

Chapter Four

ADVERSARIAL SETTLEMENT

Even though you and your spouse are posturing your cases for litigation, you may still be hoping to settle. At your direction, your attorneys may utilize any of a variety of methods to assist you in trying to reach agreement, as you continue to fight with and threaten each other.

As you work towards an adversarial negotiated settlement, you may want to consider the following:

How are cases settled adversarially?

Most typically by negotiating a written Settlement Agreement, with drafts and requested revisions going back and forth between attorneys. Sometimes both attorneys and both parties willingly come together, amicably and professionally, and hash it all out in a four-way settlement meeting to reach agreement as to the final terms.

In other cases, the only way to get all four of you together, is for one of the attorneys to arrange to depose either you or your spouse. Then, after you are all in one room, the attorneys may try to work things out. If you are all successful, the terms of your Agreement will be read into the record before a court reporter, and you will each affirm that Agreement

under oath. A proper document will then be prepared at a later date, for you and your spouse to endorse.

Settlement can also be brought about by both adversarial attorneys and both parties working together in one room with a neutral mediator to help with the negotiations, and to help keep everyone calm and polite. Having pastry in the room can help too.

For some issues, such as the division of furnishings and household items, you may each agree, at your lawyers' suggestion, to allow an arbitrator to make a binding decision as to who gets what, and to help you divide the family photos.

Another way to reach agreement is by hiring a retired judge to go back and forth between two different rooms, with you and your attorney in one room, and with your spouse and his or her attorney in another. By using his or her stature, and the provision of evaluative information, that mediator may be able to encourage you both, either gently or not so gently, to reach a settlement.

Occasionally settlement can occur through the utilization of a neutral case evaluation program, conciliation program, mediation program, or other alternative dispute resolution service offered by the courts.

If you, your spouse and your respective attorneys all want to fight and threaten each other towards settlement, you can certainly find a way to do so.

What can I do if my case isn't settling?

If your case can settle, it should. If it isn't settling, you have three basic options:

1. Modify your offer to move closer to your spouse's position, or

2. Maintain the in-limbo *status quo* and do nothing, or
3. Ask for what you want in court.

In other words, even if you try to show your spouse that the relevant law supports your position, you can't make your spouse settle. Your spouse may believe that the law supports what he or she wants more strongly than what you want. Or your spouse may simply want you to just give up and settle for whatever he or she feels like handing you, or taking away from you.

Your spouse may refuse to even tell you what he or she is willing to offer, because he or she wants to put you through the expense and stress of a trial, and would rather spend money on an attorney before giving money to you. Some people will cut off their nose to spite their face.

If I want to settle, but my spouse is not offering a reasonable settlement, do I have to prepare for trial?

Probably. Your spouse may only settle if it looks like you will get what you want in court, and he or she is tired of the litigation, or is tired of paying attorney's fees. You may have to prepare your case for trial, and put your case in the best possible posture, for your case to settle favorably. Your spouse may call your bluff. If it looks like your case is weak, and if you haven't taken all the proper steps to be able to prove your case, your spouse is more likely to refuse to settle, and to force the case to trial. Unfortunately, taking all the steps necessary to put your case in the best possible light may be a very expensive process.

If my spouse isn't reasonably trying to settle, what should my attorney and I be doing to prepare the case for court, or to work towards a more favorable settlement?

First, your attorney should probably conduct discovery. This means

he or she will send out to your spouse Interrogatories, and a Request for Production of Documents, to obtain information and documents from your spouse, possibly along with a Request for Admissions. A request to update this discovery should also be made just prior to trial.

Important adverse third party witnesses may need to be deposed, so you can ascertain what they plan on saying against you in court. Perhaps third party subpoenas for documents should be served on banks, and on your spouse's employer, to obtain financial and retirement information not provided by your spouse. You may need to employ the services of a certified fraud investigator, to find out where your spouse has been hiding assets. Custodians of Records may need to be subpoenaed for trial, so the documents can be admitted into evidence over a hearsay objection.

The house may have to be appraised, and if there is no stipulation as to a value for the house, the appraiser may have to be hired to testify in court. All of your other expert witnesses, and your non-expert lay witnesses, must be designated, and all of your exhibits must be listed. You may need to prepare Property Exhibit Schedules, and a trial notebook. The testimony for all witnesses, including you, must be prepared. You do not want to look like a deer caught in the headlights when your spouse's attorney cross-examines you. You should understand all of the statutory factors as to which you will give testimony.

Perhaps a Motion for Alternative Valuation date regarding a marital asset that your spouse wasted should be timely filed. Your attorney must also timely make any proper objections to your spouse's list of exhibits, or the objections may be waived.

Make sure your attorney has a plan, and is working towards some sort of a resolution. To learn more about the litigation process, please see Chapter 14 of this *Guide* entitled *What Happens if We Go to Court?*

If we're heading for court, is it still possible for the case to settle before trial?

Yes. Cases often settle just before the trial date. Some courts will even require participation in some form of alternative dispute resolution process, as a last attempt to settle, before the court will even let the case be tried. To increase the chances of settlement, your attorney should be communicating with the other attorney, and should be making an effort to resolve the case, instead of just letting it go to trial.

In the meantime, you need to be communicating with your attorney, and you need to know exactly what everyone is supposed to be communicating about. How are the assets valued? How is child support calculated under the child support guidelines? What is fair? What is the court likely to do? What does the law say? Whose case is stronger?

Before you head off to court, make sure you know the exact monetary value of, and exactly what you are fighting about, along with just how much money you will spend to litigate the case, so you can evaluate whether or not what you are fighting for is even worth the cost of the fight.

Does a settlement before trial mean "settling for less?"

Sometimes. If your attorney never prepared the case, chances are he or she probably figured you couldn't pay for a trial, and that your case would simply settle for the best the other side would offer just before the scheduled trial date. If your case was never properly prepared, your attorney will tell you that you will just have to agree to whatever your spouse feels like handing you.

The other attorney may not have prepared either. Did they both know the case would never be tried, and that in the end they would just each simply tell you and your spouse what to settle for? Maybe. Did you? Maybe not.

If you are serious about litigating, the other side will know it. You will pay the fees required to do the work necessary, and that work will be done. Then, if settlement occurs, it is just a bonus, and you are spared the attorney's fees for the actual final hearing.

Is God allowed in the courtroom?

No.

Constitutional principles prohibit the court from making any rulings regarding religion. The court will not decide whether, how much of, or which religion your child may be exposed to. Or which religious dietary, hair, dress, or other requirements may or may not be appropriate for your child. God and religious beliefs are usually barred from the courtroom during divorce proceedings. If they need to be resolved through litigation, these issues must usually be presented to the court in a different context, such as whether or not a specific act, cast in nonreligious terms, is in a child's best interests.

However, if you and your spouse wish to address religious or spiritual matters, you are free to do so outside of court. Even in the context of negotiating a settlement agreement in an adversarial manner, the two of you may include provisions in an agreement which you both agree to honor. But if one of you chooses to ignore those provisions, the court may be powerless to enforce them. The judge is not God. Judges enforce legal matters. It's up to God to enforce the rest.

Just as in negotiated out-of-court settlements, in the mediation and collaborative settings you and your spouse also have the ability to address religious and spiritual beliefs, if you choose to do so. You may wish to specifically seek the services of a faith-based mediator, or the services of a faith-based collaborative attorney. You may even choose to actively conduct the proceedings in a spiritual or in a religious way.

You would only be limited by the knowledge, expertise, willingness and comfort level of your mediator or collaborative attorneys.

If you find professionals who are respectful of the manner in which you wish to proceed, the efforts to dissolve your marriage are only bounded by your imagination, and by the bounds of the law. Your final Agreement will still be enforced only within the confines of the court's abilities, but it may very well be that if the process is conducted in a meaningful way, you will each be more likely to abide by the results. But be careful the candles don't set off the sprinklers in your mediator's or attorney's office.

Are there advantages to trying to settle from the outset, as opposed to settling only after we have each positioned ourselves for a trial?

Yes. In a perfect world, if you are eventually going to wind up settling, everyone should know it and just settle from the get go. Why waste your money on lawyers? Too bad you're not living and divorcing in a perfect world.

But if you are both reasonable and rational people, and are willing to reasonably settle everything outside of court, you can get creative. You can make temporary agreements and partial agreements. You can free up some money without prejudice to a final resolution. You may refinance or sell a house before all the issues are resolved, and then distribute some of the proceeds to establish new residences. You may start dividing up the investment accounts before everything is in writing. Perhaps you will experiment with custody arrangements, to find out what works best for each of you and for the children. You can pay support without the initial amount being considered some sort of precedent.

If you try to work it out, you can make it work for you.

Okay, if we all want to settle right from the start, how do I pick a mediator, or a collaborative attorney?