

The Psychology of Settlement

by Christopher R. Musulin

As matrimonial attorneys we are educated and trained to address legal issues such as custody, child support, alimony and equitable distribution; yet divorce is both a legal and a psychological process. Often the emotional and psychological issues, rather than the inherent merits or legal complexities of a particular client's situation, present the most significant obstacle to a negotiated settlement of a divorce matter. It is our obligation as divorce lawyers and legal professionals to both educate ourselves and to follow established norms of professional conduct that consider and respect the psychodynamics and all of the inherent hardships accompanying a family going through the process of divorce.

THE PSYCHODYNAMICS OF DIVORCE

Divorce necessitates a complete set of psychological adjustments for the litigants involved. The adjustments can be intensely personal, even primitive, involving behavioral regression, or more pragmatic, such as acclimating to new parenting plans, housing, or reduced socioeconomic status.

PERSONAL ADJUSTMENTS

The process of personal adjustments can be the most challenging aspect of the divorce process. According to Professor Marc Ackerman, one of America's leading forensic psychologists whose book, *Psychological Experts in Divorce Actions*, is now in its fifth edition:

At the time of divorce, there is often a massive ego regression on the part of

parents. People who had previously behaved reasonably well will behave poorly at this time. A spilling of aggressive and sexual impulses, in addition to intense depression, can occur. Most of this is based on the fact that most divorces are unilateral decisions. This results in a "narcissistic injury" of being rejected. Because a shared identity exists during the marriage, anxiety rises based upon the question, "Who am I without the marriage?" This is similar to the experience an adolescent goes through. Intense loneliness and diminished capacity can also occur in conjunction with ego regression.¹

All attorneys have encountered clients immersed in different stages of often complex ego regression. Interacting with a person in this condition is extremely challenging. A prospective client may seem distant, almost intellectually impaired and often extremely upset, bordering on volatility. A matrimonial attorney's calm logic, rational explanations and socially appropriate interaction do not fit their emotional station. One's failure to regress to their level of behavior can upset and even offend them. Why isn't this attorney equally outraged? This attorney is not empathetic with my situation! I am not connecting with him! He won't fight for me! I'll go somewhere else and find an attorney who *will* fight for me!

Bonding with a client on an emotional level at a regressed state is a fatal mistake. It distracts the client from the business at hand and creates unrealistic expectation with regard to the use of the divorce process (using litigation to exact emotional retribution), making settlement of a divorce completely impossible.

According to many legal and psychological authorities, the process of bonding with a client in a regressed psychological state is similar to a phenomenon known as "client think," a version of "group think" identified by author Irving Janus.² Professional objectivity and the pursuit of traditional litigation goals are supplanted by pursuit of a client's emotional agenda and unrealistic goals, which then become the mantra of the attorney/client duo. The attorney assumes a position in the litigation based upon 'client think' and, in effect, becomes the client. When immersed in client think, subconscious cognitive barriers arise that directly impact an attorney's judgment and otherwise compromise the fiduciary duty.

PRAGMATIC ADJUSTMENT

As to the more pragmatic adjustments related to the divorce process, both parents and children must deal with the concerns of moving to a new neighborhood, going to a new school or job, getting used to new relationships and single parenthood, and becoming familiar with visitation schedules. It may be necessary for a parent who had not previously worked outside the home to do so after the divorce. Litigants and the children are often required to survive on a strict budget. Many experience the loss of previous social groups and extended family, and are forced to make any number of other adjustments.

MUTUALITY IN THE DECISION TO DIVORCE

According to Sam Margulies, Ph.D., Esquire, a nationally recognized expert on the psychology of

divorce, the participants in the divorce process, litigants and attorneys alike, must recognize and identify the psychological position of the parties at the commencement of the divorce process if they have a genuine desire to problem-solve the marital estate and achieve a settlement.

As stated by Margulies:

The most important psychodynamic of the divorce is the issue of mutuality and how it develops. In very few divorces do the two partners mutually decide on a divorce at the same time. Invariably, after some long period of reflection and consideration, one of the partners will decide that she can't take the discomfort of the marriage anymore and is determined to end the marriage. Such decisions are not made lightly or impulsively. I have found that it is not unusual that the "initiator" has been ruminating about divorce for years. He or she has had an opportunity to mourn the loss of the dream associated with the marriage, has had time to think through what an alternative life would be like and has begun to prepare emotionally and in other ways for the end of the marriage. She may have made new friends who are not linked to her mate, may have started to achieve new credentials to be able to better earn money and in general started to live a new life.

The other partner, who we call the "non-initiator," may be anywhere on a continuum from resigned acceptance to utter shock and surprise. To the extent that the two partners are nearly equal the divorce can begin more easily. He announces he wants a divorce, citing many years of unresolved unhappiness and numerous unsuccessful attempts at counseling. And although she might have been inclined to try a little longer, she agrees that he is probably right and that they ought to get divorced. In this situation, the decision is nearly mutual and both are almost ready to begin negotiating the divorce. Contrast this situation with one in which he makes the same announcement but she

reacts with surprise and terror. She is committed to the covenant they made in their wedding vows and believes that marriage is forever no matter what. She is aghast at the damage a divorce would do to the children and she is filled with fear for her loss of place in the community and the changes that would be necessary. She is outraged that he could even consider divorce and declares her complete opposition. This couple is in trouble.³

The failure to fully recognize, acknowledge and temper the psychological position of the litigants is destructive to a settlement. A party responding to a divorce, the so-called non-initiator, needs time to adjust, mourn, and envision a new existence as a single person with all of the anxieties and adaptations accompanying such a position. Until the period of psychological adjustment is sufficiently complete to permit rational discussion concerning the marital estate, no settlement will occur.

THE TIMING OF PSYCHOLOGICAL ADJUSTMENT

Unfortunately, the process of psychological adjustment related to divorce can take anywhere from six months to a year, or even longer. In fact, according to psychologist and researcher Judith Wallerstein, a well-known clinical and forensic psychologist who has conducted a study of the impact of divorce on families over a period of 25 years, 10 years after the divorce 40 percent of women and 80 percent of men are just as angry as they were at the time of the initial divorce application.⁴

According to research results conducted by psychologist Judy Corcoran and Julie Ross, authors of *Joint Custody With A Jerk*, "There's still anger, jealousy...these feelings are reignited with every disagreement."⁵ Court proceedings, letters, phone calls or other matters related to the divorce also have the potential of reigniting regressive behavior.

Traditional divorce practice is simply not compatible with the tim-

ing of psychological adjustment in most divorce cases. The process of litigation is replete with opportunities to reignite ego regression; for example, a divorce complaint utilizing extreme cruelty as a basis to dissolve the marriage; a *pendente lite* motion detailing alcohol or drug use or poor parental decisions relating to children; or the filing of a domestic violence complaint detailing physically abusive behaviors or otherwise recounting horrible interactions between a husband and wife.

Just when the smoke clears and the property settlement agreement is drafted, the smallest or most inconsequential thing—a word, a gesture, an email or the discovery of a paramour—may upset the fragile psychological dynamic of settlement. It has nothing to do with the merits; rather, it is simple emotion. Additionally, the best practice protocols requiring a rapid disposition of divorce cases in 12 months or less are unrealistic in light of the psychological timetable in most divorce matters. In fact, the pressure of complying with best practices can make the situation even worse.

PROFESSIONAL STANDARDS ADDRESSING THE PSYCHOLOGY OF DIVORCE

Various standards of professional conduct from the state of New Jersey, the American Bar Association and the American Academy of Matrimonial Lawyers address the psychology of divorce, either directly or indirectly, in relation to the conduct of counsel and the parties. Most of these relate to expediting litigation, assuming reasonable positions, and striving to limit the emotionalization of the divorce process.

Pursuant to the Bounds of Advocacy of the American Academy of Matrimonial Lawyers:

7.1 An attorney should strive to lower the emotional level of marital disputes by treating counsel and the parties with respect.

Comment: Some clients expect and want the matrimonial lawyer to reflect

the highly emotional, vengeful relationship between the spouses. The attorney should explain to the client that discourteous or uncivil conduct is inappropriate and counterproductive, that measures of respect are consistent with competent and ethical representation of the client, and that it is unprofessional for the attorney to act otherwise.

Ideally, the relationship between counsel is that of colleagues using constructive problem-solving techniques to settle their respective clients' disputes consistent with the realistic objectives of each client. Examples of appropriate measures of respect include: cooperating with voluntary or court-mandated mediation; meeting with opposing counsel to reduce issues and facilitate settlement; promptly answering phone calls and correspondence; advising opposing counsel at the earliest possible time of any perceived conflict of interest; and refraining from attacking, demeaning or disparaging other counsel, the Court or other parties.

The attorney should make sure that no long-standing adversarial relationship with or a personal feeling toward another attorney interferes with negotiations, the level of professionalism maintained, or effective representation of the client. Although it may be difficult to be courteous and cooperative when opposed by an overzealous lawyer, an attorney should not react in kind to unprofessional conduct. Pointing out the unprofessional conduct and requesting that it cease is appropriate.⁶

This canon recognizes that the psychology of divorce is not limited to the parties. Rather, the attorneys can also engage in ego regression based upon a prior history of difficulty with a particular adversary, being overly aggressive or just being a bad attorney. Another phenomenon analogous to client think, referred to as 'attorney think,' may occur, wherein an otherwise reasonable client may become immersed in the ego regression or general bad behavior of their attorney, and thereafter assume unrea-

sonable positions. As a result, settlement negotiations are, once again, adversely affected.

The American Bar Association (ABA) has published standards for civility in family law practice. These standards impose obligations upon a family law attorney to be civil toward clients, opposing counsel, and the court as core obligations of the fiduciary duty. Among the civility standards published by the ABA, the following are directly related to the psychodynamics of divorce:

I. To Client

- Try to keep the client on an even emotional keel and avoid characterizing the actions of the other party, opposing lawyers, and judicial officials in emotional terms.
- Be aware of counseling resources and be prepared to refer the client to counseling where appropriate.
- Where a client has an exaggerated or unrealistic view of his or her options in any given situation, explain matters as carefully as possible in order to assist the client to realistically assess the situation.
- Where a client wishes to pursue a claim or motion for purely hostile or vindictive purposes, explain to the client the reasons why the client should not do so.

II. To Opposing Counsel

- Be respectful and courteous in all oral and written communications with the opposing side.
- Do not engage in conduct, oral or written, that promotes animosity and rancor between the parties or their counsel.
- Use a demeanor and conduct during the deposition or other out-of-court meeting that would be no less appropriate than it would be in the courtroom.
- Do not engage in harassing or obstructive behavior.

III. To the Court

- Act with complete honesty; show respect to the Court by

proper demeanor, and act and speak civilly to the judge, court staff and adversaries.

- Explore settlement possibilities at the earliest reasonable date, and seek agreement on procedural and discovery matters.

New Jersey Rule of Professional Conduct 3.2 provides that "a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process."

All of these standards both implicitly and explicitly acknowledge the presence of emotions in family law proceedings and empower judges, attorneys and litigants to separate the psychological dynamic from the legal issues at hand, always with an eye toward resolution, compromise and settlement, virtues consistent with the discharge of our fiduciary duties.

CONCLUSION

Of the 30,484 new FM filings in the 22 New Jersey counties between July 1, 2009, and June 30, 2010, only 226 cases were tried to conclusion, less than one percent of all divorces filed in the state of New Jersey.⁷

It is, therefore, not a question of whether a case will settle, but when. Of course, there may be a need for significant discovery, reasonable debate over legal issues, domestic violence, the institutional realities of judicial backlog or other circumstances delaying resolution, but clearly the emotional station of the litigants is equally significant and often dispositive.

As matrimonial attorneys, we can no longer be oblivious to the psychology of divorce. Law schools, continuing legal education programs, and members of the bench and bar must make better efforts to enlighten all participants on the obvious psychody-

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