Get Dressed and Get Back to Court

By Brian Schwartz and Christopher R. Musulin

There can be no dispute that the "pandemic years" of 2020 and 2021 caused everyone to take pause and reevaluate life, work, relationships, and the benefits of handwashing. The practice of law was no exception. When the court system was effectively shut down in March 2020, we were challenged to find creative ways to continue moving matters forward, despite the many obstacles which existed. For sure, in 2020, the Family Part had no "e-filing" system in place, most court fees were paid by hard copy check, and the email addresses for judicial personnel were heavily guarded secrets. Thanks in large part to the grand efforts of the Administrative Office of the Courts, the Judiciary, and the bar at large, the Family Part was able to adapt and function. We now have JEDS (Judiciary Electronic Document Submission), online court fee payments, and more commonplace electronic access to and communication with judicial personnel. Additionally, counsel more frequently exchanges correspondence, documents, and information electronically. This relative electronic revolution, with the incorporation of remote proceedings, allowed Family Part cases to move forward, while many other court divisions were closed for business. For this, all participants, including litigants, in the family law process remain grateful.

But as the impact from the pandemic (hopefully) lessens, some in the practice are confusing the modest improvements described above as a basis for the wholesale change in the way the court does business and the way we practice family law. One of the targets for permanent change is the Early Settlement Panel (ESP); specifically, there is a movement to make the ESP an exclusively virtual event, not requiring any physical appearances for the program. The authors respectfully disagree with permanently changing the ESP appearances to an exclusively virtual event and believe it is important to return to the traditional in-person model of the Early Settlement Panel.

Let us first acknowledge some important facts. The ESP program asks lawyers to volunteer their time as panelists a few mornings each year to assist the court in resolving matters. Respect must be shown to each panelist's time given. Next, it is clearly "more convenient" for the panelists to appear remotely since they can perform their task from remote locations near and far that do not require travel to the courthouse. Moreover, most panelists are not provided with any "perks" – we pay for gas, tolls, parking, and coffee. We also cannot ignore that it is more convenient for the litigants to remain in their homes or at their offices or in the school drop-off line, rather than coming to court.

With those acknowledgements, the benefits of in-person ESP far exceed those just listed, most of which are limited exclusively to convenience, not effectiveness. First and foremost, stuff happens when people come to court. In fact, the most obvious benefit of in-person ESP is the potential for greater productivity simply because people have had to initially exert far greater energy by meeting face to face in a more formal setting at the courthouse. It traditionally was a commitment shared among litigants and professionals to organize their schedules and even child care and drive to the courthouse for a several hour or half-day event, to meet at the same table, to problem solve and resolve a matter. The ESP has now morphed into a 20-minute video event, where the only exertion required is perhaps changing into a presentable shirt and clicking on a Zoom link on one's computer screen or phone.

There is a solemnity to in-person proceedings that cannot be replicated with remote proceedings. The litigants sit in a courtroom – some for the first time in their lives – witnessing the symbolism of justice. They are addressed by a real live Judge, a rather imposing figure who is sitting before them on the bench. The Judge sets the tone for the proceedings to follow – explaining the program, introducing the panelists, describing the financial and emotional consequences which flow from leaving the court without a settlement, and the benefits which flow from settling their matter (a judgment of divorce on that day!).

While at the courthouse, litigants experience a plethora of emotions from the moment they walk through security. There is the awkward moment of sharing the

same physical space with their spouse or former spouse, perhaps for the first time in months. There is the introduction to the attorney representing their spouse or former spouse – the face behind the sometimes hurtful correspondence. There is the moment when a litigant walks into the waiting room or gallery at the courthouse and maybe sees other members from their community, which perhaps causes them some discomfort or embarrassment. All of these experiences can help move a matter toward resolution – if only to avoid it from ever occurring again.

There are advantages for counsel, too. It is often the first time the attorney has an opportunity to observe and size up the other litigant – the face behind the multiple emails and phone calls from one's client. In many cases, this is the first time that counsel for the parties are seeing each other while representing these particular litigants. During a typical ESP day in court, there is generally more than one case scheduled. Unless one's matter is first, the time waiting can be used effectively. Oftentimes while stuck in the confines of the courthouse – in a common area on one floor, waiting to be called – the natural tendency should be to take advantage of the waiting period and talk about the case, problem-solve the issues, and address outstanding discovery matters. It is not uncommon that counsel is even able to narrow the issues during this time. All of this can be done before one even meets with the panel. These discussions may also lead counsel back to their clients for a "heart-to-heart" regarding the positions taken and issues on which the client may be willing to move – again, before speaking with the panelists. Then, once it is one's turn to meet with the panelists, counsel can provide the more limited scope of issues to the panelists, who in turn can provide more meaningful suggestions for resolution. In other words, a lot of stuff can happen – in person. None of this takes place with the virtual ESP.

It also cannot be ignored that the panelists have more flexibility as well if all of the various cases are presented in person. As just one example, the panelists can provide suggestions for resolution to case number one and allow those attorneys to discuss the panel's suggestions with their clients while the panel brings in the attorneys on case number two. Often, because the panelists are "there," counsel for the parties will ask to see the panelists again as maybe most, but not all, of the issues are resolved, and oftentimes returning to the panelists can help the parties reach the finish line. In other words, the attorneys and litigants are not limited to a "window" of time to present the case. Frankly, more opportunities for settlement arise simply due to the fact that the litigants and their attorneys can continue to speak after the panel recommendation, including sua sponte four-way meetings at the courthouse, for instance, in the coffee shop.

In some cases, by the time the parties reach ESP, they have much of the matter resolved with only a few narrow issues remaining. Perhaps optimistic counsel has even drafted a proposed form of Marital Settlement Agreement in advance of the ESP, hoping that with just the right recommendation, the matter will be resolved. The parties can then use the ESP recommendation as a launching point for in-person negotiations after the ESP to complete the form of agreement and, yes, get the clients divorced that day. In other words, because everyone is already together in the courthouse and has set aside the morning to focus on this case alone (no distractions), more attention is given to settling that case right then and there.

Another, and perhaps the most significant, benefit of in-person ESP is the opportunity to see the Judge assigned to your matter immediately after the ESP. In many counties, that Judge is interested in assisting, if possible, in the settlement process while the negotiations are fresh in everyone's mind. How many times have we all returned to our clients after meeting in chambers to communicate the following thought: the Judge said such-and-such? Or perhaps the Judge will address the parties, on or off the record, from the bench, providing encouragement or suggestions or, when needed, a scolding. This provides the litigants a real-time opportunity to have a Judge weigh in on the one or few issues that remain.

The financial cost of attending in-person ESP should not be ignored as a factor potentially facilitating settlement. While the reduced cost of virtual ESP is advanced as egalitarian evidence of fairness to litigants of modest means, the authors believe that the financial impact of actually attending in-person cannot be ignored. When the litigants see the amount of "sitting around and waiting" involved – at their financial expense – the parties may be incentivized to use the time wisely. Similarly, the litigants do not fully appreciate the time and effort employed by the volunteer panelists when they spend literally minutes with them on a screen. The impact upon the litigants of seeing these panelists help not just them, but those in other cases, giving up their time for the entire morning of billing solely to volunteer their time to help the litigants is tremendous. The litigants seeing

two (or three) lawyers investing their time and energy in their matter, for free, causes the litigants to want to more meaningfully participate.

Lest we not forget that there are other benefits to in-person ESP, even for panelists. Remember that adversary whom you have been meaning to call, but have not had the chance? There she is sitting in the courtroom! What about the attorney with whom you have had terse interactions? Walking into the elevator and seeing them compels you to break the ice and communicate. But most importantly, the panelists receive the recognition and gratitude from the Judge for a job well done – perhaps the most important "perk."

Now, compare all of the above to the virtual experience. All of the attorneys and litigants are in different places, waiting in the purgatory known as the "Zoom waiting room." There is no communication between counsel during this time; there is no communication between counsel and client; there is just a blank screen. There is no presentation from a Judge – except, perhaps, a pre-recorded video of a Judge giving "the speech." Then, assuming there is no occurrence of "broadband issues," which is not always a safe assumption, everyone is joined on the screen. The screen reveals the client who is still in bed, or driving in the car, or hiding in a closet so the children do not hear what is happening (or worse, the screen fails to disclose the children present in the room with the nefarious litigant). The panelists may provide their own watered-down version of "the speech." The attorneys participate half-heartedly, glancing at their phones or other screens, or clicking away on their computer, exhibiting ZADD – Zoom Attention Deficit Disorder. The panelists are anxious to move on to the next case, which is scheduled in 10 minutes, or move on to their next paying matter, or move on to some personal matter. After the virtual narratives from counsel, the litigants are brought into the mix, are told the recommendation and the ESP is concluded. With the virtual setting, there is no opportunity for discussion, no opportunity to continue the negotiations, no interaction amongst the participants – no momentum. Everyone just moves on with their day until the next "event."

The argument for remote ESP holds that the ESP is just as efficient when conducted remotely as it is in person. Candidly, if that is true (and many Judges and attorneys believe it is *not* true), it is just as likely a reflection of the state of the ESP program generally than it is in-person versus remote. When the ESP program was piloted in 1977 and subsequently codified in 1981, it was a highly effective program to facilitate settlement, as it was generally the only step prior to trial, and it occurred just weeks before the trial date. In the ensuing years, the bench and bar created divorce mediation, post-MESP economic mediation, blue ribbon panels, intensive settlement conferences, blitz weeks, and other models of mandatory dispute resolution events that may have now rendered the ESP obsolete.

In other words, accordingly, many now view ESP as a "check-the-box" event, something one must accomplish in order to move on to the following tasks – mandatory mediation, intensive settlement conferences, blue ribbon panels, blitz weeks, and so on. This attitude toward ESP is what in large part buoys the "efficiency" and "permanent remote" arguments. That noted, the anecdotal information does not even support the argument that there is no difference in settlement rates, as many Judges report that the success rate is far less for remote ESP than it was in person. Rather, the more accurate statement for the proponents of remote ESP would be that the ESP program is not successful enough to require panelists, attorneys, and litigants to appear in person – to be inconvenienced. Again, perhaps this reflects the program itself.

The perceived convenience of virtual ESP is no substitute for the traditional ESP experience. If we are going to do it, then let's do it right. It is time for all of us to get dressed and get back to court. ■

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