Psychology and Family Law

Beware of the Fact that Family Law Can Be Handled Like A Game

By Mark Baer, Esq.

Last October I attended the American Bar Association Section of Family Law Fall Conference. A common theme from the conference involved the issue of out of court settlements, as opposed to litigated verdicts. Steven Peskind introduced the theme, asserting, "Too few lawyers settle cases early and too many lawyers settle cases too late. Work harder to settle cases early. Settlements are better for the clients." He added, "A bad settlement is better than a good verdict."

Bernard J. Berry, Jr. has explained the reasoning behind this in a short article entitled, A Business Approach to Litigation – Facing Reality – Fewer Trials. Here he affirmed, "In most cases, the risk of pursuing a lengthy and costly trial outweighs the reward a party receives at the end of a trial." The point is that settlements, rather than litigation, usually most benefit the family involved.

Phillip Tucker was another to remind us that too few attorneys settle cases. According to another participant, Randall M. Kessler, "Judges like settlements and lawyers who settle cases. If you want a judge to order attorneys fees in your client›s favor, document all of your settlement efforts."

I should point out that all of these statements were made in programs relating to divorce litigation. Considering that Gregg Herman's presentation, entitled, The Ten Commandments of Divorce Settlement Negotiations, was sponsored by the Alternative Dispute Resolution Committee, it can be no surprise that he asserted, "Most agree that a bad settlement is better than a good verdict. Obviously, however, a good settlement is even better."

Last but not least, Christopher Melcher said, "The risk of [a] malpractice [lawsuit] is much lower with regard to settlements than trial. If [clients] don't get the result [he or she] likes at trial, they blame the attorney. It is much more difficult for a client to explain why they settled a case." In other words, settlement benefits both lawyers and litigants alike.

In the presentation called, 100 Days Before Trial - No Time to Lose, Christopher Melcher instructed us to be very specific when seeking documentation and information to prepare a case for trial because you might otherwise obtain information that weakens or otherwise destroys your client's case. In essence, Mr. Melcher was saying that "ignorance is bliss." On the contrary, from my perspective, significant information will most likely come out one way or another at some point inevitably, and I don't understand who benefits from delaying the inevitable--except for the attorneys and the bills they run up in the meantime.

The law is not a game, especially when families are involved. I want to be clear that I am not insulting Mr. Melcher or anyone else cited here. They were understandably advising their audience of attorneys how to properly play the "litigation game," as it is currently designed. But as I always like to point out, outcomes are determined by the way in which the game is designed. How are the dynamics of the family ultimately impacted when they are subjected to the "game" of litigation in family court?

William R. Biviano was a panelist on Searching for Mr. Green: Getting Paid for the Work You Do. He stated that "prepping a case for settlement is also prepping the case for trial." It can be no surprise to anyone that I disagree with this statement. This is the difference between prepping to settle a case based upon "rights and obligations" (trial) vs. "needs, interests, values, goals and fears" (settlement). As Judge Michele Lowrance says in her book, The Good Karma Divorce, people tend to be just as unhappy with "litigated settlements" as they are with court orders. Tellingly, non-compliance issues are salient with both.

Another suggestion made during the conference was to keep the judge engaged with visual material, if you have the technology. Otherwise, the judge may very well be "checking their email" or doing other such things. Isn't it nice to know how we must present cases to our esteemed judges to have their full attention? Maybe we should make avatars to assist in "putting on the show." Oh, I forgot, some of us have already started doing just that.

Throughout the conference, the panelists kept reiterating that what occurs in court is state specific, "locale specific," and jurist specific. In other words, results vary from judge to judge based upon the judge's biases, beliefs, assumptions and values. I think this should really scare anyone and everyone.

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