

Settling the Score
By Frank Garfield
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Preparing for settlement is as important as preparing for trial. Admittedly, the stakes are not as high: If you fail to settle your case, there may be an opportunity to try again. At the very least, you can go to trial. On the other hand, since over 90% of all family law cases eventually settle, there is something to be said for trying to get it right the first time. The following practice pointers may help.

Analyze the case objectively. Litigators often come to believe in the justice of their clients' cause. That tendency can interfere with their ability to evaluate the claims of both parties objectively. A lawyer who allows her client to believe that all of the client's claims will be upheld by a trial judge is doing him a disservice. As any litigator knows, in trial, you win some and you lose some. This is especially true in family law. It is relatively rare that everything goes only one party's way.

Be sure you can prove your case. If the parties are serious about settlement, it is incumbent on the lawyers to determine if their claims are rock solid, fairly arguable, or barely plausible. In preparing for settlement, the questions are the same as in preparing for trial: Is the claim supported by the facts? What evidence proves those facts? Is that evidence admissible? There are some claims that can go either way, but the vast majority are tolerably clear one way or the other. An experienced neutral can often provide reliable guidance as to which claims are likely to succeed at the time of trial.

Tell your client the truth. Your client should not get his first dose of reality at a settlement conference. Clients sometimes have a tendency to engage in magical thinking. They may not accept the end of the marriage or understand the financial facts. Even a party who is otherwise rational may have a hard time believing that the trial judge or other neutral will not necessarily see things his way. Each party should receive a best case and worst case analysis in advance. The danger of omitting a worst case analysis is that your client may believe that his best case is the way the case will be resolved. If so, why should he settle for less?

Consider practical compromises. There are litigators who believe that the only acceptable settlement mirrors their best trial result. This attitude obstructs settlement. One party's best trial result is the other party's worst trial result. There are very few cases in which a party is willing to settle for his worst case.

Look at it from the other party's point of view. It is easy to make a settlement proposal that works for your client. In its most extreme form, a lawyer who takes this approach writes up her client's wish list and labels it a settlement proposal. It is much more challenging to put a settlement proposal on the table that has some appeal to the other party. As a general rule, there has to be something in the settlement for both parties. Otherwise, there's no motivation to keep talking. Under those circumstances, why not go to trial and let a judge decide?

Don't over-identify with your client. Getting a divorce is an emotional experience. The parties are entitled to their feelings. But problems arise when their lawyers take on those feelings and replace professional detachment with emotional engagement.

There is a place for compassion in the attorney-client relationship, and even in mediation. In the courtroom, however, compassion is in short supply. Emotional pitches are more likely to be viewed as a smoke screen than a plea for justice. As a general rule, a party who does not like the law invokes the mantra of equity. Efforts to persuade any neutral (judge or mediator) to disregard the law in favor of doing the right thing are unlikely to succeed. One of the advantages of mediation is that the parties can sometimes persuade each other to disregard the law and respond to each other's feelings, especially if requested accommodations are reciprocal.

Avoid arguments based on abstractions. Every parent can say that the parties' children are the most important things in the world. Every parent claims to want whatever is in the children's best interests. The problem is that parties disagree about what is in the children's best interests when it comes to the specifics of a parenting plan. Curiously, the parenting plan preferred by each party always coincides exactly with what that party believes to be in the children's best interests. While the parties may invoke the children's best interests to justify their positions with respect to whether a period of weekend physical custody should end on Sunday at 5:00 p.m. or Monday morning when the children go to school, invoking an abstraction does not advance the analysis. To the contrary, it polarizes the parties by turning a practical issue into a matter of principle.

Maintain a professional relationship with opposing counsel. When the attorneys have a cordial relationship, the parties may be suspicious, or even paranoid. The lawyers may rightly believe that a prior relationship (even if it merely results from having had cases together in the past) breeds trust and confidence. But they should at least be aware of the tendency of the parties to worry that lawyers who know each other may have divided loyalties.

At the other extreme, lawyers who don't like each other very much and let it show can exacerbate the tensions inherent in these cases. Especially if the goal is a settlement, lawyers have a professional obligation to put aside their personal animosity. Responding to an obnoxious lawyer in kind may provide a measure of personal satisfaction, but it is unlikely to promote settlement.

Given the parties' sensitivities, the best policy is to maintain a professional demeanor at all times.

Make a cost-benefit analysis. Compare the settlement you can get (as opposed to the settlement you want) to your client's alternative if a settlement doesn't materialize. In most cases, the alternative is going to trial. That alternative can be burdensome, expensive, and risky. If there's no doubt in your mind that your client will get a better result by letting a judge decide, passing up the settlement and getting ready for trial is a legitimate option. But it is rare that a better result at the time of trial is a foregone conclusion. Under those circumstances, you should provide your client with a cost-benefit analysis, offer a recommendation, and let the client make the final decision.

Don't sweat the small stuff. There are deal points, matters of importance, and details that may be

significant or potentially significant. There is also boilerplate. The parties are not well served by interminable haggling between the lawyers over the fine points of a done deal. One way to address this problem: Serve proposed boilerplate on opposing counsel in advance, and bring it to the settlement conference so that it can be incorporated into a deal memo. In short, important details should be dealt with beforehand, not as an afterthought.

Put all issues on the table for discussion. It can be frustrating if the parties reach agreement on the essential terms of a deal, and one of the attorneys then says: “Now let’s talk about fees.” The idea is that the other side will not let the deal fail over the fee issue. However, this cuts both ways: The party demanding fees expects the other party to make a contribution to keep the benefit of the deal. But the other party could just as easily expect the party demanding fees to give up the claim to keep the benefit of the deal. In short, this strategy can backfire.

If a party is demanding a contribution to his fees, that issue should be addressed along with everything else. If it isn’t, the lawyer for the other party should inquire: Is this a complete list of the issues we are here to resolve? No exceptions? Not even for fees? There is no downside to this approach. If no claim is to be made, everyone will know that from the outset. If a claim is to be made, it can be factored into the settlement calculus.

Document the deal. A comprehensive deal memo is better than an agreement in principle, or a recitation on the record. It may be business as usual for the lawyers, but it is frustrating for the parties to make a deal, and then to pay thousands of dollars (or even tens of thousands of dollars) to get it documented. Your client will thank you if you can conclude the settlement conference with a comprehensive deal memo that has been signed by all concerned.

Accept that settlements are not necessarily fair. Most experienced family lawyers know that fairness is a matter of opinion, and that justice is a rare commodity. As one family law bench officer has famously remarked: “My job is to dispense equal measures of injustice and unfairness to both parties.” If the parties are serious about settlement, they have to give up the notion that the settlement must be fair. A settlement that makes sense may not feel fair to one or both parties. Trying to persuade them that they should feel otherwise is an exercise in frustration and futility. The questions are whether they can live with it, and whether they have options that are preferable to accepting the deal.

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