

TAKING THE CASE FROM START TO FINISH: GET IN, GET OUT

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I. INTRODUCTION

The following paper addresses the process of taking a divorce case from start to finish in an efficient and cost-effective manner. But before we begin, remember that while you are the attorney responsible for deciding the strategic moves, it is your client who ultimately has the final say on most matters. After all, it is your client who is getting divorced; you're there to help him achieve that goal.³

II. THE INITIAL INTRODUCTION

A. Initial Client Contact

One unique aspect about family law is that unlike most other areas of the law, every person whom you meet is a potential client. Letting people know what kind of law you practice is important. If someone you meet knows that you are a family lawyer, then when he/she or someone he/she knows is experiencing a family law problem, there is a good chance that your name will come up as the person to call for advice.

Another important resource for building future clients is from your pool of existing clients. Someone who is considering getting divorced often goes to a friend, co-worker or relative who is divorced for a referral to an attorney. Your good work and good reputation are your best marketing tools.

Other professionals can also be valuable sources of new clients. Other attorneys who practice in other areas of the law may get calls for family law cases they can send your way. Many attorneys specialize in a specific area of the law and are looking to refer cases in other areas outside their area of expertise. Other professionals, such as counselors, medical doctors and accountants, can also be referral sources. And when you do get a referral, be sure to thank the source. Making a call to say "Thank You", or even better writing a thank-you letter, could exponentially increase the chances of your referral source sending future referrals to you.

B. Initial Client Interviews:

The communication between the attorney and the client starts at the initial interview. Remember, every client and every case is different. From the outset, it is imperative that you take sufficient time to get to know your client, his or her spouse, the family, and the background of the marriage. Understanding your client's needs and expectations are vital if you are going to successfully help your client.

³ Much thanks to Amy Kaye, Louis Tesser, Jonathan Levine, Rebecca Crumrine, Edward Coleman, and Melody Richardson for their help in gathering the following information. The information presented in this paper is largely adapted from the Middle Income Divorce Seminar presented by the aforesaid attorneys at the State Bar on November 5, 2008. That seminar can be viewed online at www.fastCLE/AtlantaBar.com.

At your first consultation with the client, you should ask questions to get an idea of the history of the marriage. Encourage your client, in as much detail as possible, what transpired during the marriage, financially and emotionally, and why he or she is sitting in your office.

Remember that at that initial meeting, you are interviewing the client just as much the client is interviewing you. As you listen and talk with the client, ask yourself if this is a case you want to handle. Every attorney has a story about a case he or she took which turned out to be a nightmare after the client, the opposing party and/or the opposing attorney became unbearable. The aggravation will undoubtedly take a toll on you both emotionally and psychologically, and a difficult case with difficult parties can take a disproportionate amount of your time, detracting from spending time on other cases you are handling. As an attorney, you should never feel that you must take every single case that comes your way.

It is also important to decide how much discussion you are willing to have with a client before that initial face to face interview. Be mindful of a potential conflict that you may have with the potential client. Run an internal conflict check within your office to see if you have in some way represented this client's spouse in another proceeding. Also, you should not give a full legal opinion without knowing all of the facts. You also need to decide what you will bill the client for that initial interview. Either you can charge the client at your normal hourly rate, and for the time you meet with the client, or you can charge a flat fee which will probably be less than your normal hourly rate.

After that initial interview, the client must decide if he or she wants to retain you as their lawyer, and you must decide if you want to take the representation. That decision should be in writing. Should you and the client decide to enter into an attorney-client relationship, be sure you complete and sign a Retainer Agreement. If you decide to not take the case, it may be a good idea to send a letter to the person in which you basically state that while you enjoyed speaking to the person, you want to confirm that you will not be taking on the representation. This eliminates any possible ambiguity or future obligation.

C. Retainer Agreements

It is vital that your client has a clear understanding of your fee arrangement. This can and should be accomplished through a signed Retainer Agreement. If you are charging on an hourly basis, your client needs to be advised of that rate. You should also inform the client if he or she will be charged at differing rates for different attorneys within your firm who may work on the case. You should also explain what expenses will be passed on to the client.

If you will require a retainer, you must first advise the client of the amount of the retainer, and then discuss how the retainer will be handled. You might want to proactively answer the following questions: Are your hourly charges charged against that retainer? Is any part of the retainer refundable? Will the client incur fees or expenses in excess of the retainer? Is there a possibility that the client will have to pay an additional retainer? Is the client expected to replenish the retainer periodically? You should also discuss with your client your billing

practices. Primarily, how frequently will the client receive bills from you, and how promptly will the client be expected to pay those invoices? If you are charging your client based on an hourly rate, you should be sure to keep accurate records of your time. Make sure that if you ever do work on a flat fee basis, you clearly explain exactly what that fee is to cover.

Your retainer agreement should also clearly state under what circumstances you may elect to withdraw from the representation. It is important to note that if you should elect to withdraw from representation of a client, you promptly refund any part of the fee that was paid in advance that had not been earned prior to the withdrawal.

Whatever your policy, you should clearly articulate it to the client up front. Georgia State Bar Rule 1.5 expressly addresses fees, including: the amount of fees that may be charged, terms of payment, division of fees and how to handle disputes over fees.

D. Ethical Issues When Representing Someone You Know

When you represent a friend or neighbor, it can present an additional set of issues. You must let the client know exactly when your representation begins, and when you are on the clock and expect to be paid for your services. It is essential that the fee arrangement is in writing, perhaps even more so when you represent a friend. The last thing you want is a friend or neighbor who calls you repeatedly, maybe even at home or on your cell phone, and then tells you he didn't realize you were charging for that call. Be very clear as to when you are informally chatting with a friend and when you are undertaking a representation, rendering legal advice and expecting to be paid.

When representing a friend, the worst thing you can do to your client is give advice you think the client *wants* to hear when in reality you should give advice that the client *needs* to hear. State Bar Rule 2.1 of The Georgia Rules of Professional Conduct states as follows:

“Rule 2: Advisor: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. The maximum penalty for a violation of this rule is disbarment.”

Effective communication with the client is essential to effective representation. Always stress to your client that it is imperative that they be open and truthful. You want your client to be honest and forthcoming with you, thereby minimizing the surprises that the other side will confront you with as you move forward with the litigation.

Standard 4 of Rule 4-102 of the State Bar Rules provides as follows:

“A lawyer shall not engage in professional conduct involving dishonesty, fraud, deceit, or willful misrepresentation. A violation of the Standard may be punished by disbarment.”

Standard 45 under the Disciplinary Rules which provides as follows:

“In his representation of a client, a lawyer shall not:

- a. Knowingly use perjured testimony or false evidence;
- b. Knowingly make a false statement of law or fact;
- c. Participate in the creation or preservation of evidence when he knows what is obvious that the evidence is false;
- d. Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent;
- e. Knowingly engage in other illegal conduct or conduct contrary a the disciplinary rule;
- f. Institute, cause to be instituted or settle a legal proceeding or claim without obtaining proper authorization from his client. A violation of this Standard may be punished by disbarment.”

III. DRAFTING INITIAL DIVORCE PLEADINGS

Once you have the retainer agreement signed and the retainer check clears, the next step may be to get the case filed. The Georgia Civil Practice Act does apply to divorce cases. The same general rules of pleading and procedure that apply to all other civil actions also apply in divorce cases, except as specifically provided by O.C.G.A. §19-5-1 et seq., 19-6-1 et seq. One major difference, however, is that unlike other civil cases, there is no default judgment in a divorce case. See O.C.G.A. §19-5-8. Defensive pleadings are to be filed within 30 days of the date of service. Nevertheless, a defendant in a divorce action may, at any time before judgment and without paying costs, file defensive pleadings to the action. After a final judgment is entered, however, the Defendant cannot automatically reopen the divorce decree by simply filing defensive pleadings and paying court costs within 45 days of service as provided for in O.C.G.A. §9-11-55 for other civil cases.⁴ Thus, if an action for divorce is simply ignored by the defendant for over 45 days after service, because the person is angry, sad, in denial, or whatever the reason, he or she may find that a divorce has already been entered against them.

A. The Complaint

The divorce proceeding is initiated with the filing of a “Complaint,” (or the “Petition.”) A divorce complaint has to meet the same basic requirements as a complaint in any other civil action. Pursuant to O.C.G.A. §19-5-5, specifically a divorce complaint needs to show the following:

1. The residence or last known address of the respondent;
2. That the applicant meets the residence requirements for bringing an action for divorce or that the applicant is bringing a counterclaim and is not required to meet the residence requirements;
3. The date of the marriage and the date of the separation;

⁴ McConaughey at § 7

4. Whether or not there are any minor children of the parties and the name and age of each minor child;
5. The statutory ground upon which a divorce is sought; and
6. Where alimony or support or division of property is involved; the property and earnings of the parties, if such is known.

As with other civil actions, the pleadings should clearly show that the Court has subject matter jurisdiction by the fact that the parties are married and that the plaintiff has been a resident of Georgia for more than six months prior to filing the action; personal jurisdiction over the parties (O.C.G.A. §19-5-5); and that venue is proper (the county of residence of the defendant if he or she is a Georgia resident, or the county of the plaintiff's residence if the defendant is not a Georgia resident).

B. Grounds for Divorce

The complaint must also identify the grounds for divorce. O.C.G.A. §19-5-3 lists the thirteen statutorily recognized grounds for divorce as follows:

1. Intermarriage by persons within the prohibited degrees of consanguinity and affinity;
2. Mental incapacity at the time of the marriage;
3. Impotency at the time of marriage;
4. Force, menace, duress, or fraud in obtaining the marriage;
5. Pregnancy of the wife by a man other than the husband, at the time of the marriage, unknown to the husband;
6. Adultery in either of the parties after marriage;
7. Willful and continued desertion by either of the parties for the term of one year;
8. The conviction of either party for an offense involving moral turpitude and under which he or she is sentenced to imprisonment in a penal institution for a term of two years or longer;
9. Habitual intoxication;
10. Cruel treatment, which shall consist of the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies apprehension of danger to life, limb, or health;
11. Incurable mental illness;
12. Habitual drug addiction;
13. The marriage is irretrievably broken.

Bar none, the most common ground cited as the reason for divorce is number 13, "The marriage is irretrievably broken." Whether or not a divorce will be granted in Georgia will be determined by Georgia law. As such, the grounds must be recognized in Georgia, notwithstanding that the parties were married elsewhere and that the conduct complained of may have occurred in another state.

As you can see, most grounds for divorce are fault based, with the exception of the last no-fault provision. As you may expect, a party has the right to amend his/her complaint at any time prior to the entry of a pretrial order to cure jurisdictional defenses and to allege claims not barred by res judicata. The party can so amend his complaint as a matter of course and without leave of Court. O.C.G.A. § 9-11-15.

Additionally, a divorce complaint must be verified. See O.C.G.A. § 19-5-5. The verification must be a written statement sworn to by the affiant (divorce plaintiff), signed by the affiant (divorce plaintiff) and notarized. A written verification certifies that the party and his or her attorney of record, if any, have read the claim, and that to the best of their knowledge, the claim is well grounded in fact and is warranted by existing law. The verification ensures that the claim is not interposed for any improper purpose, nor to harass or increase the cost of litigation.

It may be beneficial to start settlement discussions and possibly some informal discovery before the action is even filed. In some cases the party may feel that the actual filing of the legal action could cause his/her spouse to overreact and refuse to respond rationally. Sometimes, if the parties are amicable, the parties may want to try the collaborative process before filing a legal action for divorce. (Collaborative law is an interesting way to resolve the divorce without having to involve the court. As it oftentimes a highly successful process, it is certainly an option you will want to familiarize yourself with and your client with.)

Explain to your client that in most counties upon filing the complaint the court issues a Standing Order. You must discuss the points of the Standing Order with the client and how it operates. Once you have addressed all of the advantages and disadvantages of when to file the divorce action, you should allow the client to instruct you as to when to actually have the case filed.

IV. DISCOVERY

In divorce cases, discovery, if utilized economically, can be an efficient and cost effective way to collect the evidence and documentation necessary to support your client's position. However, if faced with a non-cooperating, stubborn opposing party, obtaining discovery can be difficult in addition to unnecessarily expanding the litigation and the expenses. When presented with a discovery dispute, know the law, and quickly apply it.

A. Civil Practice Act and the Uniform Superior Court Rules

Although discovery in divorce cases is broad, requests, and objections thereto, must fall within the parameters of the Civil Practice Act and the Uniform Superior Court Rules O.C.G.A. §§9-11-26 – 9-11-37. The Civil Practice Acts states in pertinent part: “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody,

condition, and location of books, documents, or other tangible things and the identity and locations of persons having knowledge of any discoverable matter.”⁵

B. Put the Parties On Notice

In cases where the funds may not be available for numerous depositions, deposition transcripts, and subpoenas for documents to financial institutions, it is important to put the parties on notice at the onset of the litigation that each side is going to need to disclose financial records and documents, and that each is to save all documents throughout the course of the litigation. A letter to the opposing party to be served with the Complaint should state that in the course of the divorce, discovery may be served in the event the parties are unable to settle. The discovery will request any and all financial documents, documents evidencing any outstanding issue in the case, including but not limited to the divorce, custody, child support, and parenting time.

C. No Time Like the Present to Serve

You should not wait to serve discovery. Go ahead and serve Interrogatories, (a maximum of 50)⁶ and Requests for the Production of Documents⁷ within the first 30 days of the case. And, utilize Requests for Admission⁸. There are no restrictions as to how many times you can serve Requests for Admission, or how many Requests you can serve. Requests for Admission should accompany your Interrogatories and Requests for the Production of Documents. Serve additional Requests for Admission when you receive responses to initial discovery to clarify any responses. Failure to respond to Requests for Admission within the allotted time will result in an admission of the statement therein. You will want to send a 6.4(B) letter in the event clarification or supplementation of Interrogatories or Requests for Production is needed.⁹

The next step may be to schedule the deposition of the opposing party. The use of deposition transcripts in Court proceedings are governed by O.C.G.A. § 9-11-32 which states, in pertinent part: “At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance

⁵ O.C.G.A. §9-11-26(a)(1)

⁶ O.C.G.A. §9-11-33

⁷ O.C.G.A. § 9-11-34

⁸ O.C.G.A. §9-11-36

⁹ Uniform Superior Court Rule 6.4(B) states:

“Prior to filing any motion seeking resolution of a discovery dispute, counsel for the moving party shall confer with counsel for the opposing party in a good faith effort to resolve the matters involved. At the time of filing the motion, counsel shall also file a statement certifying that such conference has occurred and that the effort to resolve by agreement the issues raised failed. This rule also applies to motions to quash, motions for protective order and cases where no discovery has been provided.”

with any of the following provisions:.....” As an attorney, if you have an objection at your client’s deposition then insist on objections being made at deposition. Ask the Court to rule on admissibility of deposition testimony in Motion in Limine.

D. Gather Your Discovery

If a response to discovery is ambiguous or was not provided, the best thing for you to do, notwithstanding yelling at the opposing counsel, is to call the opposing counsel to discern why there is a discovery dispute. Ask why no response was provided, or why the responses were not completed; why were documents not produced? A lot of time and money may be saved by a conversation. And, whatever the conclusion to the conversation, memorialize the conversation in writing. As soon as you receive responses to discovery requests, review them and, if needed, send correspondence to the opposing party pursuant to Uniform Superior Court Rule 6.4(B) in an effort to resolve an outstanding discovery dispute without further Court intervention. If the opposing party fails to respond to your discovery requests, send a 6.4(B) letter as well, although doing so is not required by law.¹⁰ Also, identify a deadline for definitive and timely response. (ie. “seven (7) days”; “no later than January 15, 2009”).

After the allotted time has passed in the 6.4(B) letter, file a Motion to Compel in conformity with Uniform Superior Court Rule 6.4(A), and O.C.G.A. § 9-11-37.¹¹ Attach as an exhibit the discovery requests, any responses, and the 6.4(b) correspondence, request hearing, and provide the Court with a Rule Nisi. Plead in your Motion to Compel that time is of the essence, that settlement discussions are thwarted due to the lack of discovery. Explain to the Court why the discovery is needed to further the case. As a practical tip request attorney’s fees and expenses for bringing the action. O.C.G.A. §9-11-37 provides that if the motion is granted, the Court shall, after opportunity for hearing, require the party whose conduct necessitated the motion or the attorney who advised such conduct to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees, unless the Court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

E. Pursue Other Means of Collecting Information

Address discovery disputes timely and specifically. Provide opposing counsel verbal and written notification of what the dispute is, why the information is necessary and what remedy and sanctions you will seek on behalf of your client. Provide the Court detailed reasoning as to what the dispute is, what you have done to attempt to cure the dispute, why the dispute is hindering the case, and what relief you seek from the Court.

¹⁰ See *Green v. Snellings*, 260 Ga. 400 (1991).

¹¹ Uniform Superior Court Rule 6.4(A) states: “(A) Motions to compel discovery in accordance with OCGA § 9-11-37 shall: (1) Quote verbatim or attach a copy as an exhibit of each interrogatory, request for admission, or request for production to which objection is taken; (2) Include the specific objection or response said to be insufficient; (3) Include the grounds assigned for the objection (if not apparent from the objection); and, (4) Include the reasons assigned as supporting the motion. Such objections and grounds shall be addressed to the specific interrogatory, request for admission, or request for production and may not be made generally.

The opposing party is not the only source of information, and in the event the opposing party is not responsive or is being stubbornly litigious by failing to provide responses simultaneously seek the requested information from other sources. Documents from third parties may be sought pursuant to the Civil Practice Act or the Evidentiary Code.¹² Send subpoenas to entities having knowledge of the information sought – i.e. financial institutions, daycare facilities, cell phone providers, banks, employers etc. State in the Motion to Compel that the opposing party’s failure to comply with discovery necessitated sending subpoenas and incurring additional funds, and said party should have to pay fees for same.

The Requests for Production of Documents to a party may include a Notice to Produce, pursuant to O.C.G.A. § 24-10-26, which requires, in part, production of documents at any hearing. When appearing for the Motion to Compel, the party, pursuant to the Notice to Produce, is required to have the documents with him or her.

V. TEMPORARY HEARING

A. Get a Temporary and Make It final

Since a Court may not make final adjudications of the parties’ property rights at a temporary hearing in a divorce case,¹³ exactly how does one “get a temporary and make it final”? The short answer is that you present compelling evidence at a temporary hearing on the contested issues in hopes that the hearing and the outcome will provide a reality check for both parties. Not only will the parties learn that it is unpleasant (not to mention expensive and stressful) to litigate any issue, they will also learn how the Court may be inclined to view their case.

If your case is pending in the Fulton County Superior Court Family Division, re-read the Family Court Rules before you file for temporary relief. Some of Fulton County’s local rules are in derivation of the Uniform Rules of Superior Court. The Family Division Rules require the parties to attend the 30-Day Status Conference in an effort to resolve the contested issues before a temporary hearing will be scheduled.¹⁴ Pursuant to the Uniform Rules of Superior Court, the other side must be given at least 15-days notice of the temporary hearing, unless otherwise ordered by the Court. Some metro-county Courts require that a temporary hearing be requested in the initial pleadings, so the best practice is to include the request for a *rule nisi* in the prayer for relief in the petition or answer.

The Fulton County Family Division Rules were amended in November 2007 to vary Uniform Superior Court Rule 24.2 requirements that the Domestic Relations Financial Affidavit

¹² (Request to Produce Documents to a Third Party O.C.G.A. §9-11-34(c), Deposition Duces Tecum, or Subpoena for Production of Evidence)

¹³ Henderson v. Henderson, 258 Ga. 205 (1988)

¹⁴ See Fulton County Family Division Rule 4000-3.2.1 (text set forth in full in Appendix A)

("DRFA") and the Child Support Worksheets be filed with the initial pleading. Under the Fulton county rules 4000-6.3.1, the client has 30-days from the date of filing to serve the Court and the opposing party with the Domestic Relations Financial Affidavit (DRFA) and Child Support Worksheets, if children are involved. Neither the DRFA nor the worksheets need to be filed with the clerk. They are provided to the Judge and the opposing party. Those documents, along with the responses to the Court's mandatory discovery, must be exchanged at the 30-Day Status Conference.

B. Thirty Day and Sixty Day Status Conference

The focus of the 30-day Status Conference is to determine which issues, if any, are in dispute and methods of resolving those issues. If by that time the parties are unable to agree on a temporary basis regarding the issues of financial responsibilities and support, possession of the marital home, child custody / visitation issues or possession and use of personal and real property, then a temporary hearing will be convened immediately or set for hearing soon thereafter for the Court's determination of these matters. Mediation is available and at the 30-Day Status Conference, and dates may be set for future mediation, late case evaluation and trial.

At the conclusion of this Conference, the Case Manager notifies the parties of the next hearing and/or conference date, and a Family Division Scheduling Order is filed with the Court. After the temporary hearing, the Judge or Judicial Officer decides whether to send the parties to mediation and whether the 60-Day Status Conference will regularly set or, based upon the circumstances of the case, deferred to a future date. A Family Division Scheduling Order is then filed with the Court in accordance with the Judge or Judicial Officer's ruling.

The focus of the 60-Day Status Conference is for the parties to discuss and agree upon the unresolved pertinent issues of the case. In the event the parties are unable to resolve any such issue, a temporary hearing will be convened or set for hearing soon thereafter for the Court's determination of these matters. Except upon good cause shown, an issue which was determined by the Court at a prior hearing will not be revisited at the 60-Day Status Conference.

Regardless of the county in which your case is pending, instruct your client to begin gathering the documents necessary to complete the DRFA and Child Support Worksheets.

C. Have an Appraisal Done on the Marital Residence

In addition to that information, in today's market, it is now essential to obtain a current appraisal to ascertain the fair market value of the marital residence, particularly if the contested issue is related to the temporary possession of the home and/or the mortgage payments. Appraisals done in the last six months or even in the last three months may no longer be accurate. For the same reason, do not rely on an estimate of the mortgage balance. Ask your client to obtain the actual mortgage balance from the lender. If necessary, ask your client to detail both his *current* monthly expenses and his projected *future* expenses. Make sure your client understands that assembling all of this information will be a tedious and time consuming venture, but one that will ultimately pay off as it will be relied upon by the judge in rendering her

decision. Credibility is the key to success, and careful preparation will boost your client's credibility.

The judge may take the cost of the mortgage payment into account when allocating support to the custodial parent. If there are sufficient liquid assets available to make a cash payment to reverse the negative equity situation and refinance the loan, perhaps the payment can be factored into the child support worksheets to support a deviation from the presumptive amount.

D. Complete Your Child Support Worksheets

Similarly, it is critical to have accurate and detailed information regarding the children's expenses. The Child Support Worksheet must accurately reflect those expenses if your client intends to ask the Court to deviate from the presumptive amount of child support based upon those expenses. O.C.G.A. § 19-6-15(a)(10) says that a "deviation" is "an increase or decrease from the presumptive amount of child support if the presumed amount is rebutted by evidence and the required findings of fact are made by the Court . . ." The most broadly defined deviation is that for "Extraordinary Expenses" which may include "summer camp; music or art lessons; travel; school sponsored extracurricular activities, such as band, clubs, and athletics; and other activities intended to enhance the athletic, social, or cultural development of a child."

Have your client gather statements, receipts, cancelled checks and any other document that would support an expense that enhances the development of the child. While there are numerous grounds set forth in the statute upon which to argue that a deviation is in the children's best interest, the Court will consider the requested deviations on a case-by-case basis. The Court will only deviate for expenses which have actually been incurred by the family. Your client should be made aware he or she will lose credibility if the worksheet includes a "wish list" of activities for the children. As a general rule of thumb, if you are thinking about applying imputed income in your Worksheet to the opposing party, apply the state's hourly minimum wage and multiply that by a 40 hour workweek.

E. Affidavits

Divorce litigants can benefit from the procedural rule limiting witnesses at the hearing to two per side, including the client, while allowing unlimited affidavit testimony.¹⁵ Use of affidavits evens the playing field by reducing costs associated with depositions and streamlines the temporary hearing. Therefore, rather than having the appraiser testify at the hearing as to his or her opinion regarding the fair market value of the home, prepare an affidavit with all the necessary elements to have the affidavit and opinion admissible, if the opposing party will not

15 8. U.S.C.R. 24.5(A) Witnesses in Domestic Relations Actions, which provides:

At temporary hearings the parties involved and one additional witness for each side may give oral testimony. Additional witnesses must testify by deposition or affidavit unless otherwise ordered by the Court. Any affidavit shall be served on opposing counsel at least 24 hours prior to hearing.

stipulate to that value. Similarly, if you intend to impute income to the other parent on the Child Support Worksheet, prepare an affidavit for an expert to sign that declares or indicates a reasonable amount of income to impute and the basis for that opinion.

The affidavits must be served on the opposing party at least 24 hours in advance of the hearing, and must meet all the evidentiary requirements that would be necessary if the witness were to testify in person. The most frequent mistake an attorney makes is to attempt to use an affidavit that is deemed inadmissible because it contains hearsay or lacks a proper foundation. Take time to review the rules of evidence and make sure the averments in the affidavit lay the proper foundation for whatever testimony will be introduced by affidavit.

F. Check List for the Temporary Hearing

The following is a list of helpful items you should have before you enter a hearing: (1) A completed, notarized Domestic Relations Financial Affidavit (current and prospective) served and/or filed at least 10-days in advance of hearing date; (2) A completed Child Support Worksheet served and/or filed at least 10-days in advance of hearing date; (3) Proof of Current Income; (4) Documents to support any requested deviation on Child Support Worksheets; (5) Current Appraisal of Marital Residence; (6) Current Mortgage Balances; (7) Loan documents if any debt secured by marital residence is maturing in near future; (8) Affidavits in proper form with proper foundation averred for admissibility; (9) Exact and current balances of all liquid asset accounts; (10) Preliminary Report and Recommendation of the Guardian Ad Litem; (11) Copies of any case law upon which you intend to rely; (12) Information of 401(k) plans, including ability to borrow against account balance; (13) Amount of Attorneys fees with explanation of work performed to date and work expected to be performed in future; (14) Evidence to support any attempt to impute income; (15) Evidence to defeat any attempt to impute income; (16) A prepared Client.

While preparing for a temporary hearing can be tedious, it is a critical step in a contested divorce case. It forces parties to separately examine their respective financial circumstances, and it provides an opportunity to focus on those aspects of the parties' finances which are really at issue and dispose of extraneous issues. A temporary hearing theoretically guarantees parties the opportunity to present or defend their side of the case and allows them to get a feel for how the judge will rule at the final hearing. Both the Court's decision and comments made as a result of an interlocutory hearing may temper the positions of the parties – making settlement more likely.

VI. MEDIATION

Perhaps the best option available to you as a lawyer is mediation. As previously discussed, most counties require that the parties go to mediation at some point. Explain to your client that mediation is their opportunity to vent out their frustrations, make their demands, listen to what the other side has to offer, and then try and see what viable options await them.

Make sure that your client understands the concept of mediation and the purpose of mediation. Mediation is not the forum for your client to scream at his or her spouse, nor is

mediation the proper place for your client to stay quiet. By helping your client recognize the value of mediation, you will help yourself in the long run.

Do not arrive at the mediation without the information needed to settle. Uniform Superior Court Rule 24.2 Financial Data Required: "If the parties are ordered to participate in mediation at any time prior to trial, each shall serve the affidavit upon the other at least five days prior to the mediation. Each shall furnish the mediator with a copy at the time of mediation." Additionally, do not arrive at the mediation without a compromise position. If you can't get anything in the realm of settlement from the mediation, at least it can achieve the following:

It can (a) give you a greater understanding of your opponent's position; (b) create an appropriate image of yourself and your client; and (c) knock out one last barrier to having your case heard.

Make sure that if you do reach an agreement that you commit the agreement to writing in appropriate depth to resolve the case. If you fail to resolve the case, remember to reiterate your position at mediation in a letter to opposing counsel.

If you are successful in reaching an agreement, either a full agreement or a partial one, make sure that you add a clause in your Agreement that permits the mediator to act as arbitrator on issues that are peripheral: visitation, meeting point for transfers, furniture, etc. As of January 1, 2008, the law is now clear: arbitration is authorized even in the context of child custody. O.C.G.A. §19-9-1.1 states: "In all proceedings under this article, it shall be expressly permissible for the parents of a child to agree to binding arbitration on the issue of child custody and matters relative to visitation, parenting time, and a parenting plan. The parents may select their arbiter and decide which issues will be resolved in binding arbitration. The arbiter's decisions shall be incorporated into a final decree awarding child custody unless the judge makes specific written factual findings that under the circumstances of the parents and the child the arbiter's award would not be in the best interests of the child. In its judgment, the judge may supplement the arbiter's decision on issues not covered by the binding arbitration."

In sum, the pros of using arbitration in family law cases are: (a) client heard in less formal situation; (b) need for Court approval/not stuck with it; (c) you pick the judge; (d) efficiency/time, while the cons are: (a) cost (b) need for Court approval/no finality;

VII. GOING TO TRIAL

Because your client is not looking to spend exorbitant amounts of money in trying his case, it is your duty to prepare for trial in the most efficient way possible. Discuss with your client his goals and expectations as you prepare for trial so that at the end of the day your client does not walk away disappointed.

A. Schedule a Bench Trial

If you are looking to save your client time and money, one cost-effective option is to waive the right to trial by jury. However, before you waive that right, make sure to remind your client that he does have the right to a trial by jury, but that such a right will definitely cost him more and may yield less preferable results than a bench trial.

Once your client decides he wants a bench trial, you need to discuss possible dates with the opposing counsel and the judge. When you attempt to schedule the trial and opposing counsel resists, file a Motion for Scheduling Order pursuant to Uniform Superior Court Rule 8.1 where the Court may set dates for the completion of depositions, filing motions to compel, hearing motions to compel etc. so that your opposing counsel has no excuse to avoid trial. Also, confirm your trial date in writing and send that writing to your client, your witnesses, and opposing counsel.

To avoid spending any more time than is necessary in the courtroom, try to settle as many issues with opposing counsel as possible. Your client will appreciate your efforts to resolve as many of the issues as possible before going to the judge.

Additionally, allow your client to take control of his case. Involving your client in trial preparation will serve two important objectives: first, your client will feel like he is running the show, and that he knows where the case is proceeding; second, it will reduce the cost of your legal fees.

B. Start Strong With a Good Opening Statement

When trial comes and you find yourself in the courtroom speaking to the judge, tell the Court what you want for your client. Focus on and identify the key issues for the judge and simplify those issues. While your client will want the judge to know about that rude email his spouse sent to him the week before, the judge could care less about that email. Explain to your client that the Court is only interested in the important issues.

The Court has broad discretion to control the content of the opening statement. Personally, I like to make a one-page handout which summarizes the case. On this one-page handout (which I give to the judge before I begin my opening), I outline the chronology of key events in the case, the issues I feel are important and what I would like the judge to do.

C. Use the Power of the Subpoena

A subpoena can be used to direct a witness or a custodian of records to bring evidence to a trial, a hearing or a deposition. If you feel that there is some piece of evidence you must have for your case, be sure you serve the subpoena on the correct person well in advance. Be sure the witness served has directions to the courthouse, and take the time to interview that witness ahead of time.

VIII. ENDING THE ATTORNEY-CLIENT RELATIONSHIP

Once you have taken the client to the finish line and have received the Final Judgment and Decree, be sure to prevent a potential malpractice lawsuit by sending your client a closing of the file letter. The letter both explains what still needs to be done, and it also serves as a great marketing tool as it allows you to make referrals to tax specialists, estate planners, insurance agents and others. Most importantly, you and your client know what must be done, and by whom, to properly conclude your representation of the client. In said letter, include the following:

- Thank your client for choosing you to represent them.
- Advise your client to procure a current Last Will and Testament. Generally speaking, a will is automatically revoked upon divorce, unless it was specifically made in contemplation of that divorce. Therefore, your client will need to procure a new Last Will and Testament. You should refer them to at least two estate planners.
- Refer your client to a Certified Public Accountant to assist them in future tax issues, and with the tax implications of the Settlement Agreement.
- Advise your client of the possible need to file IRS Form 8822. It notifies the IRS of where to send correspondence or notices to the client.
- Advise your client to notify all insurance companies, including, but not limited to, health, life, disability, automobile, property and homeowners and notify them of the divorce. It is possible that an insurance company could consider the divorce a change in condition sufficient to deny them coverage. If appropriate, recommend at least two insurance agents.
- Tell your client to change the beneficiary of certain assets such as an IRA, retirement accounts and life insurance policies, as a divorce does not automatically do so.
- If your client is the recipient of certain funds from their spouse's retirement account and a QDRO is required, follow-up on preparing the QDRO, have it submitted to the judge for signature, and have it approved by the plan administrator. It is also important to confirm that the funds have actually been transferred.
- Tell your client to diary the critical dates in the agreement such as when they will be paying or receiving child support, alimony and/or lump sum payments.
- Confirm with your client that you have no original documents belonging to him.
- Inform your client of all issues relating to medical insurance and COBRA, and the need to timely act to ensure they are properly and adequately covered.
- Discuss the transfer of both real and personal property and whether a deed or title transfer form must be signed; who is responsible for preparing and filing those forms.
- Inform your client to close and/or cancel all credit cards, and to notify the financial institutions of the divorce and your client's non-responsibility for any future issues.
- Tell your client to provide the Settlement Agreement to their children's school, so that the school is adequately informed of custody issues.

- Inform your client of remedies for non-payment of child support, alimony and property division payments or for non-compliance with the Final Order.
- Tell your client to keep accurate records of all payments made and/or received.
- If any fees are outstanding discuss a payment method or plan.
- Inform your client of issues relating to Social Security benefits and their automatic entitlement if they were married for more than ten years.
- Identify the actions that your firm will be taking to assist them in closing the file.
- Specifically list each task your client must do him or herself.
- Inform your client of all aspects of modification statutes.
- Discuss tax issues relating to attorney's fees.
- Send the Final Judgment and Decree of Divorce together with the Settlement Agreement.
- Schedule a closing of the file meeting with your client.
- Send a thank-you letter to witnesses, experts, and the referral source.