THE RECORDER
ESSENTIAL CALIFORNIA LEGAL CONTENT An ALM Web site

It's Time for More ADR in Family Law

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The Recorder
December 9, 2011

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Image: courtesy photo

Second of two parts.

Part one of this series discussed how family courts are unequipped to deal with family law disputes because of two practical problems: The courts are overwhelmed and do not have the resources to dedicate the needed time to each family law case; and when the courts are able to devote the time, it leads to an intrusive and incomplete analysis of the family unit. This results in poor orders that cause more harm to the family than good.

Alternative dispute resolution options, such as mediation, collaborative law and arbitration, have inherent benefits for these practical problems. Each provides a greater level of privacy, saves parties money and time, and generally reduces the emotional expense of a divorce. The parties are also better able to reach a resolution tailored to their needs than what a court would be able to do.

When going to court means everyone loses and the family will be harmed, the conversation no longer is how ADR compares to family court, but why we must use ADR for family law cases.

In today's hurting government sector, I suggest that this shift must happen now. It benefits both the state and the parties that private ADR options be the primary course to resolving family disputes before pursuing any course of litigation. In fact, family law litigation should be a last resort, reserved for true emergencies. When we reserve the court system for the most pressing emergencies, the pressure on the court system eases and emergencies are heard timely and given the needed care. For an in-depth discussion of the difficulties with having emergencies heard timely in family court today, please see my articles, "***Ex parte* process across county lines**," and "**Working through**

shortfalls of the *ex parte* process," published by *The Recorder* on Dec. 20 and 27, 2010, respectively.

ADR IN FAMILY LAW ABROAD

On Nov. 14, British Columbia's attorney general introduced the Family Law Act, an overhaul to British Columbia's archaic Family Relations Act of 1978. The overhaul process began in 2006, when the attorney general announced a review of the Family Relations Act to modernize the law and better support cooperative approaches to dispute resolution. Through several discussion papers, culminating in the "White Paper on Family Relations Act: A Proposal for a new Family Law Act," published in July 2010, the Family Law Act was born. See "**The New Family Law Act: A Brief Background and a Shorter Synopsis**," Nov. 14, 2011, JP Boyd, The Stream, Courthouse Libraries Blog.

According to the White Paper, the new family laws would need to promote cooperation and noncourt dispute resolution. In the original family laws of 1978, family law was treated as another civil dispute; however, according to the White Paper, the adversarial model is not suited for family disputes. Instead, mediation, interest-based negotiation, collaborative law, parenting programs and judicial settlement processes offer simpler procedural options, reduce polarization between the parties, and resolve conflicts earlier with less cost. According to the White Paper, the courts should be reserved for matters involving "ongoing risk of violence, resolving otherwise intractable disputes, for clarifying the legal principles upon which negotiated settlements are based, for managing unprincipled or uncooperative parties and for enforcing obligations." The White Paper recommended that family court not be the primary forum for resolving family disputes and the language of the Family Law Act recognize a full continuum of dispute resolution options and use less adversarial language.

Applying the White Paper's recommendations, the Family Law Act now refers to family law attorneys as "family dispute resolution professionals." While the Family Law Act does not require family lawyers to be certified in ADR techniques, the act does require that ADR be promoted absent a finding that family violence may be present, affecting the safety of the party or ability of the party to negotiate a fair settlement. If there is no finding, the attorney must discuss with the party the advisability of ADR and inform the party of the ADR resources available to assist him or her in resolving the dispute. The Family Law Act further provides that the Lieutenant Governor in Council may prescribe the training, experience and other qualifications necessary to assess whether family violence is present.

While far from perfect, there is plenty for the family law community in California to learn from British Columbia's initiatives. First, British Columbia's family law community has recognized that

family court should not be the first resort for family law matters. Second, it has become the responsibility of the government and the family law practitioners to educate parties as to the benefits and advisability of ADR.

CALIFORNIA COURTS

In California, the courts have already implemented many ADR programs. For example, parties are required to attend mandatory court custody mediation prior to custody issues being heard. Before a trial, parties must attend a mandatory settlement conference. Additionally, in many counties, at the beginning of a dissolution case, parties will receive a notice regarding court or private ADR options available to them. However, these have acted as little more than add-ons to an already overwhelmed system. Custody mediation dates are hard to come by, and the time allocated with the mediator is minimal. Mandatory settlement conferences require preparation, resulting in high costs and still use the court's precious time. Although the notices begin a conversation with the party, these notices are still in an adversarial system without the help of counsel to encourage or explain the use of ADR. With recent budget cuts and crowded dockets, the court's services are stretched thin and are far from sufficient.

Learning from British Colombia, the court may be able to reduce its load at little cost, by changing its vocabulary from an adversarial to a cooperative one, and requiring the private sector to participate. For instance, rather than requiring custody mediation through the courts, the court may approve private sector custody mediations, alleviating court services for the financially disadvantaged. Such moves would equate to badly needed repairs of a broken system until California can implement a more extensive family law overhaul.

PRIVATE SECTOR'S PRACTICAL SOLUTIONS

Family law practitioners have a significant role to play in resolving these practical problems and assisting parties through the family law system.

More than any other legal practice, family lawyers need to be equipped in ADR techniques, which are more successful in resolving family law disputes than the adversarial court process. ADR provides the skills needed to handle the multifaceted aspects of family law. Family lawyers will be better equipped to engage in healthy negotiations or collaborations with opposing counsel, find creative ways to expand the pie, and when needed, use a third-party neutral. Rather than a party rushing to court, with the assistance of counsel, the party will use ADR techniques to see better results sooner. Instead of a grocery shopping outing tainting an entire custody case (as discussed in the **first installment**), attorneys would assist the parties to discuss the incident and proper safeguards, if needed, and move on to the actual visitation plan, immediately benefiting the child.

However, there is no requirement that family law attorneys have any ADR training. In fact, family law specialists, certified by the California State Bar, are not required to have any educational hours or training in ADR. The focus on litigation as a means to resolve family disputes is counterintuitive because it ignores what is central to a family dispute: the family. As noted in the White Paper, family law cannot be treated as another form of civil dispute.

The second course of action is awareness. Mistakenly, parties expect the court to be quick arbiters of justice. Family lawyers, gatekeepers to family law litigation, should provide their clients a realistic view of family court at the outset of their case. Family court is not the place to air out frustrations. Neither will the parties' day in court feel good or end well, regardless of lawyering abilities. It'll be a costly and stressful battle. It will likely take longer than anticipated, and the results may be uncertain. Simply put, family court is not equipped to handle a divorce, and should always be a last resort.

Family lawyers may be concerned with lost business. It is true that litigation is far more expensive and lawyers reap the financial benefit. However, often family attorneys are not paid the full value of their work, and collecting fees can be more than problematic. Instead, ADR practices result in happier clientele, who are more likely to refer cases back and pay their bill in full. Additionally, family law practitioners will be able to take on more cases and a broader range of cases. Because more parties can afford an ADR approach to their case than a litigious one, attorneys will not be limited to representing middle- and upper-class clients. Additionally, an ADR-focused practice is more fulfilling than the stress of a zero-sum litigation practice.

MOVING FORWARD

The shift to ADR as the mainstream approach for family law will require that the family law community be in agreement. Otherwise, a disgruntled client, unconvinced by ADR, will find a lawyer willing to fight for him, under the false impression that he will find justice in court. Counties might begin developing rules that parties be required to exhaust ADR options before a family law motion is filed, except for emergencies, and might reserve ADR court-services for low-income parties, to alleviate the stress on the court's system. The state has already condoned collaborative law for family law, which requires an agreement from the parties and counsel not to use litigation, such as formal discovery or motions, to resolve the dispute. The state may also require family law practitioners, whether litigators or not, to have state-approved certifications in ADR.

With the state in a severe budget deficit, and 50 percent of first-time marriages still ending in divorce, we cannot expect that the courts will have the ability to handle the influx of divorces moving forward. The practical problems discussed are an epidemic, and until the state can act, the solution must come from the private sector. It is the duty of family law professionals to educate themselves

and the parties so the parties have the resources they desperately need to properly resolve their family law disputes.

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