious domestic abuse. Of course, parties may prefer mediation if they want a third party to manage the process or they may prefer a Collaborative process if they want the security provided by the disqualification agreement.

I discussed these issues in more detail in an article I co-authored with Gregg Herman entitled, "[Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases.](#)" You can go to my [website to see the other articles I have written](#) on the subject.

The next part describes my study of the Divorce Cooperation Institute and how DCI lawyers do Cooperative Practice.

Part 4

The last part of this blog describes why the ADR field should add Cooperative Practice to the “ADR toolkit.” This part describes how lawyers can *add it to your own practices*. Mediators should also be interested because Cooperative Practice often involves mediation when people have difficulty resolving disputes.

I recently conducted a study of the Divorce Cooperation Institute (DCI), an organization of more than 70 Wisconsin lawyers, established to provide a cooperative and efficient negotiation process. I conducted in-depth telephone interviews and surveys of DCI members and the findings are described below.

Lawyers interested in offering Cooperative Practice may use or adapt DCI’s approach, as appropriate. Although DCI uses the process only in divorce cases, it can be readily adapted in other types of cases.

DCI members normally use an explicit process agreement at the outset. The agreement requires people to: (1) act civilly, (2) respond promptly to reasonable requests for information, (3) disclose all relevant financial information, (4) obtain joint expert opinions before obtaining individual expert opinions, (5) obtain expert input before requesting a custody study or appointment of a guardian ad litem, and (5) negotiate in good faith to reach fair compromises based on valid information. (Here’s the full version of [DCI’s principles](#)).

DCI members value Cooperative Practice because they can tailor the process to the parties’ needs. In Cooperative cases, they use many of the elements in Collaborative Practice – such as commitment to full disclosure of relevant information, four-way meetings, joint experts, and individual coaches. Many DCI members – including many who use Collaborative Practice – find Collaborative process to be too formal and rigid and believe that it sometimes involves more of these process elements than needed. DCI members report using them only as needed in Cooperative cases and so they believe that a Cooperative process generally produces good outcomes as efficiently as possible.

For more information about my study of Cooperative Practice in Wisconsin, click [here](#).

The next part describes how Cooperative negotiation is different from negotiation in litigation.

Part 5

Since a Cooperative process does not include a disqualification clause as in Collaborative cases, some people wonder if Cooperative process is any different from negotiation in litigated cases.

Although many lawyers negotiate cooperatively at times, a Cooperative process can provide greater predictability and confidence than in litigation. DCI members say that a Cooperative process creates a legal culture where cooperation is the norm. Traditional litigation-oriented practice normally does not involve an explicit process agreement. In litigation, lawyers often are not sure about the other side's intentions and each side may feel that it needs to take tough positions to protect themselves. This sometimes creates a cycle of adversarial behavior that is hard to break out of.

Although DCI members sometimes use litigation procedures (such as formal discovery or contested hearings) in Cooperative cases, these are used as the last resort and are 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. When contested hearings are needed, the Cooperative process can improve the quality of litigation. One lawyer said that in trials in a Cooperative cases, the process tends to be more cooperative than in traditional litigation-oriented cases.

For more information about my study of Cooperative Practice in Wisconsin, click [here](#).

The next part describes how practitioners can add Cooperative Practice into the services they offer. Mediators may also be interested because they may be used in Cooperative cases.

Part 6

Lawyers who want to do Cooperative Practice may use or adapt DCI's procedures. For examples of other forms of Cooperative negotiation agreements, see the [Boston Law Collaborative](#) and the [Mid-Missouri Collaborative and Cooperative Law Association's](#) websites.

Lawyers can start using a Cooperative process on an ad hoc basis, which may be particularly appropriate when the lawyers in a case have previously worked well together and trust each other. If appropriate, the lawyers might convene a four-way meeting with the parties early in the case to jointly identify issues, exchange information, and plan how to handle the case in the future. At that point, they might sign a Cooperative participation agreement if they think it would be helpful.

Lawyers may also organize practice groups to promote Cooperative Practice. Such groups can help develop practice norms and procedures and help lawyers develop reputations for cooperation.

I have been giving talks to encourage lawyers to incorporate Cooperative Practice into the "portfolio" of services that they offer. I recently gave a talk in Seattle and a CLE conference call in Colorado and Cooperative groups may develop there – in addition to the ones in Wisconsin, Missouri, and Boston.

I would be happy to talk with others interested in developing Cooperative Practice for your cases. Feel free to email me at landej@missouri.edu or call me at 573-882-3914.

You can go to my [website to see the other articles I have written](#) on the subject.