

Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law

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What is Cooperative Law?

Cooperative Law (or Cooperative Negotiation or Cooperative Practice) involves an explicit agreement – a “participation agreement” – by lawyers and parties setting out a negotiation process. These agreements vary and may include terms providing for extensive participation by the parties, confidentiality, sharing of all relevant information, negotiation in good faith, and use of an interest-based approach to negotiation. The process generally begins before the parties file a lawsuit or perhaps soon after. The participation agreement may provide for 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 and avoid tactics that would unnecessarily aggravate the conflict. Although Cooperative Law can be used for almost any kind of issue, this article focuses on family law cases.

In Cooperative Law, the lawyers may tell clients something like the following:

From our experience, we know that in some cases, people have difficult disagreements and feel angry or threatened and are tempted to respond by escalating the conflict and resorting to litigation. Although sometimes trial is the only or best method to resolve conflicts, usually negotiation is better – and almost all cases get settled sooner or later anyway. So if and when we have a tough disagreement in your case, both lawyers are going to work together using a checklist of techniques to deal with negotiation impasses to make sure that we have tried absolutely everything possible to negotiate an appropriate resolution. Although we could represent you in litigation after a real impasse, we will not take any legal action for thirty days as a cooling-off period, except in a real emergency. If we represent you in litigation, we would be committed to focusing solely on the merits of the issues and avoiding tactics that would unnecessarily aggravate the conflict. You would be free to hire other, more adversarial, lawyers if you want, though if one of you does so, the other is likely to do the same and you will probably escalate the conflict, dramatically increase the costs, and cause emotional harm to yourselves and your family.

Cooperative Law is similar to Collaborative Law except that Cooperative Law does not include 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 even threatens litigation), the Collaborative Law process must end. All of the Collaborative Lawyers are disqualified from representing the parties, who must hire new lawyers if they want legal representation. The disqualification agreement effectively gives each party the power to fire the other party’s Collaborative Lawyer.

What Cooperative Law is Not

Cooperative Law is *not* when lawyers negotiate cooperatively on an ad hoc basis within the context of ongoing litigation. Such ad hoc cooperation may involve informally sharing information, using a single expert, and being reasonable in negotiation. In Cooperative Law, the lawyers and parties make an explicit agreement establishing a negotiation process, typically focusing exclusively on negotiation before litigation begins (or suspending litigation during negotiation). Thus it is wrong to suggest that there is no difference between Cooperative Law and traditional negotiation. Although it is good when lawyers negotiate cooperatively on an ad hoc basis, it is not “Cooperative Law.”

To see the difference for yourself, take a look at Cooperative process agreements that David Hoffman uses, at <http://www.bostonlawcollaborative.com/resources/forms-statutes-rules-and-articles/collaborative-law-forms.html>, or ones from the Mid-Missouri Collaborative and Cooperative Law Association at <http://www.mmcla.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 Collaborative Law Groups Should Encourage Members to Provide Both Collaborative Law and Cooperative Law

Although some divorcing couples may prefer Collaborative Law, others may prefer Cooperative Law. Couples may want to use Cooperative Law because they want to engage in a respectful interest-based negotiation and also retain the option of keeping the same lawyers if they need to go to court. Retaining that option can help parties resist pressure to reach agreements that they believe would not be in the best interest of themselves or their families.

By offering clients a choice of Collaborative or Cooperative Law, lawyers can help clients make a more informed choice about which process to use. Even clients who ultimately choose Collaborative Law would benefit by knowingly choosing that procedure after considering the possibility of using Cooperative Law.

Professionals working with divorcing families can assist people to make wise choices by helping them understand their own capabilities, attitudes about professional services, and assessments of and preferences about the benefits and risks of various procedures. (For an analysis of these factors, see John Lande & Gregg Herman, Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases, 42 Family Court Review 280 (2004), available at <http://www.law.missouri.edu/lande/publications.htm#ccl>.)

Collaborative lawyers could also benefit by providing Cooperative Law services in appropriate cases. The disqualification agreement can serve as a crutch in getting parties to settle. Some Collaborative lawyers may rely on it too much to reach agreement and fail to use the full range of available problem-solving techniques. Thus, by providing Cooperative Law, Collaborative lawyers can practice problem-solving techniques and learn to resist habitual impulses to litigate or threaten litigation.

Conclusion

Lawyers and parties would generally benefit if members of Collaborative Law groups offer clients the choice of Collaborative or Cooperative Law. Offering clients this option would be appropriate unless the vast majority of lawyers in a Collaborative Law group cannot promote problem-solving negotiation without a disqualification agreement.

Additional Resources

For suggestions about breaking impasse (including a bibliography), see an article by Paula Young at <http://www.mediate.com/articles/young13.cfm>.

For more information, including copies of articles that can be downloaded, see <http://www.law.missouri.edu/lande/publications.htm#ccl>.

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