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Overcoming Roadblocks to Reaching Settlement in Family Law Cases

By JOHN LANDE



Although most cases eventually settle without trial, the negotiation process often is not pretty.

In “litigation as usual,” settlement often comes only after adversarial posturing, the original conflict escalates, the relationships deteriorate, the process takes too long and costs too much, and nobody is really happy with the resolution. This article describes roadblocks to negotiation and ways to overcome them to reach good settlements in family law cases.

Roadblocks to Settlement

Parties and lawyers often have multiple fears about negotiation, prompting them to procrastinate and/or take actions that make settlement more difficult. I call this the “prison of fear” in my book, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money*, and my article, *Escaping from Lawyers’ Prison of Fear*, 82 UMKC L. REV. 485 (2014). Of course, this is not a literal prison made of bricks and mortar. Nonetheless, it prevents people from acting constructively, often blocking them from doing what they would want if they weren’t so afraid. Lawyers frequently have these fears, which also sometimes infect parties.

Part of the legal lore is that lawyers suggest negotiation only if they have weak cases. Many lawyers are very afraid of appearing weak, which they fear will cause the other side to try take advantage. Lawyers worry that the other side will sniff weakness from the mere suggestion of negotiation and then act tough. For example, lawyers may fear that a suggestion to negotiate would cause the other side to drag out the process, refuse to provide relevant information, act in a contentious manner, and make extreme demands. Thus lawyers might worry that their client would lose confidence in them for not aggressively protecting his or her interests and/or that the client would make excessive concessions due to pressure from the other side.

So, for many lawyers, litigation-as-usual feels like a safer course. By taking tough positions and litigating vigorously, they demonstrate to the other side and their clients that they will not be pushed around or “give away the store.” By waiting to negotiate until discovery has been completed, lawyers can protect themselves and their clients from making bad decisions due to a lack of important information. If they wait long enough, perhaps the other side will “blink first” and suggest negotiation, possibly signaling weakness in its position. Thus, by letting litigation run its normal course, lawyers can avoid risks from adverse reactions from the other side and complaints from their clients about not being tough enough. Since most cases settle eventually, lawyers can wait until late in the litigation process, when both sides increasingly worry about the risks at trial and are more motivated to settle. This approach increases lawyers’ billings while protecting themselves and their clients from risks of early settlement.

Cognitive biases reinforce this adversarial culture of litigation-as-usual. These biases lead people to systematically misjudge the facts and merits of a dispute. For example, a common bias, “reactive devaluation,” occurs when people discount information simply because of the source of the information. Thus, if the other side

makes a statement, one is less likely to believe it than if someone neutral, like a mediator, makes the statement. People often are overconfident about the likelihood of success at trial. Folks selectively perceive things, typically to confirm their preexisting beliefs. People generally experience “loss aversion,” prompting them to make poor decisions when faced with the prospect of incurring losses, as might occur at trial. This is especially problematic when people “anchor” their expectations unrealistically, thus increasing perceptions of potential losses through negotiation. All these dynamics can lead to a chain reaction of tough positions and an escalation of the conflict so that people want to fight, not negotiate.

Family law cases often involve people’s deeply held beliefs, values, and images about parties’ identities that stimulate strong emotions and interfere with good decision-making. Divorcing couples may interpret issues as reflections of their worth—or lack of worth—as parents and spouses. For example, characterizations of joint or sole custody send powerful signals about who is a good parent—or a better parent. Although these custody decisions presumably reflect legal norms and the interests of the children, it can be hard for parents *not* to interpret the decisions as powerful judgments about them as human beings. It can be particularly difficult for parties to separate their feelings about past behavior, which often is not legally relevant, from decisions that courts are likely to make. For example, people who feel horribly hurt and angry because of their spouses’ infidelity often have a hard time negotiating, even indirectly through their lawyers.

Family law cases take place within expansive relationship networks that can increase partisan pressures and complicate conflicts. Each spouse in a divorce may feel judgments from friends and relatives about the character of the other spouse. For example, people in the wife’s network may never have liked the husband and she may feel pressured to demand a lot to maintain her status with her friends and relatives. When separated and divorced couples take new partners, the spouses may feel they need to please the new partners, who may feel particularly critical of the former spouse. With the prevalence of Facebook and other social media, these tensions can play out in public, further exacerbating the conflicts.

Overcoming the Roadblocks

Although some lawyers feel that they need to delay negotiation, fearing that the other side will perceive a negotiation overture as a sign of weakness, many lawyers don’t worry about this. Lawyers and clients with strong cases may prefer to gain the benefits of early negotiation rather than trying to gain advantage

by deferring negotiation. They can project confidence in their ability to get good results both in negotiation or trial and offer the other side the benefits of resolving the case quickly and reasonably. Acting cooperatively can satisfy some parties' and lawyers' interests in being fair and avoiding unnecessary conflict.

In my study, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 CARDOZO J. CONFLICT RESOL. 63 (2014), I interviewed lawyers who were identified by their peers as having good reputations as lawyers. In general, these lawyers said that they didn't worry about suggesting negotiation early in a case.

[O]ne lawyer in this study said that he "prepares for settlement from day one of the lawsuit" and that there is a "constant process of evaluating the claim throughout the litigation." Another lawyer said that he "always has an eye toward settling," taking care of matters as fast and cheaply as possible and minimizing clients' risk. A third lawyer said, "It is all negotiation from the time suit is filed. You are constantly negotiating or setting up the negotiation. It doesn't just happen. You are negotiating from the outset, setting up where you want to go. You are judging [the other side] and they are judging you." He elaborated, "Negotiations don't occur in a week or a month. They occur in the entire time of the lawsuit. If anyone tells you they aren't negotiating, they really are. Every step in the process is a negotiation. You don't call it negotiation but in effect, that's what it is."

Id. at 66 (citations omitted).

Although some family law negotiations involve intense adversarial struggles starting with extreme demands by both sides, many are what I call "ordinary legal negotiation." In this process, lawyers negotiate based on expected court decisions or typical agreements in similar cases. In divorce cases, lawyers generally know the likely amounts of child support and usual parenting plans. These standards are the reference point for the negotiations, and lawyers may negotiate for deviations from these standards.

The lawyers in my study generally recommended actively managing cases from the outset of a case. Many lawyers suggested something like the following recommendation from one of the subjects.

Sooner or later, you will need to negotiate. You need to get out in front, get the facts, get the client on board. Try to prepare a settlement letter. ... This drives the case in the right direction. If you wait, you just get sucked into a pile of mud. If the other lawyer sends the letter, then you have to catch up.

Id. at 74. To prepare, lawyers should understand their clients' real interests, develop good relationships with their counterpart lawyers, carefully investigate the cases, and make strategic decisions about the best time to take

various actions.

When lawyers are confident because they are well prepared, they don't need to fear negotiating. They can suggest negotiation while being ready to litigate as vigorously as necessary. Lawyers can tell their counterparts that they can handle the case "the easy way or the hard way," and that they prefer the easy way but they are prepared to use the hard way if necessary. This approach can convey great confidence in one's case and can cause counterparts to negotiate reasonably.

Lawyers are humans, subject to cognitive biases like everyone else. With self-awareness, they can counteract these biases in themselves, their clients, and the other side. To combat overconfidence, lawyers should consult respected colleagues to get candid assessments and advice. To be most effective, lawyers should ask these colleagues to help identify unconscious assumptions and weaknesses in their cases.

Contrary to the popular myth, good lawyers can negotiate successfully regardless of the strength of their cases.

Family law cases often involve intense emotions, and lawyers should be prepared to help clients deal with them effectively. Because clients often are in extremely stressful times in their lives, their judgment may be impaired. Although some lawyers don't want to discuss clients' emotions, failing to deal with the emotions can create major problems and inhibit effective negotiation. This does not require lawyers to act as therapists. But it does require understanding the clients' real interests and helping the clients understand them as well. Good lawyers can assist clients to realistically consider their motivations (including pleasing or punishing others) and the likely outcomes in their cases. Clients may need some time and therapy before they are ready to make good decisions and so lawyers should consider the best time for negotiation.

Conclusion

When the default expectation is that lawyers and clients will fight hard, lawyers can have a hard time initiating negotiation. Numerous roadblocks can prevent negotiation or derail it once it starts. Any one of the roadblocks can keep a case on the track of ever-accelerating conflict. It can take just one of the lawyers or parties to impede progress in reaching a reasonable and efficient result.

Negotiation is especially important in family law cases. Often, minor children are involved, and bitter conflict can leave emotional scars for the rest of their lives. The parties themselves also can suffer long-term emotional and economic damage. So it is particularly important to promote reasonable negotiations at the earliest appropriate time in family law cases.

Lawyers can earn a healthy living by getting good results for their clients through negotiation. As described above, this requires careful reflection, preparation, cooperation, and determination. Contrary to the popular myth, good lawyers can negotiate successfully regardless of the strength of their cases. Negotiation does not necessarily require surrendering important interests. With confidence and a willingness to fight hard in court if needed, lawyers can keep their clients on track to resolve cases as reasonably and efficiently as possible. Of course, negotiation will not always lead to good outcomes, but it is always worth considering.

Lawyers can earn a good living by negotiating at the earliest appropriate time in their cases. Although they may make more money in any single case by going to trial, this would not lead to increased overall income if the lawyers have other cases they can handle in the saved

time. Developing a reputation for reasonableness can lead to increased referrals of clients with realistic expectations. It may also lead to fewer uncollectable bills.

Life is too short to fight all the time. By negotiating whenever appropriate, lawyers can help clients navigate difficult conflicts, enjoy satisfying professional lives, and provide well for their own families. **FA**



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