

## **CASES ON A CLIFF'S EDGE: HOLD ON OR LET GO?** © *Interflow—Maier, Ryan, Sobraske*

Some successful cases demand tenacity and endurance from professionals to reach the finish line. However, becoming too invested can be wearing and may create problems for the process. Too little persistence can lead to easy collapse. This workshop explores these issues, including when professionals vary in their commitment to persevere.

### **OUTLINE**

- The existential question: to stay the course or not has practical, strategic, psychological, ethical and spiritual complexity
- Strategies and practical steps to try and avoid a case devolving to this make-or-break moment

### **Subtopics to cover today**

- Considerations at the outset of the case
- The question of extraordinary effort
- Late game dynamics
- Consideration of termination
- Professionals affect clients, clients affect professionals
- Tendencies
- Techniques
- Problematic Issues for professionals

### **AT THE OUTSET**

- Some cases may eventually end up on a cliff
- Is there anything we can do on the front end to help with this?

### **Questionable case? Team up? No question!**

- More challenging cases require a team!
- More resources, more endurance (tag-teaming), more of a 'support group'

### **Ethics of taking questionable case → may prevent harmful litigation**

- Ethical to take very difficult case that might fail? (esp. given expense)
- Yes, with team, have a real chance, and litigation could be much worse
- Informed consent important

### **Strong team hangs tough, weak team collapses**

- Strong team has 2 attorneys and 2 neutrals (coach & financial) or 2 coaches
- 2 + 2 has optimal balance
- Team needs to stay cohesive, quickly adaptive (like whitewater rafting crew)
- Work on cohesion from outset so already strong when team severely tested—or falls apart

### **Preserving the collaborative: for attorneys and for neutrals**

- Attorneys are often advocates first, team members second
- Attorneys try to balance both roles
- If client pushes hard toward termination, attorney may need to honor this
- If client struggling, attorney can still endorse collaborative as ‘best possible outcome’
- Neutrals often work ‘all out’ to keep ship afloat, need whatever help lawyers can provide

### **Professional missteps that unnecessarily jeopardize the case**

- Keep a good pace and provide deliverables in a timely way
- Keep communicating, especially pre-/post-collaborative meetings and in-between
- Keep an eye on where it’s headed

### **The COVID factor**

- Overall fatigue, depression, cabin fever
- Problems—residency, school, activities, trips, grandparents, video game/social media addiction
- Help them remember some of these challenges are COVID-related
- Balance safety and normalcy

GROUP DISCUSSION: Narratives of cases on a cliff’s edge

SMALL TABLE DISCUSSION: Your tendency to hold on or let go?

### **THE QUESTION OF EXTRAORDINARY EFFORT**

- Go extra mile or let collaborative case die a natural death?

### **Don’t work harder than your client**

- Does this truism always hold true?
- Can be frustrating to work harder than a client
- Can feel better to limit one’s efforts and lower one’s stress level
- May need to push clients to work harder

### **Professionals over-function, clients under-function**

- Question—if professionals over-function, does this cause clients to under-function?
- Need clients to function (need their motor running)
- Tiring to ‘drag them up the hill’ through *our* labor

### **Extraordinary efforts enable, entitle?**

- Does working harder than the client invite—
- More demand, more complaints?

### **Doing extra—overly directive?**

- Some forms of ‘overdoing’ can lead to ‘overcontrolling’
- EXAMPLE: reframe lawyer demand as a question (language)
- EXAMPLE: lawyer accidentally pushing own agenda to ‘help all’ through crisis

### **Root of difficulty? Illness or intent?**

- One or both clients may have personality disorder or mental illness
  - Professionals may see as (be annoyed by) seemingly 'poor/spiteful behavior'
  - If mental illness present, most often, is root of behavior (not in one's control)
- Deal with mental illness as disability, part of case, rather than as bad faith

### **Personality disordered—needs extra help?**

- Many areas of life, a disability (like personality disorder/mental illness) justifies extra help
  - Why not in collaborative?
  - Professional seems to be working harder than client
  - Perhaps not if include how hard client working to manage mental illness amidst divorce
- Professionals maybe need to vent first (to facilitator), readjust second

### **Professionals responsible to work harder if take a harder case?**

- Example: Fatigued lawyer ready to be done, reminded of client's limited capacity and our responsibility to this client for having taken the case

PRESENTERS ROLE PLAY: Root of difficulty

### **LATE GAME**

- Not always, but quite often, case teeters on edge in late-game rounds

### **Late-game fear, unresolved loss**

- Fear of going it alone (emotionally, financially)—what's next?!
  - Some grieved loss before process began; others *during* process (may see 'new ex' as kind/cruel)
  - If not able to articulate these feelings, comes out sideways in conflict, negotiation demands
- Name the issues (fear/grief) so don't go chasing our tails (negotiation instead of feelings)

### **Cumulative fatigue**

- Near the end, everyone can get really tired, it's easy to:
- Dig in your heels or 'who cares, take whatever you want'—I just want it done!
- At this point, litigation may look attractive—not understanding it's a 2<sup>nd</sup> marathon

### **History of trauma**

- For those who have had trauma in their backgrounds, divorce process can be stacking on top of old trauma—triggering not only in the moment but through all of one's pain layers simultaneously
- Nothing increases vulnerability like loss of a previous partner, now partial adversary and fear for (projection onto) kids [not going to let him do to them what happened to me...]

### **Cumulative micro-aggressions**

- For minorities, people of color, LGBTQ, tapestry of one's life may have many small tears
- Many micro-aggressions pile up into a macro load, easily triggered by team missteps
- May seem an unreasonable reaction until contextualize

### **Late-game, the big ball of everything mushed together reappears**

- Facilitator (and others) help clients separate loaded feelings from practical decision-making
- Otherwise, feelings like hurt, anger can drive the bus (of the divorce) over a cliff
- Even if accomplished before, may reappear late in game (worst time!)—creates reactivity, demands
- Disentangle big ball Gordian Knot again, easier 2<sup>nd</sup> time around; also normalize, reassure
- ‘It will get better after an agreement is completed, you’re almost there’
- Very hard to accomplish this if the 2<sup>nd</sup> round is the 1<sup>st</sup> round (too tired, intensity too high)

### **The drama of the final rounds—what’s real, what’s exaggerated?**

- In the final rounds, clients may explode with a dramatic display of feelings
- Is this real—a substantive feeling, an important negotiation item? Or is this bluster?
- Empathizing to the right degree is key—not dismiss what’s important, but not fall for hyperbole

### **Late-game posturing, positioning, brinksmanship**

- These dynamics tend to destabilize, erode momentum toward being done
- Careful about litigation-like positioning (proposals/counters) without face-to-face engagement
- Clients may seem too angry, triggered or ‘tired of this’ to engage, but usually still necessary
- Want clarity in negotiation but not hardened positions or overbearing ultimatums (do or die)
- EXAMPLE: Lawyer gives clean, supportive info to client vs. fear-based reactivity

### **Emergency measures to save the case may skyrocket costs**

- Late-game destabilization may require intensive work to ‘save the collaborative’
- But these emergency measures (meetings/hours) can drive up costs
- Is it worth it?—to the client? to the professionals?
- But so much time, energy, money already invested, litigation would cost so much more...

### **Many last pushes—what is (or should be) the very last?**

- Each late-game crisis requires a hard push, and perhaps another, and another...
- At some point, there isn’t one more push ‘left in the tank’
- Question arises “is another push justified?” (at some point there has to be a *last* push)
- If another push is agreed to, someone has to lead it—who’s right for this, who still has energy?

GROUP DISCUSSION: Many last pushes

### **TERMINATION**

- Cases on the edge of a cliff tend to face the question: ‘Should we terminate?’

### **Client terminates from depression, depletion, distortion—intervene?**

- A client may feel unable to go on because of depression, depletion and distortion
- Is that a good-enough reason to end? Isn’t perception distorted? Litigation would be worse?

### **The question of potential harm to client if continue, if don't**

- As attorney, assessing substantive outcome for client—will this cause harm?
- But this question begs another—what is the alternative? ‘What causes least harm?’
- Some will accept anything just to be done
- May send for 2<sup>nd</sup> opinion (this better discussed by team)

### **Team split about—doing extra, keep going?**

- Team may be divided about continuing to invest in a case on a cliff's edge
- If team is split, mend split before mend case rather than other way around

### **It takes 2 to marry, 1 to divorce; how many team members to end the case?—just 1?**

- A team member, perhaps under stress, may unilaterally decide to pull the plug
- Better for professionals to have a team discussion before a final decision is made

### **We've done all we can do, the rest is up to you**

- Sometimes extra effort is helpful or necessary
- At some point, extra effort approach confers no further benefit
- Then, rest is up to clients
- EXAMPLE: positional stand-off (clients in own bubble)—clients to meet and solve or over

### **A bridge too far?**

- Hopefully gap is small—bigger gap requires significant compromise by one/both clients
- Bad sign if gap is widening rather than narrowing

### **Sometimes it simply has to end**

- Sad to see a collaborative fail
- But sometimes professionals have no more cards to play
- Clients are unwilling or unable to stretch further
- Once you've tried CPR, a defibrillator, and an adrenaline stick, record the time of death
- EXAMPLE: all settled, but underlying unrest produced one more petty problem (one too many)

GROUP DISCUSSION: Signs that it's probably over

### **Signs that it's probably over**

- Repeated deceit, bad faith, moving goal posts significantly
- Ongoing, egregious insults (to clients/profs) from early in case (without remorse or resets)
- Breaking participation agreement in a serious way
- At the end, significantly widening rather than narrowing the gap
- No path to resolution
- Refusal to pay
- Demand process changes (perhaps firing neutrals) that preclude a reasonable process
- Group Discussion: What are the signs you've seen?

## **PROFESSIONALS AFFECT CLIENTS, CLIENTS AFFECT PROFESSIONALS**

### **Professional issues may exacerbate client issues**

- If team struggling to stay in harmony, rifts may ripple toward clients, worsen case
- Engage in team processing to clean up issue, rebuild cohesion
- Some lawyers lapse into 'litigation irritation' from 1-sided perspective, escalates client

### **Dysfunctional clients may induce dysfunction, disorientation, dysphoria in professionals**

- Clients who suffer deeply from emotional issues may induce a similar state in professionals
- As if to say, "This is what it feels like to be me"
- Saddled with these feelings, professional may misstep
- This plays out familiar old script—"You let me down, just like everybody else"
- recognize this is happening, talk to facilitator/team as needed, try not to bring dynamic into case
  
- Clients looking to start fights may entice their advocates to do so by proxy
- Lawyers—good to provide productive advocacy without getting pulled into client's need to fight
- Cohesive team can talk about this dilemma openly
- If play out client scripts, predictably bad outcome (their relationship fails = the collaborative fails)

### **Manage taxation of discomfort, suffering**

- As noted, clients who suffer deeply, especially from mental-emotional issues, will often draw professionals into similar states via their empathy or aggression
- Must be managed effectively by each team member and often, team as a whole
- Prophylactically say "Prepare to be tired, uncomfortable, to suffer"
- Careful of professionals who resist this by being preemptively aggressive, controlling or avoidant

### **Professionals letting go too early or too easily can leave clients in the lurch**

- Professionals do well to have some grit and endurance to weather the ups and downs
- Bumps are part of the journey
- Professionals need to stay strong when clients are having their doubts
- If both clients and professionals destabilize, then we're in trouble

PRESENTERS ROLE PLAY about challenging dynamics within a team

## **TENDENCIES**

### **Cases that live on a cliff's edge**

- Some cases seem to live on a cliff's edge throughout the case
- This may simply reflect age-old relationship patterns, not that the case is doomed
- Professionals do well to pace themselves, not apply emergency adrenaline to routine crises.

### **Driving toward destruction**

- Some clients have a tendency to sow negativity, destruction, engage in self-sabotage.
- (1) *Psychologically*, empathize with the underlying concern
- (2) *Practically*, show how this approach, if played out, has unhelpful impact
- (3) Contain the misguided approach
- (4) Help the other client desensitize

### **Client controlling process to limit cost affects outcome, boosts cost**

- Some clients who think they know better try to dictate the process, ostensibly to save cost
- However, these ill-conceived measures, if undertaken:
  - Mess up process, lead to repairs and emergency measures, more cost for worse outcome
  - Nor is it a good idea to tell a cardiac surgeon how to do their job

### **Hopeful optimism vs. gritty realism**

- Collaborative may want transformation, but sometimes, just getting to finish line is plenty
- In bumpy cases need shrewd realism—like a gumshoe detective—alongside plucky hope
- While optimism feels better, it can also lead to mistakes
- In this yin and yang, professionals often take turns playing light and shade

## **TECHNIQUES**

### **Candid humility—“I’m not sure what to do”—may open options**

- If professional genuinely perplexed about next steps—share this
- Can invite more cooperative creativity and open new options

### **Optimal stress**

- Clients become more stressed as case continues
- While many have talked about the negative side of stress—
- A bit of heat is needed to melt resistance and cook a compromise

### **ROLE PLAY regarding optimal stress**

### **I just need a win!**

- For client who felt disempowered in marriage, divorce can feel 1-sided (whether accurate or not)
- This doesn’t preclude other spouse from feeling similarly (on both counts)
- When reasonable compromise emerges or in case of workable but suboptimal agreement, ‘disadvantaged client’ may need a symbolic win

### **Client recommit to process**

- Client who comes to yellow light crawl or red light stop may rethink if process is viable
- Seeing a litigator to compare options may prevent termination, allow to recommit

### **Manage (filter) words vs put it on the table straight (unfiltered)**

- one type of client: professional can be candid, real about situation, constructively critical
- other type of client: professional, ever honest, must speak more carefully, less explicit

### **Simplify tough legal, financial, parenting issues**

- Some clients can't manage complexity and labyrinthine legal, financial, parent issues
- Simplify discussion, and if needed, present a range of simplified options

### **In mental health, 'marching orders' vs 'best for client'**

- For an attorney whose client has a notable mental health issue—
  - Must balance expressly stated desire by client ('marching orders') with
  - What is 'best for client' (attorney's interpretation and influential articulation of this)
- Though client of course makes ultimate decision
- Gentle pressure, good information to help them make a good decision

### **Connect to patient's therapist if injuring the collaborative process**

- Individual therapist may focus on 'express your truth, your anger, stand up for yourself in divorce'
- Without hearing both sides, therapist may have a skewed view, not understand collaborative
- Facilitator may have to rebalance client's working through emotions with working through divorce
- Facilitator may speak to therapist—pros/cons based on receptivity, savvy, discretion

## **PROBLEMATIC ISSUES FOR PROFESSIONALS**

### **Attorney may wish to end if not a good-enough deal**

- Attorneys trained to focus on a good outcome
- If believe this is not achievable, tempted to overstep, push the client toward their view

### **Professional failure if ends**

- Some professionals link self-esteem to how many cases succeed
- Feel a sense of personal professional failure when case falls out of collaborative

### **Taking too much time & energy, have other cases to get to**

- A busy professional may complain about how much a particular case or client demands
- Hopes for it to end so that time and energy can be redirected to less taxing, less interminable cases

### **At end of retainer, must wait for payment**

- Important for professionals to be paid in a timely manner
- If funds run low, other arrangements must be made
- If not, natural for professionals to struggle with commitment (if might never be paid)

### **Seems like too much effort and for an outcome not assured**

- If too much effort for too long, professionals can become worn down, make mistakes, 'don't care'

### **Professionals frustrated by unreasonable client and their own loss of control**

- Professionals can become overly frustrated at clients who choose poor strategies and don't listen
- This frustration sometimes related to the lawyer's need for control
- And a concomitant desire for the case to end

## **QUESTION AND ANSWER; TAKEAWAYS**