Learning from Cooperative Negotiators in Wisconsin

John M. Lande

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Learning From “Cooperative” Negotiators in Wisconsin

What can you do if you are a lawyer and want to negotiate cooperatively with the other side from the beginning of a dispute? Of course, in some cases, parties and lawyers do negotiate or use other settlement processes at the outset. Often, however, they use a litigation-oriented process and, even though they may eventually settle, too often the process is more expensive, time-consuming, and destructive than necessary.

To negotiate constructively from the outset of a matter, some lawyers use a “Cooperative” process, giving parties an additional process option, especially if parties believe that mediation or Collaborative practice is not suitable. Cooperative practice offers parties the opportunity to have lawyers represent them in an interest-based process governed by a negotiation agreement—while retaining ready access to litigation if needed, without losing their lawyers as in Collaborative practice. Cooperative practice can increase interest-based negotiation in direct negotiation between lawyers, increase efficiency and satisfaction with negotiation, and influence the general legal culture to incorporate problem-solving in everyday practice more often.

Cooperative practice is a recent innovation involving an agreement by both sides structuring a negotiation process to produce early and efficient settlements. Typically, Cooperative negotiation agreements involve a commitment to negotiate in good faith, provide relevant information, and use joint experts when appropriate. Cooperative processes have been used in divorce and employment cases and can be used in virtually any civil matter. For example, the Garvey Schubert Barer law firm uses a Cooperative process they call “Win” (Win Squared) in employment cases; the Boston Law Collaborative uses a cooperative process in family, business, and employment cases; and the Divorce Cooperation Institute (DCI) uses a Cooperative process in divorce cases.

This article presents findings from a study I conducted about how DCI members use the process. Learning from DCI’s experience, parties and lawyers can identify situations in which cooperative negotiation would be ideal, with possible application in a wide range of civil cases, including family, employment, probate, construction, commercial, and tort cases, among others.

How Cooperative Negotiation Works
DCI is an organization of more than 70 Wisconsin lawyers that was founded in 2003. DCI’s approach involves an explicit process agreement at the outset, which may be written or oral. It 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) using good-faith negotiation sessions, including four-way sessions where
appropriate, to reach fair compromises based on valid information. When the parties reach an impasse, many Cooperative lawyers turn to mediation before using litigation. Most DCI members in the survey indicated that they use oral agreements (based on DCI’s fundamental principles), though most believed that it would be desirable to use written participation agreements more often.

DCI members generally shared goals of providing a process that is 1) based on valid information, direct negotiation, and client decision making; 2) tailored to the parties’ needs; and 3) efficient. They wanted to satisfy clients’ and children’s interests, reduce conflict, and produce fair results. They wanted to minimize use of the courts—and also have access to them if needed to promote constructive resolutions.

DCI members generally thought that a Cooperative process is appropriate only when there is a good chance that it would be productive. Most said it is appropriate when the lawyers and parties on both sides are willing to be reasonable and there are not problems that would seriously undermine the parties’ ability to negotiate with confidence, such as serious fraud, domestic abuse, mental health problems, or substance abuse.

Four-way meetings are major features in Cooperative cases. The vast majority of survey respondents said that they use at least one four-way meeting in most of their Cooperative cases, and about half said that most negotiation takes place in the four-ways in most of their cases. Thus, lawyers tailor the process by using four-ways only when needed. Moreover, even in four-way meetings, there may be some “shuttle diplomacy” (where the lawyers talk with each other and then go back to their clients) or caucuses (where each pair of lawyers and clients meets separately). When lawyers or parties decide to do some negotiation outside of four-way meetings, it is to promote the goals of the Cooperative process. For example, some divorcing spouses may want to cooperate but may have a hard time working directly together. One lawyer said that when there is “volatility” between the parties, four-ways are risky because they can “make settlable cases unsettled.” Similarly, four-ways may be considered inappropriate if parties are too uncomfortable in participating directly in the negotiation, such as some cases involving domestic abuse.

DCI members reported that they normally avoid using formal discovery and contested court hearings in Cooperative cases, though litigation sometimes can be a helpful resource in advancing a Cooperative negotiation process. In these cases, litigation procedures are the last resort and generally intended to advance the Cooperative process. For example, one lawyer said that a party may need the “reality therapy” of a temporary order hearing and then get right back to negotiate a permanent resolution. Survey respondents said that the use of litigation procedures in Cooperative cases usually does not prevent people from negotiating cooperatively.

Some respondents noted that using a Cooperative process can improve the quality of the litigation process if litigation is 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 often there is much more dialogue to develop a “mutual game plan” and to narrow the issues to be tried. As a result, hearings have been very satisfying experiences where both sides presented legitimate legal arguments and the process was not adversarial. One lawyer said that a Cooperative process formalizes how attorneys should practice law but too often don’t.

How Cooperative and Litigation-Oriented Processes Differ

Although a Cooperative process sometimes involves litigation procedures, DCI members sharply distinguished it from traditional litigation. In litigation-oriented practice, they saw the lawyers’ and parties’ mindsets as being quite varied, which makes it hard to know what to expect in many cases. Although lawyers in litigation-oriented cases sometimes act cooperatively by sharing information and negotiating reasonably, they cannot assume that they can trust the other side to act cooperatively or honestly. Because many parties and lawyers fear being exploited in litigation, both sides may feel compelled to take an adversarial posture to protect themselves. Thus, when lawyers and parties are in “litigation mode,” there is a significant risk of escalating the conflict.

DCI members believed that in Cooperative cases, the lawyers generally could be counted on to have positive mindsets and thus negotiate respectfully and in good faith. This mindset is built into the process as the reasonableness of the participants is a critical factor in determining whether to use a Cooperative process. Although DCI members said they appreciate negotiating with other DCI members, the vast majority of Cooperative lawyers said that they are willing to use a Cooperative process with lawyers who are not DCI members.

The differences in lawyers’ mindsets are reflected in differences in the DCI members’ accounts of procedures used. In litigation-oriented practice, the process is structured through litigation on an ad hoc basis. Lawyers often start by using unilaterally initiated litigation procedures instead of informal efforts to cooperate, such as voluntary exchanges of information or use of joint experts. DCI members said that four-way meetings are relatively rare and that parties’ participation and decision making may be quite limited. They said that in litigation-oriented cases, the process and results vary a lot, the time and expense are sometimes greater than necessary, and the parties’ satisfaction is sometimes lower than necessary. One lawyer said that in a traditional 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.

By contrast, in Cooperative cases, DCI members
generally reported that they begin with negotiation, employ mediation when they run into problems, and use litigation procedures as a last resort. They try to tailor the process to fit the needs of each case to make it as efficient as possible. DCI members said that the Cooperative process gives parties more “ownership” and creates a “culture of civility,” which “reduces the ‘heat’ of the case.” As a result, they believed that parties often are more satisfied with the process, outcome and efficiency.

**How Cooperative and Collaborative Processes Differ**

Cooperative and Collaborative processes are somewhat similar to each other, and about half the DCI members in the study offer both processes. In Collaborative practice (often called Collaborative Law) lawyers and parties sign a “participation agreement” establishing a negotiation process to produce a fair agreement for both parties. A “disqualification agreement” is an essential element of the participation agreement. It provides that if any party engages in contested litigation, all the lawyers are disqualified from representing the parties, who must hire new lawyers if they want legal representation.

The Collaborative movement has grown dramatically since it began in 1990. It has an international professional association and many local practice groups in the United States, Canada, and other countries. Collaborative practitioners have developed professional standards for trainers, practitioners, and Collaborative practice as well as detailed participation agreement protocols. Collaborative practice is used almost exclusively in family cases despite great efforts to use it in other types of cases.

Just as DCI members developed their Cooperative process as an alternative to litigation-oriented practice, they designed the process as an alternative to Collaborative practice as well. The study captured their perceptions of Collaborative practice in Wisconsin, which may differ from the process elsewhere.

DCI members generally saw the process in Collaborative cases as more predictable than in litigation-oriented cases. They generally believed that Collaborative lawyers have a positive mindset and that people can expect to be treated honestly and respectfully in Collaborative cases.

By contrast, some DCI members had a strong reaction against what they saw as an inflexible ideological view by many Collaborative practitioners about what are (and are not) appropriate negotiation practices. DCI members—including many who handle Collaborative cases—generally believed that the Collaborative process is too rigid and elaborate. DCI members said that the Collaborative process is done almost exclusively in four-way meetings, which were sometimes unnecessary or too long. Many said that the process often involved too many professionals such as coaches, financial experts, and child development experts and that the use of large teams of professionals sometimes diminishes the roles of parties and lawyers. DCI members said that when parties do not reach agreement in the Collaborative process, they typically do not use mediation.

DCI members differed in their views about the disqualification agreement. Some believed that it often promotes a good process whereas others thought that it can lead clients to fear that their lawyers will abandon them or that they will feel pressured to settle. One lawyer described a Collaborative case in which his client “went ballistic” in reaction to the other side’s proposal, but the disqualification agreement caused the client to make an extra effort to settle the case because the cost of failure was so large. On the other hand, some DCI members were concerned that the disqualification agreement would force lawyers to “abandon” clients when they need their lawyers the most, requiring them to incur the expense of educating a new lawyer. Some lawyers said that the disqualification agreement puts great pressure on parties, with one likening it to having an “anvil hanging over their head[s].”

DCI members generally saw Collaborative practice as an improvement over litigation-oriented practice in increasing parties’ satisfaction, especially with the outcomes. Many said, however, that it sometimes requires more time and money than necessary, which can reduce parties’ satisfaction with the process.

**Helping Parties Choose a Process**

One of the virtues of the ADR movement is that it offers parties a range of processes for handling their conflicts, and the experiences of DCI members suggest that Cooperative practice can be a beneficial tool for lawyers and parties. An important role for dispute resolution professionals (defined broadly to include public and private neutrals, lawyers, and court personnel) is to help parties choose a “forum” that they believe best “fits their fuss.” Although it is sometimes appropriate to manage a process primarily through litigation—such as when a party or lawyer is untrustworthy—it is often better to use an alternative that may be more constructive and efficient. For example, mediation has become very popular in recent
decades as it provides the advantage of having a neutral professional manage a negotiation process. Early neutral evaluation also employs a neutral, though the focus is on providing guidance about the legal merits and, if necessary, management of litigation.

In Collaborative family practice, the parties’ lawyers manage the negotiation process, which some parties may prefer because their lawyers provide legal advice and leadership in the process. The Collaborative movement has invested great resources into promoting high-quality service through development of practice protocols, educational materials and training for practitioners and parties, and professional continuing education requirements. The process is especially desirable for divorcing spouses who trust each other and who want a process with a highly developed protocol and ready access to a range of coaches, child development experts, and financial experts. It is appropriate for well-informed parties who believe that the benefits provided by the disqualification agreement outweigh the risks. The disqualification agreement clearly promotes productive negotiation in many cases, though it is not necessary or sufficient to promote collaboration. Some people struggle to collaborate even with a disqualification agreement, and many people negotiate quite well without one. David Hoffman, who is co-chair of the Section of Dispute Resolution’s Collaborative Law Committee and has handled cases with and without a disqualification agreement, argues that the “chemistry, intentions, and skill of the participants” are more critical to the success of a negotiation process than whether the parties use the disqualification agreement or not.

Parties may prefer a Cooperative process instead of 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 an event of an impasse, 4) fear that the other side would exploit the disqualification agreement to gain an advantage, or 5) fear getting stuck in a negotiation process because of financial or other pressures. In addition to concerns about the disqualification agreement, parties may want an alternative to Collaborative practice if they want to tailor the process differently from local Collaborative practice norms in their area. For example, in some areas, parties cannot use a Collaborative process if they do not want to work almost exclusively in four-way meetings or if the opposing counsel has not been trained in Collaborative law. Parties in nonfamily cases may be especially interested in a Cooperative process because parties in those cases generally are less willing to risk losing their lawyers if they cannot reach a settlement.

Lawyers who want to do Cooperative practice may consider DCI’s procedures, which can be adapted for almost any kind of case. Cooperative practice may be particularly appropriate when the lawyers have worked well together in the past. Lawyers can convene a four-way meeting early in the case to jointly identify issues, exchange information, and plan how to handle the case in the future. They may also organize practice groups to develop practice norms and help lawyers develop reputations for cooperation.

Cooperative practice, like all dispute resolution processes, is not appropriate in all cases, but it can be the best process for some parties. When dispute resolution professionals help parties choose a dispute resolution option, a Cooperative process should be on the list of alternatives they consider.

Endnotes
3. See Divorce Cooperation Institute, cooperativedivorce.org.
4. This study is based on in-depth interviews and surveys of DCI members conducted in 2007. See John Lande, Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin, 2008 J. Disp. Resol. 203. This article is adapted from that study. The study and other information about Cooperative practice can be downloaded at www.law.missouri.edu/lande/publications.html#cdc.
5. For the full version of the principles, see cooperativedivorce.org/about/principles-cfm.
6. In the overall Collaborative movement, there are some variations in practice models, particularly between practice communities, but also within them to some extent. Even so, there are concerns within the movement about whether there is orthodoxy regarding terminology and procedure.
8. Collaborative law is a form of limited-scope representation because the disqualification agreement precludes lawyers from representing clients in litigation. Under the Model Rules of Professional Conduct, “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Model Rules of Prof’l Conduct R. 1.2(c) (2007). Thus before undertaking a Collaborative representation, lawyers must determine whether the process is reasonable for their clients and obtain their informed consent. The Model Rules define informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct.” Ed. R. 1.0(c). See also John Lande & Forrest S. Mosten, Collaborative Lawyers’ Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients’ Informed Consent to Use Collaborative Law (unpublished manuscript). In this respect, Collaborative law is different from traditional lawyering because it is not clear whether lawyers are generally required to advise clients about ADR options. See Marshall J. Breger, Should an Attorney Be Required to Advise a Client of ADR Options?, 13 Geo. J. LEGAL ETHICS 427, 428–31, 433–36 (2000).