

# *Divorce Manual*

## **A Client Handbook**

### **American Academy of Matrimonial Lawyers**

To encourage the study,  
improve the practice,  
and advance the cause  
of matrimonial law,  
to the end that the  
welfare of the family  
and society be preserved.

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#### **THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS**

The American Academy of Matrimonial Lawyers is an organization of the nation's top matrimonial attorneys from 47 states who specialize in all issues related to marriage, divorce, annulment, custody, child visitation, property valuation, property distribution, alimony, and child support.

The Academy was founded in 1962 "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law to the end that the welfare of the family and society be preserved."

The Academy currently has chapters in 24 states which conduct local continuing education programs, participate in the legislative process and engage in a variety of other activities to serve the public and to improve the practice of matrimonial law.

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## **GLOSSARY**

## **INTRODUCTION**

The American Academy of Matrimonial Lawyers has produced this handbook to explain what people throughout the United States face when considering or going through a divorce. This handbook is the product of the combined experience and collective efforts of Academy Fellows from around the country. The laws and procedures of most states are taken into account, but this is not a guide to the law of any one state.

Like any handbook, this one is no substitute for legal advice. It is intended only to give you some idea of what to expect and to help you and your lawyer work together more effectively.

A Glossary at the back of this book defines some commonly used terms.

## **I. THE DIVORCE PROCESS**

### **A. Introduction**

The goal of the legal process of divorce is to end the marriage and decide such issues

as child custody, visitation, child support, alimony (sometimes called spousal support or maintenance), property and debt division and attorney's fees and costs.

A divorce judgment can be based on an agreement between the parties or result from a trial. An agreement is usually less traumatic for you and your children, and less expensive than a trial. Ultimately, most cases are resolved without a trial.

Divorce is called dissolution of marriage in some states.

## **B. Divorce Proceedings**

The divorce process varies from state to state. What procedures are available and how long the process lasts is unique to each state's court system. Your lawyer can explain how the process works in your state. The following general description applies in most states.

### **1. The Petition**

A divorce begins with the Petition, called a Complaint in some states. This document notifies the court and your spouse, when served, that you want the court to end your marriage. It also lists what you are asking for, such as child custody, child visitation, child support, spousal support, property division, attorney's fees and costs.

### **2. The Response**

After a Petition is served, the other spouse is entitled to file opposing papers. In most states, if you are served with a Petition or a Complaint, you must file your opposing papers within a certain time or you will lose your right to present your side of the case to the court, and the court might give your spouse everything asked for in the Petition.

### **3. Temporary orders**

Temporary orders, also called pendente lite orders, set the rules while the case is pending. Either party can ask the court to make temporary orders stating, for example, who stays in the house, who is responsible for the children, who pays which bills and restraining inappropriate conduct. It is in both spouses' best interest to agree upon reasonable arrangements while the case is pending rather than incur additional legal fees and add to bad feelings by having to go to court for temporary orders. In a few states, some temporary orders automatically go into effect when a divorce proceeding is filed or the other spouse is served.

### **4. Discovery**

Each spouse is entitled to information from the other about the case. The legal procedures for obtaining that information are called discovery. Discovery may be a simple, speedy process or one consuming a great deal of time, energy and money.

There are several different discovery procedures, sometimes referred to as discovery devices. A list of questions known as interrogatories, requiring a formal written answer to each question, may be sent. By a request for production one party may obtain

documents from the other. In a deposition, or examination before trial, the spouses and other persons, including experts, may be required to answer questions under oath in a lawyer's office while a court reporter takes down what is said and then prepares a transcript. If your deposition is to be taken, there will be advance notice and your lawyer will discuss the procedure with you.

Discovery may be conducted informally. It is often more efficient and less expensive for lawyers informally to exchange documents and information than to send and respond to interrogatories and requests for production and to take depositions.

## **5. Negotiated settlement**

Most lawyers and judges agree that it is better to resolve a case by agreement than to have a trial in which a judge decides the outcome. Also, people who have been through a divorce value the privacy and control that a negotiated agreement gives them. People are more likely to obey a judgment which is based on their agreement than one which has been imposed on them by a judge. Voluntary compliance is important because enforcement procedures available from the court are usually expensive and sometimes inadequate. For

these reasons, following discovery ——— and at any time, even during trial ——— the spouses and their lawyers should try to negotiate a settlement.

Because of the limited number of judges available to hear trials, most courts require the parties and their lawyers to attend a settlement conference in which a judge or other person tries to bring about a settlement. It is often very persuasive to hear from a judge how the judge would likely rule if the case went to trial.

Although your lawyer may recommend that you accept or reject a particular settlement proposal, the decision to settle or not to settle is yours. Your lawyer cannot and will not make that decision for you.

Even if a case is settled by agreement and you never see the inside of the courthouse, there are certain legal procedures that have to be followed to turn your agreement into a judgment and end your marriage. Your lawyer will see to completing this part of the process.

## **6. Trial**

If you and your spouse cannot settle your case, it will go to trial. At trial you each tell your story to the judge. It is told through your testimony, the testimony of other witnesses, and documents called exhibits.

Trial is likely to be expensive and unpleasant. However, it can be the only alternative to never-ending unreasonable settlement demands. Still, trials are risky. No lawyer can predict the outcome of a trial because every case is different. A judge, a stranger -- possibly with a viewpoint, temperament and values very different from yours -- tells you and your spouse how to reorder your lives, divides your income and assets, and dictates when each of you may see your children.

Sometimes, a trial does not end the case. Each party may, within a limited period of time, appeal to a higher court. An appeal adds more time and expense to the divorce process and is hard to win.

## **7. Alternative Dispute Resolution**

There are other methods of resolving your case. These methods are called alternative dispute resolution and include mediation and arbitration.

### **a. Mediation**

In mediation, the parties meet with an impartial individual (who should have special training and qualifications) for the purpose of helping them reach an agreement. It is important to have independent representation throughout the mediation process. The parties should consult with their own lawyers about mediation and the legal ramifications of any proposed agreement. Mediation is required in some states.

### **b. Arbitration**

The spouses may agree to submit some or all of their disputes to an arbitrator, a person chosen to decide the issues that the parties present. An arbitrator should have special training and qualifications. The arbitrator's decision can be made into a court judgment. Although traditionally the decision of an arbitrator is binding and final, some variations have emerged in recent years. Your lawyer can discuss with you whether arbitration is advisable.

## **C. Your Conduct**

Here are some good rules to follow during divorce:

- Do try to maintain good communication with your spouse and children.
- Do talk to your lawyer before agreeing to a settlement.
- Don't physically or verbally abuse your spouse or children.
- Don't say anything to others that you wouldn't want your spouse or the judge to hear.
- Don't go on a spending spree. Excessive spending on yourself or others may harm your case.
- Don't throw away financial records or other possible evidence.
- Don't try to hide evidence or assets.
- Do keep your perspective and try to be rational.

Divorce is stressful, but not the end of the world. How you or your spouse feels during your divorce can change dramatically as the case progresses. It's normal to go through stages of denial, anger, guilt, depression and acceptance on the way to a resolution.

These stages don't necessarily occur in any order or only once. So, if you're depressed, for example, you can take some comfort in knowing that you'll probably feel different next week.

## **D. After the Divorce**

### **1. Modification**

Whether the issues in your divorce are settled by you and your spouse or are decided by a judge, some things in your judgment can be modified (changed) by a judge after a hearing. Usually, child support, alimony, child custody, and child visitation can be modified, but only if one of you can show that there has been a change in circumstances. Examples of a change of circumstances are losing your job, inheriting substantial sums of money, or remarriage. Grounds to change child custody orders can include someone moving away, or the needs of the children changing as they grow older.

Some orders are not modifiable. Usually the division of your property is not subject to modification. And, if you and your spouse have agreed that alimony shall not be modifiable, the courts of most states will follow that agreement.

### **2. Enforcement**

If you or your spouse disobeys an order that the court makes in your divorce judgment, there are ways to enforce those orders. Examples of disobedience of an order are failure to pay support, failure to turn over property that was awarded and refusal to allow the visitation that was ordered.

Orders to pay money can be enforced by garnishing wages or bank accounts or by having the sheriff or marshall seize and sell property belonging to the person who hasn't paid. Orders for support, to turn over property and for child visitation can usually be enforced by contempt of court proceedings. Papers are prepared and served on the disobedient person, ordering that person to appear in court. After a hearing, the judge can put the person in jail or impose a fine as necessary to make the person obey the order.

### **3. Omitted Property**

If there is marital or community property that is not awarded to one or both spouses in the divorce judgment, some states allow further proceedings to divide those assets. Sometimes this can be done by making a motion in the divorce case and sometimes it requires a separate lawsuit.

## **E. Some Questions and Answers about the Divorce Process**

**1. Should I be the first to file?** That depends. In some areas, the first person to file has a choice of more than one court. In that case, your lawyer may have a preference about which court would be best for you. Otherwise, it doesn't usually matter who files first. But to be sure, ask your lawyer.

**2. Why did my spouse ask for so much in the Petition? I thought we agreed on some of those things.** Before knowing what the issues will be and what might happen under the law and the facts of the case, no one wants to take the chance of asking for too little. So people tend to ask for more than they really expect. Like when you read in the newspaper that someone has filed a "10 million dollar lawsuit", what is demanded in the Petition or Complaint usually has little real meaning.

**3. What are the chances my case can be settled?** Most divorce cases are settled.

**4. May I date?** In some states, the court is not concerned with your private life. In others, a relationship with someone other than your spouse before you are divorced may hurt your case. Whatever your local law, dating someone else may anger your spouse and impede settlement. If you have children, you should get some professional advice about how much your children should know about your love life.

**5. May I spend money on my lover?** There are at least two possible reasons why you shouldn't. You may have to pay back the money when the property is divided. And your spouse may be very angry. That anger could lead to distrust that could complicate the divorce proceedings.

**6. How long will my divorce take?** That depends on a lot of things. Every divorce is different. Factors that can make a difference include the schedules of both parties, both lawyers and the court, the cooperation of witnesses, the speed of the appraisers, and the complexity of the case.

**7. Nothing is happening in my case; what can I do?** Talk to your lawyer. You are entitled to know the status of your case. There may be a very good reason for a pause or delay. For example, appraisals may not yet be completed. More information may be needed.

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## **II. RECONCILIATION**

Sometimes divorce seems the only solution to problems in a marriage; often it is not. Sometimes it takes the start of a divorce to motivate people to make an effort to save a once cherished relationship. Don't be embarrassed to tell your lawyer if you're interested in reconciliation. Every experienced matrimonial lawyer knows how important it is to exhaust all possibilities of saving a marriage before finally deciding to end it.

If you are considering trying to reconcile, talk to your lawyer about the effect that your efforts will have on your divorce if reconciliation fails.

While trying to save your marriage, counseling can be very helpful. Your lawyer is not trained as a therapist, but can recommend a counselor if you need one. See Chapter III (Counseling).

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### **III. COUNSELING**

#### **A. Purposes of Counseling**

Here are some ways that counseling can benefit you and members of your family:

**1. Helping you help your children through the breakup of their family** How you act and what you say during the divorce affects your children. Your conduct makes a big difference in how your children feel and how they relate to you and your spouse. A mental health professional can give you guidance to help minimize the damage and speed the healing process.

#### **2. Helping you and your spouse work together for your children's welfare**

Cooperating during the divorce can set the tone for how you and your spouse will work together in the future for your children's welfare. Even after you are divorced, you both are still parents of your children. The children's best interests are served if each of you is courteous to the other and maintains an active role in the lives of the children and in the decision-making that affects them. If you and your spouse are not yet able to put aside your differences and put the children first, counseling can help.

#### **3. Helping you deal with the stress of divorce**

Some people cope better with stress than others. Talking with a counselor about how to deal with stress is often helpful.

#### **4. Helping you work with your lawyer**

Counseling may help you see emotional issues for what they are so that you can make better judgments as to legal and financial matters. Lawyers are not trained to do psychological counseling, just as mental health professionals are not trained to give legal advice.

#### **5. Helping you to understand the marital breakup**

Counseling can help you and your spouse understand the reasons and causes of the marital breakup. You need to understand what went wrong with this marriage to help you make a wiser decision in selecting your next spouse. Although you may think that you will never marry again, most divorced people do remarry. A better understanding of your role in the breakup of this marriage will maximize your chances of success next time.

#### **6. Helping you rebuild your life**

If you understand and appreciate the problems of your marriage, you will be better equipped to recover from your anger and frustration, and to rebuild and get on with your life.

#### **7. Reconciliation**

If there is a chance of saving your marriage, explore it.

## **B. If You Have Been To Counseling**

If you have had some counseling, and you find during the process of the divorce that there are still unresolved emotional issues, don't be reluctant to return to a counselor to deal further with those issues. Many times our problems and issues do not surface until we are in the middle of a divorce.

## **D. Some Questions and Answers about Counseling**

**1. Are my conversations with my counselor confidential?** Maybe. Because of the importance of this issue and differences in rules from state to state, ask your lawyer.

**2. Must I go to counseling even if I don't want to?** No, unless the court orders you to. If you and your spouse don't agree about custody or visitation, you may be interviewed by a mental health professional who will make a recommendation about how the issue should be decided. These people are favorably impressed that a parent has had some psychotherapy or counseling.

**3. Do we have to go to counseling together?** It depends. If the purpose of going to a counselor is to help save your marriage or to work on problems the two of you are having, you may need to go together. However, if the purpose is to work on problems of your own, you will usually go alone.

**4. Do we have to see the same counselor?** If you are going for individual counseling or therapy it is usually a good idea to go to separate mental health professionals. You or your spouse might question the loyalty of someone that the other is also seeing individually, unless that person is specifically working with both of you.

**5. Should I consider counseling for my children?** Yes. Many children have trouble dealing with divorce. They are frightened and feel responsible. Your children may benefit from counseling or support groups.

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## **IV. CHILDREN**

### **A. Introduction**

Ordinarily parents make decisions about their children together. But when parents divorce, the hostility between them sometimes causes them to disagree on what is best for the children. In addition, divorce presents a whole new set of child-rearing challenges. Even the best parents may find it useful to consult a child development expert for help in meeting these challenges.

Issues related to children can present challenges for your lawyer as well. While your lawyer's loyalty is to you, your lawyer also has an obligation as an officer of the court to keep the best interest of the children in mind, even if that interest is inconsistent with

yours.

## **B. Legal and Physical Custody**

Some states make a distinction between physical custody and legal custody. The terminology varies from state to state.

Physical custody is the responsibility of having the children live with you. The parent with whom the children are at the time has the responsibility for making day-to-day decisions about them. Day to day decisions include what the children eat and wear, who they play with and when they go to bed. Legal custody is the right to make important long-term decisions affecting your children's welfare. Long-term decisions made by the parent with legal custody may include the children's education, religion, and non-emergency medical care.

Many variations are possible. There can be joint legal custody and sole physical custody, and vice versa. Usually the parent without physical custody has visitation rights, also called access or secondary physical custody. The terminology is less important than how the arrangement works in practice.

## **C. Joint Custody**

There is no one standard joint custody arrangement. Some parents alternate weeks with the children, others alternate months. Still others divide the children's time unequally, but in a manner that meets the needs of each particular family. Parents who work out these arrangements themselves are usually more creative than courts are when the parents can't agree. Legal custody, in which the parents share the right to make certain decisions for the children, can also be joint or divided in appropriate cases. Joint custody is not necessarily appropriate in every case.

## **D. Allegations Of Child Abuse**

Allegations of child abuse, whether sexual, physical, or psychological are serious. Unfounded or false claims are harmful to the children and obscure the real issues. Judges and lawyers will try to protect children both from a parent who is an abuser, and from a parent who fabricates such a claim.

Some states permit, and others require, disclosure of any information necessary to prevent a parent from harming a child. Lawyers, and others, may be required to reveal any information that indicates there will be a substantial risk of abuse to the child, or to reveal information necessary to prevent abuse. These laws vary from state to state as to which occupational groups (such as lawyers, social workers, psychotherapists, teachers, members of the clergy) are permitted or required to report child abuse.

## **E. Custody Litigation**

### **1. Mediation**

When parents can't agree on issues of custody and visitation, many states require the parents, and sometimes the children, to participate in mediation. The parents meet with

a mediator, who may be a member of the court staff. It may be a person with extensive training and experience. The mediator tries to help the parents reach an agreement. Some parents hire a private mediator to help them solve their custody and visitation problems.

## **2. Investigation**

Sometimes the court will order an investigation and recommendation by a social worker or mental health professional. The investigation may include interviews with the parents, the children, their teachers, their day care providers, neighbors, doctors and anyone else who is significantly involved with the children. The investigator usually writes a report and makes recommendations to the judge. The recommendation can be helpful in reaching an agreement. If no agreement is reached, and the custody or visitation dispute must be decided by the court, the judge will probably read the report and be influenced by it.

## **3. Lawyer or guardian ad litem for the children**

The court may appoint a lawyer or a guardian ad litem, or both, to represent the children or look out for their best interest in a custody or visitation dispute. The roles of each vary from state to state.

## **4. Trial**

If after investigation, negotiation, and mediation, the parents are still not able to settle custody and visitation issues, these issues are presented to the court for decision in a trial in which witnesses are called and arguments are presented. Then the matter is out of the parents' control as the judge decides what arrangement to impose on them.

## **5. Children as witnesses**

Parents often want to know if their children will be called as witnesses. Professionals advise against involving children in court proceedings because it is a very traumatic experience for them. This is equally true whether the dispute is over custody or something else.

Many people incorrectly assume that at a certain age children have an absolute right to pick the parent with whom they will live. Many courts have developed the custom of interviewing the children. However, the interview alone will not determine the court's decision.

You may want your lawyer to talk to your children. Although opinions vary, many lawyers will refuse, believing that such direct involvement in the case is very hard for children and not in their best interest.

## **F. Child Support**

The amount of child support which you will have to pay or be entitled to receive will vary from state to state, and sometimes between regions within a state. It will depend on income, the custody arrangement, and other factors. The amount of child support is

usually determined by guideline formulas. These formulas have the advantage of making the amount of support more predictable and the disadvantage of being too rigid, and therefore inappropriate in some cases.

## **G. Misuse Of Children**

In the heat of divorce proceedings, it's easy to lose sight of the fact that the parents are getting divorced and not the children.

It is inappropriate to raise custody and visitation issues to gain an advantage in negotiations over financial issues. Such tactics only heighten the emotional tension and make settlement more difficult. Your lawyer is not ethically permitted to raise custody or visitation issues in order to gain an advantage in financial matters. You should not ask your lawyer to act contrary to this ethical obligation.

## **H. Your Conduct With Your Children**

The behavior of parents before and after divorce has a great influence on the emotional adjustment of their children. The following guidelines may be helpful:

- Put your children's welfare first. Never use your children as a weapon against your spouse.
- Be sure your children have ample time with the other parent. They need it.
- Visitation should usually not take place in the children's home.
- Don't introduce your children to your new romantic interest until the children have adjusted to your separation and your new relationship is stable.
- Don't bring your children to court or to your lawyer's office.
- Keep to the schedule. Give the other parent and the children as much notice as you can when you will not be able to keep to the schedule. Be considerate.
- Be flexible. You may both need to adjust the schedule from time to time.
- Giving of yourself is more important than giving material things. Feverish rounds of holiday type activities during every visitation period or lavish gifts may be viewed as a crude effort to purchase affection, and is not good for the children.
- Do not use your children as spies to report to you about the other parent.
- Do not use the children as couriers to deliver messages, money or information.
- Try to agree on decisions about the children, especially matters of discipline, so that one parent is not undermining the other parent's efforts.
- Avoid arguments or confrontations while dropping off or picking up the children and at other times when your children are present.

- Don't listen in on your children's phone calls with the other parent.
- Maintain your composure. Try to keep a sense of humor. Remember that your children's behavior is affected by your attitude and conduct.
- Assure your children they are not to blame for the breakup, and are not being rejected or abandoned by either parent.
- Don't criticize the other parent in front of your children. Your children need to respect both parents.
- Do not let guilt you may feel about the marriage breakdown interfere with discipline of your children. Parents must be ready to say "No" when necessary.
- You are only human. You cannot be a perfect parent. When you make a mistake, acknowledge it and try to do better next time.

## **I. Some Questions and Answers About Children**

**1. I once had a brief affair. My husband says he will take the kids away from me. Can he?** Misconduct or fault which does not involve the children is seldom significant in determining child custody. Tell your lawyer about these concerns.

**2. I have had some problems during my marriage with depression. I saw a psychiatrist. My spouse says I'm crazy and will lose custody of the children. Is that right?** The mere fact that you have sought help for the problems you have encountered in your marriage is not a basis to lose custody if it is otherwise in the best interest of the children for you to have it. In fact, the ability to recognize the need for and to get professional help is usually seen as a good sign of maturity and responsible action, both desirable characteristics in a custodial parent.

**3. I am a good father. Are judges prejudiced against fathers?** In most states both parents are equally entitled to seek custody of children. However, the court is likely to give primary custody to the parent who was the children's primary caretaker while you were married.

**4. I want to move out of state and take our child with me. Will I be able to?** Whether a parent is allowed to move away with a child depends on the law of your state and the facts of your case. In some states, to move your child without court permission is a crime.

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## **V. SELECTING A DIVORCE LAWYER**

### **A. Introduction**

Selecting a lawyer to represent you in your divorce is more than just picking a name; it means establishing a close and sensitive relationship that will continue for months and perhaps years. It is important to find and hire the person who is right for you and your

case.

## **B. Getting Names of Lawyers**

### **1. From other professionals**

Lawyers, accountants, psychotherapists, members of the clergy and other professionals meet and work with divorce lawyers in the course of their work and are often a good source of referrals. Ask them for the names of family law specialists with good credentials and reputations and whose qualifications are most appropriate to your case. Lawyers, in particular, are aware of the reputations of other lawyers, even those outside their specialty, so a lawyer you already know and trust can be an exceptionally good referral source. If you need a divorce lawyer outside your geographical area, divorce lawyers in your area often know who the best people are in other regions.

### **2. From organizations**

Your state bar may have a process for certifying family law specialists and may give you names. While certification is no absolute assurance of quality, it usually requires a certain proven level of experience, study, and interest in the field. Certified specialists have usually passed an examination in this area of the law. The American Academy of Matrimonial Lawyers is an organization with a rigorous screening procedure which admits only qualified specialists.

The American Bar Association and most local bar associations have family law sections. Although any lawyer can join these sections with no screening or testing, lawyers who belong may have a higher level of interest and involvement in the field of family law than those who don't.

### **3. Referrals from other persons**

You may have friends or relatives who have gone through a divorce. They are a good source of information about lawyers, with two qualifications. Every client and every case is different, so it is difficult to evaluate the performance of a lawyer in someone else's case. Also, the lawyer-client relationship is highly personal. So while the impressions of a former client about a lawyer are useful, you should meet the lawyer and make your own judgment.

## **C. What to Look For**

When asking for names of lawyers, when interviewing lawyers, and when deciding which lawyer to hire, different things are important to different people. For example, a person of limited means may be most concerned about cost. Another person may require experience with a certain type of family law problem. Decide what is important to you and select accordingly.

Here are some criteria to consider:

### **1. Cost**

While local market conditions such as supply, demand and competition determine in large part what lawyers charge, there can be a significant variation in fees. Generally, better known, better established lawyers charge more. The quality of representation you get may or may not be worth the higher price they charge. There are often highly skilled and experienced lawyers available who charge less because they are not yet as well known and are therefore not in such demand. A lawyer in this category can be an excellent value.

Even if cost is very important to you, it is false economy to reject a referral because you are told that a lawyer charges for a first consultation. Although some lawyers may give useful information and advice in a free consultation, there is a chance that a lawyer who is not charging for the time will treat the meeting more as a sales session and not feel obligated to deal with substantive issues. Even if your purpose is to interview the lawyer in order to help you decide whom to hire, you will not learn enough about the lawyer unless you talk about your case and hear what the lawyer really thinks about it.

## **2. Gender, age, race, religion, national origin**

Competent lawyers come in all sizes, shapes, genders, colors, religions and ages. None of these factors has anything to do with the lawyer's ability. Irrespective of the lawyer's ability, your comfort level is important if the relationship is to work. If you are inclined to hire a lawyer that you feel a common background with, there is no reason why you shouldn't. Just be sure you are not being swayed by stereotypes.

## **3. Credentials**

There are objective factors that may help you evaluate the lawyer's professional competence and appropriateness for your case. Although mere membership in professional organizations may not mean a lot, active participation in the work of the organization is one mark of a lawyer's involvement in the specialty. Publishing articles, books and treatises on family law and teaching other lawyers are even better indicators of experience, competence and reputation. The length of time in practice, and the amount of family law experience are also important criteria.

## **4. Personal compatibility**

You must feel comfortable with the lawyer you hire if you are to work effectively together. If you are not comfortable with a lawyer you interview, you should probably trust your instinct and not hire that person, even if you cannot isolate the cause of your discomfort. The relationship between lawyer and client in a family law matter is especially important. You will be telling the lawyer intimate facts of your life and the lawyer may have to give you advice and information that you may not like. Be sure the lawyer is one to whom you can talk and listen.

## **5. Location**

The location of the lawyer's office may or may not be important, depending on the circumstances. Here are some things to consider.

It is a great benefit to be able to go conveniently to your lawyer's office to meet and work on your case. And if the lawyer's office is far from the courthouse, you may have to pay for the lawyer's travel time. On the other hand, lawyers sometimes represent clients who have never seen the lawyer's office, especially in large, sparsely populated areas where it is common for lawyers to travel long distances to court, to depositions, and to meetings.

#### **D. Interviewing**

Many people hire the first lawyer they meet. Others interview several lawyers before deciding which one to hire. How many you interview may depend on how much time you have, the urgency of your situation, how many lawyers there are to choose from and how quickly you find one you like.

Tell the lawyer about your situation. Take a list of your assets and debts and sources of income with you. A copy of the last several years' tax returns can also help speed the discussion and make it more meaningful. A narrative or outline of the important events in your relationship with your spouse can also be helpful.

Make a list of things you want to discuss and take it with you to the interview. Ask questions. Then ask more questions. Listen carefully to the answers and write them down. Review the answers later and think about them. Listen not only to the information the lawyer gives you, but also to the way it is presented. Think about how the lawyer related to you. While a lawyer may be appropriately optimistic about your case, do not hire a lawyer simply because that lawyer predicts a better outcome than another lawyer.

Here are some questions you might ask:

- What is likely to happen to me?
- How much property will I get?
- How much support will I get?
- How much support will I have to pay?
- Do I have a choice of courts?
- Does it make a difference?
- Do you have associates or paralegals?
- How do you decide who does what work on my case?
- Are you reachable by phone?
- If I call and you aren't available, how is my call handled?

•• How much do you charge for travel time, secretarial time, photocopies, postage, faxes, long distance calls, mobile phone calls, supplies, computer use or anything else other than your time?

•• What expenses do you pay from the money I pay you and what do I have to pay directly?

•• Under what circumstances would you refund all or part of my retainer fee?

•• Do you have any personal feelings about the positions you would have to take if you represented me?

•• How often are you out of the office in court, at conventions, on vacation, and for other things?

•• How do you cover my case at those times?

•• How much do you know about the judge who will decide my case if it goes to trial?

•• Do you think we can work together?

•• Will you be available at the times that are convenient for me?

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## **VI. THE LAWYER-CLIENT RELATIONSHIP**

### **A. Introduction**

Whenever a relationship is established, its participants form expectations of each other. The lawyer-client relationship is no different. And as in any other relationship, lawyers and clients have rules and boundaries which govern those expectations. Some expectations are appropriate; others are not. Here is an overview of what you can and cannot expect of your lawyer.

### **B. What You Can Expect from Your Lawyer**

Having the assistance of a skilled lawyer during your divorce gives you the security of having someone on your side who knows what to do. Furthermore, you will have someone you can talk to in confidence about your situation and how best to deal with it.

Lawyers provide a variety of specific services for clients going through a divorce. These services include:

•• Consulting with you

- Educating you about the law and facts
- Devising and carrying out case strategy
- Investigating the law and the facts
- Preparing and reviewing documents
- Negotiating a settlement
- Preparing and filing all necessary court papers
- Preparing you to testify
- Preparing other witnesses to testify
- Hiring experts and appraisers
- Conducting discovery
- Responding to discovery initiated by your spouse
- Preparing for court appearances including trial
- Conducting trials and hearings
- Advising you about what to expect.
- Advising you on conduct and alternatives
- Taking the heat for tough decisions

### **C. What You Cannot Expect from Your Lawyer**

#### **1. Your lawyer will not handle matters that are beyond the scope of your agreement.**

The lawyer you have hired to represent you in your divorce will not usually represent you in other matters unrelated to your divorce, unless the two of you specifically agree otherwise. For example, if you need legal assistance in selling your home, preparing your will, or defending against a civil lawsuit, it will be necessary to make specific arrangements with your lawyer, or to hire another lawyer, possibly in the same firm, with the appropriate specialization or expertise.

#### **2. Your lawyer cannot guarantee results.**

The eventual outcome of your divorce depends on the facts, the law, how the judge views your case, and other factors. Every case is different. Although your lawyer may express an opinion on possible or probable outcomes, nobody can be sure of the result until it happens.

### **3. Your lawyer cannot do anything unethical or illegal.**

Lawyers work under very strict legal and ethical codes and take them very seriously. If you ask your lawyer to do anything unethical or illegal, your lawyer will refuse. If you insist, your lawyer will withdraw from your case. Examples of forbidden conduct are: encouraging or permitting perjury, hiding assets or income, and in any manner deceiving the court or the other side.

### **4. Your lawyer may be reluctant to act against the best interests of your children.**

A lawyer's first duty is to look out for the client's best interest. Yet divorce lawyers are also concerned about the welfare of the children and some ethical guidelines encourage lawyers to keep the children's interest in mind.

### **D. Lawyers and Clients Should Maintain an Appropriate Professional Relationship.**

Sometimes friendships and even romances develop between lawyers and clients. Many lawyers have close personal friendships with former clients. But because of the intense emotional nature of a divorce, it is usually best for lawyers and clients to defer establishing a social relationship until after the case is over. Romantic relationships are not advisable as they interfere with a lawyer's objectivity and affect a client's expectations. A divorce lawyer and a client should never have a sexual relationship during the case.

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## **VII. COMMUNICATION BETWEEN LAWYER AND CLIENT**

### **A. The Importance Of Communication**

The lawyer-client relationship works best when the two of you are able to communicate -- not only about the facts of your case, but about your working relationship.

Information should flow both ways between you and your lawyer. Just as your lawyer should satisfy your need for information, you should provide your lawyer with all information that your lawyer requests. Advice based on incorrect or incomplete facts may be worse than no advice at all.

If you do not understand the advice you are given, or find it hard to accept, tell your lawyer. If, for example, you do not understand why your lawyer is recommending that you accept or reject a particular settlement proposal, you should ask why the recommendation is being made. Only by giving your lawyer the opportunity to explain things will you know whether there is a real problem to be addressed.

### **B. Financial Information**

Your lawyer will ask you for financial information, and perhaps ask you to fill out a questionnaire. Financial information includes income, expenses, assets, and liabilities. Your lawyer may also want to see papers such as income tax returns, paycheck stubs,

statements of savings and investments, employee benefit statements, and papers regarding your debts. Your cooperation in getting this information to your lawyer, although time consuming, is essential to the proper preparation of your case.

### **C. Marital History**

Your lawyer may also ask you to prepare a history of your marriage which includes personal as well as financial information. Where the custody of your children is in dispute, more than financial information will certainly be necessary. In addition to a history, some lawyers ask their clients to keep a diary of events related to the divorce. Complete candor, including any negative facts about yourself, is crucial.

### **D. Keeping in Touch**

Your lawyer will be communicating with you. There may be periods of inactivity, but when something important happens, your lawyer will want to let you know. If you move, or are planning to be away, be sure your lawyer knows where you are.

### **E. Calling Your Lawyer and Returning Calls**

Lawyers work on more than one case at a time and the practice of matrimonial law requires lawyers to spend time in court, at depositions, in conference, and on the telephone. So you should not expect your lawyer always to be available immediately when you call. You should, however, expect that your lawyer, or a staff member, will respond to your telephone calls promptly. If an emergency arises, tell the person who answers the telephone that it is an emergency and explain the situation. No matter how upset you are, be courteous to your lawyer's staff.

Likewise, if your lawyer calls and leaves a message for you to call back, you should do so as soon as possible. Your lawyer will understand that you also have commitments that may make you temporarily unavailable.

Your lawyer will appreciate your calling during regular business hours. But most lawyers will make every effort to be available when needed for a real emergency.

### **F. Being Available**

You and your lawyer will have a hard time communicating if you are not available to each other. Before hiring any lawyer you should consider whether your schedules are compatible. If you can't meet with your lawyer during normal business hours, make that clear before you hire the lawyer. Remember that your lawyer is a human being, entitled to free time. If you expect your lawyer to be available evenings or weekends, say so in advance so that the lawyer can decide whether to take your case under those conditions.

### **G. Correspondence**

When you receive correspondence from your lawyer, read it and respond. Delay in responding to correspondence could be harmful to your case.

## **H. Your Involvement In Other Legal Proceedings**

If at any time during your divorce, you are involved with any other legal proceeding, such as criminal, traffic, juvenile, probate, tax, bankruptcy or a civil lawsuit, let your lawyer know as soon as possible. It may affect your divorce.

### **I. Some Questions and Answers about Communication:**

**1. What result can I expect?** Don't be concerned if your lawyer's opinions and advice are guarded. There is little that is black and white, and much that is gray, in divorce. First impressions of a case can be wrong, so be wary of lawyers who say

at the beginning that they can accurately predict the results. As the case progresses, your lawyer will be able to give you a range of possible results.

**2. Can I get a second opinion?** Yes, but keep a few things in mind when you do. Many lawyers believe it's best to tell your lawyer you're going to do it and ask if it's OK to have the second lawyer call for information. They feel that second opinions can be valuable, but only if based on accurate information. Other lawyers do not like to limit a client's ability to get a second opinion without telling their lawyer.

**3. Do I really have to tell my lawyer everything?** Generally, yes. It is extremely difficult for your lawyer to represent you effectively without knowing everything. But look at Chapter X (Confidentiality) for exceptions to the lawyer-client privilege.

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## **VIII. THE RELATIONSHIP BETWEEN OPPOSING COUNSEL**

### **A. Introduction**

People watching the interaction between the lawyers in their divorce sometimes have a hard time making sense out of what they see. One client said at the end of the divorce, "I could never understand how they could be at each other's throats one minute and cracking jokes the next." In spite of appearances, it is usually to your benefit if the two lawyers get along with each other.

### **B. You Benefit From Cooperation Between The Lawyers.**

Stipulations can be reached which simplify the case, move it toward settlement and save you money. Lawyers often meet without their clients to try to isolate areas of agreement and disagreement and to cooperate in exchanging information. Your lawyer will discuss any such agreements with you.

All this can be done without compromising your position. If negotiations don't result in a settlement, your lawyer can and will vigorously represent you in trial. The time spent exchanging information and negotiating will make you and your lawyer better prepared for trial.

Lawyers routinely extend simple courtesies to each other such as agreeing to extend

deadlines and postpone hearings. You may feel like every advantage should be pressed in your favor, and that if the other side is under time pressure, your lawyer should take advantage of it. But in the long run, it doesn't help you for your lawyer to be uncooperative. In most cases, an extension is available by court order anyway. Refusing to agree just costs you and your spouse more legal fees. And the shoe will be on the other foot some day. When you need more time, the other side will remember your discourtesy and refuse. Then you will have to go to court for relief and both your legal fees will again increase. Still, you are not powerless in these matters. If you truly believe that a delay will work to your detriment, tell your lawyer so that you can discuss what to do.

Finally, it is important for lawyers to treat each other in a way that makes it possible to work together in all cases. The good reputation your lawyer has developed for cooperation and reasonableness in previous cases will benefit you in your case.

### **C. You Will Be Hurt If The Lawyers Are Drawn Into An Emotional Fight.**

Part of the job of a matrimonial lawyer is to be objective, to stay calm and rational during the emotional cross fire of a divorce. Experienced lawyers know that anger can impair their judgment. So they try to avoid personal feuds with the opposing lawyer. Still, some clients are pleased at first when their lawyers attack opposing counsel. Their pleasure usually lasts only until they realize the cost in fees and lost settlement opportunities caused by belligerence. If you feel your lawyer is not being aggressive enough, the two of you should talk about your concerns. Some cases require more aggressiveness than others. But if your desire for a more militant approach is motivated by anger, your best interests may not be served, and your fees will certainly be higher.

### **D. Dirty Tricks Do Not Help.**

Your lawyer will be honest with opposing counsel and will expect you to do the same. Concealing information, lying, or in other ways being dishonest or trying to hide behind legal technicalities will almost always hurt your case. Lawyers and judges are angered by conduct which violates the rules requiring full and truthful information. Your case could suffer if you are less than candid. Another reason to do things right is your lawyer's duty to the judicial system. Lawyers have good reasons to obey all the rules that govern their profession. Breaking the rules means losing the respect of judges and other lawyers, and even risking the loss of a license to practice law.

### **E. Some Questions and Answers about the Relationship Between Opposing Counsel**

#### **1. Can lawyers be friends and still put their clients' interests first? Yes.**

Matrimonial lawyers take their work very seriously. Even if the opposing lawyer is a friend of your lawyer, both lawyers can and will work zealously for their clients' best interest. Although it is sometimes hard for clients to understand, lawyers learn early in their career to take their client's side and argue positions with great conviction, even if they are arguing against a lawyer who is a close friend.

#### **2. Why is the other lawyer being so nasty when my lawyer is being so nice?**

Lawyers are people, each with an individual style. Some think they gain an advantage by trying to intimidate the other side. Other lawyers are overly aggressive because they think their clients expect it.

Intimidation almost never works. Keeping calm and polite in the face of inappropriate behavior is usually the best way to a settlement or success at trial.

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## **IX. YOUR RELATIONSHIP TO THIRD PARTIES**

### **A. The Court**

The judge, often referred to as "the Court", is the decision-maker. Show respect for the office of the judge even if you disagree with the particular judge. Be prepared for the possibility that the judge may not share your view or your lawyer's opinion of what constitutes justice in your case. Some judges are wiser than others, and, being human, they all have good days and bad days.

Never contact a judge about your case. Judges are not allowed to communicate with either party without both parties being present or notified. Any attempt to influence the judge in this way will backfire.

Courtesy to the court staff is also essential.

### **B. Experts**

#### **1. Your side**

Early in the preparation of your case, you and your lawyer should have a conversation about what experts may be needed, which ones are available and the merits of the different choices. Once you and your lawyer agree to hire an expert, you should give that person your full cooperation. Unless there is a different arrangement, you are financially responsible for the fees and expenses of your expert witnesses.

If you are sent experts' reports for your review and comment, discuss them with your lawyer, not with the expert. Conversations you have with your lawyer are privileged and may not be disclosed to third persons. (See Chapter X, Confidentiality.) However all conversations you have with the expert witness and any communications in writing by you to the expert witness may be obtained through discovery by the other side and used in court. You do not have the right to dictate to the expert what the expert's opinion will be.

#### **2. The other side**

Expert witnesses retained by the other side should be treated courteously, even if you disagree with them. Do not talk to any such expert witness without speaking with your lawyer first. You should not volunteer information, nor should you attempt to persuade the expert that you are right. When dealing with experts retained by your spouse, assume that everything you say will appear in the notes of that expert and be presented

in court.

### **3. Appointed experts**

Sometimes the court appoints a single expert to investigate an issue and make a report to the court. At other times both sides agree to hire the same expert. Deal with an appointed or agreed expert the same way you would deal with the other side's expert.

### **C. Your Children**

Your children are the most important other family members with whom you will have to deal in the course of your divorce. Don't talk about the details of the case with them and don't use them to carry messages to your spouse. For additional thoughts about children, see Chapter IV (Children).

### **D. Witnesses**

Friends, neighbors, teachers, and business colleagues usually prefer not to get involved in your divorce. Acting as a witness, either by deposition or in court, is an imposition on their time, their energy, and often their livelihood. Be considerate of them and don't try to pressure them to color their testimony. The most effective witnesses appear not to be biased for either side.

### **E. Psychotherapists and Members of the Clergy**

Usually what you tell these people can't be used against you in court. But rules vary from state to state so talk to your lawyer. See Chapter X (Confidentiality).

### **F. Others**

Although friends and relatives can be a valuable source of moral support during your divorce, there are risks in discussing your case with anyone other than those professionals whose job it is to help you through it. People with a little knowledge may believe they can give you better advice than your lawyer who has years of training and experience and knows your case. The law that applied to in your friend's case may have nothing to do with your case or may have changed since your friend's divorce. Furthermore, even a trusted confidant could become a witness against you.

### **G. Some Questions and Answers about Clients' Relationships to third Parties.**

**1. Why can't I use my regular accountant as my expert?** Some specialists are very good in their field, but do not make good witnesses. Moreover, they are handicapped by lack of knowledge of divorce law and procedure. You might have great confidence in the accountant who has prepared your tax returns for many years. However, if those were joint returns, that person may have a conflict of interest which could be an obstacle to taking your side in your divorce. Also, your accountant may appear biased because of the past relationship and need for your future business.

**2. My friend who got divorced got x result. Will I?** Friends who have been divorced can raise unrealistic expectations. Every case is different, and what happened to your

friend is almost always irrelevant to your case.

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## **X. CONFIDENTIALITY**

One of a lawyer's most fundamental ethical obligations is to maintain the confidentiality of client communications. With few exceptions, some of which are noted below, your lawyer cannot voluntarily reveal anything learned while representing you. These rules exist so you can tell your lawyer the whole truth without fear that what you say will later be used against you.

Direct communications between you and your lawyer are protected by the attorney-client privilege. This means that not even a court can make you or your lawyer tell what you have said or written to each other. Information that your lawyer obtains from documents or people other than you cannot be voluntarily revealed, but may in some cases be disclosed if ordered by a court.

But be aware that the attorney-client privilege can be lost if someone other than you and your lawyer (or your lawyer's staff) hears or reads what you and your lawyer say or write to each other. There are many ways in which your privilege can be waived by disclosure of your confidences to persons other than your lawyer: for example, talking to your lawyer in the presence of a third person not on your lawyer's staff; telling others what you have discussed with your lawyer; and allowing others to read correspondence between you and your lawyer. If you bring a friend or relative with you to your lawyer's office for moral support, your lawyer may ask your friend or relative to wait in the reception room in order to preserve the privilege. Because the rules regarding confidentiality and privilege vary slightly from state to state, you

should never discuss confidential information about your case with anyone other than your lawyer without first checking with your lawyer.

There are also several exceptions to your lawyer's duty not to reveal client confidences. A conversation in which a client tells a lawyer that the client intends to commit a crime or, in some states, a fraud, is not privileged and the lawyer could be forced to testify in court about the conversation. The privilege may also be lost if you or one of your witnesses commits perjury and in other circumstances which you should discuss with your lawyer. Also, if a lawyer is accused of wrongdoing by the client, the lawyer may reveal confidential information necessary to defend against the accusation.

Confidential information provided to others may also be revealed during divorce proceedings. Psychologists, therapists, public officials and others may be required by law in your state to report suspected child abuse. Judges may report suspected tax fraud to the Internal Revenue Service. Financial, medical, and psychological records may be subject to subpoena. In summary, your right to privacy may be diminished during a divorce.

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## **XI. DOMESTIC VIOLENCE**

### **A. Definition.**

Domestic violence includes beatings, threats, stalking, other forms of intimidation, harassment, neglect, and physical, emotional, and sexual abuse. Domestic violence may include any act by one family member that causes physical or emotional harm to another family member.

### **B. The Harmful Effects of Domestic Violence**

In addition to the obvious immediate trauma caused by violence, domestic violence has long-term, far-reaching harmful effects on all members of the family. The lifetime harm to children is well-known.

Even when you decide to get help, being involved in domestic violence can make it harder for you to relate to your lawyer or others who might be able to help you. Domestic violence has long been considered a private matter, not to be discussed outside the family. Reluctance to talk about these problems is a direct result of the feelings of guilt and fear experienced by members of families marked by violence. It is ironic that even the victims of domestic violence, who have done nothing wrong, feel guilty about it.

In some states, domestic violence may be a ground of fault in the divorce proceeding. In others it affects only child custody and visitation.

The two most important points to remember about domestic violence are:

If you are committing it, stop!

If you are a victim of it, get help!

### **C. Tell Your Lawyer**

Although it is hard to discuss domestic violence that you have been involved in, it is most important that you tell your lawyer about it. Your lawyer can't help you unless the full extent of the violence is disclosed. Your lawyer can help you find remedies and resources, but only if the lawyer knows about the problem.

### **D. What Can Be Done?**

As difficult as domestic violence is to deal with, help is available and your lawyer can help you find it. Here are some potential resources.

#### **1. Shelters**

Many cities have public and private agencies that provide shelters for battered spouses (usually women) and children. Since victims of violence fear that more violence will result from leaving the home, the locations of the shelters are kept secret. Many such agencies also provide counseling and legal help when the victims cannot afford to pay

for such services.

## **2. Restraining orders**

Legal procedures are available. Courts can order that the perpetrator of domestic violence move out of the family residence. Restraining orders can be made which may be enforced by the police. The courts of many states have simplified procedures for people to get court orders against domestic violence. Sometimes these procedures are designed to be used by persons unrepresented by a lawyer if they cannot afford one. Forms and instruction booklets are sometimes available from the court clerk.

## **3. Criminal prosecution**

If you are the victim of domestic violence, a report to the authorities for possible prosecution may be appropriate. Sometimes the victim of domestic violence is reluctant to report the crime to the authorities for fear of the consequences of sending the other spouse to jail. Often, the perpetrator of the violence is the sole support of the family and fear of being without money to live on stops victims from making a criminal complaint.

## **4. Civil lawsuits**

In some states, spouses have the right to sue each other aside from a divorce proceeding. If you have been involved in domestic violence, talk to your lawyer about the possibility of a separate lawsuit. Deadlines called statutes of limitation apply to such suits so that unless they are filed within a certain time (sometimes as soon as a year or less from the date of the act), you lose your right to sue.

Usually the only remedy available by civil lawsuit is money damages. The prospect of a judgment for civil damages can affect the settlement negotiations in the divorce case. It can also be a deterrent to further violence.

If you have committed an act of domestic violence, you will want any divorce settlement to include a release of all civil claims for such acts. Your lawyer needs to know about them so they can be included in the release.

## **5. Therapy**

Domestic violence is usually a symptom of deeper problems. It is very difficult to treat or cure, and usually requires extensive therapy for the perpetrator as well as the victim. Agencies are available in most cities that can provide therapy according to ability to pay. Your lawyer can recommend a therapist.

## **E. Reporting requirements**

In some states domestic violence towards children must be reported by lawyers to child welfare authorities. The usual confidentiality of conversations with your lawyer may not extend to child abuse. In some states, physicians, psychotherapists, and public officials are required to make a report, but not lawyers. A report of child abuse can lead to criminal prosecution and even placing the child in a foster home or public facility.

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## **XII. ATTORNEY'S FEES AND COSTS**

### **A. Introduction**

[It is important to both you and your lawyer that you talk about fees and costs at your initial conference. Unless fees and costs are discussed, either of you might make incorrect assumptions about what the other expects. False assumptions can lead to misunderstandings which can harm the lawyer-client relationship.](#)

[If you are concerned about the cost of your divorce, discuss with your lawyer how much you can afford to pay, how extensive the lawyer's work needs to be, and any limits you think should be placed on fees.](#)

[If you feel you can't afford the fees of the lawyer you consult, say so and ask for the names of other lawyers or agencies that can handle your case. You should make an agreement to pay fees only if you know you will be able to honor it.](#)

### **B. Different Fee Arrangements**

[Fees charged by lawyers vary from state to state and community to community. Some arrangements are the: retainer, hourly fee, contingency fee, engagement fee, bonus \(or results accomplished\) fee, and flat fee. These terms are described in the Glossary.](#)

[Fees are based on many factors including the complexity of the case, the skill needed to perform the service properly, whether agreeing to represent you requires your lawyer to turn away other clients, the amount involved, the results obtained, the experience, reputation, and ability of your lawyer, the time limitations you impose, and the circumstances under which the services will be performed.](#)

### **C. Written Fee Agreements**

[Your lawyer should ask you to sign a written fee agreement. You are entitled to an opportunity to review the fee agreement, to think about it, and to get answers to any questions you have about it. You should read and understand it. Once you sign, the fee agreement is a legally binding and enforceable contract.](#)

### **D. Costs And Expenses**

[Different law offices have different procedures for handling costs and expenses. Those procedures are usually described in a written fee agreement. You may be responsible for paying out-of-pocket costs incurred for your case by your lawyer, such as photocopies, postage, long-distance calls, court filing fees, process servers, court reporters, computer time and similar expenses. You will be responsible for paying any experts that you and your lawyer decide to hire. If you have questions about costs, ask your lawyer.](#)

### **E. Security for Payment**

Your lawyer may ask you for security for payment of fees and costs in the form of a mortgage on your real estate or a lien on your property. You should carefully review and understand the security agreement and other papers. It is a good idea to review them with another lawyer before signing them. Similarly, your lawyer may ask you to have a friend or relative guarantee payment of your fees. Be sure that the details are thoroughly discussed and that you and the guarantor both understand the papers before signing them.

## **F. If You Find You Can't Pay According To Your Agreement**

### **1. Work with your lawyer to solve the problem.**

Talk to your lawyer. Most lawyers will try to resolve fee problems with clients and often something can be worked out that will satisfy both of you. Your lawyer may want some security for payment (if permitted in your state), a promissory note, or a regular payment schedule. You might be able to borrow from friends, family or an institutional lender.

There are many ways to handle a divorce. If you have instructed your lawyer to do everything possible on your behalf, you might rethink the cost of your strategy. If you revise your instructions so that your lawyer does only those things essential to your proper representation, your fees and costs may be less.

### **2. If you can't resolve the problem after talking to your lawyer, here is what might happen.**

#### **a. Withdrawal**

Your lawyer might withdraw from your case.

#### **b. Liens**

Some states allow a lawyer to have a lien against your property or files until the fees have been paid. Even the states that allow liens have strict rules about how they can be enforced. Before you find yourself in this situation, you should ask your lawyer to explain the rules and procedures to you. You might also want to consult another lawyer about your rights and responsibilities as to such liens. Most

states require lawyers to turn over all of the client's papers to the client when withdrawing from a case.

#### **c. Mediation**

If you and your lawyer can't resolve a fee dispute, you might agree to take the dispute to a mediator. A mediator is a person who meets with both of you and tries to help you work out a settlement, usually by reaching a compromise.

#### **d. Arbitration**

Arbitration is presenting your case to someone other than a judge who has power to

decide the case. An arbitration award can be made into a court judgment and enforced. Your written agreement with your lawyer may contain an agreement to arbitrate any fee disputes. Some states provide you the right to arbitrate even if it's not in your fee agreement. Arbitration can be faster, simpler and cheaper than litigation in court.

#### **e. Lawsuits**

If you do not pay the fees you have agreed to pay, the lawyer has a right to sue you for the unpaid fees. In that event, the dispute will be decided by a judge or jury. Many lawyers will only sue a former client as a last resort.

### **G. Some Questions and Answers About Fees and Costs**

**1. I don't want the divorce; why do I have to pay for it?** We all have expenses for things that happen to us that we don't bring on ourselves. We don't ask to get sick, but if we use health care professionals, we have to pay our medical bills.

If you are involved in a divorce and choose to be represented by a lawyer, you must expect to pay for those services.

**2. Why do lawyers charge the fees that they do?** Lawyers are professionals who run a business with all the usual overhead. Supply and demand influence legal fees as they do the cost of most things. So lawyers who are in greater demand generally charge higher fees.

**3. How much will my divorce cost?** It's impossible to predict how much your divorce will cost, although your lawyer may be able to give you a range. The cost of the case depends on many factors, some beyond your lawyer's control. These factors include the kind of lawyer your spouse hires, how you and your spouse behave in the litigation and the court to which your case is assigned. Generally, the more things you and your spouse can agree on, the lower your fees will be.

**4. Is there anything I can do to help keep the fees down?** Yes. Be actively involved in your case. Take the time and trouble to learn what's going on. Follow your lawyer's instructions. Volunteer to help with the work whenever possible. Have reasonable expectations of your lawyer. Watch for ways to settle issues. Don't insist on fighting to the last drop of blood over small issues, or for a supposed principle. When talking to your lawyer, avoid long, detailed stories unless your lawyer assures you it's necessary information.

**5. Can I make my spouse pay my fees?** A court may order a spouse to contribute to the fees of the other spouse. If you get such an order, your lawyer will credit what is actually paid to your account. But seeking such an order does not change your obligation to pay the balance that you owe to your own lawyer. Also, many lawyers do not accept cases on the possibility that the other spouse will be required to pay the fee by court order.

**6. What can I do if I can't afford the lawyer I want?** Just as none of us can have everything we want or purchase things that we can't afford, you may not be able to

afford the lawyer of your choice. In most communities, there is a wide variety of providers of legal services. Everyone should be able to find help at a price they can afford. There may even be another lawyer in the office of the lawyer of your choice who is quite competent to handle your case and whose rates are lower. For those who can't afford to pay any fees, free legal aid is available in some areas.

#### **7. Will my lawyer wait until the case is completed for me to pay fees and costs?**

Not usually. Each month, law firms must pay their staff, rent, utilities and other operating costs. You can't realistically expect your lawyer to wait until your case is over to be paid. If you do not pay your lawyer when you are billed, the firm may have to borrow money to pay office expenses. If money must be borrowed to finance your divorce case, you should borrow it, not your lawyer. Although some lawyers will wait for part of their fee, especially if given some security, most will expect you to pay your fees as the case progresses, even if you have to borrow it.

**8. Why does my lawyer charge me every time we talk on the phone?** Abraham Lincoln said, "A lawyer's time and advice is his stock in trade." It's still true. Time on the phone is just as valuable as the other time your lawyer spends on your case. But there are several ways you can minimize fees for phone calls. Accumulate several questions, write them down, and ask them all during one call. When giving your lawyer information, it may be more efficient to give it to a secretary or to send it in writing. Nonetheless, every person and every case is different. If you need the reassurance and are willing to pay for it, it might be worth it to you to call more often.

**9. What if I can't pay for appraisers and other experts?** If you don't have money to hire experts, you may have no choice but to proceed without experts. It may also be possible to get a court order for expert's fees to be advanced by your spouse or from marital property. In any event, it is not your lawyer's obligation to pay for experts which might be needed on your case.

**10. Why do I have to pay a lawyer to force my ex-spouse to comply with the marital settlement or judgment?** No one can guarantee that your spouse will honor agreements or court orders. Courts will enforce orders if an appropriate request is made, but it is not the lawyer's responsibility to provide enforcement for no fee.

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### **XIII. ESTATE PLANNING CONSIDERATIONS**

#### **A. At the beginning of the case**

You may have an estate plan or will that gives your entire estate and life insurance to your spouse if you die. This plan does not necessarily change because someone files for divorce. Talk to your lawyer about what changes, if any, you need to make and are able to make in your estate plan while the divorce is pending.

Not only should you review your will, you should review the beneficiary designations for your life insurance and retirement plans, including IRAs, and discuss with your lawyer what changes, if any, to make. If you are holding property with your spouse in a form

that would give it all to your spouse on your death, you may want to change the form of title.

There may be restraining orders that temporarily limit your right to change title to property or beneficiaries of insurance and death benefits.

## **B. After the divorce**

In some states a divorce will automatically change your estate plan. In other states it won't. So when the case is over, update your estate plan to be consistent with the judgment and with what you want to happen to your estate.

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## **GLOSSARY**

### **Affidavit**

Written testimony under oath - usually sworn to in front of a notary.

### **Alimony**

Payments made to support a current or former spouse. Also called maintenance or spousal support.

### **Alternative Dispute Resolution**

Ways for parties to a divorce case to resolve their disagreements without a trial; usually defined to include negotiation, mediation and arbitration.

### **Annulment**

An order which nullifies a marriage, or declares that no marriage ever existed. Also called declaration of invalidity or declaration of nullity.

### **Answer**

A document used to respond to the complaint or petition. Answers usually admit or deny specific allegations or claims in the document being answered. Also called a response.

### **Appeal**

A procedure to ask a higher court to review the ruling of a lower court.

### **Appearance**

Coming into court as a party to a case or voluntarily submitting to the power of a court. Usually this is not a physical act, but a lawyer filing a document.

### **Arbitration**

Submitting a disputed matter for decision to a person who is not a judge. The decision of an arbitrator is usually binding and final.

### **Attorney (at Law)**

An advocate or counsel employed to prepare, manage and try cases in court. Must be licensed by the state. Lawyer and attorney are usually synonymous.

### **Charging Lien**

A lien that permits an attorney to assert a claim for fees against any property involved in the litigation, and prevents the sale or other disposition of that property until the fee issue has been resolved.

### **Child Support**

Money paid by one parent to the other for the support of their children.

### **Citation.**

See Summons

### **Common Law Marriage**

A marriage without license or ceremony recognized by the law in the state it was created. Not recognized in most states today.

### **Community Property**

A form of co-ownership of property by a husband and wife who reside in one of the eight states where community property is recognized.

### **Complaint**

The first document filed in a case setting forth facts upon which the plaintiff's claim is based. Now called a petition in many states.

### **Contempt of Court**

Failure to comply with a court order by a person who is able to comply. It also includes conduct in court which obstructs a court in the administration of justice.

### **Contingency Fee**

See Fees

### **Counterclaim**

A pleading asking for a divorce or other relief filed in response to a Petition or Complaint. Also called a Counter-Petition or Cross-Complaint.

### **Counter-Petition**

See Counterclaim

### **Cross-Complaint**

See Counterclaim

### **Cross-Examination**

Asking questions of a witness who was put on the stand by the other lawyer. Cross-examination is usually intended to discredit the witness or weaken the effect of the testimony.

### **Custody**

Usually refers to the parent's right to (1) have a child live with that parent and (2) make decisions concerning the child. Exact meaning varies greatly in different states.

### **Declaration**

Written testimony under oath, not necessarily sworn to before a notary.

### **Default**

Failure to do something or to do it on time.

### **Defendant**

The husband or wife who is sued for divorce. In some states, the respondent.

### **Deposition**

Testimony under oath taken before a court reporter but not in court. A discovery method.

### **Direct Examination**

Asking questions of a witness by the lawyer who called the witness.

### **Discovery**

Procedures used to learn facts necessary to settle a case or prepare it for trial.

### **Dissolution of Marriage**

The legal process of ending a marriage. In most states, the legal term for divorce.

### **Domestic Violence**

Conduct against another member of a family which can include beatings, threats, stalking or other forms of intimidation, harassment, neglect, and physical, emotional,

and sexual abuse. May include any act by one member of a family that causes one of its members physical or emotional harm.

### **Equitable Division**

A system of dividing property owned by parties to a divorce. Now used in the majority of states.

### **Evidence**

Proof presented at a hearing, including testimony, documents or objects.

### **Exhibits**

Tangible things presented at trial as evidence.

### **Ex-Parte**

Any application to a court for relief made when only one side is present, or in some states, without formal notice.

### **Fees**

A lawyer's charges paid by a client for legal services rendered to the client. Although many different fee arrangements are possible, the following represent the most common types of fees:

**1. Hourly fee:** A fee based on the time expended and an hourly rate.

**2. Retainer:** Money paid by the client to the lawyer to obtain a commitment from the lawyer to handle the client's case. A retainer can be a deposit against which the lawyer charges fees as they are earned. It can also be a non-refundable engagement fee. This is a fee that is sometimes charged by a lawyer for the agreement to take your case and to commit to being available for your case. Normally, an engagement fee is in addition to charges on an hourly rate basis. Your written fee agreement should specify whether a retainer fee is refundable, and if so, in what amount and under what circumstances.

**3. Contingency Fee:** A percentage of the recovery. Contingent fees are generally forbidden in divorce cases, but, in some states, are permitted in a proceeding to enforce the judgment.

**4. Bonus Fee:** A fee based upon factors in addition to the hourly fee. Also called a premium or final fee.

**5. Flat Fee:** A fee in a fixed amount for handling an entire case or a certain part of it.

**6. Minimum Fee:** A fee which sets a floor on charges for services.

### **File**

To place a document in the official custody of some public official. Also used to mean

start a case.

### **Garnish**

To take money from wages or from an account to satisfy an unpaid court order for the payment of money.

### **Grounds**

The conduct or circumstances which must be proved to entitle a person to a divorce. See No-Fault Divorce.

### **Guardian-ad-Litem**

A person appointed by a judge to prosecute or defend a case for a person legally unable to do so, such as a minor child.

### **Hearing**

Any proceeding before a judicial officer.

### **Injunction**

A court order which requires a party to do some act or prohibits a party from doing some act.

### **Interrogatories**

Written questions served on the other party who is required to serve sworn written answers within a specified time. A type of discovery.

### **Joint Custody**

Any arrangement which gives both parents legal responsibility for the care of a child. In some states, also means shared rights to the child's companionship.

### **Judgment**

The decision of a court. A type of order. Also called a decree.

### **Jurisdiction**

The power of a court to decide a particular matter.

### **Legal Separation**

A court order or, in some jurisdictions, a written agreement between the parties, arranging the terms under which the parties will live apart after separating. While signifying the separation of the parties, it does not formally dissolve the marriage or permit the parties legally to marry other persons.

### **Lien**

A legal claim or charge on property for the payment of some debt, obligation, or duty.

### **Litigation**

All of the proceedings that take place in the course of a lawsuit.

### **Maintenance**

See **Alimony**.

### **Marital Property**

Interests in property acquired by the spouses during the marriage which is to be divided between the parties at divorce.

### **Marital Settlement Agreement**

The written agreement made between the parties settling the issues in a divorce. Called a Separation Agreement in some states.

### **Mediation**

A dispute resolution process in which a disinterested third party, the mediator, assists the parties in reaching an agreement.

### **Motion**

An application to the court for an order. May be written or oral.

### **Modification**

A change in the judgment, based on a change of circumstances.

### **No-Fault Divorce**

A divorce granted without proving that one party is guilty of misconduct.

### **Order**

A ruling by the court.

### **Perjury**

The crime of lying under oath. It includes lying during a trial, at a deposition, or in a written affidavit. It can be punishable by imprisonment.

### **Petition**

See **Complaint**

### **Petitioner (Plaintiff)**

The party who filed the Petition (Complaint).

### **Plaintiff**

See Petitioner

### **Pleading**

A document filed with the court which asks for something or responds to a pleading filed by the other party.

### **Privilege**

A client's right to refuse to disclose confidential communications between the client and certain persons in a professional relationship with the client, such as lawyers, doctors, psychotherapists, and priests.

### **Propria Persona, In**

See Pro se.

### **Pro Se**

A party who is representing him or herself in a lawsuit.

### **Request for Production**

A written request by one party to the other asking the other party to turn over tangible objects, usually documents.

### **Respondent (Defendant)**

The party defending against a divorce Petition (Complaint).

### **Response**

See Answer.

### **Restraining Order**

See Injunction

### **Retainer**

See Fees.

### **Retaining Lien**

A lien that permits an attorney to hold any of your property, papers and records in the attorney's possession until fees are paid.

### **Separate Property**

A property which is neither community nor marital property. Also called non-marital property.

### **Service**

The delivery of official papers by a means prescribed by law.

### **Settlement**

The resolution of disputed issues by agreement between the parties.

### **Spousal Support**

See Alimony.

### **Stipulation**

An agreement between the parties or their lawyers about issues in the lawsuit.

### **Subpoena**

A document served on a party or a witness commanding appearance at a certain time and place. A Subpoena Duces Tecum is a command to produce documents, papers, or other things listed in the subpoena.

### **Summons**

The written notification of the lawsuit that is served upon the Defendant. Also called a Citation.

### **Temporary Orders**

Orders granting relief between the filing of the lawsuit and the judgment. Automatic in some states. Also called Pendente Lite Orders.

### **Trial**

The final hearing in court to decide the issues in the case.

### **Uncontested Divorce**

A divorce in which there is no dispute as to how any of the issues will be resolved.

### **Visitation**

The right of a parent who does not have primary custody of the child to spend time with the child.

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