

Effective Use of Neutrals

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Family Law Institute 2010

Cost-Effective Use of Experienced Financial, Parenting and ADR Neutrals to Resolve Family Law Issues

Presented by Tom Harjes of Baker Tilly Virchow Krause, LLP and Steven B. Schmidt of Steven B. Schmidt Mediation

I. Introduction

As a result of the economy today, millions of parents are out of work; homes are in foreclosure; businesses are closing; bonuses may be non-existent and salaries frozen or cut; bankruptcy filings for individuals and businesses for economic relief are now commonplace; federal, state, county and city tax revenues have plummeted and funding of court administration has been severely cut; and our legal system has probably never been so challenged to manage new case dissolution/paternity filings and so many post-decree proceedings to modify custody, child support and spousal maintenance based upon a substantial change in circumstances.

Law firms have also been adversely affected by the economic crisis with jobs and income cuts; clients cannot afford to pay their legal fees for divorce; and some cannot even afford to go forward with the divorce, while living separated but in the same home.

Given the economic circumstances today, shouldn't every lawyer advise their clients to strongly consider current best practices and smart practices for engaging parenting, financial and ADR neutrals compared to what may be cost prohibitive litigation practices. Of course, there are always the exceptions, particularly those not affected by the economy and those clients and attorneys who choose to continue to use historical litigation practices for their personal, emotional or financial purposes.

In our presentation, we will do our best to explain how and why your use of neutrals to resolve family law issues will be more cost effective for your clients (financial and emotional) than traditional litigation. An attempt to analyze the differences in the financial and emotional costs for traditional litigation as compared to the use of ADR, parenting and financial neutrals is necessary.

II. Traditional Litigation

- Litigation often involves months of discovery with each party hiring their own financial experts to value businesses, real estate, retirement assets and to trace any premarital or inherited/gifted assets to one of the parties.
- Separate custody/parenting experts are often hired to show why their client should be awarded sole or joint physical custody and why the other parent might not be capable of caring for the parties' children.
- In many cases where you have a disparity in income vocational evaluation experts are hired to show how little a spouse may be able to earn to support himself or herself, and the other side hires an expert to show why a spouse may be capable of earning far more than they admit.

- Comparative responses related to emotional costs serving as a neutral parenting expert vs. hired parenting expert:
 - Evaluators reported much higher emotional costs to the parties and children for those cases involving hired expert evaluations as compared to neutral evaluations with one evaluator reporting twice as many high conflict cases than low conflict cases for hired expert valuations.
 - Settlement outcomes reported by the evaluators reflected generally that 80-90% of the cases settled involving neutral parenting evaluations (one reported only 50% settlement) but cases involving hired experts resulted in a much higher likelihood that the cases were tried with responses ranging from 50% to as high as 80% going to trial.
 - All of the parenting experts reported that the use of a neutral parenting evaluator resulted in fewer cases returning to litigation on parenting issues than in cases where hired experts were used.
- Parenting experts responded when they were retained as a parenting consultant early in the case that they observed the following:
 - Parenting/Custody litigation was reduced moderately to significantly.
 - Communication between parents was moderately to significantly improved.
 - Conflict between parents was moderately to significantly reduced.
 - Legal fees and parenting/custody evaluation fees were reduced moderately to significantly.
- Responses when they served as a parenting consultant but engaged after the parties were actively involved in litigating parenting issues:
 - Parenting/custody litigation was moderately reduced.
 - Communication between parents was moderately improved.
 - Conflict between parents was moderately to significantly reduced.
 - Legal fees and parenting/custody evaluation fees were moderately to significantly reduced.
- The parenting experts responded that in their practice they provided more cost effective parenting assessments or limited evaluations for settlement purposes that significantly reduced neutral parenting evaluations. Some of the evaluators also indicated that they performed an ADR hybrid, referring to it as “facilitative evaluation” and after observing the interaction of children and parents as necessary a mediation process is used to help parents reach agreement.
- ADR Neutrals
- Mediation
 - Mediation was created as an alternative form of conflict resolution.
 - The core principle of mediation is for the parties to retain control over decision making rather than abandoning that control to a legal system where lawyers and judges are making the decisions for the parties. The parties may do this by effectively choosing their own case management within the ADR-mediation process.

- Quoting from the training manual prepared by THE FENE authority, Referee Kevin McGrath, he states that there are four primary components for the bench to offer FENE during the Initial Case Management Conference:
 - “(1) This is an opportunity for the judicial officer to reach out to the parties directly and encourage them to maintain control of their family and their finances and work towards resolution in a timely and amicable manner;
 - (2) That about 75% of the families who participate in ENEs resolve their cases and do so in a short period of time;
 - (3) That early resolution will result in a huge savings emotionally (if only by shortening the sometimes excruciating anxiety of being in family law litigation) and financially; and
 - (4) The professionals who are providing ENE services are eminently qualified (sometimes more qualified or experienced than the judicial officer) to help them resolve this matter and that frequently more is learned about a family during the initial ENE process than actually comes out in a formal trial.”
- Settlement rates for ENEs in Hennepin County have consistently resulted in approximately 70% of the cases having full or at least partial settlement. Other counties such as Filmore County, St. Louis County and Brown County, the Third, Sixth and Fifth Judicial Districts, settlement rates for FENE and SENE are at 80%.
- The Hennepin FENE data reveals that the average evaluator spends less than 6 hours per case. The hourly rate paid to the FENE evaluator averages \$150.00 per hour, and thus the cost for the evaluator is approximately \$945.00 per case.
- The average time for a case to be resolved from the date it is assigned to the evaluator is approximately 67 days with an average of 2.6 financial issues per case. The case is resolved in an average of 1.6 meetings.
- In many FENE cases, the evaluator assists the parties in selecting neutral experts to assist in evaluating an issue with the expert sometimes retained as a Rule 706 expert to survive the FENE and to reserve the parties’ resources if the financial issue is not resolved during the FENE.
- FENEs significantly reduce the costs to the parties for legal fees by resolving the case early and cost efficiently.
- The emotional cost is also significantly reduced through shortening the anxiety and timeframe for the financial and parenting issues to be resolved.
- FENE significantly reduce court administration negating hearing and trial time.
- Moderated Settlement Conference
 - Rule 114 provides for an ADR process known as a moderated settlement conference. The process is facilitative and evaluative but also confidential. Hennepin, Ramsey and Washington Counties have used moderated settlement conferences with AAML – MN Chapter providing the moderators to clear up significant backlog of cases that has proven to be very successful.

Accountants/CPA's who serve as financial neutrals routinely provide the following services:

- 1) Property schedules for division
- 2) Cash flow/income schedules for support
- 3) Non-marital tracing to substantiate non-marital claims
- 4) Forensic analysis
- 5) Business valuations

Other commonly used financial neutrals fall in the following areas:

- 1) Real estate appraisers
- 2) Personal property appraisers
- 3) Actuaries for pension valuations
- 4) Realtors (for market analysis)
- 5) Mortgage brokers
- 6) Vocational evaluators

The key issue in effectively using a financial neutral is communication. The following example will take you step-by-step through a typical engagement with a CPA who is a financial neutral. In this example are many tips and recommendations based on our experience in this area. Many of these same tips and recommendations can also be used when hiring other types of financial neutrals.

Step One: First contact with the neutral – A helpful way of beginning the engagement is for the financial neutral to initiate a conference call with the attorneys to discuss the case and to establish the ground rules (see **Exhibit A** – Checklist). Alternatively, an initial meeting can occur with the clients, attorneys and the financial neutral. This may be preferable if the clients need to feel more comfortable with the person they are hiring. The following items should be discussed during the call/meeting:

- 1) Role of expert: Will the financial neutral be covered under Rule 706 where their work product will be admissible? Or will they be under Rule 114 where their work product will be used for settlement purposes only? In the case of Rule 706, the financial neutral should provide a sample court order for the attorneys to have signed by the judge or referee (see **Exhibit B** – Rule 706 Order).
- 2) Conflict check: The financial neutral should verify no potential conflicts exist that could affect the perception of either the clients, attorneys, or judicial officer.

Step Two: Second contact with the financial neutral – Typically this will be a meeting with the clients and attorneys to present and discuss the preliminary financial analysis. An alternative might be for the financial neutral to issue a written report. The following items should be discussed:

- 1) Communication: How will communication between the financial neutral and clients and/or attorneys occur after the meeting or report is issued? Typically additional questions not answered during the meeting are best relayed by email (copying all parties) or by conference call. Answering client questions one-on-one can sometimes lead to later disagreements between the parties simply because each person may have heard a slightly different explanation to the same question asked privately.
- 2) Homework: The financial neutral should summarize any tasks for the clients and attorneys in a memo or email upon conclusion of a meeting. This will ensure clarity as to the responsibilities and specific tasks needed to complete prior to the next meeting.

Step Three: Third contact with the financial neutral – This is often a settlement meeting in which the financial neutral can prepare scenarios on behalf of each party for settlement purposes. This meeting may occur with or without a mediator.

Step Four: (Possible) Trial: If settlement is not reached and trial is imminent, another conference call with the attorneys is helpful to establish the ground rules for trial.

- 1) Discuss how to present alternatives to the financial neutral's scenario.
 - a. Property division (see **Exhibit D** for example of alternative allocations)
 - b. Non-marital claims (see **Exhibit E** for example of alternative home values at time of marriage and currently)
 - c. Cash flow analysis (see **Exhibit F** for example of impact with different budgets)

There are other ways that financial neutrals can be involved. They can be included as part of the FENE process and the collaborative law process. Again, the most important thing to help ensure a smooth process with any financial neutral is communication.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

In Re the Marriage of:

COURT FILE NO. _____

Petitioner,

and

Respondent.

**STIPULATION and ORDER
FOR APPOINTMENT OF EXPERT
UNDER
MINNESOTA RULE OF EVIDENCE 706**

STIPULATION

The parties, by their undersigned counsel, hereby stipulate and agree to the appointment of ___(name)___, a ___(job title)___ at ___(firm name)___ concerning the preparation of a marital and non-marital net worth schedule for property settlement division, preparation of non-marital tracing schedules in support of non-marital claims, and projections of future cash flow for each party under various property divisions, child support scenarios, and spousal maintenance alternatives, on the terms of the court order set forth below, and hereby waive their right to formal motions and any hearing on this stipulation and the requested order.

Dated: _____.

[Attorney/Law Firm]

Attorney for Petitioner

Dated: _____.

[Attorney/Law Firm]

Attorney for Respondent

7. The parties shall each enter into a written engagement agreement with ___(firm name)___, which shall provide for the terms of compensation, right to withdraw for non-payment or non-cooperation by either party, and such other terms and conditions as the firm shall reasonably require.

8. In accordance with the decision of the Minnesota Supreme Court in *Peterka v. Dennis*, _No. A07-165 (Minn. May 7, 2009), ___(name)___ and ___(firm name)___ and its partners, directors, officers, employees and contractors are immune from suit for all acts performed pursuant to this appointment.

BY THE COURT:

Order Approved as of Date Heard

Dated: _____, 20__

Referee of District Court

Dated: _____, 20__

Judge of District Court

February 16, 2010
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No schedules shall be submitted to Court that contain the heading "For Settlement Discussions Only – Subject to Change." If an attorney intends to submit a schedule in Court that contains that heading, they must first email their request to Baker Tilly Virchow Krause, LLP and copy the other attorney. Baker Tilly Virchow Krause, LLP will then remove that heading from the schedule and email a scanned copy of the schedule to the requesting attorney with a copy to the other attorney.

Pursuant to a discussion with your attorneys, each attorney and/or client will have the ability to separately request alternative financial scenarios for settlement purposes. Any schedules we prepare pursuant to such a request will only be provided to the attorney and/or client requesting the schedule. If the requesting attorney uses the schedules to make a settlement proposal, the schedules will be provided at the same time the proposal is made.

FEES AND RETAINER AGREEMENT

Our fees are based upon the time and expenses incurred to perform the required services. Because of the many uncertainties encountered in the financial analysis, it is not possible to predict the ultimate cost of our services. However, we will provide detail information relating to time and expenses on a monthly basis with our billing invoices. Our current fees are based upon the following hourly rates:

Administrative staff	_____
Professional staff	_____
Senior Professional staff	_____
Director/Partner	_____

Our firm reviews the hourly billing rates on an annual basis in August. If the hourly billing rates are increased, you will receive prior notice.

Our retainer for the engagement is _____ Thousand and 00/100 Dollars (\$____,000.00). Invoices for the remainder of our fees will be rendered on a monthly basis and payments are due within thirty (30) days. We understand the retainer and any additional fees will be paid from marital assets. Invoices will be mailed to Mr. _____ with copies mailed to Ms. _____. To avoid any assertion or allegation that our work may in some way be influenced by, or contingent upon, the outcome of this litigation, we require that any outstanding invoices from us be paid prior to our furnishing testimony.

Any changes to this fee arrangement must be done on a written basis.

INDEMNIFICATION

Our engagement is to serve you and your attorneys as a neutral expert to assist in the negotiation process. You agree that we are not serving as the arbitrator, mediator or negotiator of your claims or disputes. You further agree that you will rely exclusively on your own attorney for advice concerning (i) your legal rights, (ii) negotiating strategy and tactics and (iii) that you will not rely at all upon us to advise you concerning the advisability, merits, fairness, value or adequacy of any settlement of your dispute that you may decide to accept.

You agree to hold ____ (name of firm) ____, their members, directors, officers and employees harmless and to indemnify them from any and all liabilities, costs and expenses relating to this engagement, including any expenses (and those of our legal counsel) incurred by reason of any action taken or committed to be taken by us in good faith. In the event that you bring an action or assert a claim for damages against us you agree that your damages and recovery will be limited to the amount of fees paid by you to us for this engagement.

**Mark and Jean Sample Dissolution
Property Settlement Schedule
Valuation Date: December 31, 2009**

Mark's Information

	Total Value	Allocation of Value	
		Mark	Jean
5,000	5,000	5,000	0
5,000	5,000	0	5,000
50,000	50,000	25,000	25,000
60,000	60,000	30,000	30,000
100,000	100,000	100,000	0
50,000	50,000	0	50,000
150,000	150,000	100,000	50,000
500,000	500,000	500,000	0
500,000	500,000	500,000	0
450,000	450,000	0	450,000
(250,000)	(250,000)	0	(250,000)
200,000	200,000	0	200,000
0	0	0	0
15,000	15,000	15,000	0
20,000	20,000	0	20,000
35,000	35,000	15,000	20,000
945,000	945,000	645,000	300,000
0	0	(172,500)	172,500
945,000	945,000	472,500	472,500

1) Cash and Securities:

- a) Checking account: Mark
- b) Checking account: Jean
- c) Investment account: Joint

2) Retirement Accounts:

- a) 401(k): Mark
- b) 401(k): Jean

3) Business Interests:

- a) ABC Company, Inc. (100%)

4) Real Estate:

- a) Homestead
- b) Less: Mortgage

5) Other Assets/(Liabilities):

- a) Personal property
- b) Car: Mark
- c) Car: Jean

Jean's Information

	Total Value	Allocation of Value	
		Mark	Jean
5,000	5,000	5,000	0
5,000	5,000	0	5,000
50,000	50,000	25,000	25,000
60,000	60,000	30,000	30,000
100,000	100,000	100,000	0
50,000	50,000	0	50,000
150,000	150,000	100,000	50,000
750,000	750,000	750,000	0
750,000	750,000	750,000	0
400,000	400,000	0	400,000
(250,000)	(250,000)	0	(250,000)
150,000	150,000	0	150,000
0	0	0	0
15,000	15,000	15,000	0
20,000	20,000	0	20,000
35,000	35,000	15,000	20,000
1,145,000	1,145,000	895,000	250,000
0	0	(322,500)	322,500
1,145,000	1,145,000	572,500	572,500

6) Preliminary Net Worth Allocation

7) Difference to Equalize

8) Equal Net Worth Allocation

**Mark and Jean Sample Dissolution
Projected Cash Flow**

Cash Flow Calculation

Jean's Budget Assumption:	Mark's Scenario			Jean's Scenario		
	5,000			7,000		
	Case One			Case Two		
	Mark	Jean		Mark	Jean	
1 Salary	160,000	50,000		160,000	50,000	
2 Less: Pre-tax deductions	(2,400)	(2,400)		(2,400)	(2,400)	
3 Less: Retirement plan	(11,200)	(3,500)	7%	(11,200)	(3,500)	
4 Spousal maintenance	2,375	(28,500)	7%	5,250	(63,000)	
5 Annual Pre-tax Cash Flow	117,900	72,600		83,400	107,100	
6 Income taxes (below)	(22,577)	(8,778)		(12,049)	(19,241)	
7 FICA/Medicare taxes	(8,942)	(3,825)		(8,942)	(3,825)	
8 Annual After-tax Cash Flow	86,381	59,997		62,409	84,034	
9 Monthly After-tax Cash Flow	12,198	7,198	5,000	12,204	5,201	7,003
10 Monthly Budget		(5,000)	(5,000)		(5,000)	(7,000)
11 Over/(Under) Budget		2,198	(0)		201	3
12 % of cash flow available to each		59.0%	41.0%		42.6%	57.4%

Income Tax Calculation

13 Marital Status (1=s, 2=m, 3=hh)	1	1	1	1
14 Exemptions (adults & children age 17+)	1	1	1	1

Adjusted Gross Income:

15 Salary	160,000	50,000	160,000	50,000
16 Less: Pre-tax deductions	(2,400)	(2,400)	(2,400)	(2,400)
17 Less: Retirement plan	(11,200)	(3,500)	(11,200)	(3,500)
18 Spousal maintenance	(28,500)	28,500	(63,000)	63,000
19 Total	117,900	72,600	83,400	107,100

Deductions and Exemptions:

20 State taxes paid	5,911	2,613	3,374	5,063
21 Real estate taxes	4,000	4,000	4,000	4,000
22 Home mortgage interest	20,000	20,000	20,000	20,000
23 Charitable contributions	2,400	2,400	2,400	2,400
24 Greater, standard or itemized ded.	32,311	29,013	29,774	31,463
25 Exemptions	3,650	3,650	3,650	3,650
26 Total	35,961	32,663	33,424	35,113
27 Taxable Income	81,939	39,937	49,976	71,987

Income Taxes

28 Federal Tax	16,666	6,165	8,675	14,178
29 Federal AMT	0	0	0	0
30 State Tax	5,911	2,613	3,374	5,063
31 State AMT	0	0	0	0
32 Total Income Taxes	22,577	8,778	12,049	19,241