

Preparing a Client for Settlement

BY JENNIFER A. BRANDT

Settling a divorce case is no easy task. It requires parties who are at odds with each other to come together for their mutual benefit. These parties must set aside their emotions and look at their economic situation in a detached, business-like manner. The attorneys advising these parties play a monumental role in convincing them to set aside their devastation, anger, and, perhaps, regret and focus instead on resolution. Both parties must have this same mindset to reach consensus. Timing also is key.

Before investing time and effort into preparing a party to settle, it is important to look at why settlement is the correct choice in the case. Although as litigators, we are geared up to try cases, settlement can save clients significant trial-related costs, which are undoubtedly greater than those associated with even the most complex and protracted settlement negotiations. In addition, trial often occurs after the parties have unsuccessfully attempted settlement, thus, further increasing the final cost of the divorce. Sometimes preserving assets means resolving the matter, rather than proceeding to trial, and facing the inherent risks associated with a trial. Most jurisdictions do not have jury trials in family law cases, leaving decision-making in the hands of one judge whose personal feelings and experiences may color his or her objectivity. In jurisdictions that do have jury trials, seeking jurors' consensus also can be risky.

Settlement makes sense because clients maintain lots of control over the outcome of their case. Though they may not achieve every objective on their to-do list, they typically reach more of their goals than if they permit the court to decide.

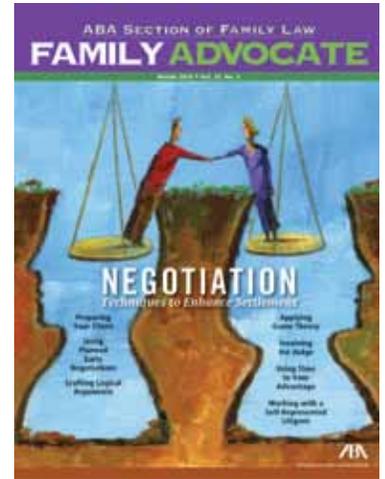
Sowing the seeds for settlement

During the initial consultation, sow the seeds for settlement. Focus on learning all you can about the marital assets and debts. Determine why the client is seeking a divorce, and keep in mind that at this point clients often are consumed with emotions and are not able to think rationally. The client is seeking your expertise and guidance and, most of all, to determine if you are someone with whom he or she can work.

A responsible attorney will use this time to educate the client about the law and how it applies to the client's specific case. This is also the time to address the client's emotional state and impress upon the client that the law is not about revenge or retribution but about equity and fairness from an economic perspective. Discuss the significant cost of trial and explain to the client that settlement presents an opportunity to limit costs and also to maintain some control over the outcome. Once this seed of settlement is planted, help the client cultivate it.

Determining the client's goals

Before an attorney can assist a client in determining a proper settlement, he or she must help the client understand what assets and debts comprise the marital estate. The best way to accomplish this is to serve the opposing party with full and complete discovery. This includes, but is not limited to, interrogatories and requests for documents. It could also include extensive depositions and appraisals of business



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interests and real estate.

Clients may not want to invest the time, energy, or resources in taking discovery, claiming that they are familiar with the other party's assets and liabilities. Nonetheless, full and complete discovery should be strongly encouraged just as if the parties were proceeding to trial. This course of action protects both attorney and client because if settlement should fail, the party is ready to proceed to trial. Moreover, it permits the client to settle with peace of mind, knowing all that may be gained and lost in the negotiation.

After discovery is complete, educate the client as to the various prospects for settlement. This is the time to review various settlement scenarios and explain the likely outcome if the case proceeds to trial. This also is the time to start aligning the client's expectations with reality. Help the client set aside anger and other emotions and focus on reality-based and objective decision-making.

Because emotion plays such a major role in family law cases and can color a client's perception, helping the client cope is almost as crucial as the economics of the case. Be sensitive to the devastation and sense of loss clients feel when going through a divorce. This emotion can be present even when your client initiated the divorce. Some clients are better at hiding their emotions, whereas others wear their emotions on their sleeves; but, in both cases emotions are present and can be an impediment to resolution.

The first step in dealing with the emotional aspect of the divorce is to acknowledge it. Encourage your client to seek professional help and to set aside the perceived stigma of doing so. Although some attorneys may not want to involve themselves with this aspect of the divorce, it cannot be ignored, especially if the client is to move toward resolution.

Setting the stage for settlement

Some people live by the motto that it takes a village to raise a child. Similarly, it "takes a village" to settle a divorce case. The attorney who believes he or she can do it alone is seriously misguided. While it is important to have a client's trust and respect, the client still may doubt counsel's advice. This is especially true for clients whose judgment is clouded by anger and resentment and for those who are seeking advice, whether directly or unsolicited, from friends, relatives, and neighbors who have been through a divorce or know someone who has, or from professionals outside of the attorney's team. These third parties, albeit well meaning, can seriously derail a client who is on track for settlement.

An attorney can be frustrated by these outsiders and advise the client to ignore them. However, if these people are valued and trusted by the client—such as a relative or financial advisor—the attorney may want to corral them to join the team and help bring the matter to closure for the benefit of the client. Sometimes this is as simple as scheduling a meeting with the client and members of this inner circle to educate them about the divorce process and the facts and likely outcome of the case if it proceeds to trial as well as possible options for settlement. If the attorney can convince the client's advisors to get on board with the settlement plan, the client will undoubtedly follow.

In some instances, however, clients continue to be distracted by these well-meaning outsiders. In these situations, have a heart-to-heart discussion with the client as to why you were hired, that is, for your substantial expertise in these matters. Inform the client that he or she cannot compare this case to another, as each case is unique and no one, except for the attorney and client, is fully aware of all the intricacies of this matter. Use this opportunity to reaffirm that together you are a team and must work together, without interference from others, to achieve the best result.

Courts often look favorably on parties who pursue settlement and unfavorably on those who become so entrenched in a position that they refuse to negotiate

Once the client begins to think that settlement is the right approach, the next step is to decide the methodology by which to settle the case. If the parties are fairly amicable and limited issues are to be resolved, a four-way meeting might be the way to go. However, this type of gathering can be a colossal waste of time and money if used as a forum for grandstanding or if the parties are not equally committed to resolution.

If the client is committed to settlement, but the other party does not share that same level of commitment, a settlement proposal can be submitted in writing to test the temperature and determine if settlement is possible. Some attorneys and clients feel that making the first move toward settlement shows weakness, but nothing can be further from the truth. Making the first move by submitting a written settlement offer puts the client in control and demonstrates a level of reasonableness. It may cause the other side to pause and reconsider their guerrilla trial tactics and understand that there is a viable alternative to trial. Even though specific settlement offers cannot be discussed if a case proceeds to trial, there is sometimes an opportunity to alert the court to the client's pretrial settlement overtures. Courts often look favorably on parties who pursue settlement and unfavorably on those who become so entrenched in a position that they refuse to negotiate.

Some parties who are committed to settlement will take their cases out of the court system and proceed by way of alternative dispute resolution (ADR). Educate your clients about these options as part of the settlement process. More and more jurisdictions are embracing these alternate ways of resolving cases.

An effective, but sometimes more costly, method for achieving settlement is to start preparation for trial. In many jurisdictions, courts do a superior job of giving parties numerous opportunities to resolve the case before trial. Preparing for and having a client attend a court-ordered settlement conference is often enough to convince the client not to proceed with trial. In other cases, a client may not realize that settlement is the best option until the first day of trial. In both instances, however, it is the attorney's responsibility to consistently remind the client of both the risks and possible rewards of proceeding to trial.

No matter how a settlement offer is communicated, prior to reviewing it, the attorney should meet with the client and lay out all possible outcomes so that the client can make an informed and intelligent decision as to how best to proceed. Attorneys in family law matters sometimes forget that a client may not have had prior dealings with the court system and may have a perception about trial based only on television or novels. Educate your client about the reality of trial versus settlement. Often, once clients comprehend that no one truly "wins" in family court trials, they may be more apt to compromise through settlement.

The psychology of settlement

Once a client is convinced that settlement is a viable and possibly the best option, explain the psychology of settlement negotiations. Tell the client that negotiation means compromise and what one side sees as a just resolution may not be shared by the opposition. Attorneys sometimes need to rid clients of their preconceived notions of what negotiation entails. It helps when the attorney can educate the client about the negotiation style of the adversary. In this way, the client can better appreciate that settlement may be a process, rather than sitting down together once and making a deal. In turn, the client can teach the attorney about the mentality of the other party so that the settlement discussions can be structured with elements that appeal to the other side.

Before negotiations are finalized, the client must feel confident that settlement is the best possible approach under the circumstances. Frequently, as a trial approaches

and client and attorney grow weary of the case, any resolution may seem appealing because it means the end is in sight. It is essential, nonetheless, that resolution not be rushed and that the client makes a thoughtful review and acceptance of the deal. The attorney must assure that the client fully understands and is comfortable with all aspects of the resolution of the matter.

Once the client is satisfied, the deal can be finalized. All the hard work, from the initial consultation through final negotiations, has paid off. Many family law clients may not be overly appreciative when the deal is done for a variety of reasons, most having nothing to do with the attorney. Nonetheless, over time and in retrospect, they will likely have a greater appreciation for the attorney's efforts in the painstaking process of preparing the client for settlement. **FA**

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