The Role of a Family Law Attorney in Settlement Negotiations

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The role of a family law attorney has changed greatly over the years. For example, I was hired by my present firm to be the litigator, as I had been a prosecutor for over seven years. While there was not nearly as much litigation as in my prior job, going to court was a routine occurrence. In addition to multiple trials, temporary hearings over custody and support were regular. The evidentiary skills that I had learned as a prosecutor came in very useful. Since in litigation there is typically a losing party, appeals were a regular part of our business. It seemed we were always either briefing an issue or waiting for a decision.Today, by contrast, it is far more common to accompany a client to a mediation session than to a contested court hearing because the number of contested trials has decreased sharply. As a result, our appellate practice has correspondingly diminished. Although most lawyers need litigation experience, the requisite skill set for a family law attorney has expanded to include skills in negotiations.

To add some objectivity to the above observation, I lead a case law update discussion for the Wisconsin chapter of the American Academy of Matrimonial Lawyers every year. For the first few years, there were an average of seventeen new cases per year to discuss. For the last few years, there were an average of eight new cases each year to discuss. As fewer cases are litigated, fewer are appealed.

Is this a good thing or a bad thing? The bad side is that reported decisions give definition to the law. After all, if a client knows what a court is likely to do, the client is more likely to accept that result, like it or not, rather than

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to fight it and have that result occur anyway. It is far easier to convince a judge to make a certain order if the judge knows any other order would get him or her reversed, or even that a certain order would be "safe" for appeal.

Putting the "A" in ADR

For the individual litigant, the result of settlement has many positives, most particularly the avoidance of the financial and emotional costs of litigation. In any conflict situation, resolution by compromise is almost always better than litigation by warfare. There is a saying among family law attorneys that "a bad settlement beats a good trial." Accordingly, a good settlement is best of all. This concept has led to a new definition of what it means to be a family law attorney. While litigation remains a possibility, it has become a rarity. So, becoming an effective family law attorney requires a familiarity regarding the settlement options and methodologies available.

When this author started practicing family law, the term "ADR" was unheard of. Even then, most divorce cases eventually settled. But the process of getting to settlement, including the threats and intimidation of litigation, is destructive to the ability of parents to co-parent their children in the future. In other areas of law, the future relationship of the opposing parties is of little concern. However, in divorce cases, where there are children—either minor or adult—the future relationship is of great concern as the parents will be forever entwined with each other. The damage done by litigation can carry over and scar the future relationship between parents for many years into the future. Words cannot be unsaid, and the bitterness of hearing partisan advocacy does not go away. The cost—both financially and emotionally—is significant.

While data are really unnecessary, studies have confirmed the value of mediation in improving relationships between parents both during a legal action and afterwards.[1] As stated by the Texas Supreme Court: "For the children themselves, the conflict associated with the litigation itself is often much greater than the conflict that led to a divorce or custody dispute . . . because children suffer needlessly from traditional litigation, the amicable resolution of child-related disputes should be promoted forcefully."[2]

1. *See* Robert E. Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 Fam. Ct. Rev. 22 (2005); Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 Fam. Ct. Rev. 373 (1996).

2. *See In re* Lee, 411 S.W.3d 445 (Tex. 2013).

Being a family law attorney involves broader responsibilities than, say, a personal injury lawyer. In P.I. law, the plaintiff's lawyer is trying to get the most money for a client, and the insurance (or defense) lawyer is trying to pay as little as possible. Any effect on third parties is irrelevant, as is consideration of the impact on the future relationship of the parties, as there will not be any. Representation is strictly a matter of dollars. Similarly, in criminal law, most cases involve a prosecutor trying to get a conviction and maximum sentence, whereas the defense counsel is trying to get no conviction or a reduced charge and minimum sentence. In most cases, third parties and future relationships are not considerations.

Mediation

As a result, lawyers began searching for alternatives (the "A" in "ADR"), and mediation came into vogue. It was successful in enough cases that it became mandatory in most custody and placement disputes and prevalent, even if not mandatory, in financial disputes.

The success of mediation can be traced to several aspects of the process. For one, a third party can break an impasse that has caused negotiations to come to a halt. For another, the process injects a fresh viewpoint in the negotiations. Lawyers sometimes get too close to their client's cause and fail to see the forest due to the trees. Parties frequently do not appreciate that there will be another side to all of the issues, with no guarantee that a fact finder will see things their way. Hearing a neutral, independent, and trusted professional give opinions and insight can cause reality to be injected into the equation.

Yet the type of mediation and the nature of the mediator are critical to its success. For example, facilitative mediation, where a mediator merely relays proposals, is of little or no use to family law practitioners. Most lawyers don't need a third party to run settlement proposals back and forth, as in a game of tennis. Evaluative mediation, on the other hand, allows the mediator to offer opinions and suggest solutions to issues. Only evaluative mediation, where the mediator is proactive in the process, is worth the time and expense in family law cases.

The type of mediator to be chosen depends on the issues to be mediated. When the issue involved is child-related, the issues are frequently not legal, but emotional. Arguably, the entire issue of "best interests" of a child is not a legal determination, but a psychological one. The issue of allocation of responsibilities and time is really not a legal one, but a parenting one. As much as lawyers learn a lot by practicing in this area, there are professionals whose expertise is precisely in the area of child development. In theory, at least, both parents want the best for their children. Therefore, it benefits

a parent to limit conflict and increase cooperation. In addition, typically both parents can learn something (sometimes, a lot) about child rearing from an expert.

Any good mediation involves a fair amount of counseling. Using a mental health professional as the mediator can turn the mediation session into a therapeutic one. In such cases, the therapy may be extremely valuable to quell the emotions and have practicality and rationality prevail. Where the issues are primarily emotional ones (which is frequently the case for custody-related issues), a mediator trained in evaluating and treating emotions can be most effective.

The danger of using mental health professionals as mediators is that the topics may drift into ones that are legal in nature. Sometimes, the dividing line is not very clear. Other times, the line is blurred or ignored by the mediator in order to reach a settlement. The result may be mediators getting involved in substantive issues on which they have little knowledge. The resultant settlement can lead to difficulties down the road.

Co-mediators, one lawyer and one nonlawyer, would avoid this danger, but the cost of mediation then doubles. Still, the extra cost may be worth it, where both legal and nonlegal issues are expected to arise in the course of negotiations.

As valuable as mediation can be in many cases, it is no panacea. For one thing, it is often conducted without attorneys being present. If, as is common, there is a power or knowledge imbalance between the parties, the results may not be equitable. If the issues are financial, using a mediator not versed in taxes or valuation issues may even confuse matters. Most critical, because the goal of a mediator is to achieve a settlement, a power or knowledge imbalance may not produce an impediment to "success," as defined by the mediator. In fact, such an imbalance might even be helpful. After all, if the mediator's goal is to settle a case, an imbalanced settlement is within the definition of success, although the long-term implications may be seriously troubling.

Collaborative Divorce

However, there were cases where mediation was not the answer, or at least the complete answer. So, lawyers formed collaborative divorce groups, seeking to bring a new approach into play. In a collaborative divorce, the parties and the lawyers agree to avoid litigation tactics in general, and court in particular.[3] The "no-court" agreement has teeth in a collaborative

3. Int'l Acad. of Collaborative Prof'ls, www.collaborativepractice.com.

divorce: If the process fails, both lawyers must withdraw and transition the case to litigation counsel. The intent is for the lawyers (and their clients) to avoid the threats of litigation and concentrate on resolution. Many models include a requirement for joint appraisals of all assets, avoiding any formal discovery and mandatory mediation. There may be mental health "coaches" (as opposed to therapists), child specialists, and neutral financial experts involved. All appraisals are joint, and there is transparency to the discovery and settlement process.

The key to a collaborative divorce agreement is the mandatory, mutual withdrawal feature. The goal is to make the cost of failure to everyone so extreme that settlement becomes almost an imperative. The theory is to entirely remove the threat of litigation from the settlement process. The financial cost of trial preparation is completely eliminated. As importantly, the sword-wielding threat of going to trial is eliminated. The result is to lessen (if not eliminate) the bitter taste of the adversarial legal process that may tarnish the parties' ability to co-parent in the future.

Collaborative divorce, however, is not for every case. When there has been domestic violence, mental illness, or substance abuse, it may not work, even when mental health coaches are utilized. In some cases, the threat of disqualification can be used to try to exact a better settlement. In other cases, the lack of a credible trial threat can cause the matter to be prolonged at a considerable emotional and financial cost. Collaborative divorce appears to have survived its most serious threat—an adverse ethics opinion from the Colorado Bar Association Ethics Committee.[4] While initially casting a shadow on a practice allowing a lawyer to withdraw from a case midstream because it might go to trial, a subsequent opinion from the American Bar Association Standing Committee on Ethics and Professional Responsibility, which found that the practice did fall within ethical parameters, has put those fears to rest.[5] As well it should. After all, if parties have been fully advised on the process, why should they not be able to retain an attorney on a limited, clearly defined basis, to avoid further damaging their families through the adversarial legal process?

4. Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007) (Ethical Considerations in the Collaborative and Cooperative Law Contexts), *available at* http://www.cobar.org/index.cfmlD/386/subD/10159/CETH/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24//.

5. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 07-447 (2007) (Ethical Considerations in Collaborative Law Practice).

Cooperative Divorce

Another option, although not yet widely available, is cooperative divorce.[6] While maintaining much of the criteria for a collaborative divorce, such as the commitment for settlement, joint and full appraisals, and voluntary disclosure, it does not include the critical aspect of mutual withdrawal of the attorneys if the process fails. Some see the process as "collaborative lite," while others do not see any difference between a cooperative divorce and a "regular" divorce. While substantively there is little or no difference, by signing an agreement to operate in a cooperative manner, lawyers can allay fears of divorcing parties regarding the roles of their attorneys. Far too many parties choose to proceed without attorneys, fearful that lawyers throw gasoline on the fire. Given the public perception of divorce lawyers, a written promise to operate to resolve issues in an amicable and professional manner can assure parties that lawyers have an important, helpful purpose to serve in these cases.

ADR and the Line Between Advocacy and Compromise

The very real controversy over these forms of ADR goes to the heart of what it means to be a lawyer and the purpose of our system of justice. To some, being a lawyer means to advocate under previous ethical rules and to "zealously" advocate his or her client's position. Because settlement requires compromise, to these lawyers, the advocacy role and the resolution role do not nicely coincide. Moreover, they define their client's interests as purely financial: the more money for their client, the better. "Success" is defined in purely economic terms.

It is here that the term "family" law has its real meaning. As stated earlier, unlike other areas of law, the opposing parties in a divorce often have a continuing relationship after the legal system is done with them. The very definition of "family" no longer means just a nuclear unit of Mom, Dad, and children, but encompasses stepparents, stepsiblings, and all of the extensions that go with them.

In traditional civil litigation, "success" can only be expressed in terms of money. The winner at trial gets a larger or smaller financial judgment. However, there are many whose value system put a different priority level on money. To these people, preserving the well-being of their "family" (defined in the broadest terms) is more important than money.

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6. For a more complete comparison of these processes, see John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 Fam. Ct. Rev. 280 (2004).

In a family law setting, family relationships are better enhanced by resolution, not litigation. And these relationships are even further enhanced if the settlement process is efficient and effective. There is a huge amount of literature (starting with Fisher and Ury's seminal book *Getting to Yes*),[7] courses, and other educational opportunities for family lawyers to improve their negotiating skills. For the benefit of their clients, becoming an effective family law attorney requires them to do so.

7. Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving in (1981).