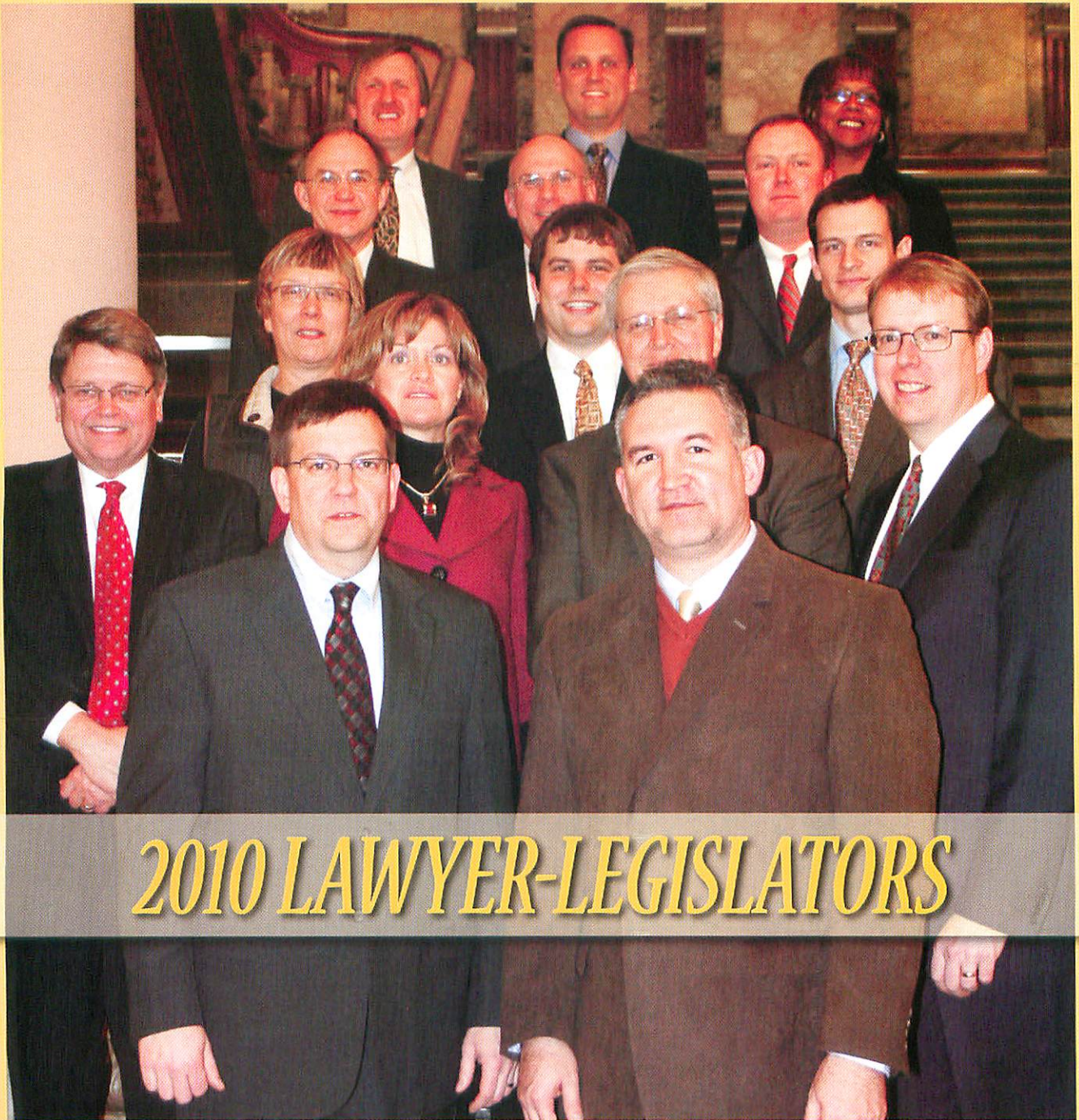




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Is significant value being left on the table of “settled” family cases?

By Steve Sovern*

Is it possible that even the best of Iowa family attorneys are leaving significant value for clients on the table when “settling” family law cases? Are there missed opportunities for long-term resolution of conflict, better lives for the children, less stress for everyone and higher satisfaction? Could these elements be missing even in what looks like a good settlement? Are we at risk as professionals when benefits are overlooked for our clients?

Some answers are found in the words of both the Iowa Legislature and the Iowa Supreme Court. The Legislature directs that:

Mediation should be used to the greatest extent possible in the resolution of domestic disputes.”
See 2000 Iowa Acts Ch. 1159, § 1.

The Iowa Supreme Court goes a significant step further in its Report on Mediation in Family Law Cases pursuant to 2000 Iowa Acts chapter 1159, section 2:

“Family law mediation will (emphasis added) provide a direct benefit for litigants and children involved in family disputes and provide an indirect benefit for all Iowans. The program will reduce parental conflict for the overall benefit of children, and plant the seeds for reduced conflict in non-family disputes.”

But wait a minute. Members of the Iowa Family Bar have always been very effective at settling cases. How else can you explain the commonly accepted statistic that says less than five percent of Iowa family cases end up in trial. Clients in Iowa experience the benefits of collaborative law without having to enter a collaborative agreement to stay out of court. Iowa family law attorneys are simply working together to settle cases.

How could we possibly do more?

Neither the Legislature nor the Supreme Court is referring to the mere settling of cases. They speak about significant added benefits for Iowans.

Results of a study in the Iowa Sixth Judicial District may provide another answer. The study reveals that something much more enduring can be accomplished for divorcing couples and their children, as well as for Iowa courts.

The study of 150 dissolution cases was conducted by Mediation Services of Eastern Iowa in cooperation with Sixth District Court Administration. It found that 38 percent of cases that were settled

by stipulation, but without the benefit of mediation, filed subsequent modification actions within three years of the original decree. During that same period, in settled cases where clients had been to mediation, only 22 percent filed subsequent modification actions.

However, most telling is the finding that 42 percent of the modifications in non-mediated cases required court intervention while only 10 percent of modifications actions of previously mediated cases required subsequent court action. This result is consistent with national research findings that re-litigation rates are much lower in cases that initially experience the mediation process. (A Decade of Divorce Mediation Research, Joan Kelly, 1996.)

Why is there a significant reduction in re-litigation when mediation is employed?

Some answers are obvious. Others have come from the experience of having mediated more than 3,000 family and custody mediation sessions over a period of 14 years.

In addition, research by the Institute for the Study of Conflict Transformation tells us, among other things, what makes mediation successful from the participant perspective. Here is the added value that mediation brings to participants and to the process that contributes to reduced re-litigation:

1. Clients who craft their own settlement “buy-in” to the result and develop a sense of ownership.
2. Working together in mediation during divorce fosters working together for the benefit of children after divorce.
3. By its very nature, a mediated resolution cannot be lopsided and, more likely, results in enduring fairness. (This presumes, of course, proper screening of clients for capacity and domestic violence issues.)

Here are some of the things I have observed in my 14-year mediation practice:

1. Parties who come to mediation in latter stages of litigation spend their early mediation efforts peeling away the layers of misunderstanding that were enkindled by the litigation process itself. Such routine actions as the mere filing of the “positional bargaining” kinds of petitions or the writing of pot-stirring demand letters can heap near irreparable damage to human relationships.

In mediation, parties often return to pre-litigation, mutual understandings after much hard work together. Further, they end up wondering what forces overtook them in the interim.

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2. Participants discover and resolve underlying core issues of conflict that often drive the presenting issues of divorce but are rarely dealt with in a stipulated agreement.
3. The real differences of the dispute are often not the legal issues but those below the tip of their particular iceberg; the hurt, the anger, the mistrust, the misunderstanding.
4. Parents come to realize that they are hearing very different stories from the very same children.
5. The only true experts with regard to issues of fairness and equity in a relationship are those who have experienced it. Therefore, it is only through the mediated interaction of these participants that lasting fairness can be achieved. (This presumes, of course, a client's clear understanding of the legal alternatives to a mediated

agreement that can only be obtained from competent counsel.)

It is important to point out here that the research offered by Joan Kelly and in the Sixth Judicial District is based upon the kind of mediation where the parties themselves communicate directly with one another and with the help of a properly trained mediator. Lawyers, if present at all, are there as sources of support and information for their clients and are rarely involved in mediation conversation, nor do they act as advocates for their clients during a session.

In these studies, the mediation approach in use focuses on party communication and the kind of mutual understandings that foster a more complete resolution, not just an end to the conflict. This is considerably different than the "settlement conference" or caucus model of mediation that is used in many other civil mediation contexts. There, the focus is on attorney communication, legal issues and case settlement.

Again, we know that, in Iowa, case settlement is going to occur in 95 percent of cases one way or the other. The settlement conference approach may well expedite closing the case but here are two among a number of questions that remain: Does settlement itself help divorcing parents work together as parents in the future? Does settlement produce an enduring agreement that allows clients to get on with their lives without ongoing conflict and re-litigation?

Consider, also, the result of a study by the Institute for the Study of Conflict Transformation. The goal was to find out what aspects of the mediation experience contributed most to participant satisfac-

tion. Here are the top three:

1. I was able to deal with issues I felt were important.
2. I had an opportunity to express my views fully.
3. I had a sense of being heard and was helped to better understand the other's point of view.

Notice that settlement of the case is not among the top three. Clearly, settlement is a desirable goal. In fact, it is the outcome of most all models of mediation as well as of a mediationless litigation process that settles cases. However, mediation can take clients beyond settlement and into, what the Iowa Supreme Court refers to as, "direct benefit for litigants and children.....and indirect benefit for all Iowans."

It will, "reduce parental conflict for the overall benefit of children." As important, the model of mediation where the parties themselves are the communicators and the problem solvers is the model shown to produce these results.

Here are some remaining questions we should ask ourselves as Iowa family lawyers: Can I provide benefits to my clients that go beyond the settlement of their cases? Do we owe our clients the opportunity for a more complete and satisfying resolution of their family matters? Moreover, do I have an obligation to at least provide an understanding of these potential benefits so that my clients can make informed choices? Or, am I at risk of leaving something of value to my client "on the table."

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