**Frequently Asked Questions About Cooperative Practice, including Why Should You Care?**

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This addresses frequently asked questions (and some misconceptions) about Cooperative Practice.

What is Cooperative Practice?

Cooperative Practice (or "Cooperative Law" or "Cooperative Negotiation") involves an agreement – a "participation agreement" – by lawyers and parties setting out a negotiation process with a goal of reaching an agreement that is fair for both parties. These 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. The participation agreement may provide for use of a mediator or a "cooling off" period before engaging in contested litigation. It 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.

How Does Cooperative Practice Differ from *Collaborative* Practice?

The formal difference is that the Collaborative Practice (or "Collaborative Law") participation agreement includes a "disqualification agreement" (sometimes called a "withdrawal agreement," "collaborative commitment," or "limited retention agreement"). Under the disqualification agreement, 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. In addition to this formal distinction, there may be differences in tailoring the procedures to the particular circumstances. For example, Cooperative practitioners may not use four-way meetings as much or involve as many other professionals in the meetings as in Collaborative Practice.

Why Would One Want to Use a Disqualification Agreement or Not?

The disqualification agreement gives parties an incentive to reach agreement because litigation would increase the time and costs for the parties as well as the burden of starting over and educating new lawyers. Collaborative Lawyers also have an incentive to reach agreement so that they accomplish their clients' goals and continue to receive their fees. The disqualification agreement is intended to create an environment where everyone focuses on negotiation without thinking about the possibility of litigation. The disqualification agreement clearly does promote collaborative negotiation in many cases. A disqualification agreement is not necessary or sufficient to promote collaboration, however. Some people struggle to collaborate even with a disqualification agreement and many people negotiate quite well without one.

Although the disqualification agreement can be helpful, it also can create problems. Some parties will not use a process that creates a risk that they would lose their lawyer – and that effectively gives their adversary the power to fire their lawyer. The disqualification agreement also creates a risk of significant settlement pressure. After investing substantial time and money in Collaborative negotiations, clients may feel stuck in the process because they feel economically or psychologically unable to hire a new lawyer to litigate when it might be in their best interest to do so.

Since Cooperative Practice Doesn't Involve a Disqualification Agreement, Isn't it Just the Same as Traditional Litigation?

No. This is a convenient myth. In Cooperative Practice, at the outset of a case, the lawyers and parties make an explicit agreement establishing a negotiation process. The parties typically focus exclusively on negotiation at the outset and suspend litigation during negotiation. This provides greater predictability and confidence than in litigation. If the parties are at an apparent impasse, they may use a mediator or a "cooling off" period before shifting to contested litigation. When lawyers act cooperatively in traditional negotiation, they do so on a limited and ad hoc basis within the context of ongoing litigation. Moreover, in traditional litigation, lawyers and parties often do not act cooperatively. Thus it is simply wrong to suggest that there is no difference between Cooperative Practice and traditional litigation.

To see the difference for yourself, take a look at Cooperative process agreements of the Boston Law Collaborative (http://www.bostonlawcollaborative.com/blc/resources/forms-statutes-rules-and-articles/collaborative-law-forms.html?branch=main&language=default) or the Mid-Missouri Collaborative and Cooperative Law Association (http://www.mmccla.org/forms/). In traditional negotiation in legal cases, parties and lawyers do not use such explicit or comprehensive agreements to design a negotiation process.

Why is the Disqualification Agreement a Barrier to Using Collaborative Practice in Civil Cases?

Virtually all Collaborative cases have been family law cases. Despite great efforts to use Collaborative Practice in non-family ("civil") matters, apparently there have been only a handful of civil Collaborative cases (six in one Canadian province), as David Hoffman documents in his "Open Letter to the Collaborative Practice Community and IACP," at http://www.bostonlawcollaborative.com/blc/whats-new/selected-publications.html?branch=main&language=default.

If a civil Collaborative case terminates without settlement, the lawyers would watch a potentially lucrative case go to a competing lawyer or law firm. Plaintiffs' lawyers paid on contingency would anticipate additional problems collecting fees if another lawyer takes over to litigate the case. Collaborative Practice is also unattractive to parties in civil cases who are concerned about investing more time and money in educating new lawyers if there is no settlement.

Although these dynamics may also exist in family cases, the consequences of disqualification generally are much greater in civil cases because of the generally larger financial stakes. In particular, civil litigators are likely to have a smaller number of large cases, as compared with family lawyers, so the loss in civil cases would be much greater. As a result, the lawyers and clients in civil cases may value their relationships more than in family cases. Given the greater risks, parties and lawyers would need greater trust that the opposing side would not abuse the process. So lawyers and clients are likely to have little appetite for ending the lawyers' representation in a case after investing a substantial amount of time and effort into it.

Family lawyers tend to practice in small local practice communities and if Collaborative Lawyers behave uncollaboratively, they face greater risks to their reputations and potential for future referrals. In civil cases, the lawyers have much less expectation of repeat interactions with the other lawyers in a case. Thus there would be a greater temptation to take advantage of the other parties, who might be wary about undertaking the process. Although the disqualification agreement is not the only barrier to using Collaborative Practice in civil cases, it clearly is a major barrier.

Should Parties And Lawyers Always Use Cooperative Practice Instead of Collaborative Practice?

No. Both processes have potential benefits and risks. There is a value to giving parties a choice between the processes.

In Collaborative Practice, everyone has an extra incentive to reach agreement to make the process work. On the other hand, some people may feel too pressured to reach agreement because they would have to hire new lawyers if they need to go to court. Each party can cause the other party to lose his or her lawyer if they do go to court.

By contrast, Cooperative Practice gives parties the option of keeping the same lawyer if they go to court, which may help them resist pressure to accept agreements they believe are not in their interest. On the other hand, because the same lawyers can go to court, people may become defensive and might not feel as safe as in a Collaborative process, worrying that the other side would take advantage in later litigation.

Why Would Parties Want to Use Cooperative Practice Instead of Mediation?

Although mediation is often a very useful process in family and civil cases, some parties may prefer Cooperative Law. In many areas, lawyers typically do not attend family mediation sessions and some parties may want lawyers to provide support, advice, and advocacy. Those parties may want a Cooperative (or Collaborative) process.

In civil cases, mediation often does not occur until late in litigation, after the parties have already invested a great deal of time, money, and emotion. In a Cooperative process, the parties and lawyers would often begin negotiation at the outset of a case.

Parties may want to use both Cooperative Lawyers and mediators in especially challenging cases.

Why Should I Care About Cooperative Practice?

Cooperative Law offers the potential to:

* increase the use of interest-based negotiation from the outset of a case, reversing the presumption of using positional negotiation

* give clients an additional important process option, especially if mediation or Collaborative Law is not suitable

* increase efficiency and process satisfaction with negotiation

* provide cooperative negotiation services in non-family cases that parties would actually use

* expand ADR in the most common dispute resolution process in contested legal cases – direct negotiation between lawyers

* influence the legal culture generally to increase use of problem-solving in daily practice

There are very few practitioners offering Cooperative processes and it would take some effort to educate and train lawyers and parties about it. Unfortunately, many Collaborative practitioners do not want to offer clients a Cooperative process, concerned that clients would take what they see as the "easy way out" by not agreeing to use the disqualification agreement. For Cooperative Practice to expand, it will require leadership from outside the Collaborative Law community.

Where Can I Get More Information About Cooperative Practice?

Boston Law Collaborative - http://www.bostonlawcollaborative.com/blc/resources/forms-statutes-rules-and-articles/collaborative-law-forms.html?branch=main&language=default

Divorce Cooperation Institute - http://cooperativedivorce.org/

John Lande's website - http://www.law.missouri.edu/lande/publications.htm#ccl

Mid-Missouri Collaborative and Cooperative Lawyers Association - http://www.mmccla.org/

LinkedIn Network, Cooperative Law Group - http://www.linkedin.com/ (use drop-down menu "search groups" for "Cooperative Law Group")