

2010 Family Court Town Hall “A View from the Bench”

Phoenix, Arizona
October 8, 2010

Under the auspices of the State Bar of Arizona, seventy-three members of the Family Court bench and bar convened for a day long program in Phoenix to seek consensus on how the practice and administration of family law could be improved. As the structure for their discussions, the participants utilized the format and processes developed by the non-profit Arizona Town Hall.

This report is the result of the efforts of the seventy-three participants. While not all Family Court Town Hall participants agree with each of the conclusions and recommendations, this report reflects the overall consensus achieved by the 2010 Family Court Town Hall.

ROLES AND CHALLENGES OF THE BENCH AND BAR

To elevate and improve the practice and administration of family law, how can the separate roles of and challenges faced by the Family Court bench and bar be better understood and accommodated?

We can elevate and improve the practice of family law by having a system that is respectful, decisive and efficient. Having attorneys involved in representing parties is a benefit to all of these goals. However, attorneys are not as beneficial to the process if they adopt the emotions or anger of their clients.

Judges need to approach very emotional situations with the appropriate respect and demeanor. Having a sense of humor, whether as a judge or an attorney, can help break down some of the stress and negative emotion that often infuse the Family Court system as long as the humor is never at the expense of any party or the integrity and respect of the system.

All involved would benefit from approaching their role in a more objective and calm fashion. It would be beneficial to the overall system if the bench and bar had more opportunities to listen and interact with each other outside the courtroom. Programs like the Family Court Town Hall and the Bench-Bar lunches, which allow for interactive discussions on substantive issues, are effective for meeting these goals and should be supported.

Judges may not realize how body language in the courtroom, time spent talking to parties in the courtroom, or stating that the case will be taken under advisement may send mixed messages to parties appearing in front of them. Clients and attorneys, on the other hand, may not appreciate the enormous caseloads and very limited time frames judges have to resolve cases.

Judicial assistants are the gatekeepers between the Court and attorneys. Family Court may benefit from uniform training of all judicial assistants utilizing “best practices” of those

judicial assistants who serve as excellent examples in this role and by taking an approach based on the attorneys and litigants as “customers” of the Family Court system. Attorneys should communicate any problems they encounter with courtroom staff to the judge or the presiding judge.

The system could operate better and more efficiently if the procedures and processes recognized that cases may need to be approached on a more individual basis. For example, more complex cases may require more time and effort while brief marriages may not need to have all procedures and time frames applied to them. Better and clearer communication about what judges want for evidentiary hearings would also improve efficiency and minimize frustrations by attorneys and litigants. Evidentiary hearings and trials could be processed more efficiently if attorneys can come to agreement on using leading questions.

In-chamber conferences can be extremely beneficial for resolving cases and improving communication between the bench and the bar. The entire system would benefit from greater use of this device as long as it does not involve prejudging the case or excluding the client from important decisions.

In sum, the Family Court system would benefit from additional substantive discussions between bench and bar about how to better understand each other’s challenges and how to work together to address them. The system would benefit from recognizing how interactions between the bench and bar are perceived by the litigants. If we focused more on the perceptions of the litigants, we might have a system that leaves litigants feeling that their case has been resolved in a just manner.

TIME ALLOCATION

Time allocation is the focus of great debate between the bench and the bar. Attorneys routinely believe that it will take greater time to prepare and require more time to present than is perceived to be necessary by the bench. How can this disconnect be addressed and what means are there available to maximize time and other resources?

The disconnect between the Bench and Bar on time allocation issues could be improved if both parties gave greater consideration to the concerns of each other. The Bench should give greater consideration to the suggestions of counsel as to how long they need for a trial; understand that predictions of time are sometimes guesswork; and, the needs of the bar to make an effective record for appeal.

Limited financial resources often impact litigants who must make difficult choices on how best to allocate funds. Consolidating Orders for Protection and temporary orders may be one way of reducing costs for litigants. Setting an evidentiary hearing immediately for temporary orders would also help as would expeditious rulings and enforcement of temporary orders relating to finances.

Timeliness is important to the integrity of the Family Court system, whether it is the timeliness of attorneys or the timeliness of issuing rulings. To preserve the integrity of the court system, there needs to be a better method of addressing those instances when there has been a

failure to issue a ruling within 60 days. This should include a method for attorneys to bring attention to their outstanding matters without fear of retribution from the judge involved. It should take into account the crushing caseload currently being handled by Family Court judges.

With respect to awarding interim attorneys fees, if this requires extensive evidence or must be a part of trial, then parties should request access to funds to pay attorneys fees pending the outcome of the case.

To maintain the integrity of the system, it is critical that Judges enforce the time frames set aside for trial and that they do so equitably between the parties. The Bar, on the other hand, should support having more family court judges, and consider how to better work within the time constraints of the Bench. For example, the Bar should understand that the emotional position of the litigants may create unnecessary time spent on issues that are not to be resolved by the bench. To the extent the attorneys can work with their clients to resolve these issues before appearing in court, all will benefit.

Cases could be handled more efficiently through case assessments (especially when attorneys are involved) that better address the evidentiary issues that *need* to come before the court as opposed to those that might better be resolved through counseling or those that are otherwise unnecessary tangents to the issues that judges actually decide. Attorneys should do everything possible to reduce any time before the court testifying on issues that are not in dispute—whether through stipulations with the other side, trial memos, preparation of witnesses, or communication with the judge on any preferences the judge may agree to for streamlining the case (such as leading questions).

RMC (Resolution Management Conference) hearings can be used as a platform for judges to not only explain their courtroom preferences but to also set the stage for how the case will be processed. This can be especially important when the litigants are not represented by counsel. Turning an RMC hearing into a telephonic conference would help reduce litigant expenses (although technology and other issues may prevent this option in some circumstances).

The Bench and the Bar both need to recognize that different cases may need to be handled differently. Cases that involve children need to have efficient resolution. On the other hand, complex financial cases that do not involve children may warrant more time for consideration. When a case involves both custody and financial matters, one option to consider is bifurcating the trial to separately address these two matters.

Given the restraints of resources in the Family Court System, litigants and attorneys may benefit from reducing their expectations of how soon a case can be tried. To balance the sometimes competing interests of evidentiary needs, fairness, efficiency and justice, all involved must constantly strive to improve communication with each other.

EMERGENCY ISSUES

Emergency issues pose challenges to the bench and bar. For attorneys, it presents challenges of addressing the clients' perceived immediate needs. For judges, it presents time management issues, along with differentiating between true emergencies and perceived urgency. What are the challenges and how can these issues best be addressed in the court system?

Emergency motions are overused. A large percentage of items filed on an expedited basis are not true emergencies. Emergency is often confused with urgency: they are two different things.

Ex parte emergency proceedings do not always result in the most just outcomes. Accordingly, we need to use emergency and ex parte proceedings sparingly. Parties also need to understand that emergency requests and ex parte requests should be considered separately. Too often ex parte and emergency requests are unnecessarily linked when only one is necessary.

Attorneys need to act as better gatekeepers in reducing emergency or expedited filings. Attorneys should “filter” the content of emergency filings so that the emergency filing is very precise with respect to the need for the emergency relief. Non-emergency items should not be included with requests for expedited relief. In addition, attorneys should not try to do an end run around an “emergency” motion that was denied by seeking an order of protection.

The court can assist by appropriately instructing and sanctioning parties (whether represented or Pro Per) who unnecessarily bring emergency motions. The court should also explore how to better communicate the proper use of emergency proceedings to unrepresented litigants before they make such filings.

While emergency motions should be utilized carefully and sparingly, they are nonetheless an essential part of the Family Court System that need to be preserved.

TENSIONS BETWEEN TIMELINESS AND FAIRNESS: COMPLIANCE WITH DISCLOSURE AND TIME CONSTRAINTS

There are deadlines for compliance with rules, including disclosure related matters. These are more than mere formalities as the overall fairness of the proceedings is contingent upon compliance. There is also the competing need for having cases decided on the merits, thereby mitigating against draconian sanctions such as exhibit or witness preclusion. What can be done by the bench and the bar to ensure that both objectives are being appropriately met?

AND

There are pre-trial requirements set by the Court. There is a disconnect in belief as to the actual need and benefit of completing these tasks as well as challenges faced by attorneys that may not be known of by the court. How can the bench and bar work together to ensure that pretrial requirements are being met?

There is often a tension between enforcing the rules and ensuring that a case will be resolved on the merits. However, if we don't insist on the rules being followed then what is the use of having them?

The Court can support compliance with disclosure and discovery rules by setting out the results of non-compliance early and clearly to all litigants—especially those litigants who are not represented by counsel. While sanctions should be utilized, care should be taken to ensure that they are not overly draconian. In some instances, a continuance may be the best way to resolve non-compliance with discovery rules. Thinking creatively about methods of sanctioning that are something other than exclusion of the evidence should be presented and considered whenever possible. The Court can assist by supporting telephonic conferences to talk through discovery disputes before they escalate.

It would be helpful to have a “Frequently Asked Questions” form on the website—especially for Pro Per litigants.

Attorneys who are struggling with the other side's noncompliance can file a Motion to Compel. Such motions, which may be accompanied by sanctions when granted, are one method that can be effective in getting parties to comply.

Attorneys should engage in practices that allow them to demonstrate timely compliance with discovery issues. Attorneys should recognize that they and their clients benefit enormously by presenting a pretrial statement to the judge and otherwise complying with filing requirements. The pretrial statement is even more effective if it clearly states what the party wants.

The Court can support efficiency and compliance by collecting the individual preferences and requirements of each member of the bench. The individual preferences should be posted and made available on the Family Court website with the judge's bio. The preferences could include such items as the following:

Who is your Judicial Assistant and Bailiff and his/her phone numbers?

How do you handle RMCs/Returns? Take evidence? Just testimony? Do you remind the litigants that it is much better for children when parents make the decisions that affect their future rather than leaving that important question to the judge to answer for them?

Do you accept/encourage telephonic conferences, and if so, on what issues or in what situations?

Do you generally allow telephonic testimony? Any restrictions?

Do you want to be provided with a bench copy of exhibits?

Do you allow e-filing of pleadings?

Do you interview children and/or what is your preferred method of obtaining the children's wishes?

What are your requirements for requesting additional time for hearings/trials?

How far in advance of trial/evidentiary hearings do you require exhibits/pretrial statements?

Do you request Findings of Fact prior to trial, and if so, how do you use them?

Will you/do you allow in chambers discussions/conferences with attorneys?

Do you accept faxes? If so, for what types of documents?

What are your requirements before vacating and/or continuing hearings and/or trials?

Do you admit/permit hearsay testimony, in particular, regarding children's out-of-court statements?

How do you use e-mail communication with attorneys, if you do?

Will you rule on the pleadings without hearing or oral argument if the attorneys agree to this method?

How do you prefer to address Requests for Attorney's Fees? During trial? After trial by written memoranda and affidavit?

In cases with complicated financial issues, where custody and parenting time are also at issue, will you consider bifurcating the trial to address the child issues earlier?

Do you keep track of and remind each party of the use of their share of the time? If not, will you do so if asked?

PROTECTING CHILDREN

There is general acceptance to the proposition that children should be protected from becoming involved in the litigation process and from the issues being contested between the parents. Yet there are also a number of services and procedures that relate to the involvement of children, such as Best Interests Attorneys, interviews of children and the like. Further, the Court is required to at least consider the wishes of the child in making custody determinations. How can the bench and bar balance these competing interests so as to ensure full presentation of relevant evidence but at the same time minimize the direct impact on the children?

We need to be cognizant of the importance of eliciting relevant information from children who are in the Family Court System while also recognizing the sensitive nature of gathering the information in an adversarial setting.

Children should not be involved unless absolutely necessary. When it is necessary to involve children, professionals and confidentiality should be used whenever possible. Moreover, when seeking the input of the child, it can be helpful to all involved if the court requires

guidelines to the questioning that protect the child and seek positive solutions. For example, instead of simply asking the child who they want to live with, the questioning could instead focus on eliciting information from the child on what the child appreciates the most about their parents and what the parents can do better.

Judges can help shield and protect children by instructing parents not to discuss the report of the child's wishes with the child as it can often be very harmful. In custody disputes, the judges can also help the children by letting them know that it is not the child's decision on where the child will go; rather that it is the decision of the judge.

With older children, it is often important to have a professional (whether a custody evaluator or the conciliation court) talk to the child in a general and careful manner. Counsel can assist the Court by letting the Court know when an interview with the child may be best and when it may not be required.

COURTROOM DEMEANOR

Appropriate courtroom demeanor is a necessity to maintain the integrity of the legal process. Why is this critical and what can the bench and bar do to further this principle?

Maintaining appropriate courtroom demeanor is essential to the entire Family Court System.

Attorneys and judges should refrain, whenever possible, from interrupting each other, raising their voices, engaging in side conversations while court is in session, or otherwise engaging in disrespectful actions that demean the dignity of the court and the integrity of the process.

It is essential for attorneys to engage in appropriate behavior and to insist upon the same behavior by their clients. It is essential for Judges and court clerks to engage in the same type of behavior that they desire from attorneys and litigants. Judges should set the stage by example. Judges can help by spending time talking to the litigants about why respectful conduct is both required and more effective in advocating a position. Judges should strive to maintain control of the courtroom and enforce appropriate behavior.

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