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Timing

Settling a divorce case is similar to trying to land a jet on an aircraft carrier. You are not aiming for where the ship is now as it will have moved by the time you arrive. So you plot a course for where you think it might be by the time you get there, taking into account its general course, wind and wave conditions, and your ability to fly and navigate. Meanwhile, you make periodic midcourse corrections to keep on track. If you overshoot or undershoot the ship, you crash. The goal is to time your arrival for a smooth landing.

Stages of Divorce Proceedings

Most divorce cases seem to follow a general pattern. First, everyone is angry and revenge laden. The lawyers get frequent calls. The animosity is so great that one wonders how these people ever were intimate with each other and pledged, sometimes before their deity, to stay together "until death do us part." The transition seems to occur when the first bills from the attorneys arrive, which inform the clients that their retainers are used up. Then, both parties begin the process of coming to the realization that fighting only enriches their attorneys while harming their children. And the settlement process begins.

Of course, not all cases proceed in such a chronological fashion; but for those that do, it is remarkable the extent to which the pattern mirrors Elisabeth Kübler-Ross's famous "five stages of grief": denial,

anger, bargaining, depression, and acceptance.¹ Often, the pattern includes a couple of extra stages uniquely associated with divorce.² Thus, many couples start with denial and proceed through anger, fear, guilt, and bargaining (although not the good type of settlement-based bargaining) until both parties reach acceptance.

Such stages of grief are not surprising; after all, a divorce is the death of a marriage. The goal of divorce lawyers should be to provide a dignified funeral.

Importance of Timing

Trying to negotiate when both parties accept the end of the marriage is far easier than when they are in the anger stage. It is not always possible to time settlement negotiations accordingly, but lawyers need to recognize the concept of timing and try to adapt the course of negotiations to the psychological arc of the parties.

I discuss in this book the art of the lawyer listening to the client, but the reverse is true as well: the client must listen to the lawyer. Overly emotional clients, whether due to anger, fear, or some other emotion, do not hear what the lawyer is saying—even if they are listening. All lawyers with a few years of experience have heard clients ask for an explanation of a settlement agreement *after they have signed it* even though the lawyer explained it frequently during the course of negotiations. People consumed with emotions are not absorbing the advice that they are getting. It's no wonder family law is one of the leading areas for ethics complaints and malpractice lawsuits. It is not that family law attorneys commit more ethics violations or malpractice than other lawyers. Rather, the timing of negotiations does not always afford the parties an opportunity for detached contemplation of their options and selection of the one that best suits their circumstances.

Timing Issues

In some cases, timing, although important, is a moot issue.

For example, sometimes timing is not a consideration (although it should be!) because of lack of control over timing: the system does not allow an individual client as much time as needed to work through the

1. ELISABETH KÜBLER-ROSS, *ON DEATH AND DYING* (1997).

2. *See, e.g.*, Pauline H. Tesler & Peggy Thompson, *The Emotional Stages of Divorce*, WOMANS DIVORCE (2012), <http://www.womansdivorce.com/emotional-stages-of-divorce.html> (last visited Oct. 25, 2012).

emotional issues. Courts control their calendars, and some are faster than others. Although some judges will allow the parties time to emotionally adjust to a divorce, some will not and will force matters—even if neither party is ready. Worse, there are some clients for whom there will *never* be enough time because they are not progressing through the stages of grief, sometimes due to a mental disorder or substance addiction.

Timing also may have to take a backseat to proper discovery. Although, as discussed in a separate chapter of this book (chapter 9, “Disclosure”), the parties should cooperate by voluntarily and promptly exchanging all necessary financial information, appraisals (especially business appraisals) can take quite some time to be done properly. In such cases, the lawyers need to carefully estimate the anticipated timeline so that their clients can adjust their expectations accordingly. When I hire an appraiser, I ask for the latest possible date when I can expect the appraisal; I far prefer my client to be pleasantly surprised by getting it earlier than frustrated that it had not arrived on time.

Timing also does not help a client whose sole goal is destruction. This type is exemplified by the allegory of the crocodile and the scorpion: A scorpion asks a crocodile for a ride across a river. The crocodile tells the scorpion that its sting is fatal to him, to which the scorpion replies, “But I can’t swim, so if I sting you, I will die as well.” This makes sense to the crocodile, so he lets the scorpion hop on top of him. Halfway across the river, the scorpion stings the crocodile. As the crocodile is drowning, taking the scorpion with him, he asks the scorpion why it stung him, dooming them both. The scorpion’s reply: “Because I am a scorpion.”

There are scorpions out there that do nothing but sting, and there is no effective settlement strategy for such people (at least, of which I am aware). But, fortunately, human scorpions are rare. Most human beings will eventually make rational decisions consistent with their own best interests, even if they behave irrationally for a period of time. And settlement is the rational choice for all divorcing parties.

Recognition of the Right Time

How, then, to recognize and take advantage of the right time?

First, be patient. Just because a client is consumed with anger at an early stage does not mean that settlement will be impossible later.

Second, pay attention. Lawyers need to meet periodically with such clients and, in addition to listening to them, watch them. It is

widely accepted that communication is at least 80 percent nonverbal. What nonverbal cues is the client giving you? Is the body posture appropriate? Is the client fidgeting? If you ask the client to repeat something you said, can he do so accurately? If the client is not hearing what you are saying, it is probably not time for settlement.

Third, observe the dynamics of the interaction of opposing counsel and his client at a four-way meeting. At one such session of which I was a part, the opposing counsel (who was one of those busy lawyers with more cases than he could effectively handle) kept calling his client by the wrong name. Worse, the wrong name was the correct name for my client's girlfriend. The wife was clearly so angry with her lawyer that it was apparent that negotiations that day would be futile, and I terminated the session.

Fourth, although the anecdote about the crocodile and the scorpion is, of course, not an example of typical human behavior, sometimes you can just sense whether a settlement is ripe that day. Trust your instincts. If it feels right, go for it: make the proposal that should lead to resolution. If it doesn't feel right—if the atmosphere is poisonous—you may want to keep the proposal in your pocket for a better time.

Testing the atmosphere is no more an exact science for settlement negotiations than it is for meteorology. And you do not have complete control over the timing: both your client and the other side have a say. Still, to the extent that you have any control, once you have sufficient information to begin discussions, try to do so. Sometimes emotions need to be prodded to catch up to reality. When uncertain, it is better to start the process and run the risk of having to put it on ice for a while than to run out of time to negotiate effectively because you waited too long.

Summary

A lawyer needs to be sensitive to when both parties are willing to make the compromises necessary to get to an agreement. Although the timing is not always within a lawyer's control, lawyers should not push a settlement process for which one of the parties is not prepared. On the other hand, lawyers should not delay starting the process until it's too late and a trial date changes all of the variables in the equation. The important thing to keep in mind is that there are no wrong times to settle a case—but there are better times and worse times.