Promoting Cooperative Early Dispute Resolution in Civil Cases

By John Lande

I was asked to discuss why more people don't use early dispute resolution models in civil cases, considering that there are thousands of certified collaborative law practitioners, most of whom handle family cases.

I suspect that there are fewer collaborative law cases than the number of certified practitioners would suggest – and that more lawyers are doing early dispute resolution cooperatively than we may realize.

To increase the amount of early dispute resolution, especially in civil cases, I think that we should build on what lawyers already do, focus on their interests, and help change the practice culture. All of these things happen slowly, aren't easy to observe, and require patience.

Less Collaborative Practice Than We Might Think

I studied collaborative law for several years, writing multiple articles about it, and many practitioners value their professionals identity as part of that movement. In general, they are turned off by the adversarial legal process and feel good about providing a generally more constructive process. They appreciate being part of a mutually supportive community with an impressive professional infrastructure.

My review of empirical research on collaborative law suggests that most practitioners who have been trained in collaborative practice don't get many collaborative cases. This is similar to the situation in mediation, where lots of people have received mediation training, but a relatively small number have substantial mediation practices. Considering the overall volume of legal cases, relatively few cases are handled through either collaborative law or mediation.

More Non-Collaborative-Law Early Dispute Resolution Than We Might Think

A lot of lawyers believe in cooperative early dispute resolution but don't feel the need for the procedures and infrastructure involved in collaborative law. I interviewed 32 respected Missouri lawyers about how they handle cases and they expressed a general preference for cooperative early dispute resolution – though not in all cases. They are quite prepared to engage in extended adversarial litigation if they feel it is necessary. See *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 Cardozo Journal of Conflict Resolution 63 (2014).

The lawyers I interviewed generally see cooperative early dispute resolution generally as just good lawyering. For a lot of cases, the stakes – and clients' willingness and ability to pay for legal services – don't justify long adversarial battles. Perhaps more importantly, they value addressing clients' needs rather than using a particular approach to practice. So while they

generally prefer to resolve cases relatively cheaply and quickly, they want to offer clients a full range of services depending on their needs in particular cases.

These lawyers can do early cooperative dispute resolution without any explicit agreement with the other side – or even with their clients. This is how they prefer to practice and they are able to make it happen if it is possible and appropriate.

Of course, this isn't always possible and there are variations in practice. A lot depends on the approach of the opposing counsel. If the other side is unreasonable, these lawyers want to demonstrate that they won't be pushed around. Cooperative early practice is more common in smaller communities, where "everybody knows everybody else" and there is a great value in maintaining a reputation for reasonableness. By contrast, in urban areas, practice is more anonymous and there is a greater chance that lawyers won't encounter each other again. In those situations, there is less incentive to be cooperative. Local practice culture also makes a big difference. Some communities and areas of practice are known for more cooperative interactions and in others, it's more cutthroat.

Whereas there is great value to have established protocols and procedures for collaborative law, many lawyers don't feel that this is necessary or helpful to do early cooperative practice – in civil or family law cases.

Promoting Cooperative Early Dispute Resolution

Reflecting on the limitations of collaborative practice, I wrote my book, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money*, which the Section of Dispute Resolution published. I wrote this for lawyers who want to use a flexible process to provide – and get – the benefits of early dispute resolution. Many experienced lawyers use techniques described in the book, though not self-consciously or systematically. The book is designed to help lawyers use these procedures more intentionally and methodically.

I have given talks on the subject and gotten reactions to the book that reinforced my sense that many lawyers use these general approaches – and that there is value in our being more explicit about these choices.

Since this isn't a distinct alternative form of practice like collaborative law, it's hard to know how much actually is being done. And it's harder to promote the techniques as a unique form of practice.

Ultimately, I think that promoting cooperative early dispute resolution is a matter of subtle changes in practice culture, which are hard to recognize and measure and which can take a long time to develop. Sometimes people can help engineer culture changes, and other times the changes result from unplanned factors beyond people's planning or control.

There can be a tension between the values of speed and quality. In a wonderful article entitled, "Two Out of Three," 11 Negotiation Journal 5 (Jan. 1995), Christopher Honeyman argued that dispute resolution processes can be faster, cheaper, and better – but not all three.

In my view, the top priorities generally should be quality, cost, and speed – in that order. That's why I have advocated for *planned* early dispute resolution, which is more likely to enhance the quality by tailoring the process to the parties' needs and interests. This should produce a process that is as efficient as possible consistent with the parties' needs and interests. It may also be relatively speedy, though sometimes people need to spend more time to do a process well. The lawyers in my *Planning to Get to Yes* study identified some good reasons why it is appropriate to take some time before negotiating. While fast resolution generally is desirable, it should not be the highest priority in my view.

In sum, I think that lawyers provide more cooperative early dispute resolution in civil cases that we may realize and that there is room for incremental growth. To achieve that growth, it may be most effective to understand lawyers' perspectives and help them figure out how they can increase the quality and efficiency of their work. Part of this involves changing the practice culture.

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