

COOPERATIVE PRACTICE – HOW DOES IT WORK?

THE COOPERATIVE PROCESS IN DIVORCE

Cooperative Process is a procedure using a participation agreement designed by the parties, with the assistance of lawyers, that includes both a negotiation and dispute resolution mechanism with the goal of reaching an agreement that satisfies the interests of the parties. While the process begins with negotiation, the parties may retain their lawyers in any dispute resolution mechanism, including litigation.

This describes the typical steps in a Cooperative Divorce. It is a flexible process so that parties and lawyers can tailor it to the parties' needs in each case.

PROTOCOL

Step 1 – Intake Interview

Cooperative Practice begins in the initial intake session¹. At this time the attorney explains to the prospective client that, after the decision to terminate the marriage has been made, the most important decision the client must make is "how" he or she will get from that intake session to the point where the marriage is terminated. In order to make this choice, the attorney informs the client about the process options available to the client, including litigation. The attorney provides the client with an understanding of the common elements and distinguishing characteristics of each process, including: will there be face to face meetings; who will attend the meetings; how frequently will there be meetings; and what will happen if, despite the best efforts of the parties and counsel, the conversation ends with a dispute. At the conclusion of the intake interview, the attorney should obtain the signature of his or her client on an Informed Consent.

Step 2 - Design of Process

After each of the parties has been informed with respect to process options, the parties design their process by selecting a Negotiation Model and a Dispute Resolution Mechanism from the available choices. Some of the major options include the following:

¹ A Cooperative Process may be undertaken after the commencement of litigation. In such event, Step 1 will not take place during the intake interview, but rather at the point where the Process is first discussed. Generally, if a Cooperative Process is entered into after the commencement of litigation, a Joint Stay of Proceedings is requested.

NEGOTIATION MODELS	DISPUTE RESOLUTION MECHANISMS
<input type="checkbox"/> Four Way Meetings Only	<input type="checkbox"/> Arbitration
<input type="checkbox"/> Four Way Meetings as Requested	<input type="checkbox"/> Private Judge
<input type="checkbox"/> Mediation	<input type="checkbox"/> Cooperative Litigation
<input type="checkbox"/> Facilitation	<input type="checkbox"/> Parenting Coordination
<input type="checkbox"/> Neutral Evaluation	
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The design of the process preferably is done at a four way meeting. Process design should be the only topic of discussion at the initial meeting. The attorneys should avoid expressing a preference for any one Negotiation Model or Dispute Resolution Mechanism, recognizing that the choice of Process belongs to the client.

Step 3 - Participation Agreement

After the parties have designed the Process, the attorneys should prepare and circulate a Participation Agreement that reflects the commitment of the parties, and their counsel, to participate in a transparent, problem solving approach to the issues presented. The Participation Agreement should include: The Negotiation Model and Dispute Resolution Mechanism selected by the parties; a provision for the gathering and sharing of relevant information and documents; and the use of experts or related professionals, if any. The Agreement may also include a time line for the entire Process, or for the negotiating period, at the conclusion of which the Dispute Resolution Mechanism is implemented. The attorneys should jointly circulate the Participation Agreement to the parties for signature. Once the Participation Agreement has been signed, The Cooperative Process begins.

Step 4 - Stabilizing the Arena

Uncertainty creates anxiety and the commitment to transparency is fragile in an environment short on trust. As a result the situation of the parties should be stabilized. Counsel for each of the parties should promptly identify short-term concerns of his or her client and how they might be addressed. Flexibility on both sides is required in order to build an environment of trust and to facilitate the

"look forward," rather than the rehashing of historic behavior. If the parties are able to agree on interim commitments, and adhere to them, it will increase the likelihood of success in the final negotiation.

Step 5 - Information Gathering

The parties have committed to a transparent, problem solving approach to their issues. In order to do this, each side must have identical information from which to identify concerns and to formulate settlement options. Each side, with the assistance of counsel, should cooperate in promptly providing all relevant information and documents in their respective possession. The attorneys should prepare "Financial Bibles" consisting of an index of pertinent documents and a binder of documents correlating to the index. Each of the parties and counsel should have an identical index and binder. The Financial Bible should be updated, as necessary, at each meeting.

Step 6 - Use of Experts

If an expert is required, the parties, with the assistance of counsel should jointly engage a single expert to determine the issue. Either party may engage a second expert to appropriately raise concerns regarding the opinion of the joint expert. After reviewing the concerns raised by the second expert, the joint expert may, or may not, revise the original opinion given. The report and testimony of the joint expert, and any second expert, is admissible in any Dispute Resolution Mechanism should the negotiation result in impasse.

Step 7 - Use of Related Professionals and Consultants

The parties, with the assistance of counsel, may involve in the negotiation a financial planner, communications coach, parenting coordinator, or other related professional. Any related professional added to the problem solving exercise should be instructed in the Cooperative Practice and provided a copy of the Participation Agreement signed by the parties.

Step 8 - Negotiation

In order to effectively negotiate as problem solvers, the attorneys must first identify and understand the concerns of their own client AND the concerns of the other party. Whether in a face to face meeting with clients or in a meeting of counsel only, the concerns of each client should be clearly identified before the commencement of any negotiation. After the concerns of the parties are identified and understood, attorneys for the parties should participate in creating options for settlement. This participation will include the background and experience of the attorneys in

finding customized solutions for clients. Indeed, the best lawyering may embrace solutions that the court would not even consider if the issue was determined by trial.

Step 9 - Resolution

If all issues presented are resolved by agreement, the understanding of the parties shall be memorialized in writing by the attorneys as a Separation and Property Settlement. The Separation and Property Settlement Agreement should clearly incorporate all of the terms agreed upon in the negotiation. After execution by the parties, The Agreement will be presented to the Court for ultimate disposition of the issues presented for negotiation.

Step 10 - Dispute Resolution (If Needed)

If the parties, with the assistance of counsel, are unable to resolve all issues presented, the unresolved issues, or the matter in it's entirety, shall move to the Dispute Resolution Mechanism selected by the parties. If a timeline for negotiation has been established, it should be adhered to unless modified, in writing, by the parties. Prior to the end of the timeline for negotiation, the decision to transition to the Dispute Resolution Mechanism may be made by either party or the parties jointly. If one party makes the decision to initiate the Dispute Resolution Mechanism, such choice is pre-emptive and the negotiation is concluded. Initiation of the Dispute Resolution Mechanism does not alter the commitment of the parties, and their counsel, to the Cooperative Practice. Participation in Arbitration, Private Judging, Cooperative Litigation, or Parenting Coordination requires adherence to the tenets of Cooperative Practice. The parties, and counsel, remain committed to a transparent presentation of the unresolved issues for determination by a third party which determination may be conclusive depending upon the Dispute Resolution Mechanism selected.