

The Changing Role of Consultants in Family Law

BY GEMMA B. ALLEN

What makes family law so compelling is its complexity. Over a period of time, divorce lawyers come to see the full spectrum of human emotions. We encounter the myriad ways that people either do or do not make a living. Necessarily we seek input from consultants in the more obvious fields of custody and business evaluations, but often in widely diverse areas as well. Common divorce disputes can include employment (could and should someone be working and what could they be earning); civil and criminal tax expertise (everything from understated income to offshore and Swiss accounts); intellectual property (from inventions to movie scripts); trust and estates (whose money is it anyway and is it accessible for support?); libel (scorned spouses now going digital); and specialized medical diagnoses (some real, and some fabricated). Even in the area of custody, there are wide varieties of the type and depth of psychological and psychiatric information a practitioner may need.

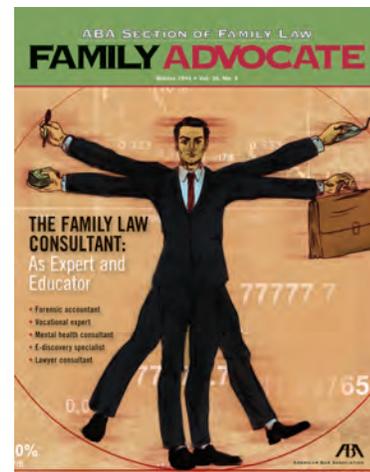
The question of what level of expertise a given litigant can afford, along with the eternal hope that every divorce will be that elusive, but desirable, “amicable” case, further complicates our decisions on consultants: All of the legal, emotional, and financial factors present in the typical case lend themselves to the strategic use of consultants. Doing so is both a skill and an art.

The textbook case

Leo Tolstoy said it first and best: Happy families are all alike; every unhappy family is unhappy in its own way. That truism is evidenced daily in family law courts. If there is a typical divorce case, it involves at least one minor child and, therefore, immediately presents a custody issue.

Thankfully, the trend of the times is toward joint parenting, but by no means is that level of parental competency or spousal amicability assured. The ideal family law firm would have a psychologist “on call” to help the parties and the lawyers discern whether or not joint parenting is likely to succeed. A mental health consultant can serve many purposes in the cases of uncertain family dynamics. Often, for example, clients will be adamant about the custodial outcome they want. However, the attorney may hear facts being described that make the case seem better suited than the client may realize either for joint parenting or sole custody. A consultant can help drill down on the right custodial direction of the case.

Even if sole custody is wanted and warranted, a psychological consultant can assist the attorney regarding the strengths and weaknesses of his or her own client and thus of the case. There is an interesting division of opinion on using consultants to “pretest” one’s client for suitability for sole custody. One school of thought says that one’s own consultant should administer the battery of psychological tests standard in the jurisdiction prior to allowing a client to undergo court-ordered procedures. Attorneys who so advise their clients opine that all they are doing is determining the suitability of their client for parenting, and that such “pretesting” is right and proper. Others frown on this practice, believing that “schooling” one’s client on the psycho-



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logical tests to come borders on witness tampering and undermines the system and objective custodial evaluations.

It's the money, honey

The next most probable issue in the "typical" divorce case is "about the money, honey." Nowadays even the seemingly simple case with one W-2 employee is rarely that simple. Benefits, including, but not limited to, health and wealth plans and bonuses payable in options may exist along with the basic salary, so a financial consultant can always be a useful asset. Many cases involve far more complex financial issues on which a consultant can be crucial. If either your client or the spouse or both have an ownership interest in a business, large financial stakes can be in play.

Many of the Illinois expert firms specializing in forensic divorce work suggest that early involvement is the key to effective use of a financial consultant. That makes sense because information sought in discovery needs to be industry specific, and the faster the issues and the obfuscations can be identified, the better it is for advocating the case. Business valuation experts theorize that consultants can be helpful, even in the pre-filing stages of a divorce, to help assess the risks of litigation and in planning for the buyout of the other spouse's interest.

There are trends and truisms in every business, and a well-informed financial consultant can help make any attorney a more effective advocate. Consultants critique the financial expertise on the opposing side of the case and point out the erroneous financial assumptions or discount rates being applied. For the two most significant issues of divorce, custody and finances, having a consultant in each of these fields is optimum. The problem for every attorney and client becomes whether the case can afford what is optimum.

Other issues/creative approaches

Less typical, but important, areas for consultant expertise in family law are not only the myriad medical woes that can affect clients, but also the effect those conditions will have on the clients' work life, insurance needs, life expectancy, and long-term health care. There are days in a family law practice where one feels like a personal injury attorney looking for input on conditions ranging from terminal laziness to catastrophic illnesses.

In these situations, an attorney may need insights from many fields, including not only a medical doctor as to the condition itself and its prognosis, but also from the insurance industry to help estimate the costs and prequalifications for specified treatments going forward, and even an employment expert on the employability of a client with those conditions. Of course, if the diagnosis is "malingering," then the consulting expertise the attorney may really need is that of a private investigator.

Lawyers can underestimate the need for consultants and/or overestimate their own personal expertise in the areas of financial and trust planning. Estate planners believe that family law attorneys could use their expertise much more effectively. Dissecting existing trust rights and benefits and planning future trusts with tax and control issues is not for the fainthearted. Whether your client or the opponent was a grantor or is a beneficiary, it is important to understand the exact nature of their benefits and retained powers. Some trust consultants privately complain that either litigation attorneys do not involve them when needed or, even if they do consult with them, they seem slow to grasp the concepts and loathe to admit their shortfalls.

Family law cases are infamous for the potential high price tag of freedom. These same cases are also infamous for the high incidence of alleged malpractice. What is a lawyer to do when considering the pros and cons of involving a consultant?

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Consultants in the traditional mode

In the historic days of a family law practice, *The War of the Roses* and *Kramer v. Kramer* were what clients anticipated and thought they wanted. An attorney was to be a gladiator, and the battle was on with the first mention of the word divorce.

The previous role of the consultant was purely strategic. He or she would assist in the preparation and evolution of how one's client could "win" the divorce case. There were and still are limits to the privilege that attaches to a client and his or her consultant; there are moments when a consultant generally must be either declared an expert witness and his or her opinion and report disclosed or else jettisoned. Always and ultimately, there has been and still is the question of cost.

An entire body of case law developed around the proper selection and use of a consultant. Presumably as one's practice increases, so does one's list of trusted "go to" consultants on relevant issues. Often an expert one has opposed, deposed, and cross-examined becomes a valuable resource in other cases, because you have seen him or her perform under fire. If possible, it is wise to involve the client in the consultant/expert selection process, particularly if the client has real savvy in the field. Additionally, if the client trusts the consultant, he or she will more likely trust the consultant's input, even when it is not entirely favorable.

How much to confide to a consultant who may or may not become an expert witness is a thorny legal/strategic question. If you want your consultant to be fully armed to give you the most help in battle, tell your consultant the good, the bad, and the ugly about the case. Communications with a consultant generally are privileged anyway. The quandary is that if your consultant is later disclosed as an expert for trial, all communications during the consulting process may then become "discoverable."

In a perfect world, a litigator could have more than one consultant, pick and choose what information to share with each, and then select the best of the lot for disclosure as an expert witness. In the real world, this would usually be a cost-prohibitive shopping trip. That is particularly so in divorce cases where there is often a finite litigation budget.

The dollars allocated to the advisory expertise must be weighed against the potential benefit that a consultant can provide in trial preparation. Often a divorce attorney must know more about a certain disease than most doctors do, or more about patents than engineers ever would. When representing clients in the financial and investment field, family lawyers sometimes need a consultant "translator," so that complex trades and dealings can be simply and effectively demonstrated at trial.

Historically, the selection, usage, timing, and disclosure of consultants was part of the art of divorce war. Cost considerations were forgotten, and sometimes still are disregarded, when the ultimate goal is "scorched earth."

The changing face of consultants

If the older style of divorce practice used consultants as a hidden and usually nondiscoverable weapon in the arsenal of trial tactics, the newer style is to utilize the consultant to facilitate settlement. For example, rather than each spouse paying for a full scale business valuation in a fully documented and annotated report, the parties can first engage in a joint expert valuation, of course, reserving the right to hire another expert if dissatisfied with the neutral result. Each side could then hire a true consultant to give a second opinion on the neutral evaluation and to help the attorney negotiate a settlement around the joint "neutral" report.

With that approach, the costs of duplicating valuation reports and the dueling and grueling cross-examinations in depositions and trial may be minimized. Even the costs

of the “neutral” could be limited to a preliminary or staged interim report to see if the parties could, anywhere along the way, agree to compromise on a valuation number.

There are obvious pitfalls in these methodologies, and care must be taken not to lose sight of trial preparation and expert disclosure deadlines, while simultaneously trying to save time and money in settlement. It is a delicate dance. We all know of cases in which the other side is not proceeding in good faith. Therefore, not only do we need to know our opponent or, at least, his or her reputation, but we need to be preparing for war while seeking peace.

In even more compelling ways, custody cases lend themselves to using consultants or even experts in this emerging role as settlement facilitators. Contested custody cases can easily cost as much as the eventual college education of one of the children. That “cost” does not even begin to measure the emotional toll on everyone involved. Instead, at almost any step along the way, a mental health consultant’s preliminary evaluation of a case could and should be used as a template for settlement.

Dr. Mark Mosk, a forensic consulting psychologist, verbalizes what many know in cases that involve a close call between two “good enough” parents. He says that “a win-lose mindset in family courts, by its very nature, improperly and perhaps dangerously removes the child’s psychological welfare from being the focus of attention and concern.” Dr. Phyllis Amabile, a psychiatrist, and Dr. Leslie Star, a clinical psychologist, each of whom do extensive work in the field of custody evaluations, both urge attorneys first to utilize their family evaluations as an outline for settlement conferences in divorce, rather than as the opening salvo in divorce wars.

A sea change

The entire practice of family law is undergoing a “sea change.” Divorce seems to be holding at a fairly predictable rate, which is not the reputed 50 percent horror story. It is, however, more than 40 percent, and is high enough that the phenomenon itself is neither shocking nor surprising. Of course, every individual divorce is shocking and sad for the particular family involved. Minimizing that pain is a worthy goal.

As divorce has become less unthinkable and more expectable, the divorce consumer has become more sophisticated. If a client knows friends or others who have divorced, they are familiar with some dramatic examples of what they are determined to avoid. Therefore, the typical divorcing couple nowadays falls into the category of wanting to divorce more amicably, less expensively, and more quickly than ever before. Every client is, at least peripherally, aware of how busy the court system already is and is likely to increasingly become with the new legal options of civil unions and gay marriage.

The creative use of consultants has the potential to fast-track the goal of the elusive amicable divorce, without sacrificing the child-centered focus and economic needs of either party. At any point along the way, for example, a divorcing couple can choose to do lawyer-assisted mediation, viewing the mediator as a “consultant” in an admittedly expanded concept of that term. If each party has a lawyer, has completed discovery, and has worked up a “wish list,” it is possible to utilize a mediator as another consulting resource to help expedite closure. Mediation is nonbinding and may not solve each and every issue in the case, but can be considered a success to the extent it takes any disputes off the table by agreement. Settlement can be like a fast train, gaining momentum as it moves forward: once some issues start to be resolved, others either can be traded off or compromised more readily.

More traditional consultants can help settle complex issues, not only in custody disputes and business valuations, but also on health considerations, real estate

appraisals, pensions, and restrictive stock situations, or the myriad other issues when “splitting the difference” is not practical, but a compromise is the pragmatic solution.

In the not too distant past, consultants were mostly a powerful and often secret weapon when preparing for war. The discovery rules are more protective of their work product, they are experienced in specialized areas, they can focus on the hotly contested issues, can educate the lawyer who retained them, and, in turn, help that lawyer to educate the judge and, most importantly, to win.

In the more modern practice, consultants can be a great and not-so-secret weapon for making peace for many of the same reasons. They can be told the whole truth, they bring specialized knowledge to the issue in their field, and they can propose credible compromises. Sophisticated clients know that their true “win” in a family law case involves minimizing everyone’s losses. With the creative use of consultants in family law cases, modern divorce wars can be transitioned into informed debates and ultimate deals. **FA**

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