What ADR Professionals Can Learn from Litigating Divorce Lawyers

By Lawrence D. Gaughan

Well over 90% of all divorce cases are resolved by agreements, but there are two divergent methods for negotiating those agreements. Much current interest is focused on the ADR (alternative dispute resolution) movement, which consists mainly of mediation and collaborative practice. The other approach is that of conventional divorce law practice. Although a growing number of divorce lawyers are actively involved and influential in ADR, there needs to be more interaction between the adherents of each approach.

It's easy for an ADR professional outside of conventional family law practice to feel a certain moral superiority over divorce litigation. Certainly such litigation can be overly expensive, time-consuming, and emotionally draining. What may get lost in this context, however, is that divorce litigators also resolve most of their cases by reaching agreements. This is true even though these lawyers generally handle more of the most difficult cases. It's an open secret that a high percentage of divorce lawyers have successful marriages. It's time for ADR professionals to consider with an open mind what they can learn about divorce negotiating from the experience of lawyers in conventional divorce practice.

A prior article, *Using ADR Ideas to Negotiate Divorce Agreements*[1], takes the other side of this same issue, namely that lawyers in conventional family law practice could profit from becoming better acquainted with ADR ideas. That article postulates that spousal negotiations are dysfunctional to the extent that the spouses are ***positional***, ***competitive***, and ***inflexible***. All of these attitudes not only result from, but also add to, the emotional level of marital conflicts. The article suggests that when these impediments to productive negotiations appear in the divorce process, they probably existed during the marriage and were likely to have also been involved in the decision to divorce.

Divorce settlements are different from many other areas of ADR in that they were managed almost exclusively by the adversarial legal system prior to the advent of ADR for divorces in the late 1970's. When a case was settled by agreement, as most were, the immediate goal in settling was to avoid litigation. So it seemed sensible to try to figure out what the court might do, and then use an agreement to do more or less the same thing without any need to appear before a judge.

Since litigating attorneys often handle the most difficult cases, they have a quite different client base from ADR professionals. ADR professionals should recognize that there are definable categories of cases that resist being settled, and that when they are settled, it may even have to be done in ways that don't always

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[1] http://www.creativedivorce.net/wp-content/uploads/2016/09/Using-ADR-Ideas-to-Negotiate-Divorce-Agreements-1.pdf

fit into "proper" ADR negotiating methods. These adversarial means include using procedural court strategies, such as civil discovery devices and motion hearings, to put pressure on settlements. They can also involve the use of threats based on predictions of court outcomes or on taking certain unilateral actions, such as withholding finances. Using retired judges as mediators has become another common means of trying to settle the most difficult cases.

In ADR circles, the use of tactics deemed coercive is considered unethical. Litigating attorneys would argue that the primary goal of reaching an agreement has to be to settle a case that would otherwise need to be resolved by a judge in an even more coercive process. However, attorneys in conventional family law practice can be, and often are, as skilled as ADR professionals in framing creative settlement options. More on this later in this article.

If we accept that there will always be some divorce cases that wind up being litigated, then the issue becomes how to resolve by agreement as many of the most difficult cases as reasonably possible. The fact that court is the clear alternative to reaching an agreement is already a coercive element that hovers over many negotiations. In order to consider the interplay between conventional "legal" and ADR process options, let's take a look at a realistic domestic relations situation that illustrates the possible limitations of both adversarial negotiations and ADR problem-solving.

James and Marie have been married for 22 years and have three children ages 19, 15 and 13. James has an MBA and is a hedge fund manager. Marie has a BA in French literature and has been a stay-at-home parent. They graduated from college and were married in the same year, and James then got his MBA. Their youngest child, Chester, has serious ADHD problems, and has struggled in school. At his age 21 James became a beneficiary of a large family trust fund. Since then he has used his income from the trust fund to finance his professional practice. For years he has spent an average of 55 hours a week managing the money he has received from the trust fund and working with his clients on their investments.

Four years ago James started an affair with a divorced physical therapist in Baltimore named Jenni. The affair continued even after Marie found out, which was 11 months ago. Marie believes that James has spent well over $200,000 on Jenni, including buying her a new BMW convertible. The parties still reside in the same house, although James moved into a separate bedroom after Marie found out about the affair. When Chester experienced serious behavior problems at age 4, Marie started drinking wine more frequently. Her drinking increased after she found out about the affair, and she assaulted James on several occasions when she was inebriated. In one incident he suffered a broken nose. Marie also yells at James and calls him obscene names in both English and French.

The parties consulted a mediator, but the meetings were not productive. James refused to produce documents concerning his income and expenditures, and Marie consistently failed to fill out forms as to her financial needs. James' extended family has insisted that he retain the income he has gotten from the trust fund and his professional practice. Marie's parents separated when her father walked out when she was 9. Her mother has frequently urged her to "take that philandering sonofabitch for every damn cent."

When the mediator declared an impasse, the parties decided to try collaborative practice. Both parties retained collaborative lawyers, whose names were chosen from a certified list. The attorneys recommended both a neutral financial specialist and divorce coaches. Despite the terms of the collaborative agreement, James turned over way less than half of the financial documents that had been requested. Marie refused to list her expenses and other needs, saying that she would do so only when James produced the requested documents.

James said that he was willing to pay Marie enough to live separately and have clear title to her own home, while insisting that she did not deserve more. Marie said she was entitled to substantial lifetime spousal support and to half of the marital assets, and that she would not accept less. There were only three collaborative meetings. Marie screamed at James at times during each meeting and James stonewalled on further disclosures and finally walked out. Marie then announced that she was going to find the toughest lawyer available to file for divorce. The frustrated professionals terminated the collaborative practice.

Where does this case go from here? Let's consider some perspectives on the difficulties that a case such as this one might pose:

The applicable law is relevant to the settlement. Clearly this is a case that requires legal expertise. The law, in a case such as this, consists of the domestic relations code, appellate court decisions, and counsels' experience in trials and even in settlement discussions. The most immediate legal issues relate to marital property. Although James' family trust fund and the income directly from it is not marital property, James' extended efforts during the marriage to manage and increase those funds may make the resulting assets marital property to the extent that they result from those efforts. This results in a complicated situation of hybrid marital and separate property. One such hybrid asset is the entity through which James does business. Furthermore, to the extent that marital property is dissipated by a spouse for non-marital purposes, it may be "recaptured" for settlement purposes. This means that there are two substantial tracing issues. These suggest a need for financial as well as legal expertise.

The grounds for divorce may be legally relevant to the settlement, or not, depending upon state law and the context. In many states, adultery remains a ground for divorce even though no-fault grounds are also available. Likewise, physical and verbal abuse are also grounds for divorce in some states. The

impact of these issues upon both the division of marital property and spousal support can make a difference in the settlement in certain situations. The law of spousal support is quite contextual in most states, in that state law often sets forth lists of rather general criteria for the amount and term of spousal support, often leaving broad areas of discretion for a trial judge.

Litigating attorneys will be acutely aware of the impact of state law, especially in complex situations. While it may be difficult to make an accurate prediction of the outcome in court of a case such as this, the lawyer will be aware of the legal parameters and how to obtain the needed financial or accounting expertise. Some aspects of a judicial outcome may even be relatively predictable. There are many other ways in which skilled divorce lawyers can use their technical knowledge of the law to understand the risks and benefits that a client would encounter in court, and to identify tradeoffs that might not be obvious to someone less skilled in the law. Lawyers are also aware of cases in which litigation actually encourages the parties to get serious about negotiating when settlement discussions have become stalled or there are disclosure problems.

Framing creative settlement options. ADR professionals clearly do not have a monopoly on creative settlements. These options may include possible solutions such as those that include the following aspects: (a) future-directed and even dealing in advance with future contingencies; (b) involving tradeoffs that a court might not otherwise be able to order; (c) taking into consideration expert advice from a variety of sources; and/or (d) are fine-tuned to the specific needs and goals of the parties. The best family law attorneys have been doing some of this kind of negotiating since long before the advent of ADR in divorce cases. There is no reason why such negotiating cannot be done effectively in adversarial cases. Using creative options should be treated as an area of basic commonality between the best adversarial and ADR negotiators.

ADR adherents would argue that option-based negotiating works better and is less expensive if it is done in a problem-solving rather than an adversarial context. A conventional lawyer might respond that all contested divorce negotiations have a certain adversarial component. Every model of dispute resolution in some way or another takes that basic fact into consideration. The expertise lawyers have in understanding the legal framework and the impact of possible court outcomes may work better in resolving some divorce cases. In others, the broader (less legalistic) views of ADR professionals and their ability to consider a fuller range of options as relevant may afford more scope to be creative. Neither set of options should be deemed exclusive.

The importance of proper disclosures. Many of the most difficult cases present not only legal complexities, but disclosure problems. It's easy to understand why James and his family might resist full disclosures, but also clear that such disclosures may be absolutely necessary for settlement decisions. In a case that calls for expert analysis, such as that of an accountant skilled in tracing,

there is no way that the expert can produce an informed opinion without the documents. Both the attorney and the expert will also be aware of how to identify and request the precise kinds of documents needed for the tracing. Counsel also know how to frame a disclosure order or agreement to protect the confidentiality of information such as client lists.

If a party refuses to identify and produce needed documents, the default way to obtain them is to file a divorce action and then invoke the civil discovery rules. These include interrogatories that a party must answer under oath, depositions of parties and witnesses, and requests for production of documents. In a case such of that of James and Marie, the request for relevant documents could legitimately cover the entire period of the marriage and be quite extensive for any given year. Not producing the relevant documents is just not an option.

The emotional context. The emotions experienced by James and Marie have a basis in the history of their marriage, the nature of their conflict, and the influence of their extended families. Their roles in the marriage have been so different and their goals so diverse as to make effective negotiating difficult in any process. This was a marriage in which the husband controlled all the finances and the wife was willing to play a role with which she was comfortable. With their separate futures on the line, it is easy to understand how each of them may respond to their present conflict in ways that are positional, competitive, and inflexible.

Even the most experienced divorce attorneys are not necessarily skilled in understanding the impact of the various emotions on a possible settlement. In a negotiating context, a need to assess the type and level of the parties' emotional involvement in the case is most critical to the degree that it affects how their disputes can be resolved. The case of James and Marie is one in which Marie will probably achieve a generous settlement, but less than if the assets had been all marital property. Directing the attention of each of them to future-based options relating to their respective goals can be a way to take their focus off the past problems and incidents of the marriage.

Divorce lawyers can be part of the solution rather than contributors to the problem. Thoughtful legal advice from the attorney can address responsible solutions in ways that legal information coming from a mediator or counseling from a collaborative coach cannot. However, such advice is not likely to be followed even it comes from a party's attorney, unless that attorney understands and respects the client's emotions in the matter. Each lawyer must be able to assess the nature and extent of the client's emotional investment in the conflict itself, as well as in the particular details of the conflict. The next step is to determine if those emotions extend beyond the client's own rational self-interest, and if so, to figure out what to do to keep the negotiations on track.

Lawyers work with experts to identify settlement options. In a case where sufficient assets are available, skilled attorneys have a better opportunity to identify future-directed settlement options. In the case of James and Marie, these might permit James retain the majority of the assets sufficient to keep his organization viable, while providing Marie with a generous settlement that makes her comfortably self-sufficient. The skill required from a lawyer or a financial expert, such as a CPA or financial planner, is to identify reasonable parameters for such possible settlements. It's possible that such advice could come from a neutral expert, but there is always the question of the extent to which each party will trust such neutral advice.

There are differing but legitimate legal and financial methods to analyze how much of James' income and assets are marital, and the extent to which they are his separate property. These approaches can be used to define the credible parameters within which a compromise settlement might occur. The final consideration is to ascertain where any compromise agreement leaves each party for the future. That could even be better as a final test for a possible agreement than any speculation as to what a court might do in a case such as this.

The financial case of James and Marie is just one illustration of the kinds of complexities that make cases difficult to settle. Suppose, for example, that issues arise concerning the stability of each party and the parenting that the minor children, and especially Chester, may need. A special kind of mental health expertise pertains to children whose parents are separated and divorcing. Due to the strong emotions surrounding litigation over custody, it is not unusual for both sides to agree upon an independent evaluation by an experienced mental health professional (usually a clinical psychologist). Mental health professionals generally consider it to be unethical to be an expert for just one side in a custody dispute.

Such a neutral evaluating professional is generally precluded from making a fixed recommendation as to how the case should be decided. The expert is instead limited to providing useful information and specific findings that may have an impact on the judge's decision. These normally do not include making a fixed recommendation as to the final result. While the expert's report is often then used as a step in the process of reaching an agreement, there may be some room for further negotiation. Each party still needs to be able to trust the legal advice he or she receives as to the terms of an agreement. Custody evaluators and parenting coordinators are probably used more in contested adversarial cases than in family mediation or collaborative practice.

Summary

An ADR professional who has not been involved in divorce negotiations between first-rate lawyers in difficult cases may not appreciate the level of skills and knowledge that they can bring to settlement discussions. It's certainly

possible that a case such as that of James and Marie could also be resolved by a skilled and experienced mediator using appropriate experts (including attorneys on each side), or in a properly structured collaborative practice case. But it's easy to understand why each party may only fully trust his or her own attorney in the process, and why some pressure may be required to obtain the necessary exchange of disclosures and foster sufficient incentives to reach a full agreement.

In summary, here are important structural aspects of divorce negotiating that ADR professionals can observe in negotiations between experienced litigators:

- Even though there may be many reasons why the legal framework may not be the only or final factor, it is certainly a relevant factor and may be absolutely crucial to the settlement.
- Settlement options can be creative, and yet choosing among them may also require taking account of practical legal considerations.
- It is essential in all difficult cases to identify the appropriate need for disclosures and determine the best means to obtain them.
- The settlement process must take into account the emotional context of the dispute as well as the substantive issues.
- The types of expertise that are needed and the proper experts should be identified as early as possible in difficult cases.
- In suitable cases, a credible assessment of the parameters of a "global" compromise may be useful. This involves comparing different but legitimate methods of legal and financial analysis.
- Every settlement should have a final review as to where the resulting agreement will leave each party for the future.

There are still cases that will need to be litigated, and others in which any negotiations may seem to require certain "hardball" tactics. There are lots of cases in which ADR styles of negotiating may be more effective, regardless of the particular structure of the negotiations. The challenge is always to find the style of negotiating that best fits the context and actual needs of any given case. The process of negotiating divorce agreements will better serve the public interest if we recognize the ongoing value of professional exchanges between lawyers in conventional family law practice and ADR professionals. Each has something of value to offer the other.

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