

Divorce From the Client Perspective

Five Observations About Legal Divorce

by [Joseph Shaub](#)

“Every person I know who hates lawyers has been through a divorce”. It was an off-hand comment by a therapist friend of mine, but I couldn’t get it out of my head - because it reflects a deep, and broadly-held, frustration with the management of legal divorce and its practitioners among the legal lay-public. This wasn’t the first time I had heard these sentiments expressed.

For the past few years, I have given a talk entitled “Family Law for the Mental Health Professional”. Its purpose is to educate therapists about law and demystify the process and its practitioners. In their feedback, these counselors have registered common criticisms of the legal profession. Often, they reflect a failure to understand our training, goals and ethical constraints. Yet, more frequently, they reveal the consequences of an “over-focus” by lawyers on a limited set of concerns, leaving other vital interests ignored or even damaged in the process.

Once we “zoom out” and gain a broader view of divorce, it becomes easier for us to understand that we are only one part of a wildly complex set of interactions, concerns and decisions. Even the most experienced among us tend to lose this perspective. The comments from therapists and their clients can be distilled down to the following five observations. Perhaps they may serve to widen our perspective in assisting those we serve.

1. The Legal Divorce is Only a Very Limited Part of a Much Larger Process

Lawyers see divorce as a problem which they are uniquely qualified to solve. We tend to treat it as an isolated “event.” While that may be true for the attorney who obtains the decree and supporting orders, and then moves on to the next case, for each divorcing individual, it is *a process*.

Divorce is a long climb back from despair and personal chaos. A study many years ago attempted to quantify the severity of various psychosocial stressors people experience in their lives, from devastating illness to speeding tickets. The researchers found that the greatest stressor was the death of a spouse or child. The second greatest was divorce. The remaining life events fell away sharply in their intensity.

This is so because divorce involves a myriad of deep psychological anchors which are violently dragged up from their mooring. Is there a person who did not embrace some image or ideal of how they wanted their future partnership to look? The *depth* with which we touch each other in our intimate lives is a product of these very early dreams and the *legal* aspects of the dissolution (the *dissolving*) of these visions are but a blip on the screen (a most expensive blip to be sure, but a blip, nonetheless).

Paul Bohannon identified “Six Stations of Divorce” and these include the emotional, legal, economic, co-parental, community and psychic divorces (loosely arriving in that order).^[i] When the lawyers have achieved their final judgments and move on to the next case, these people are locked together for years afterward. They still will be talking to their families and friends about their “ex”; they still will be able to push one another’s buttons; they will struggle with self-doubt (usually unexpressed), often descending into alcohol, work, sex, rage or other addictions; they will wonder if they are attractive, sexual or self-sufficient.

In divorce, regardless of whether you leave or you are the one who is left - and most studies conclude that scarcely any divorce is a truly mutual decision - each person has their unique and difficult struggle. One person usually gives up on the marriage before the other. Bruce Fisher in his exceptional guide to

post divorce recovery titled *Rebuilding*, calls the two roles the “Dumper” and the “Dumpee”. The Dumpee, of course, is left to bear the greater brunt of the emotional trauma brought on by the divorce. There is great, often tragic, pain. There is deep, often volcanic, rage. Observers of the process counsel that many years may pass before this person can move on (experience “divorce recovery”). The person who decides to leave is saddled with enormous, often debilitating, guilt. “I’m a terrible person.” “I have destroyed my family.” Of course, to get the Dumpee to appreciate the pain of the Dumper is one mammoth (and often futile) task. People approach this crisis with varying degrees of integrity. Yet, to automatically brand one person as a victim and the other as perpetrator is both misguided and destructive.

Whether one is the Dumper or Dumpee, it will take years to sort out a new life. If the partners never had kids and can just break off any future contact, they can go about their wound-licking and life reconstruction in isolation. But if they have children, they are locked together and each has an interest in the other’s recovery. In a fundamental sense, they cannot be adversaries.

Abigail Trafford describes the six month period after separation as a “savage emotional journey” and she terms it (and her book) *Crazy Time*.^{ii[iv]} Some observers have even opined that it may take half the length of the marriage to reconstruct a new life, however the most common estimate given is two years.

Lawyers would be well-served by embracing the knowledge that the interests, values and concerns which they represent are only a very small part of the kaleidoscope of challenges which their clients face. They disregard these other elements - and the impact their work has upon them - at the peril of their clients’ long term best interests.

2. Lawyers are Educated and Trained to Make a Bad Situation Worse

When I share this one with therapists I usually get a big laugh - it lets them express their distrust for lawyers and their lack of understanding of what drives us.

The legal divorce is extremely complex and the time has long-since passed when only the least qualified practitioners would become matrimonial attorneys, for want of another specialty that would have them. As a matter of purely *legal* analysis, the characterization and division of community estates which might consist of a successful start-up company; private disability insurance payments; stock options or intellectual property interests present the kind of challenges that lawyers can sink their teeth into. The analytical, negotiation and litigation skills required for the effective practice of family law are considerable. You’ve got to know something about running a successful business, taxation, real estate, property valuation and an array of other intellectually challenging areas. Yet, while this describes a vast array of knowledge and skills, it suffers from an over-focus and serious limitation of perspective. This is exacerbated by the very foundation of our professional lives - our legal education and training.

We learn the law by studying the adversarial system through casebooks. The litigators among us are bred in a system in which winning is the highest value. You can settle, but it still had better be a “win.” Yet litigating *divorce* is like pouring gasoline on a fire. The divorce litigator fans the embers of distrust white hot by speaking in language of entitlement, locks their client into intransigence when they readily agree to castigate the other party and sows the seeds of prolonged bitterness by failing to inquire what the other side needs in order to accept the resolution and work with their former spouse in the coming years.

The lawyer is trained to look at the other person’s position critically, in an effort to undercut the adversary’s argument - to *prevail*. The mistakes by the other party - their foolishness, vindictiveness, acting out through confusion or fear - brings on your judgment. He or she is a “jerk” or “crazy”. You write incendiary letters to satisfy your angry client. You’re tough, because, after all, you are a lawyer,

not a therapist. Then, when the rawest of wounds are inflicted, you make sure your client *has a therapist* to handle the fallout and you move on to the next case.

U.C.L.A. law professor and legal ethicist Carrie Menkel-Meadow expressed a broadly felt concern for this attitude when she wrote,

“...I wish to confront - the way our legal system asks us to wage war, without seeing the person on the other side. For lawyer’s work, like soldier’s work, has been justified by its role morality. We permit these specific actors to engage in behaviors that we would ordinarily condemn because their roles, performed within a morally defensible situation, war or litigation, require it. We might examine how the imagery of war, scarcity, and zero-sum assumptions is also the imagery of our legal system.. Beyond the complaints and debates about the treatment opposing lawyers afford each other and each others’ clients is the deeper problem of trying to understand what the actors on the other side are trying to accomplish with their lawsuits or legal matter as an expression of their humanity...[I]n litigation, finding out what the other side really wants, as opposed to making general assumptions about the other side, could facilitate more effective dispute resolution, as well as transaction planning.”^{iii[iiii]}

While the provision requiring “zealous representation” has been stricken from the Canons of Ethics, the attitude born of law school education and professional training cannot be so easily eliminated. However, no other professional trait causes more damage to clients or greater alienation from those in the attorney’s personal orbit.

3. Judges Do Not Dispense Justice

Therapists get a big kick out of this one, too. But it’s true - to the chagrin and disappointment of the judges themselves. The so called “litigation explosion” which has reached down into every trial court in the country was describe this way by Chicago Law School Professor Mary Ann Glendon in her recent book, *A Nation Under Lawyers*:

“While ambitious judicial review was enjoying an Indian Summer in the nation’s high courts, the daily work of every federal and state judge in the land was being transformed by a changing and rapidly expanding caseload. By the 1980s, the situation had reached crisis proportions. Some court systems were in gridlock. The causes included the increasing resort to litigation by previously court-shy businesses; the war on drugs; the green light the courts had given to rights-based claims; a host of other new-judge-made and statutory causes of action; the creation of new crimes; and mass tort actions such as the asbestos and Dalkon shield litigation...Today’s judges are so busy that, as one federal district judge has remarked, even Learned Hand could no longer be Learned Hand.”^{iv[iv]}

Against this backdrop, we are faced with clients who want “justice.” They want their story heard. They want vindication.

In, perhaps, the best available discussion of the practice of family law - Austin Sarat and William Felstiner’s *Divorce Lawyers and Their Clients - Power & Meaning in the Legal Process*- the authors observe that,

“Even in the era of no-fault, divorcing parties come to lawyers with a story to tell, a story of who did what to whom, a story of right and wrong, a story of guilt and innocence.”^{v[v]}

The truth, of course, is that virtually no client will achieve this judicial *imprimatur*. They want to tell their story, however they probably will never be sworn as a witness (unless it is at their deposition - certainly *not* a forum for them to tell their story in its most favorable light). They want the judge to see that they are right - but seldom will the court make a decision based upon only one party's view of the marriage and its end.

Stephen Adams is the foremost family law educator in California (and, perhaps, the country). He lectured a hall-full of divorce lawyers one day years ago about the practicalities of running a matrimonial practice. He told how he instructed his clients to go down to court a week before their hearing was scheduled to "get comfortable with the courtroom". What he intended was that each person, their sense of righteousness and hunger for vindication gripped tightly as they entered the courthouse, would watch the judge "slash, burn and plunder" the litigants' positions, deny them any opportunity to speak, and make unfathomable decisions. This is how "justice" is experienced by today's family law litigant - particularly in this age of no-fault. They will not get their "day in court" and they often will not believe justice has been done.

As Sarat and Felstiner also observed, lawyers often describe the legal process as plagued by the very absence of order and fairness that clients thought they would get from a judge. As they note,

"Lawyers attempt to draw rigid boundaries demarcating the legal as the domain of reason and instrumental logic and the social as the domain of emotion and intuition. Attempting to distinguish the legal from the social excludes much that is of concern to clients...As lawyers describe the legal process itself, a process in which personal idiosyncrasy is as important as rules and reason, in which confusion and disorder are as prevalent as clarity and order, in which the search for advantage overcomes the impulse toward fairness, the factors claimed by the ideology of separate spheres to be outside the law seem quite vividly alive on the inside...For clients, this is a difficult and disappointing message. They come to the divorce lawyer's office believing in the efficacy of rights in the legal system only to encounter a process that not only is "inconsistent," but cannot be counted on to protect fundamental rights or deal in a principled way with the important matters that come before it."^{vi}

Thus, while the reality may be debatable, judges are certainly not *perceived* by the parties to a divorce, as dispensing reasoned justice, crushing their most fondly-held expectations.

4. Each Party in a Divorce Thinks They Got Screwed and Their Spouse Didn't

A fundamental psychological defense when we are under a great deal of stress is projection. Philip Guerin, Jr. and his associates in their excellent work, *The Evaluation and Treatment of Marital Conflict* describe projection in this way,

"In reaction to emotional pain or upset, we all have an automatic emotional reflex that places the cause of that pain or upset outside ourselves. The more intense this projection becomes, the more it produces an experience of victimization and a tendency to hold others responsible for the way we feel and act. It demands that others change, instead of allowing us to take responsibility for our own behavior and emotional reactions. The opposite of projection is self-focus, the ability to see one's own part in an emotional process."^{vii}

It is here that the adversarial training and orientation of lawyers is most apt to cause trouble. It is axiomatic that the greater an individual's level of anxiety, the more intense will be their defensive responses. A characteristically distrustful person will bloom full-on paranoid under intense stress. A dependent personality will dissolve into non-functionality as the legal divorce gears up. The natural tendency to project when angry will just *explode* during divorce. Speaking with lawyers; paying

lawyers; negotiating the loss of possessions; being deposed; going to court - all of which comprise the daily task of lawyers - *spike* a litigant's anxiety. If the attorney joins with his/her client in round condemnation of the other party, then they have permitted themselves to become exploited as an instrument of the client's projection.

Yet, woe be to the lawyer who dares to suggest that the opposing party feels that they got a bad deal, or feels screwed by the process. Thus, the very information which must be imparted to a divorce litigant, in order to normalize their experience and get them to move on, is withheld by the attorneys, fearing a massive crisis in confidence by their client.

5. Client Maintenance and Control Are Competing Goals - Your Client Feels Whip-Sawed

Divorce litigants often get decidedly mixed messages from their attorneys. It is no wonder that many come away from the process feeling used. In its simplest terms, the lawyer tells the client how good their case is in order to cement the relationship and then tells them what's wrong with the case in order to move the client toward settlement. In reality, this practice can be quite subtle, and this subtlety leads to the justification or denial of the practice itself.

This tension was well-described by Craig McEwen and colleagues in a 1994 article in *Law and Society Review* entitled, "Lawyers, Mediation and the Management of Divorce Practice",

"[A]ttorneys must constantly demonstrate their identification with a client's interests and needs. Lawyers thus may build client trust by accepting and supporting a client's world-view. At the same time, however, lawyers must try to act as objective and skeptical advisors. The skeptic's role often means telling clients things they do not want to hear and urging compromise, thus placing in jeopardy the clients' trust in them as vigorous allies".^{viii[viii]}

The language which prevails at the outset of a case is replete with references to entitlement. Knowing that there are many practitioners who would gladly offer their services in the community, a lawyer does not want to dishearten the potential client by highlighting the weaknesses of the case.

Sarat and Felstiner made the following observation,

"Throughout their meetings with their lawyers, clients keep the question of marriage failure very much alive in their minds. They talk about the marriage in terms of guilt (their spouse's) and innocence (their own)...Even though law reform makes such questions legally irrelevant and gives lawyers an excuse to ignore or evade client characterizations, clients continue to think in fault terms and to attribute blame to their spouse...They contest the boundaries of law and seek to open it up to a broader range of concerns...Lawyers resist by avoiding discussion of who did what to whom during the marriage...(They) join with, and validate, the clients' vocabulary of blame only when necessary to reassure wavering clients of the correctness of their decision to secure a divorce."^{ix[ix]}

Then, as the case progresses (and the fees are billed) the weakness of the client's position presses more and more to the forefront. Their enthusiasm is encouraged by the attorney's advice to wane and as Sarat and Felstiner note,

"A costly, slow, and painful process might be justifiable if it were fair, reliably protected important individual rights, or responded to important human concerns.

Law talk is, however, full of doubts about whether the legal process even aims at meeting those goals.”^{x[x]}

Small wonder that the client emerges from the process feeling emotionally shredded.

Conclusion

“Zealous advocacy” has been stripped from our canon of ethics. The ADR movement is gaining more adherents. Advocates of “unbundling” of legal services are currying greater interest among us. There is a dawning understanding that the injuries inflicted by the litigation process, and the vaunted “adversarial system of justice”, outweigh their benefits - *especially* in the eyes of the lay public, whom we serve. While these limitations are most painfully experienced by our divorcing clients, they are felt in virtually every area of legal specialization. It’s time we responded and fundamentally reconsidered our role in helping our clients resolve the, often painful, conflicts in which their lives are periodically enmeshed.
