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Alternatives to the High Cost of Litigation  
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Almost everyone familiar with the legal system knows that only a tiny fraction of legal cases are tried. Though most negotiators eventually muddle through to reach settlement, often the process is not pretty and the resolution is less than optimal.

How can negotiators settle sooner, more efficiently, and more wisely? This article argues for the development of a negotiation protocol to help lawyers and parties negotiate cooperatively. Such a protocol would build on previous efforts to promote these goals.

Some businesses and law firms have instituted early screening processes to evaluate each case at the outset and develop early resolution plans. See Catherine Cronin-Harris, "Building ADR into the Corporate Law Department: ADR Systems Design" (CPR Institute for Dispute Resolution 1997).

Some firms hire "settlement counsel," or "resolution counsel" who have the sole function of negotiating settlement. See James E. McGuire, "Why Litigators Should Use Settlement Counsel," 18 Alternatives 107 (June 2000).

Firms can use these approaches unilaterally and don't require the cooperation of the others to attempt settlement. Although these processes often do promote constructive settlement, negotiation is likely to be more productive when all the parties actively cooperate.

Opposing parties develop negotiation procedures on an ad hoc basis in some complex civil cases and large multiparty processes, such as those used in public policy conflicts and regulatory negotiations.

The CPR Pledge (see [www.cpradr.org/pledges.htm](http://www.cpradr.org/pledges.htm)) is a systematic effort to promote cooperative dispute resolution. Businesses and law firms that have subscribed to the CPR Pledge commit to "seriously explore negotiation, mediation or other ADR processes in conflicts arising with other signatories before pursuing full-scale litigation."

This is good as far as it goes but it does not provide specific mechanisms for structuring such dispute resolution processes.

As a logical extension of the CPR Pledge, collaborative law--referred to in this article as CL--protocols that have been used primarily in family law cases can be adapted to structure cooperative negotiation in civil, nonfamily, litigation. See Pauline H. Tesler, "Collaborative Law Neutrals Produce Better Resolutions," 21 Alternatives 1 (January 2003).

## PRACTICE ELEMENTS

Major elements of collaborative family law practice include:

- the development of local negotiation protocols and required training in CL techniques;
- a signed agreement by the litigants and lawyers committing to initial and exclusive effort to negotiate in good faith and without a litigation threat;
- the extensive participation of parties and lawyers in "four-way" meetings, i.e., with all parties and lawyers participating actively;
- an agreement to provide full disclosure of all relevant information;
- the use of interest-based negotiation;
- an agreement that all collaborative lawyers are disqualified from litigating in cases in which they act as collaborative lawyers (referred to here as the "disqualification agreement");
- an agreement to retain any experts jointly and as neutrals who usually would be disqualified from participating in litigation of the case.

To promote collaborative family law, practitioners have organized at least 87 local and regional groups in 25 states and many Canadian provinces. These groups establish local refinements of the negotiation protocol, provide continuing CL techniques training, and promote CL practice and culture.

Litigants and lawyers can benefit from the development of a somewhat standardized negotiation protocol like this in several ways. Having a preestablished negotiation protocol legitimizes negotiation and can make it easier to initiate without appearing weak. Standardized procedures can reduce the need for ad hoc procedural negotiation about how to conduct negotiations, for example, about exchanging information. To the extent that negotiators need to customize negotiation procedures, a standardized protocol can provide a template of procedural issues to discuss.

Moreover, negotiation protocols can include provisions to avoid or address predictable problems that can sabotage substantive negotiations. A standardized negotiation protocol also can promote a positive legal culture that encourages cooperative approaches to negotiation more generally. See Ronald J. Gilson & Robert H. Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 Colum. L. Rev. 509 (1994).

## PROTOCOLS AND TRAINING

Because family law cases differ from other civil cases, collaborative family law negotiation protocols must be adapted to be useful in major civil cases. In family cases, the parties are individuals while many civil cases involve organizational dynamics within major businesses.

Moreover, family lawyers generally operate in local communities and, by contrast, many civil litigators operate in regional, national, and even international practice communities. Thus rather than having local groups of CL lawyers develop practice and training protocols, it is more appropriate to have national or international groups do so. Much as the CPR Institute and other groups have developed dispute resolution contract clauses, mediation standards, and arbitration rules (see CPR's Model ADR Procedures and Practices, [www.cpradr.org/mapps.htm](http://www.cpradr.org/mapps.htm)), they can develop negotiation protocols. CPR, which publishes this newsletter, would be especially appropriate to develop such protocols and offer training, given its experience developing and promoting the ADR pledge and its extensive network of businesses and law firms engaged in advancing dispute resolution practice.

Drafters of a general negotiation protocol for civil litigation might use CL procedures as a starting point and adapt them, considering the issues discussed below. Note that, collaborative law trainers and practitioners want to reserve the term "collaborative law" for processes with features described above, especially the disqualification agreement. Practitioners who use variations on these techniques often refer to the variations as "cooperative" law or negotiation.

Creating a Constructive Environment and Keeping Negotiation From Breaking Down. The CL disqualification agreement, referred to here as DA, is designed to keep litigants and lawyers focused on negotiation constructively and to inhibit them from resorting to litigation as soon as they have difficulties in negotiation.

CL proponents argue that lawyers are so used to litigating that a DA is needed to keep them from threatening or actually using litigation. Moreover, a DA can give lawyers a ready rationale for resisting clients' demands to litigate when they feel frustrated in negotiation.

Although a negotiation protocol for civil cases might include an option to use a DA, the protocol would be most helpful by developing alternative procedures to accomplish the same objectives.

Although CL family lawyers have represented clients with agreements including a DA, the agreements are a major barrier for civil litigants and lawyers from engaging in CL. Family lawyers usually have many, relatively small cases with "one-shot" clients and thus can afford to "lose" cases and clients if they do not settle.

By contrast, civil litigators generally have a small number of relatively large cases with repeat-player clients. Law firms serving major civil clients would almost never risk losing a litigation client to another firm due to a DA. And many clients would not want to risk losing the investment in educating their lawyers and their relationship of trust in their lawyers if they need to litigate. CL lawyers have promoted CL for nonfamily cases, but apparently very few civil litigants have used the process so far.

CL theorists are correct to identify potential problems of ready defection from negotiation to litigation. Once one side escalates the adversarial tensions, it is hard to de-escalate promptly and resume productive negotiations. To accomplish the same goal as the DA, negotiators could agree to "cooling off" periods (of say a few days or weeks) to prevent cycles of unconsidered escalation.

Borrowing a concept from partnering procedures—see Frank Carr, "Partnering, With a 'Ladder,' Sustains Government Contracting," 19 *Alternatives* 191 (September 2001)—litigants could agree to consult with higher authorities in their organizations if they cannot resolve an impasse within specified periods of time. Litigants also could agree to engage a neutral such as a mediator, evaluator, or arbitrator to keep the negotiation on track or to resolve particular issues.

Undoubtedly lawyers can develop a checklist of other procedures to work together to help parties "hang in" through tough times in negotiation while always retaining the litigation option.

Promoting Good Faith Negotiation. Negotiation is most productive if negotiators act in good faith. Although it is tempting to promote good faith negotiation by creating an enforceable legal requirement, careful analysis shows that such requirements can be counterproductive because they can be evaded easily and, ironically, used to undermine good faith negotiation. See John Lande, "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs," 50 *UCLA L. Rev.* 69 (2002). [Editor's note: The author's *UCLA Law Review* article received honorable mention in the professional articles category of last year's CPR Awards for Excellence in ADR. See [www.cpradr.org/awards99.htm](http://www.cpradr.org/awards99.htm).]

Drafters of a negotiation protocol might include a provision in which negotiators commit to honest negotiation but make clear that it does not create a legal obligation that might generate additional issues to litigate.

- Efficiently Exchanging Information. Negotiators need sufficient information to be willing and able to settle disputes intelligently. Discovery overkill has been a major problem in litigation because it drives up costs, prolongs the process, and generates additional disputes. Although the CL protocol of "full disclosure" of all relevant information can work well in family cases, it is likely to be counterproductive in large civil cases as it would reproduce problems in litigation rather than avoid them. Thus a negotiation protocol could be designed to help litigants efficiently exchange the critical

information and avoid exchanging less important information (or at least postpone doing so until it is clearly needed).

Drafters of a negotiation protocol might consider experience with Rule 26 of the Federal Rules of Civil Procedure, which requires litigants to disclose certain information without a specific request from other parties. Obviously this rule was adopted for use in litigation and would need to be adapted to produce good results in negotiation.

- Wisely Using Experts. In many cases, negotiators need input from experts to make good decisions in negotiation. The collaborative family law model provides that experts must be neutral, hired jointly, and disqualified from participating in litigation. In some CL groups, the parties may agree to allow experts to participate in litigation. This arrangement is intended to avoid incentives for experts' slanting their opinions for partisan advantage and to prevent costly battles of the experts. A negotiation protocol for civil cases might use a similar approach and establish it as the norm. In some cases, the negotiators may prefer to hire some experts separately and a negotiation protocol might provide for an early discussion about how experts would be retained and how their products would be used.

Using Problem-Solving Negotiation. Problem-solving negotiation, or PSN, which sometimes is called interest-based negotiation, involves identifying the parties' interests and the options for satisfying those interests and then selecting options that satisfy important interests of all parties. Because this approach involves sharing information about parties' interests and generating creative solutions, it can create value and not merely distribute value between the parties.

Despite the great potential benefits as well as research showing that most lawyers would like to use PSN, many negotiators do not do so. When one side unilaterally discloses its real interests, it becomes vulnerable to the other side exploiting the information for partisan advantage. In addition, the traditional positional approach of exchanging offers is so deeply embedded in U.S. negotiations that negotiators typically use the traditional approach out of habit.

A negotiation protocol could promote PSN use in several ways. Given the strong norms of using positional negotiation and the risks of unilateral disclosure, negotiators normally will use PSN only by making a conscious and joint decision to do so. Negotiation protocols designating it as the presumptive first choice can prompt negotiators to seriously consider using it rather than habitually using traditional methods. Although negotiators ultimately may prefer to use methods other than PSN, it makes sense to encourage them to consider using it at the outset of every negotiation. "Getting to Yes," by Roger Fisher, William Ury, and Bruce Patton, and its progeny, provide helpful suggestions for persuading negotiators to overcome reluctance to use PSN. These ideas can be incorporated into negotiation protocols and trainings.

Creating Incentives to Negotiate. Negotiation protocols may help develop and legitimize incentive structures encouraging early cooperative negotiation. Law firms have strong incentives to litigate cases extensively. Many lawyers believe that they have a professional duty to represent clients thoroughly, which may involve extensive factual discovery, legal research, and litigation tactics to gain strategic advantages for their clients. Indeed, some lawyers are concerned that they could be liable for malpractice if they do not take every legitimate action on behalf of their clients.

Lawyers paid on an hourly basis also have a financial self-interest to prolong litigation to maximize their fees. Some litigants also have strong interests promoting extensive litigation. They may get a strategic advantage by wearing down and "waiting out" opponents to gain substantial concessions. Some litigants--and especially executives personally involved in the litigation for their firms--may have strong emotional interests in being vindicated in court or having courts take responsibility for making adverse decisions. Even lawyers and litigants who generally believe in using ADR are sometimes reluctant to use ADR methods in their particular cases for the reasons described above. Thus efforts to use early and efficient negotiation techniques often need to overcome substantial barriers. See "Inside the Law Firm: Dealing with Financial Disincentives to ADR," 17 *Alternatives* 43 (March 1999).

Savvy litigants--and particularly their general counsel--often are the ones who take the lead to overcome these barriers by developing early case screening and ADR programs to resolve cases as efficiently and wisely as possible. These litigants typically communicate their expectations to their law firms which have strong incentives to satisfy those expectations, both as a matter of professional responsibility and self-interest in keeping the clients' business.

Litigants may induce more cooperation from their lawyers in promoting early cooperative negotiation efforts by crafting lawyer compensation schemes that share with the lawyers the benefits of early resolution. Drafters of negotiation protocols can develop and legitimize lawyer compensation models, creating incentives to encourage litigants and their lawyers to use cooperative negotiation processes. See, e.g., Peter D. Zeughouser, "Price & Product: A Proposal for a Focused ADR Structure," 15 *Alternatives* 141 (November 1997). Drafters might produce a menu of compensation structures so that litigants and lawyers can choose among various models that best fit in different situations.

Presumably each litigant and its lawyers negotiate their own lawyer compensation arrangements independent of the opposing parties. Nevertheless, litigants can demonstrate commitments to cooperative negotiation by using such compensation schemes, informing the other side of the arrangement (at least in general terms), and inviting the other side to use similar compensation arrangements. Although the litigants would be free to pursue litigation at any time, such parallel compensation arrangements could create powerful incentives to resolve disputes through cooperative negotiation.

Too many cases settle only "on the courthouse steps" or after lengthy and expensive pre-trial litigation that diverts productive energy, damages relationships, and tarnishes reputations. Given the prevalence of negotiation, it is surprising that there are few or no protocols promoting early, cooperative, and wise negotiation procedures comparable to dispute resolution contract clauses, mediation standards, and arbitration rules.

One can compare a pledge to use ADR to saying, "Let's have lunch sometime." Even when sincere, the suggestion is easy to forget or evade. A more detailed negotiation protocol might be like a reminder from a computer calendar that includes a list of preselected restaurants and tasty dishes. It would not guarantee an actual lunch date, but it can make it much more likely and satisfying.

Organizations like CPR can make a significant contribution to litigants, lawyers, courts, the ADR field, and the public by engaging representatives of all the stakeholder groups to develop negotiation protocols, trainings, and other mechanisms to promote their use.

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