

FAMILY LAW

Forensic Mediation in a Matrimonial Matter

Two experts explore a novel process for handling complex divorce cases

By Ronny Jo Siegal and
William J. Morrison

Regarding finances, matrimonial matters deal with equitable distribution and support. The equitable distribution process consists of identifying the assets, valuing them and distributing them. The support process consists of determining the income available for support and allocating the income among the parties and their children. In simple cases, identifying and valuing assets and determining the income available for support is generally a straight forward process. This article addresses cases with complex financial issues which may or may not involve large marital estates with funds to pay fees.

A complex case exists when:

- There are multiple assets or liabilities;
- There are determinations to be made as to whether an asset is marital or nonmarital;
- Income (cash flow) must be

Siegal is a member of Pashman Stein Walder Hayden in Hackensack. She served for more than eight years as a Judge of the Superior Court, Family Part, in both Bergen and Passaic Counties. Morrison is a CPA and a partner in the Paramus office of WithumSmith+Brown, where he is a member of the Forensic and Valuation Services Department.



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determined and attention must be given to perquisites, cash, or the sources of income;

- The parties' perceptions of income or value vary dramatically; and/or
- The parties' income is volatile or declining.

These cases generally require the services of a forensic accountant to render an opinion on the financial issues in dispute. (This article assumes there is a joint or court appointed accountant,

but the forensic mediation process works equally well with individually retained accountants.) Often, the issues involve income, cash flow, lifestyle and the valuation of assets. If testimony is required, the expert must render an opinion based on sufficient evidence and sound accounting, financial and valuation theory, and prepare a report that can withstand cross-examination.

In complex divorce litigation, expert witness services are difficult to provide in a timely and cost effective manner.

First, because of its adversarial nature, matrimonial litigation is time consuming and costly. Second, protracted discovery including the investigation of allegations of unreported income and perquisites make the process even more costly. Third, the parties sometimes have unrealistic expectations which cause them to take unreasonable positions thus protracting the proceedings even further. If the experts form very different opinions of asset value and available income, the time and costs multiply.

Litigants often complain that reports take too long to prepare and are too costly. However, litigants also want a thorough, well-documented accounting review set forth in a report, which the expert can defend in court. The challenge is to do the work required to form an opinion in this most difficult setting within the time frames prescribed by the court and with reasonable costs considering the size of the marital estate and the issues in dispute.

In these matters, litigants complain that accounting and legal fees are out of control. The professionals complain that they are not paid. Courts hold frequent case management conferences, appoint forensic accountants, mediators and Blue Ribbon Panels, but nothing seems to work. No one seems satisfied with the process. We believe that a process we term "forensic mediation" can be part of a solution. Forensic mediation is an interactive process in which the discovery, income determination and valuation are broken into manageable pieces, and the forensic investigation is integrated with the mediation process. This process will work for matters with complex issues even if the parties wish to limit discovery based on a cost benefit analysis. (The concepts and principles discussed in this article

are not new. They have been used by experienced mediators and judges, most notably the Honorable Thomas P. Zampino J.S.C. (Ret.))

Suggested Process

Appoint a mediator at the start of case so that discovery, asset valuation and income determination can be addressed in an interactive fashion. The mediator could or could not be formally appointed as a discovery master depending on the circumstances of the matter. The mediator, joint or individually retained forensic accountants, attorneys and parties, communicate frequently to address the forensic and valuation issues in stages. In the traditional forensic investigation, the forensic accountant works independently to accomplish his/her tasks while the judge, mediator, parties and attorneys await the results. In forensic mediation, the forensic accountant works in stages and involves the mediator, attorneys and parties at each step in the process. Their involvement should be to define the discrete issues to be addressed, approve funding for each phase of the process, and accept or reject each stage of the investigation.

Who Should Oversee the Process?

This process can be accomplished with the attorneys, joint or retained forensic accountants and the judge. However, we believe a mediator can best oversee the forensic mediation.

- The court may find it difficult to assume this responsibility and maintain a neutral position until all the proofs are presented. So too, the judge's calendar and case load may not permit the opportunity to carefully direct and oversee the process.

- It is difficult for the forensic accountant to assume this responsibility as he/she has been retained to formulate

an opinion. When the forensic accountant expresses an opinion he/she can alienate one or both parties if they disagree with the opinion.

- It is difficult for the attorneys to assume this task because they must advocate for their clients.

The mediator can impartially oversee the process in a prompt manner and assist the parties in strategically determining how they should proceed.

What are the Benefits of this Approach?

- Reach resolution at an earlier point in time, as opposed to retaining the forensic accountant and awaiting the results of his/her reports to proceed with the case;

- The litigation fees the parties must pay to their forensic accountant and attorneys can be substantially reduced;

- Enhance the ability of counsel and forensic accountant to collect their fees;

- Permit the attorneys to be in control of the process;

- Allow the parties to participate in the discovery process; and

- Unlike collaborative law, the attorneys and experts are ready to go to court if the mediation is unsuccessful.

What if there is Hostility or Lack of Cooperation?

This process can be used even where the parties are hostile, or the attorneys are not cooperative, or the forensic accountants disagree in their opinions. With the guidance of the mediator, the parties, attorneys and the joint or individually retained forensic accountants determine the work needed to mediate or litigate the matter.

Techniques that can be Employed

Where appropriate, the forensic accountant can perform a preliminary

assessment of the case. The goal of the preliminary assessment is to determine the complexity of the matter and the budget required to address the issues to be resolved and to ultimately prepare a report. Based upon this assessment, the forensic accountant can then explain the cost-benefit of moving forward. This explanation can form the basis for the parties' decisions on litigation strategy, but it also can enhance the prospects of settlement.

For example, a litigant may claim that their spouse has hidden \$25,000 over three years totaling \$75,000. The forensic accountant should explain the cost to investigate this allegation and the maximum equitable distribution benefit to the party of \$37,500 (50 percent of \$75,000). In a case involving allegations that a spouse who used to earn more but now earns less, the records may not exist to determine whether the decrease is voluntary and/or caused by market forces or the cost of performing the analysis may exceed the benefit. Under this scenario, the parties may decide not to proceed with an investigation.

For instance, if an individual admits to earning \$60,000 a year and it can be determined through the interview process and analytical review that the outer range of his income approximates \$100,000, the differences in alimony and child support can be determined.

Similarly, the forensic mediation process can be used when the value of a business is in dispute. Typically,

valuation experts form their conclusion of value independently before advising the mediator, attorneys and parties of their opinion. If the difference is extremely large, it may be difficult to compromise. To reach their final opinion of value, the experts draw conclusions on the critical components of a business valuation such as reasonable compensation, income to capitalize, discount rates and growth rates. These decisions can lead to a large difference in the conclusion of value. (These concepts are addressed in *The Business Valuation Bench Book*, co-authored by William J Morrison and Jay E. Fishman.)

In forensic mediation, these critical components can be addressed separately before the entire valuation is completed. In this regard, the difference in the conclusion of value between the two experts can be reduced, making resolution easier. For instance, if one expert concludes that the income to capitalize is \$1 million, and the other opines that it is \$600,000, there will be a large difference in the conclusion of value between the two experts based on this one issue. The difference increases because the same holds true for each of the critical components. Thus, if each of the critical components is addressed in forensic mediation, the difference between the two valuations can be eliminated or reduced.

It is critical to quantify what is in dispute, and to do so as early and as inexpensively as possible. Cost benefit analyses can be performed throughout the

case so that the litigants can choose the level of service they can afford. In many cases, a limited financial investigation is warranted because the issues involved are not material. Under this arrangement, the forensic accountant should advise the parties whether sufficient data gathering and analysis have been performed to prepare a report for court. If the expert believes that professional standards cannot be met, it should be indicated that the work product is for settlement purposes only.

Dividing the process into stages can also increase the efficiency of the discovery process. For instance, if income is to be the first issue addressed, those documents would be produced first. The documents could be further segregated into time periods: one or two years could be analyzed first, and the results reported. If all parties agreed with the findings, the forensic accountant can move on to the next issue.

Conclusion

Forensic mediation involves a mediator in the discovery, analysis and valuation stages of a case rather than when this process is complete. In so doing, the process can be divided into pieces and short circuited where appropriate. This strategic approach allows the attorneys to be in control of their matter, enables the litigation process to proceed faster, and facilitates the resolution of the matter at an earlier stage. This will help attorneys and experts provide high-quality, timely, cost effective services. ■