As Family Law Changes, So Should the Judiciary

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My last two columns discussed the increase in the number of pro se parties in family law actions, the Family Law Section’s Strategic Plan to help members adapt to the change, and a list of five actions family lawyers can take on an individual basis to reduce the number of pro se parties and maintain a valuable role in the family law process. The other factor in the equation involves the judiciary.

Once again, I took an informal and completely unscientific survey of approximately 40 experienced family lawyers and members of the judiciary on what the judges and commissioners can do to reduce the number of pro se parties, increase the role of family lawyers, and maintain a successful judicial system. For purposes of this discussion, I am not addressing those parties who genuinely do not have the means to hire counsel, have no assets and no children, or are illiterate. A system that ignores this reality is doomed to fail. We need to have a meaningful discussion of access to the court system for those constituents; however, such a well-deserved discussion is beyond the scope of this column.

Just as lawyers must make lasting and significant changes, judges and commissioners also need to change their interactions with pro se parties and lawyers in order to help reduce the number of pro se parties and increase the number of people who go through the process with at least some help from a capable lawyer. The following are the top five action steps the judiciary can take to achieve this goal:

1. Don’t let pro se forms replace lawyers. Overwhelmingly, the respondents in the survey believe that the easy availability of pro se forms, many of which are drafted by court-sanctioned committees, are sending the signal that lawyers are not necessary and do not provide value. The next most frequent response was that judges and commissioners go beyond their decision-making role and assist pro se individuals in completing the forms. The perception is that the creation of the forms and the assistance provided by the decision-makers are replacing lawyers.

Although it is undeniable that pro se forms are here to stay and do provide assistance, it is equally undeniable that pro se forms are no substitute for thorough and comprehensive draftsmanship that can be performed best by family law lawyers. Most pro se litigants are not competent to draft legally binding contracts that competently resolve present disputes and minimize future disputes. It is not uncommon for problems to occur when parties have ill-defined placement schedules, do not understand the relationship between shared placement and variable costs, or have no concept of the value of a retirement plan or how to divide it. Encouraging pro se litigants to fill in blanks without counsel leaves room for error, restricts creative solutions, and results in matters unresolved in many cases.

While seemingly painful at first, this problem can be addressed. Judges and commissioners should not, nor are they required to, approve incomplete, wrong, and poorly drafted forms. Judges and commissioners should not approve forms that contain contradictory or ambiguous provisions. Judgments and marital settlement agreements that omit assets, debts, or other essential provisions should be rejected. Judges and commissioners should not draft provisions, complete the form, or “fix” the problem on the record and then approve the documents as submitted. The Department of Motor Vehicles and the Internal Revenue Service use forms, and neither is particularly helpful in completing the forms. These institutions do not lower their standards and accept forms that are inaccurate or incomplete. A person’s divorce, which is one of the most crucial financial and
emotional events in a lifetime, should not be treated differently. The judiciary should not lower its standards and accept documents that are incorrect. Doing so puts the litigants and the system at considerable risk.

Therefore, incomplete or inaccurate pro se documents should not be accepted, and the parties should be rescheduled to appear again with corrected paperwork. In doing so, the judges and commissioners should encourage the parties to seek legal counsel, particularly if there are children, assets, or an income disparity. If done consistently, the message will be clear: the forms are only an adjunct to the process and not a substitute for lawyers. In that case, there will be more lawyer involvement, fewer pro se parties, reduced post-judgment proceedings, and less work for judges and commissioners in the long run.

2. Encourage settlement and help reduce conflict. A perception of pro se parties is that lawyers unnecessarily create conflict. While this is a major issue for lawyers to address individually and as a profession, the judiciary can address this issue in at least two ways. First, judges and commissioners should require mandatory mediation with trained lawyer-mediators in all cases, including those cases with represented parties and those cases with self-represented parties. All issues should be mediated, including support, property division, asset allocation, etc. In pro se cases, it is often the only time the parties actually sit down and discuss their case. When that happens, most issues are resolved. If everything is not resolved, the disputed issues are narrowed and more manageable. Trained lawyer-mediators encourage parties to seek lawyer consultation on the agreement and the divorce process. This increases the likelihood that pro se parties will see the value of lawyers and seek out their assistance. In the cases with represented parties, the lawyers will provide an effective conflict resolution approach in their representation. The parties will see that lawyers can work toward resolution, and the parties will tell their friends, neighbors and relatives. This will result in a deterioration of the image of lawyers as conflict creators.

The idea of mandatory mediation is easily implemented. Similar to a list of lawyers for guardian ad litem appointments, the family law judges and commissioners in each county should solicit the names of trained lawyer-mediators that can be appointed by the court. The lawyers should be paid their mediation hourly rate, but agree to take cases with a range of incomes as a service to the court, including some cases as pro bono. The judiciary could appoint the same mediator to mediate a $500,000 case if the mediator would also take a zero value/no income case. The promise of the paying case will increase the number of lawyers to be available for the nonpaying case. A partnership between the lawyers and the bench has little risk and the potential for great gain.

Second, judges and commissioners can help reduce conflict by being extremely mindful of the long-range impact on future conflict of their rationales and decisions. Stated more frankly, if either party believes that pursuing litigation will result in their getting exactly what they want, that party will not be inclined to engage in mediation. Rarely is a family case “all or nothing.” A big win without sufficient cautionary language for one party fosters conflict; it does not end conflict. For example, absent a compelling situation, a commissioner in a temporary hearing that awards most of the money and time with the children to one party on a “temporary” basis without a balanced rationale creates a monster case. In this hypothetical situation, the “winning” party may feel empowered to take a similar position for the rest of the case and has no appreciation for the risk of seeking judicial decision making in the future. Further, the “losing” party can be angry and resentful and may then choose to fight for the sake of fighting.

This pattern can occur throughout the life of the case, from a pretrial with a judge who “foreshadows” a case in one party’s favor to the judge who gives a maintenance payee or payor exactly what they request (both in the amount and term of maintenance) without careful cautionary language. A good rationale is not just to protect a decision from potential reversal; a careful rationale can make a powerful difference in any stage of a case’s life. In every situation and without compromising the legitimate claims of a party, the final rationale should be explained such that each party should have some appreciation of the risk of not working out a resolution now or in the future. If a party appreciates and understands a risk, he or she will take steps to minimize or avoid the risk. This will lead to more pro se parties seeking the help of lawyers. Parties with representation are more
likely to request that their lawyers help resolve their matter in a way that minimizes risk. Consequently, lawyers will be seen as problem solvers rather than conflict creators.

3. Encourage and support “unbundled” services. Thanks to revisions in the ethics rules, and a broadening definition of legal services, it is possible for lawyers to “unbundle” services. A lawyer no longer needs to start with a party at the beginning of a process and do all of the tasks necessary to the conclusion of the action. While the unbundling of services may not result in fewer pro se parties who represent themselves at a final hearing, the result will be fewer people appearing in court without the benefit of legal advice. Many lawyers are fearful that if they work on only part of a matter, a judge or commissioner will either chastise them for “piecemeal” work or require them to participate in portions of the action in which they are not retained. Consequently, few lawyers do their unbundled work in the courtroom, and some lawyers do their unbundled work “underground” and distance themselves from a case. This limits the lawyer’s ability to effectively communicate with a party or the court, reduces the quality of the work, delegates the unbundled services to a less respectful level of representation, and stifles the growth of this kind of necessary representation.

Judges and commissioners should welcome and encourage unbundled work as they abandon the concept of “all or nothing” representation. The court should allow a lawyer to enter into a specific and limited representation notice with the court and represent a party in one discrete aspect of a case, such as the treatment of inherited or gifted property in a property division, while not participating in other aspects, such as the child support provision. Judges and commissioners should encourage lawyers to at least draft portions of a marital settlement agreement that completely and effectively resolve a complicated issue. The court should explain to pro se parties that even if they do not want a lawyer to represent them through the entire process, lawyers are available to help with portions of the process and that the court would encourage such participation. At a minimum, all parties should be encouraged to consult with a lawyer.

Similar to a list of lawyers for guardian ad litem and mediators, judges and commissioners should solicit the names of lawyers who unbundle services. A list of such lawyers should be available at each courthouse for the judiciary to provide to the parties. This is an example of a partnership between the judiciary and lawyers that aids the judiciary and allows the lawyers to provide value to parties and remain a viable part of the family law process.

4. Hold pro se parties and lawyers to the same standard of practice. A minimal standard of practice can be well-defined. A judge or commissioner can require lawyers and parties to arrive timely, be prepared, be respectful, use the time efficiently, and obey the directives of the court. A clear message to lawyers and pro se parties that such a level of practice will be required can help increase the use of lawyers. A pro se party who is unable to follow the standards of the court will, by necessity, seek legal counsel to navigate through the process. I have been retained by a number of people who started pro se but discovered that the court process was too difficult to succeed without assistance. I have frequently been told that these individuals found themselves in scary situations, and the judge or commissioner did not come to the rescue. A pro se party whose case is adjourned because he or she is not knowledgeable about the law and is wasting the court’s time should have to be prepared the next time he or she appears. He or she may prepare by retaining or consulting counsel. If a pro se party disobeys a court order and is sanctioned accordingly rather than being given a “pass,” he or she is more likely to take court orders and procedures seriously and request assistance of a lawyer to navigate through the process. Even if coddling a pro se party in a particular instance seems judicious at the time, it sends a profound message that there is a different standard for pro se parties and lawyers are not needed. If the pro se party is held to the same standard as a lawyer, it is more likely a lawyer will be involved.

To make this theory work, however, all lawyers must also be held to a reasonable standard of practice. This will also increase the use of lawyers. Lawyers that are required to arrive on time, be prepared, use the time wisely, and be respectful will waste less time and client’s money, and reduce the cost of litigation. Lawyers held to a reasonable standard of practice are more likely to settle a case prior to a court hearing; consequently, the lawyer’s value to the party increases. The more this occurs, the more likely the message will be relayed to the parties and the larger community. A lawyer who is sanctioned for not obeying a court directive will likely follow all future directives. A lawyer who promulgates a meritless claim or argument should be sanctioned to
send the message that such actions devalue the role of lawyers and unnecessarily create conflict from which parties flee. A party or lawyer who over tries a case should be held accountable. If lawyers are required to behave better, more parties will seek out lawyers’ services. If the courtroom is unwelcoming to anyone who lacks the ability and respect to use the court’s time and resources efficiently and respectfully, those people will be more likely to seek the assistance of others who can participate appropriately.

5. Help keep the cost of a divorce down. Another perception of pro se parties is that divorces are enormously expensive. There are ways in which the judiciary can reduce the actual price tag of the divorce, which will lead to a greater appreciation for the value of the lawyer’s services. For example, judges and commissioners should have more telephonic status and scheduling hearings rather than requiring such meetings to be in person. Each in-person appearance involves travel, waiting in the halls, and occasionally some non-case focused conversation time with the court. Even something as short as an in-person status or scheduling conference can take as much as an hour and a half for a lawyer with a 15-minute one-way drive. However, a telephonic status or scheduling conference can almost always be completed in 15 minutes.

Another cost-savings idea includes calling cases first that have one or more lawyers involved. Each judge and commissioner has the inherent authority to manage its calendar without denying access to the court. Not only does this keep the cost down for a represented party, but it acts as a tremendous opportunity to demonstrate the value of the lawyers. Pro se parties waiting in the courtroom can see firsthand how the lawyers work and how much can be accomplished with a lawyer involved. The judge or court commissioner can take the opportunity to explain the value of the lawyers as a teaching opportunity for those pro se parties waiting.

In addition, all contacts with the judiciary should be meaningful. A contact with the court will be perceived as a waste of money if the case does not move forward. For example, lawyers should be expected to work on the case before any court appearances, and a status conference that simply confirms that things are being worked on is a waste of time and money. Deadlines with specific objectives should be set after each contact with the court, including clear discovery obligations and scheduling orders, and consequences should be implemented if the deadlines are not met. These simple and effective changes can help keep the price tag of the divorce down. Neither the family lawyers, the judiciary, nor the State Bar of Wisconsin, working alone, can reduce the number of pro se parties in the system or increase lawyer assistance. However, if the three groups work together on a unified goal and support change in each other, then it is possible that we can have the best of all worlds: the judiciary remains a system in which justice can be dispensed fairly and effectively, and family lawyers can make a contribution that is valuable and relevant.

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