"Effective Streamlined Settlements without Posturing, Positioning or Puffery"
by Lisa B. Forberg

At the June 28th LAW networking event, a few of us were discussing whether it was necessary to play hardball to get satisfactory results in an employment case. Why couldn't the attorneys be direct about their clients' concerns and needs, rather than engage in posturing or positioning?

As many of us know, in dispute resolution, whether the conflict involves business partners, employers and employees, or divorcing spouses, much depends upon the process chosen by the clients and which lawyer is on the other side. If the other attorney is known for positioning, puffery, and posturing, then you are often forced into doing the same to protect your client's interests. This can result in excessive discovery, motions, the hiring of dueling experts and expensive trial preparation for a case that will likely settle, as the trial date gets closer.

Settling a classic adversarial case, with the threat of a contested trial, requires the lawyers to prepare for a final showdown, even if the likelihood of trying the case is quite small. It requires that clients' goals, needs and interests be kept secret to maintain the upper hand. The gamesmanship and strategizing involved in litigation can be exhilarating, cathartic and ego-boosting. Having been a divorce attorney for over ten years, I also appreciate how a complex litigated case can boost a firm's bottom line.

Adversarial litigation is often emotional for all involved, including the lawyers, with such emotion compounded in cases involving people who know each other, such as business partners, workplace associates and spouses. In the context of an emotional conflict, parties who choose to litigate enter into a process that necessarily pits one against the other. For example, the Tennessee family law Complaint requires the parties to list "Plaintiff *versus* Defendant" in its heading. This establishes from the start that one side is at odds with the other.

In reality, litigants are often disappointed to find out that no one really wins or loses; that the court, from its policy of fairness, imposes a compromise on the parties. And sometimes, the court's decision is not what either side really wanted!

What would happen if the two lawyers were hired intentionally for a limited representation, for the sole purpose of helping the clients work out a settlement, and not to litigate? By "closing the courthouse doors" for that particular case, with those particular lawyers, what might the process look like? Would clients feel like they had to give in to the other side? Or could it result in long-lasting win-win solutions? Is it possible to get good results for clients without exaggerating what our clients want or without understating what they are willing to give up?

On the flip side, is it necessary to limit the scope of the lawyer's representation to settlement only, with the constraints that this type of representation might entail? We all know, or may even be, lawyers who cooperate and work well with opposing counsel in litigated cases.

David Lee, the fictional family law attorney in the TV show, "The Good Wife" is the epitome of the posturing lawyer. Lee believes that harm is caused when his clients don't get as much money, property, or time with the children as they want. This aim of "getting as much as possible" for

our clients is ingrained in us as lawyers. We rarely question the worthiness of this goal. This goal is also how some clients define success, demanding that their lawyer throw the opposing party "under the bus" to achieve that end.

But perhaps harm is instead caused when the family law attorney routinely encourages clients to get the most stuff, viewing the case simply as "us versus them" with only one "winner." In this mindset, the other party, someone they once loved, becomes a non-entity, someone to beat in the quest for the biggest piece of the marital pie.

In *Getting to Yes: Negotiating Agreement Without Giving In*, authors Roger Fisher and William Ury describe and advocate a process called interest-based negotiation. This type of negotiation is at the heart of alternative non-adversarial dispute resolution processes such as mediation and Collaborative Practice. By example, if two spouses are fighting over the marital home, by both parties focusing on the underlying interests represented by the house, settlement options open up. Instead of trying to convince the judge that Mom or Dad should be awarded the home, a win-lose proposition, interest-based negotiation might uncover that Dad is afraid of being alienated from the children, if he ends up in a small apartment, and that Mom is mainly seeking school continuity and actually fears the financial strain of the big house.

A win-win solution could take many forms in this scenario, one of which would be selling the marital house with both parents getting similar, but smaller properties from which to co-parent. With at least one parent remaining in the old school district, everyone's needs would be met.

With interest-based negotiation and with the courthouse doors voluntarily "closed" by the clients, they create instead an opportunity to sit down and discuss their needs and concerns directly, asking and responding to non-threatening questions, in an effort to reach mutually-acceptable solutions. The closed courthouse, with lawyers hired only to settle the case, through a series of roundtable business meetings, is the hallmark of the Collaborative Process, an alternative dispute resolution process that has been available in Tennessee since 2009.

Unlike early-stage mediation, in Collaborative cases, both clients have their own lawyers by their side from start to finish, and unlike late-stage mediation, where lawyers are necessarily involved, the lawyers (and clients) have intentionally removed trying the case from the list of process options. Collaborative attorneys are specially trained in this process and must keep up with yearly continuing education to engage in the practice.

Besides face-to-face interest-based negotiation and a commitment to settlement, the Collaborative Process has other distinguishing features and benefits. It might be helpful to provide an example loosely based on one of my past cases.

This case involved a common divorce scenario:

- Wife and her long-term individual therapist both believe the husband is abusive and a potential threat to the wife's safety.

- Husband admits he has used threatening language to his wife but states he has never physically hurt her.
- Husband recently has been diagnosed as suffering from bi-polar disorder.
- Husband is under the care of a therapist and has started taking prescribed medication to help control his moods.
- Husband learns wife has had an affair and is devastated.
- Wife is anxious to get divorced; husband is too mad to move forward.
- Trust between the parties has always been problematic and is now at an all-time low.
- Children sense a deep rift between the parents and are absorbing this to their detriment.
- Parents aren't ready to tell the children about the split due to their own psychic pain.
- Everyone is scared about the future and angry and sad about the past.

Most of us know how litigation tends to deal with this fact pattern: rally the forces, obtain a temporary restraining order, get the guardian *ad litem*, hire a detective, obtain the hard drive, allege nasty things about the other person and get the most for your client – the most parenting time, the most money, more property, etc.

Is this type of high-conflict case right for an interest-based Collaborative negotiation? What kind of value can the Collaborative Process add to this scenario?

The Collaborative Process, which incorporates the advocacy of two lawyers and the assistance of neutral professionals, a mental health practitioner (coach) and a financial expert, enables:

- Constructive communication to occur between the spouses, so that some disputes are resolved quickly, and others are de- escalated.
- A focus on what the family needs to move forward.
- A safe environment from which to manage crises.
- The sufficient gathering of information.

As always occurs in Collaborative divorce, and did in this particular case, a coach was hired not to do therapy, but to help with the parties' emotions and with their communication.

The coach met with the clients off-line before the first group settlement meeting with the lawyers. She helped the clients explore their perceptions of reality: Mom started to accept that Dad was hurting emotionally, but not a threat to her safety; Dad could now see that his wife wanted him to have a significant role in the children's lives, which helped decrease his fears. This reframing of reality de-escalated the Wife's drive for a restraining order and helped the parties develop needed boundaries. The coach also helped these parents craft words with which to tell the children of the upcoming changes in their lives. Her further presence in the settlement meetings helped the clients identify what they needed to do to successfully co-parent going forward.

The financial neutral also met with the parties together to gather facts regarding budgets, assets and liabilities. The clients were required to disclose all of their financial information and to swear to the truth and completeness of their disclosures, under their lawyers' guidance. The lawyers included these sworn statements with the marital dissolution agreement submitted to court.

A last point of conflict in the case concerned how long the wife would have to buy out the husband's marital property interests. Using the parties' respective budgets and a time-line for future events, the financial neutral helped the parties develop various options. The Collaborative process was so successful that the parties, who started out in a state of dysfunction, were able to make this final decision on their own.

This case would have been very challenging for just the two lawyers to manage, despite their commitment to collaboration and their years of experience. More important, this would have been a completely different case had it been litigated. It most likely would have started with a domestic violence petition. It might have settled in a marathon shuttle diplomacy/ mediation session a week before trial. It likely would have been handled with the clients never setting eyes on one another or deciding anything together, despite having young children they would need to co-parent for years.

Did this particular case have to be formally Collaborative, with the attorneys hired on a limited representation basis, thus removing the court option? If not, the parties at their lawyers' encouragement might have given up prematurely instead of continuing their work on the negotiation. The parties might have been less forthcoming about their needs and concerns, knowing that the information could be used against them. Finally, as I often tell consults who are considering the Collaborative process, by choosing it they insure that <u>both</u> lawyers have the training and commitment to a settlement model of dispute resolution.

In my ten years of doing Collaborative cases, I can state emphatically that removing the court option puts the focus and resources on practical solutions, rather than on posturing, positioning and puffery. The process is more streamlined and less costly to the clients, both emotionally and financially, and if the parties need to have a relationship going forward, they have an opportunity

to show their children that they can work together for their best interests. This is a blessing for children who are most harmed, not by a divorce by itself, but by the level of unmanaged conflict.

Abraham Lincoln told students in a law lecture 150 years ago:

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

So, with that said, I urge you to go forth and make peace!

Lisa Forberg, of Forberg Law Office, and a member of the Middle Tennessee Collaborative Alliance, has included Collaborative Practice in her divorce and mediation work since 2006. She has presented and published extensively on the topic. Her JD is from the Santa Clara University School of Law. Lisa was named in the national bestseller, *Conscious Uncoupling*, as a change agent who is "working hard to improve things both emotionally and financially" for divorcing couples.