ADR Buzzwords Create Unrealistic Expectations for Divorcing Parties

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Buzzwords are a pervasive feature of most verbal landscapes. Every discipline has them. At best, they can be useful shorthand. At worst, they can be misleading, or even dangerous.

Alternative dispute resolution has spawned its share of buzzwords. The most common derive from the ubiquitous emphasis on settlement. “Thinking outside the box” leads to “win-win solutions” for example. The implication is that if the parties and their lawyers let their minds expand, the answers they come up with will delight all participants in the process.

Professionals typically pride themselves on thinking outside the box. Whether they are litigators, collaborative lawyers, or mediators, they tell their clients they do it; maybe they even believe it themselves. But there is very little evidence to support that proposition.

To the contrary, the evidence is that professionals do the same thing time and time again; they don’t think much at all, let alone think outside the box. This should not be a matter for shame or blame. The overwhelming majority of cases do not call upon professionals for that particular skill.

Take a typical divorce case. The tasks at hand are to divide the parties’ property, provide for their support, and figure out how they will co-parent their children. The laws of the State of California require an equal division of community property, a fair allocation of the income available for support, and frequent and continuing contact between both parties and their children. Accomplishing these tasks is routine in the vast majority of cases.

The problems caused by divorce are many and real. Both parties pay a heavy price. The children suffer. The financial and emotional dislocations may persist for years. Parties and professionals thinking outside the box will not ameliorate these problems. What will help is minimizing the time and money and trauma involved in getting a divorce. ADR does its part by offering an expedited process.

Win-win solutions are nice, but they are more common in the textbooks than in real life. It would be great if one party wanted the peaches and the other the pits, but it doesn’t usually work that way. Both parties want the peaches, and there aren’t enough of them. As an empirical matter, win-win solutions are far and few between.

When it comes to divorce, solutions that produce two winners are even more uncommon than solutions that produce a winner and a loser. It is more often the case that both parties lose. Mediation clients understand intuitively that hiring lawyers to do their talking for them – either as litigators or collaborative lawyers – increases the cost of the process without improving the end result.

Another buzzword that has great currency is “self-determination.” The idea is that the parties are unconstrained by the substantive and procedural rules that apply to everyone else. Thus, they can make their own deal, even if it bears no relationship to the result that would be imposed upon them by a judge in Court,

or the result that might be negotiated by lawyers. In the informal setting of ADR, they can tailor the process to meet their needs. The implication is that the parties are firmly in control of the process and the outcome, and that this makes it possible for them to do it their way.

If self-determination is understood to mean opting out of a burdensome, inconvenient, and expensive bureaucracy in favor of efficient and economical private dispute resolution, there is no great harm. This is one of the advantages of doing it yourself instead of letting lawyers and, ultimately, a judge do it for you. To put it simply, the traditional system offers no benefit that justifies its cost.

However, the theoretical ability of the parties to do whatever they wish does not translate into substantive outcomes that are out of the ordinary, let alone creative.

In case after case, the parties opt to divide their community equally as the law requires. In case after case, they do their best to divide the available income fairly as the law requires. In case after case, they agree to a schedule of physical custody that works for them and their children as well as possible under the circumstances.

A party could theoretically agree to take less than his or her equal share of the community property, or less than his or her fair share of the available income, but very few parties have any incentive to do that. Given the reality that what each party is entitled to under the law isn't enough, neither party is ordinarily willing to give more or accept less than what the law provides.

The concept of self-determination is misleading to the extent that it implies that departing from the laws of the State of California is the goal. If it encourages the parties to believe that they are entitled to a better substantive outcome, it is harmful. As neither party is ordinarily prepared to give the other a better substantive outcome at his or her expense, the fallacy of self-determination leads inexorably to the fallacy of the win-win solution.

The search for "common ground" is a favorite metaphor among many mediators. The idea is that the parties' similarities are more important than their differences; that their focus should be on shared interests and compatible goals instead of divisive positions.

The problem is that common ground often takes the form of a generality or an abstraction. Thus, for example, each party can say "I want to be fair." However, each party has a very different notion of fairness. While there are some mediators who consider that their job is to promote agreement between the parties on an agreement that is fair to both of them, other mediators discourage the parties from believing that the outcome of any issue is controlled by either party's sense of fairness. In Court, of course, neither party's sense of fairness is even relevant; the judge's sense of fairness is the only one that matters.

The vast majority of divorcing couples can also agree that they want what's best for their children. Surely this should count as common ground. As it turns out, what each party thinks is best for the children coincides with what each party thinks is best for himself or herself. Every experienced divorce lawyer knows that there are an infinite number of workable parenting plans, and that each party invariably invokes the children's best interests, as he or she contends for his or her plan of choice.

In the main, buzzwords are a marketing tool for proponents of ADR. The more untested the process, the more grandiose the claims. Thus, collaborative law trumpets itself as the "next generation" of ADR, a "new paradigm" when it is little more than a theory in search of a practice. Buzzwords create unrealistic expectations, and foster the illusion that a better process produces a better substantive outcome. The answer to the emphasis on buzzwords is recognition that most cases are relatively routine.

- Resolving a case does not require thinking outside the box. The task at hand is to pick from among the handful of solutions that have emerged from millions of divorce cases in this state. What masquerades as creativity is usually no more than professional competence. An experienced family mediator can help the parties make a better deal because of superior knowledge, not by thinking outside the box.
- The goal is negotiating a settlement that both parties can live with. The imagery of win-win solutions and self-determination puts too much pressure on the divorce professionals, and encourages the parties to have unrealistic expectations.
- The idea of common ground implies agreement.
- One of the great lessons of mediation is that agreement is not a prerequisite to accepting the reality of the situation and making a deal that both parties can live with. Parties who may disagree when it comes to just about everything make deals all the time.

In short, divorce is not about finding common ground, getting creative, or making both parties feel like winners. It's about helping the parties close the book on a chapter in their lives as gently as possible, make the best of a difficult situation, and move on.

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