DR Currents

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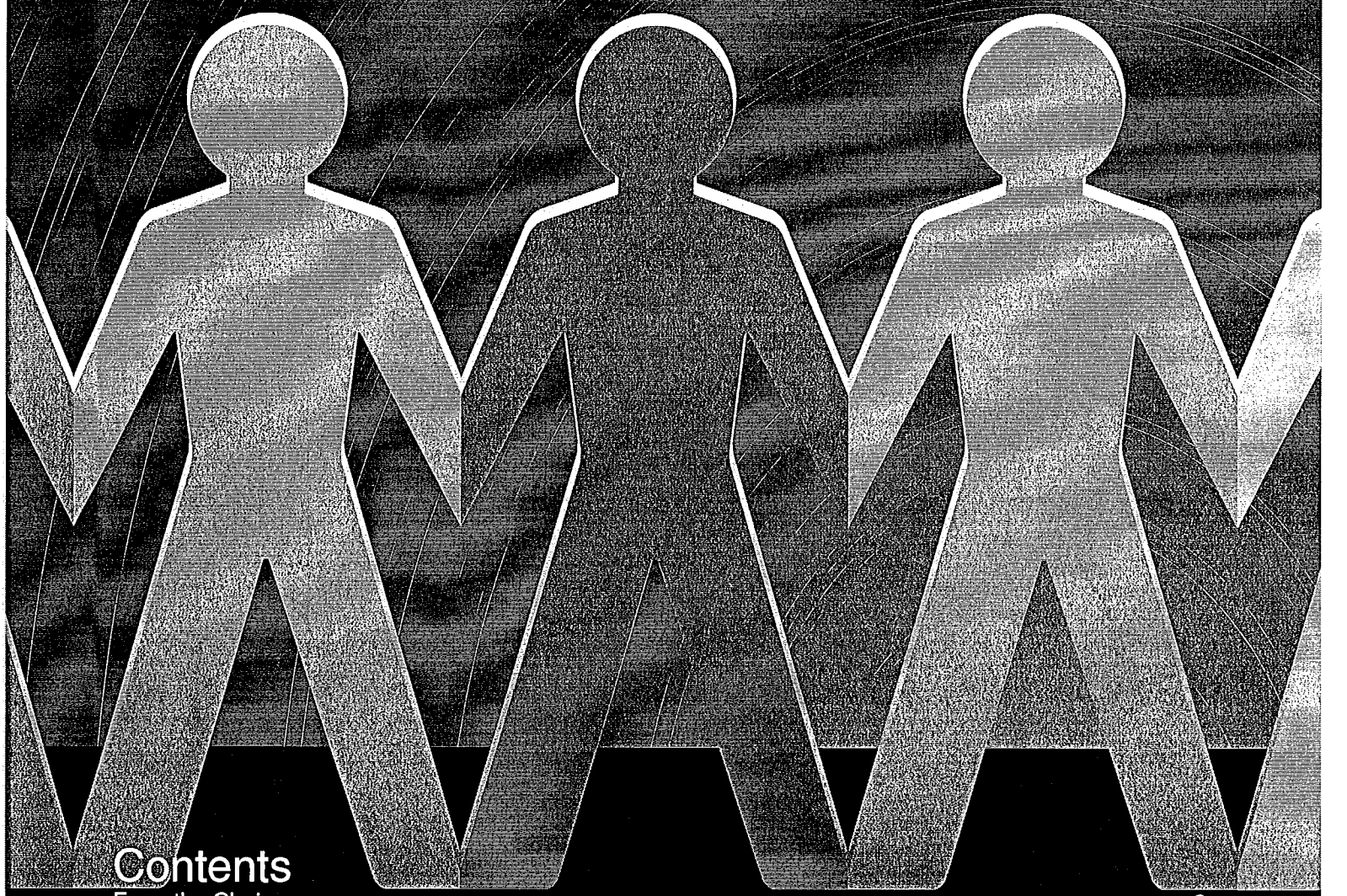

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When the Law Is Involved, Do Feelings and Notions of Fairness Matter?

by Mark B. Baer

People involved in legal disputes frequently say, "I want to have my day in court." As lawyers, it is relatively easy for us to accommodate such a request. Before doing so, it is advisable that the attorney determine what the client means when they make such a statement. Should that statement be taken literally or figuratively? Does the individual making the statement know or understand the distinction? Doesn't the answer to that question depend upon the client's sophistication when it comes to the actual court process?

According to Merriam-Webster's Collegiate® Dictionary, 11th Edition, "day in court" is defined as "(1) a day or opportunity for appearance in a lawsuit; or (2) an opportunity to present one's point of view or argument."[1] As defined by Cambridge Dictionaries Online[2], The Free Dictionary[3] and many others, "have your day in court" means "to get an opportunity to give your opinion on something or to explain your actions after they have been criticized." The Cambridge Dictionary of American Idioms defines "have your day in court" to mean "to have the opportunity to make a complaint publicly and to have it judged fairly."[4]

Do people in dispute literally have the unfettered right to give their opinion or otherwise explain their actions in a court of law? Don't procedural and evidentiary rules often restrict such rights? If so, how can their ability to do so be unrestricted? Might such limitations prevent someone from feeling as though the matter were judged fairly?

My point is not to criticize litigation or the court process, which serves an essential role in resolving legal disputes. The crucial question is whether or not litigation or the court process is essential or even necessary for any given legal dispute.

In her book titled *The Good Karma Divorce,* Judge Michele Lowrance, a domestic relations judge in the Circuit Court of Illinois, wrote the following:

> *The couples I see in my courtroom are desperately searching for emotional release; they smuggle their pain into their testimony, even when it is not relevant to the topic. They do so at every opportunity, hoping that somehow the court will know how to lessen their agony. In the end their desperate emotions remain unattended and unsatisfied. The sight of couples who participate exuberantly in a demolition derby always disturbs me. In an attempt to alleviate pain, even though pain is transitory, they lash out, and irreparable damage is done. The court system was not built to house these emotions, and attorneys are not trained to reduce this kind of suffering. Divorcing people expect relief far beyond what the legal realm can provide from their attorneys and the courts, and they often end up feeling like members of a powerless, unprotected class. They are disappointed in their attorneys, and their attorneys are disappointed that they are not appreciated.*

In my personal life, when divorced people discover I am a member of the judicial system, they are exploding to tell me how the system has failed them. People want to believe that life should be fair and bad things should not happen to good people. They expect emotional injustice to be righted by legal justice. The feeling that the rules of fairness have been violated leaves them limited choices on the emotional menu. Either they believe they did something wrong and blame themselves, or they think they were in the right and the administration of justice failed them. The unfortunate fallacy in believing that emotional injustice can be righted by the legal justice system creates anger and feelings of being cheated. This sense of being treated unfairly happens not just in those cases in which there was all-out warfare, but even in those in which disputes were eventually settled. Years after the divorce both groups of people understandably still have enduring bitterness and quiet, brooding grudges." [5]

In other words, much of the dissatisfaction people have with the litigation process has to do with the fact that it ignores the feelings and emotions that are fueling the locomotive, which is pulling the litigation train. Many of those feelings and emotions involve issues that led one or both parties to decide to end the marriage. However, in a no-fault state, such issues are generally irrelevant, with the exception of domestic violence. As Judge Lowrance says, "If you are going to trial on principal and are seeking to vindicate some moral standard that is crucial to you, you should know that moral standards and principals are not what courts are meant to address. Trials only address the law. For example, in a no-fault state, adultery is not relevant."[6]

I am by no means advocating for the elimination of no-fault divorce. While divorce rates did rise as a result of no-fault divorce, domestic violence rates fell by approximately 20 to 30 percent and wives' suicide rate fell by 8 to 13

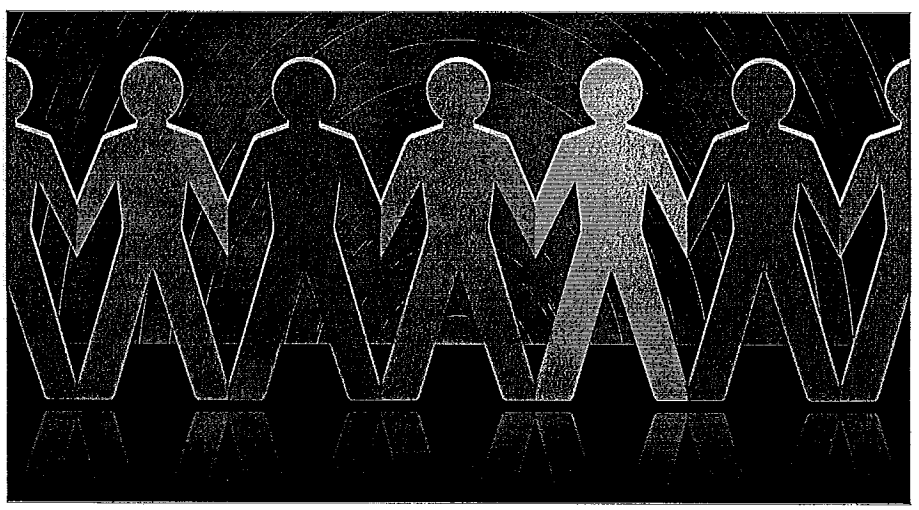
percent.[7] Furthermore, fault based divorce does not and never has addressed the underlying feelings and emotions. Rather, it merely requires proof of the existence of such fault before a divorce will be granted.

While litigation and the court process may not address feelings and emotions, such things are dealt with in collaborative law and certain mediation models. In fact, the website for the Maryland Courts contains a document titled "Mediation Framework Descriptions."[8] The document begins with the following paragraph: "Mediation is a process for people in conflict which includes two or more participants and one or two mediators. The ***trained*** impartial mediator(s) helps people in conflict to ***communicate with one another, understand each other***, explore options for mutual gain, and if possible, reach agreements that satisfy the participants' needs. A mediator(s) does not provide legal advice or recommend the terms of any agreements. Instead, the mediator(s) helps people reach their own decisions which may include agreements, may rebuild their relationship, and if possible, find lasting solutions to their disputes. Mediation is a process that lets ***people speak for themselves*** and ***make their own decisions*** [emphasis added]." It is important to note that feelings are a key aspect of each and every model of mediation mentioned in that document.

The Mediation Descriptions by the Maryland Program for Mediator Excellence specifically provides as follows:

Committee Notes:

'Evaluative Mediation' is not defined here because we believe it is a misnomer. Evaluation is a technique, not a mediation framework. If a process consists solely of an evaluation and attempts to get participants in line with the evaluation, then that process is not mediation, it is more likely a settlement conference. In a survey asking Maryland mediators how they define their practice, no mediator responded that they define their practice with the term 'Evaluative.'



A Settlement Conference is not mediation, although the two are often confused. We define settlement conferences here in order to try to clarify the distinction. Settlement conferences are ordered by the courts in a wide range of civil cases and attendance is mandatory. The conferences usually take place 30-days prior to trial.

Settlement conference neutrals are judges or lawyers who are familiar with the decisions of the particular court in which the case is filed. The conferences are focused on settling the lawsuit. The neutrals discuss with the participants the value range of their case and attempt to get the participants to reach an agreement, which may be a compromise. The conferences usually operate with attorneys present, and the entire process may consist of the neutral meeting solely with the attorneys. The process may take place in separate meetings with each side, as the neutral uses persuasive arguments, and attempts to encourage the parties to come to an agreement within a range of settlement options.

I raise these issues because of something I read in an article titled "Budget cuts lead to dysfunctional family law departments" by Franklin R. Garfield that was published in the Los Angeles Daily Journal on April 9, 2013. Garfield's second practice pointer to "family lawyers who participate in the mediation process directly" is to "help the parties put aside their feelings and notions of fairness. Absent an agreement to the contrary, [applicable] law is controlling. The parties' feelings and notions of fairness are mostly irrelevant. The parties have usually shared their feelings with each other and anyone else who will listen on dozens of occasions; sharing them with the mediator is unlikely to advance the analysis. Along the same lines, everyone wants to be fair – or at least everyone says so. But fairness is a subjective concept. Unless the parties have the same notion of fairness, they are stuck with [applicable] law – whether or not they think it is fair."

When Garfield refers to "mediation" in his article, he is apparently referring to "evaluative mediation." I refer to "evaluative mediation" as an "alternative form of litigation," and according to the Maryland Program for Mediation Excellence, "evaluative mediation is not mediation."

I have never meant to indicate that "evaluative mediation" has no value. The fact that I am distinguishing it from what I refer to as "true mediation" does not mean that I don't believe it serves a purpose. If "evaluative mediation" is able to help parties to resolve their dispute in a more expeditious manner and at a lower overall cost, it certainly has value. My intention is to make a

distinction, so that when people opt to enter into mediation, they enter into the type of mediation they all desire. People should get what they want and if they don't know and understand their choices, they can't make an informed decision. Furthermore, once they make an informed decision on the process, they should be able to determine which professionals are best suited to assist them in that process. If the "mediator" and attorneys only know and understand the "evaluative mediation" model, they are not well-suited to assist clients in other mediation models. This is extremely important to recognize, considering that in Maryland, "evaluative mediation" is not even considered mediation.

I agree with Garfield about one thing – "fairness is a subjective concept." In mediation and other forms of consensual dispute resolution, "fair" is referred to as a "four letter word that starts with an 'F.'" This is precisely because fairness is subjective. What is "fair" to one party involved in the dispute may not be "fair" to the other party. When attorneys, mediators and others are involved in the process, their concepts of fairness may well differ from those of one or both of the parties and from those of the other professionals involved. In fact, in her book, Judge Michele Lowrance says the following is a "detrimental misconception about what really happens in court: Your concept of fairness will approximate that of the judge's. You believe there is a clear-cut non-discriminatory standard of justice that is not dependent upon the judge's personal values."[9] Regardless of differences in perception, resolutions can be reached that are "fair" to each of the parties. Under such circumstances, does it really matter whether or not their attorneys and/or other professionals involved may disagree? After all, as Lowrance says, "it is a detrimental misconception to believe that your attorney will understand and execute your goals and desires in a way that satisfies your sensitivities and needs."[10]

There is a big difference between letting the client know how the proposed agreement might differ from what the law might otherwise provide and advising a client as to the "fairness" of the agreement. If the client is okay with an agreement that differs from what the law might otherwise provide, should the attorney or anyone else be insisting that they instead enter into an agreement that a court would have made? People are allowed to enter into any agreement, as long as it is not illegal or in violation of public policy. Just because the attorney may not have agreed to such terms if they were a party to the agreement, does not mean that their client shouldn't. After all, isn't the ultimate choice up to the client? If lawyers do otherwise, aren't they being paternalistic? A great deal has been written about lawyer paternalism, especially in family law.[11] If the attorney believes that an agreement is outside of the "realm of reasonableness," then might it be appropriate to request that the client get a second opinion in writing? If the client still wants to enter into such an agreement, isn't the attorney in the clear, if they "dotted their i's and crossed the t's," by writing a CYA letter and obtaining a copy of the other lawyer's opinion letter? People should not be prohibited from entering an agreement they want, unless their cognitive reasoning and understanding skills are at issue, the agreement is illegal or in violation of public policy, or it is too outside the realm of reasonableness.

Doesn't "true mediation" provide people with the opportunity to provide their point of view or argument? Doesn't "true mediation" provide people the opportunity to give their opinion on something or explain their actions? Doesn't "true mediation" provide people the opportunity to make a complaint publicly, by doing so in front of at least one neutral person? In other words, doesn't "true mediation" give people their "day in court," so to speak? In fact, doesn't "true mediation" actually address that which most people are seeking, when they say they "want their day in court?"

Mark B. Baer is recognized as a 'thought leader' in many areas of Family Law for his provocative and forward-thinking ideas on improving the way in which family law is handled. As a former litigator who advocates the use of mediation and collaborative law whenever possible, Baer points out the inherent flaws that exist in litigating family law matters, then reveals more creative and less destructive approaches. He also highlights the difference between 'dispute resolution' and 'conflict resolution' to offer simple ways of achieving a better result for all parties involved, including the children.

(Endnotes)

1 By permission from *Merriam-Webster Unabridged©2013* (http://unabridged.merriam-webster.com/) by Merriam-Webster Inc. (www.Merriam-Webster.com)."

2 Cambridge Dictionaries Online. Cambridge University Press©2013 (http://dictionary.cambridge.org/us/dictionary/british/have-your-day-in-court).

3 Farlex, Inc., *The Free Dictionary*. Farlex, Inc. (2013) (http://idioms.thefreedictionary.com/court).

4 Cambridge Dictionary of American Idioms, 88 (Paul Heacock ed., Cambridge University Press) (2003).

5 Michele Lowrance, Judge, *The Good Karma Divorce, 2-3*. New York: Harper Collins (2010).

6 Id. at 195.

7 Shankar Vedantam, *Marriage Economy: 'I Couldn't Afford To Get Divorced,'* NPR (December 20, 2011) (http://www.npr.org/2011/12/20/144021297/marriage-economy-i-couldnt-afford-to-get-divorced).

8 Maryland Program for Mediator Excellence's Definitions Task Group, *Maryland Program for Mediator Excellence – Mediation Descriptions*. (May 19, 2010) (http://www.courts.state.md.us/macro/pdfs/mediationframeworkdescriptions.pdf).

9 Id. at 194.

10 Id.

11 William L. F. Felstiner and Ben Pettit, Paternalism, Power, and Respect in Lawyer-Client Relations. in J. &. Sanders, *Handbook of Justice Research in Law* (pp. 135-153). New York: Springer-Verlag New York, LLC and Kluwer Academic/Plenum Publishers. Copyright 2002.