



Cooperative Practice: Another Tool for the Effective Lawyer's Practice

Dispute resolution processes, such as formal mediation, using Rule 114 qualified mediators, civil arbitration, collaborative law, and now cooperative law, have gained favor over the past two decades, prompted in large part by the scarcity of judicial resources and the high cost, both emotionally and financially, of litigation. While cooperative law is easily applied to family law cases, other civil cases may also benefit from its application.

Cooperative Practice incorporates a process by which attorneys and their clients enter into a formal agreement to cooperate toward reaching a resolution of issues. Though the terms can vary, parties and their counsel agree to negotiate in good faith, readily disclose relevant information, use jointly retained experts, and either refrain from formal discovery or limit the scope of formal discovery to disputed issues. If litigation is necessary, it is used sparingly and surgically, meaning the parties make as many agreements as they can to narrow the disputed issues for the judiciary.

The idea of narrowing issues for the judiciary is not new. Most experienced attorneys engage in some level of Cooperative Practice for the majority of their cases. In a more traditional litigation model, clients may, however, feel left out of the process and become frustrated with their lack of choice or control over how to gather information and ultimately reach a resolution. Cooperative Practice gives clients an opportunity to participate actively in the litigation process.

Active participation by clients is also key to the Collaborative Law movement, which is why Cooperative Practice translates well

when dealing with collaborative attorneys who are accustomed to the Collaborative Law model of practice. The cooperative method of engaging clients also works well when the attorneys on a case are unfamiliar with each other or somewhat inexperienced in their practice. Even when attorneys know each other and work well together, cooperative agreements still provide an extra aid in the progress of the case toward resolution. Generally speaking, attorneys engaging in Cooperative Practice do not make assumptions about each other based on their previous experience or existing relationship. The use of the cooperative process offers several advantages over a more traditional process.

ADVANTAGES OF COOPERATIVE PRACTICE

There are three primary advantages of Cooperative Practice: (1) client involvement; (2) court intervention; and (3) cost-effectiveness.

First, Cooperative Practice has the advantage of strong client involvement. The Cooperative Practice process is initiated at the outset of a case because clients are more likely to engage in and take ownership in resolving their case at its early stages as opposed to when they are in the middle of heated negotiations in the later stages of litigation. Clients involved from the beginning are more apt to provide information and offer alternatives throughout the process, which makes negotiations more meaningful.

After some initial negotiations, face-to-face meetings are necessary. Instead of frequent

meetings in person, parties and attorneys may agree to meet on occasion, but to share information electronically, thereby streamlining the process because everyone has the same access to the same information at the same time. Once relevant information is shared, negotiations may once again commence with an eye toward an efficient outcome. Breakdowns in negotiations are sometimes unavoidable, but the cooperative agreement itself can provide a "cooling off" period for emotions to settle, for a mediator or neutral evaluator to be retained, or, if both parties agree, for filing the case in court.

Second, one of the chief benefits of Cooperative Practice as compared to Collaborative Law is that the cooperative model empowers attorneys to seek court intervention rather than withdrawing when



Lisa Kallemeyn
Contributing Author

Ms. Kallemeyn has been practicing matrimonial and family law exclusively since 1994. Her practice emphasizes cooperative resolution to family law issues. Also, she is a qualified mediator under Rule 114 of the Minnesota Rules of Practice.

it becomes necessary to involve the court. Court intervention is not seen as a failure of the process itself. This is important because, especially in marriage dissolutions, parties may not be in the same emotional place and may need some prodding, if not from counsel, then from the court. The cooperative protocols allow the parties to set timelines and limits while using every tool available in a cost-effective manner.

Thirdly, and consistent with what has been previously referenced, Cooperative Practice is advantageous because it is cost-effective. The Cooperative Practice agreement can specifically include the use of private evaluators or mediators, and can specify the extent to which each professional is used. Mediation and arbitration, therefore, are welcome tools in this process. With fewer clients able to afford private professionals, the cooperative process can further reduce costs if both attorneys are also trained mediators and are dedicated from the outset to efficiently resolve the matter. Attorneys who wish to engage this cooperative process can follow some simple steps to initiate and formalize the process.

STEPS FOR THE COOPERATIVE PROCESS

An attorney should first assess a case to determine whether it is suitable for the cooperative process and, if so, explain the process to the client. If the client is interested, the attorney should then discuss the process with opposing counsel. If all attorneys and clients are agreeable to participate in the cooperative process, an agreement outlining the process should be drafted, discussed, and signed. After that, information sharing and negotiations may commence.

Suitability

Most cases will benefit from dedicated use of the cooperative process. Some cases, however, are not right for Cooperative Practice. For example, those cases involving severe domestic abuse, chemical abuse, severe mental health problems, or criminal allegations may not translate well into the formal cooperative process. Attorneys should screen for these issues and advise clients for or against the process accordingly.

Explain Options to Client

If an attorney feels a case may be right for the cooperative process, he or she should explain the pros and the cons of the process to the client and indicate that, in general, the cooperative process does mean that clients may end up doing more work on their case than in a general process. The Center for Principled Practice in Cleveland has found that empowering clients with the option to participate in the cooperative process drives their behavior and sets the tone for the case. Clients who are more engaged are more likely to be satisfied with the outcome.

Explore Possibility of Cooperative Process with Opposing Counsel

If all parties and counsel agree to the cooperative process, the next step is for the attorneys to meet and set parameters for the process. At a minimum, these parameters should include information sharing, an outline of the issues and ideas for negotiating, and an agenda for a four-way meeting with the parties. A written agreement, if used, should be drafted and signed at or before the time of the four-way meeting.

Agreement

It is largely up to the attorneys and their clients to determine how the process should progress. The written agreement is essentially their road map throughout this cooperative process. Attorneys and parties may agree, for example, to exchange information informally in an effort to save time and money. They may also agree to copy attorneys and clients on all electronic correspondences and document transmissions to ensure that everyone has the same level of access to relevant information. Moreover, attorneys may agree to contact their clients regarding the status of the case on a regular basis as defined by the agreement. They may also agree to identify the major issues requiring the most attention in the written agreement.

A sample of a proposed agreement is available at CooperativePracticeMinnesota.com. At a minimum, the agreement should require that attorneys and parties:

- conduct themselves in a civil manner,
- respond promptly to reasonable information requests,

- disclose all relevant information,
- use joint experts wherever possible, and
- use negotiation sessions to move the case forward with the good faith intent of progressing efficiently toward settlement.

The written agreement in Cooperative Practice has many similarities to written agreements used within the Collaborative Law model. Additionally, the Cooperative Practice agreement memorializes how many attorneys already conduct themselves when litigating.

DISTINCTION BETWEEN COOPERATIVE PRACTICE, LITIGATION, AND COLLABORATIVE LAW

Collaborative Law and Litigation Practice are at opposite ends of the spectrum. Cooperative Practice seeks to use the best of both models. Litigation is approached from the very beginning with a viewpoint that litigation is inevitable. Collaborative Law takes a drastically different approach, especially at the end of its process, where use of the court system is avoided at all costs. It is significant to note, however, that even when litigation is the approach taken, the vast majority of cases are resolved in whole or in part prior to significant judicial intervention.

Attorneys may wonder why they need a formal process like Cooperative Practice to essentially do what they do anyway. Some argue that most litigated cases already settle outside of court order or trial, as most attorneys are skilled negotiators. In response to this criticism, Cooperative Practice serves an important role in the practice of law because it saves a significant amount of resources that are often wasted in unnecessary discovery or posturing during the course of litigation.

Litigation

The Cooperative Practice process requires an agreement, which may be written or verbal. A written contract is preferred. The agreement can expressly limit, though not exclude, the use of litigation. Executing the agreement at the

onset of the case sets a more conciliatory tone to the case. The rules for proceedings should be clearly defined in the agreement and tailored to each individual case and clients' needs. For example, though at least one four-way conference is preferred, counsel and clients may decide to communicate electronically in a multiple-level exchange, which may, under the terms of the cooperative agreement, permit the direct sharing of information between an attorney and the opposing client. Obviously, a written agreement is needed so that everyone understands the scope and limits of information sharing. Permitting this sort of streamlined information sharing implies a respect for clients and attorneys that also contributes to creating a conciliatory tone in the process.

However, even when such respect exists, judicial input may be desired, or required, on occasion to move the case toward resolution. In such a circumstance, the parties and attorneys may agree to move the case into the court system. The court system is not avoided to the same extent in the Collaborative Law process, whose clients in that process sign an agreement that they will discharge their

Collaborative Law attorney if they need to engage the court system.


As Distinguished from Collaborative Law

The Cooperative Practice model requires a formal agreement and, at some point, a four-way conference. The agreement can be as flexible as necessary to meet the needs of the clients and can include a mediation clause. Cooperative Practice attorneys themselves are not required to complete mediation training. The process, therefore, may be implemented by any attorney who wants to use it. Use of the process does not require membership in an organized practice group; there are no dues, and there are no formal continuing education requirements. Practitioners instead commit to representing their clients regardless of whether the case proceeds with or without court intervention.

There is no disqualification clause. The disqualification clause is a key component of Collaborative Law because it keeps everyone engaged in the process; attorneys are precluded from representing their clients in the court system should negotiations

prove unsuccessful. While this clause may work well for individuals who trust each other and desire a well-developed protocol with access to high-quality professionals to help them, for those who do not completely trust the other party, cannot afford neutral professionals, and cannot afford to hire a new attorney in the event court intervention becomes necessary, the Cooperative Practice model is an attractive alternative. The presence of a disqualification clause can sometimes keep parties from meeting their goals. For example, one unreasonable party in a Collaborative Law case could hold the threat of disqualification as a way of gaining an advantage in the negotiations. The individual least able to afford a new attorney to review and engage in litigation may feel that the option to use the court system is unnecessarily limited.

Of course, sometimes issues arise that are a natural outgrowth of the underlying issue and may not be due to the inflexibility of one party. This is worth emphasizing because there also may be genuine differences of opinion or of material fact, or one client may be psychologically unable to move from his



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or her position without court intervention. Judicial officers, as ultimate arbiters of court cases, are valuable resources, and the Cooperative Practice model recognizes this.

Because the use of the court system is not seen as a failure, the Cooperative Practice model does not require a disqualification clause. The court system itself offers resources such as telephone conferences, early neutral evaluations, and formal court hearings. Cooperative Practice allows attorneys to choose in advance which, if any, court resources would best serve the needs of the clients. While use of the court system is not preferred, attorneys understand that some client issues can be most easily resolved through the use of formal litigation.

The understanding behind the Cooperative Practice model, however, is that the court resource is used only for issues that cannot be resolved through negotiation. The court system is used selectively and efficiently. In today's tough economic times, good attorneys can offer their clients a choice between

litigation and two resolution-based processes, one that enables the attorneys to use the court system and one that does not.

The selective use of the court system, or at least its availability, largely contributed to the speedy resolution of the first case in which I used a Cooperative Practice model.

ONE COOPERATIVE PRACTICE EXPERIENCE

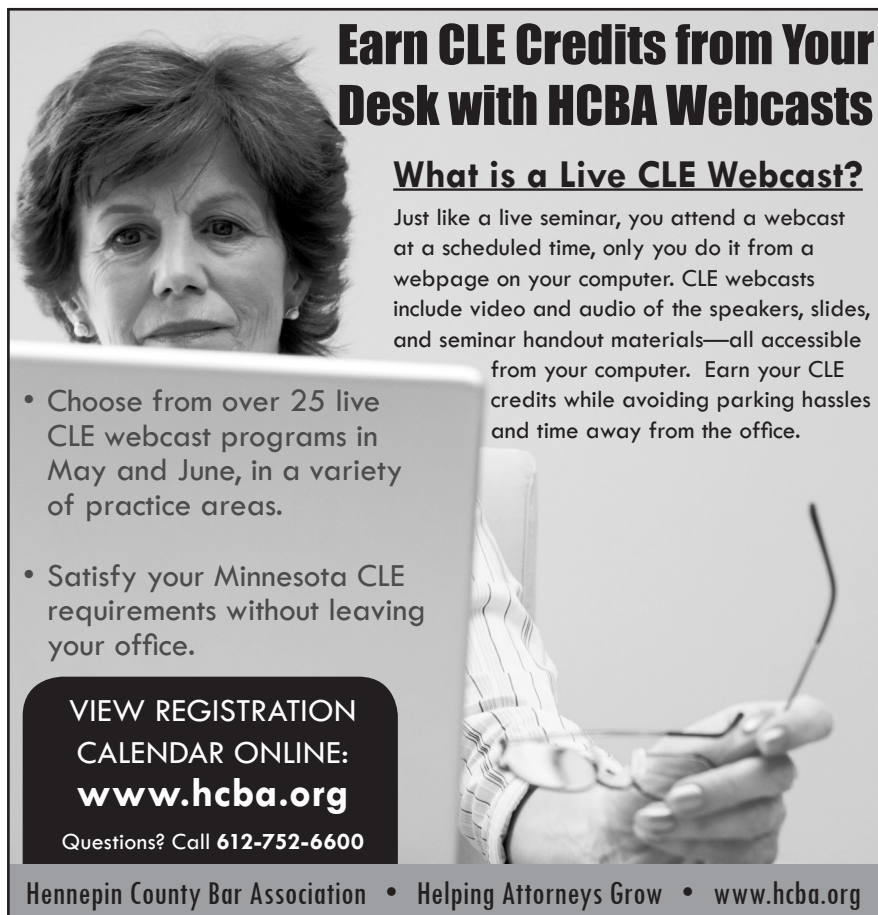
A client came to me after seeking a dissolution of his 18-year marriage. The client and the client's spouse had no children and both had worked to varying degrees throughout the marriage. The client's wife had kept up her professional license but was employed elsewhere, earning substantially less than her ability. The parties had reached this agreement as to their employment situation approximately 10 years into their marriage because my client's income adequately provided for both of their needs. This client had a substantial nonmarital interest in the homestead and a new girlfriend. He was

clearly ready to proceed with a dissolution of the marriage. He also expressed concern about his wife and her ability to earn a living should she choose not to again be employed in her profession. He did not want to pay her spousal maintenance and he wanted to guard his nonmarital interest in the homestead, but he also wanted to be "fair" to his spouse.

Of course, the litigious manner of handling this file would have been to file the case with the court and take the position that marital property was divided equally, that my client's nonmarital interest was his alone, and that his wife was well able to support herself. A vocational evaluation would have been a necessary component to this position. We were well on our way toward quickly filing the case with the court and waiting for a judicial assignment and an order setting an initial case management conference.

Prior to our filing, however, my client's wife hired an attorney. I approached that attorney about the Cooperative Practice process. We held a four-way conference to discuss the possibility of an agreement to work cooperatively. Prior to the conference, we e-mailed basic documents and asset information back and forth, so we each came prepared for the conference with a spreadsheet and a proposal for proceeding. My client was eager to move forward with the basic spreadsheet and the understanding that his wife could return to her profession with ease. His wife was adamant about not returning to her licensed profession but was frustratingly vague as to why not. She was able to understand the idea of "potential income" and the tracing of my client's nonmarital interest in the homestead. However, these concepts were difficult for her to accept because she still did not want to be divorced. The only issue she was adamant about was that she would not return to her profession even if it meant her earning lower income. In sum, she still hoped to reconcile.

My client was much further along in the "emotional divorce" aspect than his wife. Reconciliation was not possible. However, together, the parties worked out a plan for my client's wife to remain in the homestead for two weeks while he moved out so that she could slowly remove furniture and other 18-year accumulations of personal property without interference from him.



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I would *never* have advised a client to voluntarily leave the homestead but for the fact that I knew and trusted the other attorney and we had agreed to give the cooperative process a try. The plan was successful; my client's wife did remain in the homestead for an additional week with my client's consent, but otherwise the separation process went smoothly. She had left the homestead by the date certain and my client was eager to resolve the potential spousal maintenance and nonmarital property issues. We put forth a tentative offer on those issues and looked forward to another settlement conference.

Unfortunately, the settlement conference had to be canceled because my client's wife had a family tragedy. In a frank discussion with opposing counsel, we agreed to give my client's wife some additional time, with a "drop dead" deadline, after which time I would file the petition with the court. The jurisdiction of the dissolution action would then have required the parties to proceed with an initial case management conference and an early neutral evaluation (ENE).

I want to stress, however, that the wife's attorney was acting entirely in her best interest. My client was willing to be fairly generous in the dissolution action so long as this case was resolved quickly. Both attorneys understood that his patience would not last, and that the tentative offer might disappear at any time.

For my client's part, he understood that after a lengthy court process and a vocational evaluation, he would end up in a more favorable financial position. However, he did not want to spend the next nine months in divorce court, felt guilty for ending the marriage, and did not want to pay for a vocational evaluation if he could avoid it. With the deadline looming, we engaged in a settlement conference and had a complete agreement to file with the court. The divorce was final two weeks later.

Had my client or I insisted on filing the case in October, it is unlikely that the case would have been settled by January. The ENE process would probably have been completed with no resolution since the wife simply was not ready for the divorce to be finalized, and we would in all likelihood

have been looking at a March pretrial date, a vocational evaluation, and an accountant to trace the nonmarital asset.

Instead, both clients knew what was expected of them and what to expect of their attorneys and the timeline for meeting those expectations. In my case, it translated into a happier client because he knew why we were waiting to file and that we would not wait forever. Information was shared at the final conference in a manner that let me encourage settlement in a respectful fashion. The clients needed only to continue to cooperate to divide retirement accounts.

MOVING BEYOND THIS ARTICLE

Nationwide Practice

The goal of the Cooperative Practice movement is to develop a standard cooperative agreement and protocols that are easily accessible to all attorneys in a practice community. There is a local group forming but this is a national concept that has touched areas such as Wisconsin, Boston, Missouri, Texas, Washington state, Florida, Ohio, New York, and Indiana.

Wisconsin lawyers, for example, use the Cooperative Practice process in and around Milwaukee and have identified that the four-way meeting is key to implementing this process. The clients need to see for themselves that their attorneys respect and trust each other and, for the attorney's part, that the "other side" has a face and an interest that may not necessarily be directly adverse to his or her client's. Wisconsin has found what I have found: litigation can be helpful to advance the process but does not prevent the continuation of the cooperative process.

Even when cases have to be tried, the cooperative process helps attorneys and judges by encouraging a dialogue for a "game plan" and a narrowing of issues. Both sides in these types of trials report being satisfied with the process; one attorney notes that the process "formalizes how attorneys should practice law but too often don't." (*Learning from 'Cooperative' Negotiators in Wisconsin*, John Lande, *Dispute Resolution Magazine*, Volume 15, Number 2, Winter 2009.)

Application Beyond Family Law

Though Cooperative Practice is extremely applicable to family law, where practitioners and counselors should be attempting to make families better first and foremost, it also has a general application to other civil cases. Intuitively, a more general civil component could also provide another alternative to the Collaborative Law model because in Cooperative Practice civil attorneys would not have to risk losing potentially significant trial retainers to another firm or risk investing in extensive negotiations on a contingency fee case. The application of Cooperative Practice to the general civil process is in its infancy, but attorneys interested in cooperating by formal agreement, without limitation to their litigation rights, should further explore and experiment with implementing the process.

Website

There is a website for the Minnesota Cooperative Practice movement at CooperativePracticeMinnesota.com. For attorneys interested in learning more, this website offers a list of other attorneys interested in Cooperative Practice as well as updated forms and links to websites around the country.

CONCLUSION

Minnesota has a reputation for being somewhat novel in its use of alternative dispute resolution processes. For example, the Early Case Management process is respected throughout the country and the Collaborative Law movement has gained its true momentum here. Now, there is another process that is emerging and gaining support: the Cooperative Practice process. A local informal group is putting Minnesota at the forefront of this evolving process. Attorneys who are invested in making a Cooperative Practice model work will be offering a valuable service to their clients while also preserving judicial resources. 