

Wisconsin Lawyers Use “Cooperative Practice” in Divorce Cases

John Lande

University of Missouri School of Law

What can you do if, as a lawyer, you want to negotiate a divorce cooperatively from the outset of a case? The Divorce Cooperation Institute (DCI), an organization of more than 70 Wisconsin lawyers, has established a general process to provide a cooperative and efficient negotiation process to improve the quality of divorce by using cooperative negotiation whenever appropriate. This article summarizes the results of a study of DCI involving in-depth telephone interviews and several surveys of DCI members. (DCI also sponsors educational programs and offers practice tools to improve divorce practice generally, though this article focuses on its negotiation practices.)

DCI’s approach generally involves an explicit process agreement at the outset, which may be written or oral. The agreement 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, (5) obtaining expert input before requesting a custody study or appointment of a guardian ad litem, and (5) good-faith negotiation sessions, including four-way sessions where appropriate, to reach fair compromises based on valid information. (For the full version of DCI’s principles, see its website at <http://cooperativedivorce.org/about/principles.cfm>.) When the parties reach an impasse, many Cooperative lawyers turn to mediation as the next resort.

Although many divorce lawyers negotiate cooperatively at times, DCI members say that an established Cooperative Practice provides greater predictability and confidence. They find that DCI has created a legal culture where cooperation is the norm in Cooperative cases. Traditional litigation-oriented practice normally does not involve an explicit process agreement and is not based on a pre-established set of negotiation principles. Although DCI members sometimes use litigation procedures (such as formal discovery or contested hearings) in Cooperative cases, they are the last resort and generally intended to advance the Cooperative process. For example, one lawyer said that a party may need some “reality therapy” of hearing from a judge at a temporary order hearing and then get right back to negotiation for the permanent resolution. Thus DCI members retain the option of using the court as a resource in advancing a Cooperative negotiation process. The Cooperative process can also improve the quality of litigation when contested hearings are needed. One lawyer said that when there are trials or hearings in a Cooperative cases, the dynamics tend to be more cooperative than in litigation-oriented cases. She said that in Cooperative cases there is often much more dialogue to develop a “mutual game plan” and to narrow the issues to be tried. Instead, the hearings have been very satisfying experiences where both sides presented good legal arguments about genuine differences of opinion and the hearings have not been personal or adversarial.

Cooperative Practice differs from Collaborative Practice in that Cooperative Practice does not involve a disqualification agreement and thus Cooperative lawyers are not disqualified from representing clients in litigation if needed. About half of DCI members use Collaborative Practice in some cases because they believe that the disqualification agreement can contribute to a positive negotiation process. About half of DCI members do not use Collaborative Practice, concerned that the disqualification agreement causes parties to fear that their lawyers will abandon them and put pressure on them in negotiations. Some are concerned that Collaborative Practice generally violates legal ethics rules. Virtually all of the DCI lawyers in the study believe that Collaborative Practice is not appropriate in cases involving serious domestic abuse. (Tables comparing DCI members' perceptions of litigation-oriented, Cooperative, and Collaborative Practice are included below.)

DCI members value Cooperative Practice because they can tailor the process to the parties' needs. In Cooperative cases, lawyers use many of the same elements as in Collaborative Practice – such as four-way meetings, joint experts, and individual coaches. Many DCI members – including many who use Collaborative Practice – find Collaborative process in Wisconsin to be relatively formal and standardized and believe that it sometimes involves more of these elements than needed. DCI members report using process elements only as needed in Cooperative cases and thus they believe that the process generally produces good outcomes for families as efficiently as possible.

This study suggests that when parties want to negotiate cooperatively through lawyers, they should consider options including both Collaborative and Cooperative Practice. Collaborative Practice may be particularly appropriate when well-informed parties need or want a disqualification agreement to negotiate collaboratively. It is not appropriate in all cases, however, and some parties and lawyers may want a negotiation process with access to the legal system that does not necessarily terminate the Cooperative process. Cooperative Practice may be appropriate when parties want to cooperate but at least one of them does not want to use a Collaborative process because of the disqualification agreement. Parties also may prefer Cooperative Practice 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 event of an impasse, (4) fear that the other side would exploit the disqualification agreement to gain an advantage, (5) fear getting stuck in a negotiation process because of financial or other pressures, and/or (6) have a history of domestic abuse.

In addition to concerns about the disqualification agreement, parties and lawyers may want an alternative to Collaborative Practice if they want to tailor the process to their needs 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.

Lawyers who want to do Cooperative Practice may use or adapt DCI's procedures. Although DCI uses this process for divorce cases, the procedures can be adapted for almost any other kind of case. Lawyers can do so on an ad hoc basis and/or by organizing a group of like-minded practitioners. Cooperative Practice may be particularly appropriate when the lawyers have worked together cooperatively in the past and trust each other. If appropriate, the lawyers might 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. Lawyers may also organize practice groups to promote Cooperative Practice. Such groups can help develop practice norms and procedures and help lawyers develop reputations for cooperation.

The complete results of the study are in "Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin," 2008 Journal of Dispute Resolution 203. To download a copy of this article and more information about Cooperative Practice, including other models, see <http://www.law.missouri.edu/lande/publications.htm#ccl>.

DCI Members' General Perceptions of **Lawyers' and Parties' Mindsets** in Litigation-Oriented, Cooperative, and Collaborative Practice

	Litigation-Oriented	Cooperative	Collaborative
Lawyers' goals	protect client's interests, which may involve an agreement on as favorable terms as possible	cooperative, flexible, and fair negotiation process based on valid information and client decision-making	reach fair agreement satisfying each party's needs, using standard and elaborate process
Expectation that lawyers be trained in the process	none, other than normal legal training	no requirement; many trained in mediation and/or Collaborative Practice	requirement or expectation of being part of a Collaborative group
Expectations about other lawyer's and party's mindset	varies widely	for case to be appropriate, both sides must have positive mindset	for case to be appropriate, must have great trust in other side because of risk of disqualification
Fear of exploitation by other side	varies and may be substantial	relatively low	relatively low
Trust in and respectful treatment of other side	varies and may be quite limited	normal	normal
Effect of engaging in litigation procedures	serious risk of escalating conflict	usually does not prevent cooperative negotiation	not applicable because litigation procedures are not permitted

DCI Members' General Perceptions of the **Process Used** in Litigation-Oriented, Cooperative, and Collaborative Practice

	Litigation-Oriented	Cooperative	Collaborative
Use of participation agreement	almost never	usually explicit oral agreement, sometimes written	always very detailed written agreement
Disqualification agreement	not applicable	not applicable	varying views: some see it as contributing to positive process; others believe it can cause clients to fear that their lawyers will abandon them or put pressure on negotiations
Use of four-way meetings	rare but increasingly used	common, but frequency and length vary depending on the case	almost all substantive activity occurs in four-way meetings; sometimes too many or too long
Voluntary and informal information sharing	varies and sometimes limited	share all relevant financial information	obligation to initiate disclosure of wide range of information at outset of case
Use of joint experts	occasional	normal, as needed	normal – and sometimes excessive use of experts
Use of formal discovery	varies but often the first approach	varies but <u>not</u> the first approach	no formal discovery
Use of mediator in case of serious impasse	varies	often assumed that mediator would be used	unusual because parties doubt that they can negotiate successfully
Use of court hearings during divorce process	normal	only when needed; sometimes with goal of promoting cooperative negotiation	never

Decision-making by parties	varies substantially	substantial and tailored to the parties' situations	substantial; sometimes parties are overwhelmed by professionals' opinions
Appropriateness for cases involving serious domestic abuse	may be only appropriate option, though may aggravate conflict	sometimes appropriate	almost never appropriate

DCI Members' General Perceptions of **Outcomes** in Traditional, Cooperative, and Collaborative Practice

	Traditional	Cooperative	Collaborative
Time and expense of the process	often substantially higher than necessary	as reasonable as possible	sometimes higher than necessary
Parties' satisfaction with the <u>process</u>	varies, but may be lower than necessary	generally high	generally high, though some frustration with nature, time, and expense of process
Parties' satisfaction with the <u>outcome</u>	varies, but may be lower than necessary	generally high	generally high