

## I. GETTING A DIVORCE CASE OFF ON THE RIGHT FOOT

### INTRODUCTION

The practice of family law is changing dramatically as we finished the first decade of the 21<sup>st</sup> century. At the present time, Nevada is mired in a serious recession with high unemployment, a high foreclosure rate, huge drops in real estate values, numerous business failings, increased bankruptcy filings, massive budget cuts in state and local budgets, and a stagnating local economy.

This has led to large increases in the number of pro se litigants and fewer clients willing or able to finance much litigation in family law cases. Clients are more budget conscious than ever and are very wary of incurring sizeable legal fees in their cases.

It is more important than ever to have serious discussions with your client at the very beginning of a case about finances and fees. Many couples separate either before or during the divorce process thereby incurring expenses for two households instead of one.

Therefore, it is suggested that attorneys strongly consider utilizing non-court alternative dispute methods for their clients including, but not limited to, mediation, the collaborative process, private assessments, private arbitration, and utilizing divorce coaches and certified divorce financial planners or analysts. Even with added professionals in a case, the overall costs can and often are cheaper.

#### A. Tactics for Thoroughly Interviewing the Client

Your client has called your office and made an appointment. Now what do you do?

Interviewing a client is an important art of the legal business. Your purpose as a professional is not just to talk to the client but to get them into your office as a paying client. In some instances, you may not want to take them on as a client because of their lack of finances or because the level of conflict may just be too high and the case too difficult.

Assume for purposes of this seminar, you want to establish a rapport with the prospective client and sign the client up for your services. A good client interview requires more skill than just sitting down with the client and asking a bunch of questions and taking notes.

Here are the initial client interview fundamental points:

Active listening

Positive reframing

Humor

Empathy

Create comfortable surroundings

More listening.... get to know the person in front of you by using open ended questioning and show a genuine curiosity about your client and the client's case.

What I do is make some small talk, exchange pleasantries and then get down to the business of the case. Here is a very useful interviewing technique: when clients come in, they often start giving you case information in a disorganized way. I start by explaining to clients that I can better understand their case if I get the basic facts down and get a sense of the overall picture.

Information Gathering Subject Areas

### BASIC

Date of marriage; city, state and country of marriage ceremony;

Dates of birth of all children;

List of community property;

List of separate property assets List of community debts;

List of separate debts;

Restore former name or retain married name;

Personal history of client including age and date of birth, social security number, education, employment, job status (employed or not or self employment), health concerns, addiction concerns, mental health issues, criminal history, prior relationship histories (if relevant), children from other relationships,

Personal history of the other party – similar factors

### FINANCIAL

Are both parties employed and information about incomes.

If a person is unemployed, is that person receiving unemployment, looking for work, retired, etc.

Will either party possibly be relocating for employment purposes?

Pension and retirement accounts information – IRA, 401(k), deferred compensation, Social Security benefits, Are their taxes current or do the parties owe back taxes? Real estate ownership information and is mortgage current? Is the house value “upside down” and any hope of recovering or adjusting the loan? Credit card debts.

Current, cut off, in collection, etc. Medical bills.

Motor vehicles and associated loans.

Support obligations for others (legally obligated)

Support obligations for others (elderly, disabled but with no legal obligation to assist)  
See NRS 125B.080(9)(e).

### CASE STATUS

Is this a new case with no court cases filed by either party or an existing case? If so, what stage is the case at now? Trial coming soon, time remaining for discovery and motions.

Was there a domestic violence application submitted in Family Court or (sometimes) in Justice Court? Was a TPO issued?

Were there any prior cases filed and later dismissed or settled?

Were there or are there any child support enforcement cases? If so, which state orders are enforced and for whom? Pending or closed?

Were there any prior domestic violence civil or criminal cases?

Was either party a defendant in a past or pending criminal case?

Was either party involved in a DUI or reckless driving case?

Was either party or a child involved in a mental health commitment? Any other civil cases of consequence to this domestic case? (probate, personal injury, business disputes, real estate, etc.)

Were there any abuse and neglect proceedings involving CPS?

Asking all these questions and gathering the relevant information will help you in recognizing the client's fears and understanding their core interests.

A good interview process not only provides the information but it imparts a sense to the client that you are thorough, professional, and concerned about that client as a person.

With this information, you can start the legal process for the client by providing directions, discussing options, discussing possible outcomes, and discussing the various processes which could be used to achieve the client's goals at a reasonable cost.

## B. Review of Fundamental Documents in the Divorce Case

It is not unusual in the beginning of a divorce that your client has only a few documents. The other party may have the bulk of the documents still in their possession. What can be done depends on whether your client has already moved out or is contemplating moving out and filing for divorce.

If your client is still in the marital residence, he/she should be advised to make copies of critical documents before the other party is aware of the forthcoming divorce. Many documents are now contained in computers whether they are personal computers, laptops, etc. Any documents on those computers should either be printed out or downloaded to a compact disc or a memory stick if there is an opportunity to do so.

This extends to electronic communications. Print out as many emails as possible since these can be a source of excellent evidence. The same is true of text messages on cell phones, etc.

The same is true of social media evidence. If the other spouse has a Facebook page, print it out right away. Facebook pages often have excellent evidence that is very helpful to your client. Such evidence tends to be persuasive since it is usually written and posted by the other party. This includes pictures. There have been many cases in which social media evidence is compelling proof in your favor.

Don't forget medical evidence such as medical records, prescriptions, etc.

## C. Drafting an Inclusive Separation Agreement

When parties separate, their living expenses often go up. It may be pragmatic to assist the client in working out temporary arrangements for child custody matters, financial support, etc. so that the client is stabilized for the time being while the divorce case is processed through the system. It does help if both parties have a working separation agreement on who pays what bills, where the children go to school, etc.

## D. Conducting Effective Discovery

Effective discovery begins with the fundamental question of where the records are that you will need for the divorce. Does your client or the other party have them? Will subpoenas be necessary to obtain records from financial institutions, medical care providers, government agencies, etc.

You may want to consider hiring a private investigator to conduct a background check for information from multiple databases. Licensed private investigators have access to databases that many private individuals do not have available to them.

## E. Separating Joint Bank Accounts

Normally, bank accounts are separated during the latter stages of a divorce.

However, in the beginning, you may want to advise your client to remove money from one or more financial accounts for multiple reasons: (1) your client needs living expense money right now; (2) you need to be paid a meaningful retainer to start the case; and (3) to preserve and protect the funds from being dissipated by the other spouse.

It is not uncommon for a disgruntled spouse to close out financial accounts and then hide the money or allegedly "gamble" the money away so that the other spouse will not have access to the funds.

Whatever you do, you must account for the funds. Make sure they are used properly for legitimate reasons.

#### F. Can You Establish the Grounds for Divorce?

Technically, the actual grounds for a divorce are easy. The great majority of the time the grounds for divorce will be incompatibility. It is a required element easy to allege and prove. All it takes is for one spouse to allege that they parties are incompatible in marriage and there is no possibility of reconciliation.

Jurisdictional residency is also an element of a divorce. At least one of the parties has to be a bona fide resident of Nevada. In the large majority of cases, this is not a problem. However, we do have several cases wherein a party moves to Nevada for the purpose of establishing residency for divorce purposes. Nevada's six week residency is the shortest in the United States and our state has a 100 year history of being the mecca of divorces. It was the biggest industry in Reno for about sixty years and an important part of Las Vegas legal culture for the past half century.

You are obligated to carefully scrutinize short term residence cases. Your client better be here full time for just over six weeks to be safe. The test is actual physical residence in Nevada. It is not acceptable to come here, rent an apartment, return to the home state to work during the week and return to Las Vegas on weekends. No good.

If your client is a new resident, have them get a Nevada drivers' license, register to vote, etc. Have them identify individuals as witnesses for residency purposes.

#### G. Does Your Client Need a Protective Order?

The separation phase and the beginning of the divorce are among the most dangerous times for domestic violence. Feelings are hurt, emotions are raw and people are angry. These are normal human emotions at this time. The risk is greatly magnified if the other spouse has a drug or alcohol problem, domestic violence history, criminal arrest history, a personality disorder or a mental illness.

In Las Vegas, a person who is or may be a victim of domestic violence can go to the DV office at Family Court and fill out the application for a Temporary Protection Order. It is easy to do and does not require a lawyer. The standard for granting a TPO is on a "probable cause" basis. It is better to issue a TPO and hopefully prevent a domestic violence problem

than allow it to happen and address it afterwards.

The Las Vegas Metropolitan Police Department has a section which does nothing but serve TPOs, extended TPOs, Orders to Show Cause, etc. Police also assist by helping people move out of residences or stand by while the ousted party removes some belongings after a TPO was issued.

Police can also enforce Protection Orders with arrests and violations of such orders can result in criminal prosecutions.

#### H. What Types of Divorce Procedures are Available?

A divorce is nothing more than a restructuring of the relationships between the adults, between the adults and their children and a restructuring of their assets, debts and finances. For the majority of cases, the parties can work through their personal relationship and financial issues and settle their divorce. A smaller percentage of cases involve dysfunctional behaviors by one or both parties and non-court resolution methods will generally not work.

If there is no emergency, you might suggest to your client that both parties try to resolve the case without first resorting to litigation. This can happen through negotiations, mediation, collaborative practice, or some other non-court approach.

#### I. Using a Divorce Checklist to Make Sure Your Bases are Covered

There are multiple divorce checklists readily available for use by lawyers. These are helpful in making sure you cover all bases and ask all of the pertinent questions. Many malpractice claims in domestic relations cases arise from omissions, i.e., the failure to do something or find out critical information for the case.

A checklist is most helpful for those areas where lawyers are likely to be weakest in domestic cases: tax aspects and tax consequences and the legal consequences of certain financial assets such as IRA, 401(k) accounts, and various financial instruments.

#### J. Taking the First Steps in Starting the Divorce Action

1. Drafting Initial Divorce Proceedings. Civil procedure requires that a civil action be commenced by the filing of a complaint. A difficulty often arises when a party does not know all of the necessary financial and property information at the start of a case and thus formulates a complaint that says, e.g., we have community property and community debts to divide without specifying either in the complaint. This is very problematic if the other party defaults because the scope of the prayer for relief dictates what can be granted for a default divorce.

2. What the Responses Should Look Like. Responses to the other party's pleading should be short, direct and factual.

3. Properly Serving Papers. Personal service is required and is the

preferred choice of service methods. Consult the rules of civil procedure for guidance on service of process. If the other party can't be found and you want to publish the summons, use a licensed process server to assist with the affidavit of due diligence. They have access to better databases that can be used to locate a defendant. Private citizens and friends do not have access to the same resources.

Sad but true. There are more than a few litigants who file suit but make only perfunctory efforts to actually serve the other party. They may claim they do not know where the other party is whereas the other party may not be difficult to locate. Although the rules may permit it, using a personal friend to locate a defendant may not work too well.

#### K. Negotiation, Mediation or Litigation – Making the Right Choice

A competent lawyer **MUST** be informed about the multiple ways that a domestic case can be handled. The methods include litigation, negotiation, mediation, arbitration, early neutral evaluation (not done in all jurisdictions), and the collaborative practice model.

The choice of method depends upon the type of client, type of case, financial resources, need for protection orders, need for other court orders, and also depends upon what the other party is willing to do. Your client may be fully amenable to use the collaborative method or mediation but the other spouse will refuse.

**LITIGATION** – this is the traditional legal process. One party sues the other in a court of law. The parties usually hire lawyers to do this for them although the percentage of pro se litigants in family courts nowadays is quite high. Lawyers give legal advice to their clients, help determine and advocate their “positions” and represent them in court proceedings and negotiations.

The common form of dispute resolution in practice is the informal hybrid process labeled by some as “litigotiation” which describes the process wherein the parties are engaged in both litigation and negotiation during the course of the case.

If the parties are unable to privately settle the case through negotiation, they have the final resort of having a third party decision maker, the Judge, makes their decisions for them during a trial or in motion hearings.

**MEDIATION** – this is a process in which the parties use a third party neutral person to assist them in reaching a settlement. A mediator may or may not be a lawyer. A mediator may discuss the law and the legal process but does not represent either party and cannot provide legal advice.

Mediation can be done with parties whether they are represented by counsel or not. The parties usually exchange information and documents prior to the mediation or bring them to the mediation. The mediator assists the parties by facilitating discussions, evaluating information, brainstorming ideas and looking for areas of agreement and compromise. The goal is to assist the parties to reach agreements that can meet their needs without the financial and emotional cost of contested or protracted court fights.

Mediation in family law is successful. Overall, about two thirds of mediated divorce cases result in full settlements. About 10-14% result in partial settlements. Even those cases that formally "fail" in mediation often end up being settled later along the lines suggested or considered in mediation.

COLLABORATIVE – this is a newer model of dispute resolution that is quite successful in practice. Each party is represented by a lawyer and is assisted by a divorce coach (mental health professional). The parties employ a neutral financial specialist to collect and analyze their financial information. The parties can employ any other professional they need for a particular case (child custody specialist, appraiser, etc.).

The parties sign a participation agreement that they will not go to court or threaten to go to court. If they do, the collaborative process fails and they have to get new lawyer for any court action. All the professionals involved in the case including the lawyers are disqualified from further representation of the clients.

This is entirely a non-court process. The professionals work together in a team model to meet with the clients, develop the information, develop the options and work to find resolutions to their case. This model works very well: settlement rates average around 90%.

Even with multiple professionals, the fees are lower mainly because the lawyers are not writing complaints, motions, briefs, affidavits, etc. and are not going to court. Furthermore, the divorce coaches do a lot of the preliminary work on the child custody issues and the financial neutral takes the lead in developing the financial information.

If the matter is settled, the attorneys prepare the joint petition paperwork for the clients but do not sign the court documents as attorneys of record. The parties sign the documents as pro se litigants.

#### L. Potential Pitfalls That May be Encountered

1. ATTORNEY FEES In Bero-Wachs v. Logar and Pulvar, 123 Nev. 71,157 P.3d 704 (2007), the Nevada Supreme Court ruled that any attorney fees judgment rendered against a client cannot attach to or reach any assets which are exempt under NRS 21.090. Few divorces today have marital assets beyond those exempt from execution. A fees judgment can only be enforced against non-exempt assets.

The legal boom came down harder in Argentina v. Jolly, Urga, Woodbury and Standish, 125 Nev. 527, 216 P.3d 779 (2009) when the Supreme Court essentially ruled that motions to adjudicate attorney fee disputes under NRS 18.015 generally cannot be prosecuted in the same underlying case. A retaining lien is a passive lien which does not require or allow any affirmative court action. A charging lien can only be asserted in the same action in the district court if the client either requests the court to hear it or has otherwise consented to the court's jurisdiction.

The Argentina decision was legislatively overruled by the 2013 Nevada

Legislature which changed the lien law to allow attorney liens to be adjudicated in the same case in which services were rendered.

2. INTERESTS V. POSITIONS Processes such as mediation, collaborative divorce, and negotiations focus heavily on interest based approaches and not on legal “positions.”

It is important for you as a lawyer to understand the differences. As an example, in a custody context, a mother may take the legal “position” that she wants primary physical custody and a commensurate amount of child support. In interest based theory, what she is saying is that being the primary parent to raise her child or children is very important to her and that she wants to be assured of having the financial means and security to do so.

A father may take the legal “position” that he wants specific parenting times in the decree or order. In interest based theory, what he wants to be assured of is access to and meaningful involvement with his children. Understanding the real underlying interests of both parties is critical to understanding a case and developing settlement options and outcomes. While you may represent an adult in the actual case, other involved parties may also have significant interests to be taken into account. This is particularly true for children. They have their own points of view.

3. INTERVIEWING CHILDREN – This is a tricky area because of the conflict between a local court rule and your due diligence and legal responsibilities as a lawyer.

EDCR Rule 5.03. Confidentiality, best interests of children.

Absent a written order of the court to the contrary, all lawyers, litigants, witnesses or other parties privy to matters being heard by the family division are prohibited from:

- (a) Discussing the issues, proceedings, pleadings, or papers on file with the court with the minor children of the litigants;
- (b) Allowing any minor child to review the record of the proceedings before the court, whether in the form of transcripts, audio cassettes or audio-visual tapes; or
- (c) Leaving such materials in a place where it is likely or foreseeable that a child will access those materials.

[Amended; effective August 21, 2000.]

The ethical conflicts arise because you may become aware of an incident of child abuse or neglect during the interview with the client. An attorney is a mandatory

reporter of child abuse to the proper authorities and the failure to do may result in a criminal prosecution such as what happened to a Reno attorney several years ago.

A lawyer may also need to talk to a child to gain information regarding domestic violence involving that child. And, on occasions, a child may be required to appear as a witness.

4. FEES AND CONFLICTS Often times a client brings along relatives or friends to the client interview and has them in the same room during the interview. It is necessary for an attorney to discuss this with the client and get the client's permission before proceeding to the full interview.

The fees for a client may also be paid by a friend or relative. An attorney must still retain the confidentiality of the attorney client relationship regardless of who pays the fees. Sometimes the paying person wants information about the case.

5. IMPAIRED CLIENTS There are times when a lawyer will talk to a client who is an alcoholic, drug user, has mental health problems, domestic violence history or a personality disorder. Impaired clients can be especially challenging. If a client is a potential risk to the other party or to the children, the attorney may have ethical responsibilities that transcend the restrictions of the attorney client relationship.