

Serial Case Management – A Killer Idea!

What we often lack as judges and court staff is time to handle the very cases that drain our energy and monopolize our docket: the high conflict cases. Shifting from a standard hearing calendar and trial calendar docket to a proactive system that emphasizes case management requires what seems like a monumental physical effort that is tough to address, particularly in times when staff support is at a low ebb. Add to this the fact that if we aggressively manage these emotional cases, we will likely say or do something that spawns the inevitable recusal motion, it seems like a losing scenario for the trial judge.

As an alternative, however, consider a different approach. What if the judge at the case management hearing is not the judge who will try the case, but is a separate judge who also has substantial family law experience? And, what if this judge has plenty of calendar time to devote to the high conflict cases, and can set up serial case management conferences as frequently as every two to four weeks? Under this scenario, a judge could determine the issues and set priority deadlines for discovery and for utilizing experts, and could constantly jaw-bone or cajole the parties and attorneys about resolution strategies without the fear of recusal, because this judge will not try the case. This process could be used separately from the case management staff's schedule for normal case processing and compliance issues. However, the process could use a Magistrate for follow-up with the parties on the judge's directives. Review progress every two to four weeks. At each setting discuss resolution techniques, use of alternative dispute resolution processes, and other cost efficient methods of guiding the case to a lasting problem-solving resolution.

Use the "Sieve model" to identify the least intrusive alternative dispute resolution process, and continue to use the next highest technique until they are all exhausted; only then can you be satisfied that a trial is needed. Some of the more progressive, but least intrusive techniques are: a parent facilitator, focused parenting education to increase awareness of the needs of the children, use of a tribunal of diverse family law professionals, court-based field experience (watching actual contested family law cases in court), and therapeutic mediation (use of a mental health professional as a mediator who will focus on the emotional triggers between the parties and try to resolve those issues as a step toward a problem solving resolution of the more traditional issues).

Use a single, neutral, problem-solving expert wherever possible: Parenting facilitators, neutral financial experts, credit counseling experts, or settlement conferences with an experienced family law attorney who is not involved in the case.

Discuss fees: Cost of going through a full, adversarial trial versus a problem-solving resolution without a trial.

Impose a sanction or consequence for failure to provide discovery in a timely manner, and for attorneys who don't cooperate in a reasonable manner to explore problem-solving resolution of disputed issues.

Analyze the grief process and alter the time frame for aggressive resolution techniques to accommodate the stage of grief for each party, and to help the still-grieving party through the grief process. Use the cooperation assessment tool, which is a simple instrument used to identify which cases are not ready for cooperative negotiation. This instrument can be given to a party in the attorney's office and actually scored by the attorney.

If the case is one that likely require a trial, get it ready for the trial judge and minimize the time required for trial by focusing on the issues and reducing testimony to the real and legitimate disputes, and limiting evidence on emotional triggers the parties want to emphasize, but which will not be likely to help the judge decide the case. Require that experts meet face-to-face and agree on the differences in their opinions, the reasons for the differences, and quantify the effect on the decision based on which opinion is accepted (this is particularly helpful on business valuation opinions). The experts can then make their presentations on the disputed areas only, saving time and expert fees, and helping the judge focus only on the actual issues in dispute. They must also discuss their differences with the potential for resolution in mind.

The utility of this idea is that the case-managing judge can relentlessly push the parties toward a lasting resolution because of the greater availability of time, and the sole focus on case management as opposed to trial and the emphasis on resolution techniques as opposed to deciding only legal issues. Add the freedom from fear of the inevitable recusal motion, and you have a real recipe for success! Use of a senior judge experienced in family law could be an ideal resource for this job function. Every Circuit probably has at least one senior judge who could fit this role. So what are you waiting for – go recruit one!