

Why and How Lawyers Should Use a Planned Cooperative Negotiation Process

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Since many lawyers cooperate when they negotiate, some may wonder whether there would be any value in using a more formal, planned negotiation process. You can distinguish “big-c” (“Cooperative”) processes that have explicit negotiation agreements and “little-c” (“cooperative”) practice where lawyers cooperate informally on an ad hoc basis. There are many advantages to using a big-c Cooperative process in appropriate cases.

1. A Cooperative process is likely to be more explicit, systematic, and thorough. A written Cooperative negotiation agreement can include more detailed provisions than people are likely to use in an informal cooperative process.
2. A Cooperative process provides more legitimacy by having a proper name.
3. A written Cooperative agreement is a useful symbol of commitment to cooperate in negotiation – and it may promote commitment to cooperate. Parties can use explicit oral negotiation agreements, though written agreements can provide more legitimacy and detail.
4. A Cooperative process is more likely to begin at the outset of a case. Lawyers sometimes focus on cooperative negotiation only after a case is well under way.
5. A Cooperative process is more likely to engage the parties more directly in negotiation when appropriate.
6. A formal Cooperative process can help with problems in negotiation. This may be especially helpful when dealing with less-experienced lawyers or those who struggle with diligently representing clients in a cooperative way. A Cooperative negotiation agreement can provide that when parties reach an apparent impasse, they would have a “cooling off” period and engage a mediator or neutral evaluator before they take the issue to court.
7. Having a local group develop a standard Cooperative agreement and protocol may help socialize lawyers in a practice community. The process of developing a standard local Cooperative agreement may in itself promote more commitment to using a Cooperative process if it reflects the local practice culture and enables lawyers to feel more “buy in.” Any “standard” agreement can be modified in particular cases to reflect the parties’ needs.
8. Lawyers doing Cooperative negotiation may develop protocols for some processes, such as checklists for initial consultations with clients and initial conversations between lawyers to orchestrate the process. Lawyers using a Cooperative process may wish to adapt selected protocols developed by Collaborative lawyers.

How Lawyers Conduct a Cooperative Negotiation Process

1. Assess the appropriateness of a case for Cooperative negotiation
 - a. Appropriateness is based on whether the lawyers and parties want to cooperate to reach a reasonable resolution and whether there are problems that would seriously undermine the parties' ability to negotiate with confidence (e.g., serious fraud, domestic abuse, mental health problems, or substance abuse).
2. If you think that a Cooperative negotiation process might be appropriate, discuss this (and other dispute resolution processes) with your client to see what process the client wants to use.
3. If your client wants to use a Cooperative negotiation process, contact the other lawyer and see if the other side is open to using it.
4. If the other side wants to use a Cooperative process, plan the process with the other lawyer. This conversation should cover the substantive concerns of each party, procedural plans, potential problems in the negotiation, ideas for making the negotiation work successfully, and an agenda for a meeting with the parties. If you are going to use a written negotiation agreement, review the agreement together.
5. Convene a "four-way" meeting with the lawyers and parties to discuss the case. (You do not need to commit to Cooperative negotiation in advance; you can meet and see how that meeting goes before deciding whether to use a formal.) During the meeting, the lawyers and parties
 - a. identify issues to be resolved
 - b. plan to exchange information
 - c. jointly plan the process, e.g., hiring experts, scheduling negotiation sessions
 - d. possibly agree to a "cooling off" period (e.g., 10-30 days) if you get "stuck" and plan to use a mediator or neutral evaluator to help get unstuck
6. Continue negotiating as appropriate. This may include some combination of additional four-way meetings, conversations just between lawyers, and conversations just between parties.
7. If needed, use litigation procedures such as limited discovery or court hearings. If you use litigation procedures, focus solely on the merits of the issues and avoid tactics that would unnecessarily aggravate the conflict. Resume negotiation as soon as appropriate.

For model Cooperative agreements, see:

Boston Law Collaborative:

<http://www.bostonlawcollaborative.com/blc/resources/forms-statutes-rules-and-articles/collaborative-law-forms.html?branch=main&language=default>

Divorce Cooperation Institute:

<http://cooperativedivorce.org/members/cdagreement04.pdf>

Mid-Missouri Collaborative and Cooperative Law Association:

<http://www.mmcla.org/forms/>

For more information about Cooperative Practice, see:

<http://www.law.missouri.edu/lande/publications.htm#ccl>