

SEMINAR OUTLINE

"The Divorce Process"

By Charles F. Vuotto, Esq.

I. CLIENT/ATTORNEY PARTNERSHIP

A. Preparation for Initial Meeting With Attorney:

□ Place Emotions in Perspective

1. The client should be reassured that feelings of insecurity, anger, guilt and anxiety about the future are common but are not taken into consideration by the court.

2. If the client wishes to discuss these feelings, or is ambivalent or concerned about possible reconciliation, future vocational plans, finances or emotional adjustment of children, the attorney should give the client a list of marriage counsellors or other mental health professionals.

□ Make a List of Goals in Order of Priority

1. Children
2. Support
3. Alimony
4. Property

□ Prepare a Detailed Marital History

1. Providing this information will permit the attorney to commence his work quickly.

2. Provide the specifics concerning the date that you met your spouse, courted, and became engaged.

3. Provide the specifics of the marriage (date, place, civil or religious ceremony).

4. Provide a narrative of the major events during the course of the marriage.

5. Provide a specific delineation of the events leading to the breakdown of the marriage.

6. The client should provide information concerning any emotional or physical problems of the children and their educational and custodial status. If custody is an issue, the client should be questioned as to whether

the children have a preference. The ages of the children will have a bearing on the weight given by the court to the preference of the children.

7. Provide the full names and addresses of all witnesses to any key events delineated within your marital history and a summary of what each witness personally saw.

8. Discuss with the attorney the facts you think are most important.

9. Retain a copy of what you provide to your attorney.

Gather Information and Documents

1. The client should collect all records available including but not limited to:

- (a) Personal and business tax returns for the last 5 years.
- (b) Monthly statements for all checking and savings accounts along with canceled checks and deposit slips.
- (c) Any and all personal financial statements or loan or mortgage applications made by either party within the last 5 years.
- (d) Copies of wills.
- (e) Copies of investment statements for the last 5 years.
- (f) Copies of most recent retirement benefits statements.
- (g) Copies of any real estate, jewelry or other appraisals.
- (h) Copies of the deed to the marital home or any other residences.
- (i) The outstanding balances of any mortgages or other debts

owed.

(j) Copies of any credit card statements for the last 5 years on any credit cards maintained by either party.

(k) Copy of marriage certificate.

2. Provide your full name and your spouse's full name exactly as they appear on the marriage certificate.

Provide your complete address as well as the complete address of your spouse including telephone numbers.

3. Provide a physical description of your spouse for service of process.

4. Provide the full names and birth dates of all children.

5. Provide a list of all assets, how said assets are owned, held or titled, the date of purchase or acquisition, the purchase or acquisition cost, current liens or encumbrances against said assets and whether or not all or any part of said assets were acquired by gift or inheritance by one's spouse or acquired prior to the marriage or with pre-marital funds.

6. Current income information including each spouse's last 3 paystubs and an explanation of any deductions from the pay.

7. Inform your attorney if either you or your spouse have or are involved in any other legal proceedings. If so, when? where? who instituted the proceedings? what were the charges? what decision was reached?

B. What attorney should accomplish at meeting:

□ Develop a Rapport with the client

1. The client should have a comfort level in confiding in his or her attorney.

2. The attorney should be sensitive to the client's particular peculiarities and sensitivities and not act condescending toward him or her.

3. The client should recognize that although the attorney should be empathetic, his role is primarily an objective one and to aid the client in the resolution of the legal issues.

4. The client should recognize that the attorney's service will not necessarily result in a total solution to all of his or her problems.

5. The lawyer should not intimidate the client.

6. The lawyer should not be overly charming.

7. The lawyer should not be pugnacious -- make unrealistic promises, boast or threaten to "get the bastard".

8. Although the lawyer should listen and be empathetic to the client, he should not pretend to be a psychologically trained counsellor.

□ Not Push the Client into Divorce

1. If the client is unsure about his or her feelings, the attorney should encourage the client to spend time thinking through the problems.

2. The lawyer should encourage the client to consider improving the marriage through the use of trained counselling or mental health professionals.

□ Provide Basic Outline of Divorce Law and Procedure

1. The attorney should explain the basic concepts of custody, support, alimony and equitable distribution.

2. The attorney should provide a basic roadmap of the procedural course which lays ahead to the matrimonial litigant.

3. The attorney should explain his function in the course of the divorce litigation.

4. The attorney should explain that it is most important for the client to understand that the law is concerned with the economic realities of contemporary life, not with a model of domestic relations that no longer exists.¹

¹ Lepis v. Lepis, 83 N.J. 139, 156 (1980).

□ Advise as to Communicating with Spouse

1. Your attorney should encourage you to be civil to the other spouse and to keep open the channels of communication. In the long run, this will benefit both of you, the lawyers, and most importantly, the children.
2. However, if you have not already done so, do not discuss your intention to obtain a divorce, see an attorney or take any other action if you feel that your spouse will take some adverse action in response to this information. Such adverse information could span the gambit of fraudulently conveying assets to physical abuse.

□ Advise as to Recordings/Diaries

1. In some cases, it may be advisable to make tape or video recordings of conversations or of other important considerations, i.e. personality within the marital residence, in order to show lifestyle. However, such recordings must be made in conformity with state and federal wiretap laws.
2. It may be advisable for your to keep a diary of future relevant events. Usually, such documents are work-product within the attorney/client privilege (which will be discussed below).

□ Explain Attorney/Client Privilege

1. The purpose of the privilege is to preserve the sanctity of confidentiality of a client's disclosures to his attorney and to promote an open atmosphere of trust. The rule recognizes that sound legal advice or advocacy serves public ends and rests on the need to encourage full and frank communication between attorneys and their clients.²
2. Except with certain exceptions, communications between the lawyer and his client in the course of the attorney/client relationship and in professional confidence, are privileged, and the client has a privilege
 - (a) to refuse to disclose any such communication, and
 - (b) to prevent his lawyer from disclosing it, and
 - (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness
 - (i) in the course of its transmittal between the client and the lawyer, or
 - (ii) in a manner not reasonably to be anticipated, or
 - (iii) as a result of a breach of the lawyer/client relationship, or

² Reardon v. Marlayne, 83 N.J. 460 (1980) and United Jersey Bank v. Wolosoff, 196 N.J. Super 553, 561 (App. Div. 1984) quoting Upjohn Company v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Et. 2d 584, 591 (1982).

(iv) in the course of a recognized confidence where privileged communication between the client and such witness.³

3. The privilege will not extend in certain circumstances:

(a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or fraud, or

(b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or

(c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer.

4. A communication made in the course of a relationship between a lawyer and a client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.⁴

5. The attorney/client relationship is not necessarily dependent upon the payment of money or the execution of a formal retainer agreement, but may be assumed from conduct, such as where the lawyer indicates that he will "handle" the case.⁵

6. However, deception and deceit in any form is sufficient to pierce the privilege. Merely because a statement was made from a client to his attorney does not necessarily qualify the statement as privileged. To be privileged it must have been made in the course of the relationship expressly made confidential or those which could reasonably be assumed to be made confidential. Therefore, a statement made by a client to his attorney for the purpose of communication to others is not privileged.⁶

7. Communications between an attorney and client through necessary intermediaries and agents are covered under the privilege.⁷

□ Illicit Client's Goals

1. Convey your list of prioritized goals to attorney.

C. What client should do at meeting:

3 N.J.R.E. 504, N.J.S.A. 2A:84A-20.

4 State v. CIBA-GEIGY Corp., 247 N.J. Super 314, 322 (App. Div. 1991) Appeal granted, 126 N.J. 338 (1991).

5 Procanik v. Cillo, 206 N.J. Super 270, 281 (Law Div. 1985).

6 State v. Schubert, 235 N.J. Super 212, 219-224 (App. Div. 1989).

7 State v. Davis, 116 N.J. 341, 361 (1989).

□ Make Notes

1. Your attorney will provide you with important information and usually a list of tasks to perform, documents to obtain and information to provide. It is necessary that you record these instructions with specificity so that there are no delays in getting this information to your attorney.

2. Your attorney should also record this information so that if you do not, efforts are not duplicated unnecessarily in the future.

II. PLEADINGS

A. COMPLAINT FOR DIVORCE

□ Causes of Action

□ Fault Grounds

1. **Adultery.**⁸

2. **Desertion:** Willful and continued desertion for the term of 12 or more months, which may be established by satisfactory proof that the parties have ceased to cohabit as man and wife.⁹

3. **Extreme cruelty.** This is defined as including any physical or mental cruelty which endangers the safety or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant; provided that no complaint for divorce shall be filed until after 3 months from the date of the last act of cruelty complained of in the complaint, but this provision shall not be held to apply to any counterclaim.¹⁰

4. **Addiction:** Voluntarily induced addiction or habituation of any narcotic drug as defined in the New Jersey Controlled Dangerous Substances Act (N.J.S.A. 24:21-1 to 24:21-45) or habitual drunkenness for a period of 12 or more consecutive months subsequent to marriage and next preceding the filing of the complaint.¹¹

8 N.J.S.A. 2A:34-2(a).

9 N.J.S.A. 2A:34-2(b).

10 N.J.S.A. 2A:34-2(c).

11 N.J.S.A. 2A:34-2(e).

5. **Institutionalization:** for mental illness for a period of 24 or more consecutive months subsequent to marriage and next preceding the filing of the complaint.¹²

6. **Imprisonment:** of the defendant for 18 or more consecutive months after marriage, provided that where the action is not commenced until after the defendant's release, the parties have not resumed cohabitation following such imprisonment.¹³

7. **Deviant sexual conduct:** voluntarily performed by the defendant without the consent of the plaintiff.¹⁴

□No Fault Grounds

1. **18 months separation,** provided that the husband and wife have lived separate and apart in different habitations for a period of at least 18 or more consecutive months and there is no reasonable prospect of reconciliation. Further provided that after the 18 month period there shall be a presumption that there is no reasonable prospect of reconciliation.¹⁵

Other Causes of Action

Assault

Battery

Negligence

Intentional Infliction of Emotional Distress

Negligent Infliction of Emotional Distress

Battered Woman's Syndrome

Fraud/Deceit/Misrepresentations

Fraudulent Conveyance

Spoilation of Evidence

Transmutation

Constructive Trust

Quantum Meruit

Contract

□Whether and When to File the Complaint

¹² N.J.S.A. 2A:34-2(f).

¹³ N.J.S.A. 2A:34-2(g).

¹⁴ N.J.S.A. 2A:34-2(h).

¹⁵ N.J.S.A. 2A:34-2(d).

1. Social Security Benefits

It if can be helped, a judgment of divorce should not be obtained before the 10 year period has transpired in order for the client to be eligible for Social Security benefits based on the other spouse's work record.

2. Strategic Advantage at Time of Trial

3. Cut-off For Equitable Distribution

□Jurisdiction & Venue

□Jurisdiction

□Venue

1. The New Jersey Superior Court has jurisdiction of all causes of divorce when either party is a bona fide resident of New Jersey.

2. However, a New Jersey court can only adjudicate financial issues upon a party who is subject to personal jurisdiction of the court such as where he is a resident of the state or has tangible or intangible real or personal property within the state.

3. For purpose of divorce, either absolute or from bed and board, jurisdiction may be acquired by personal service of process upon a defendant within or outside New Jersey, or if same cannot be obtained, jurisdiction may be acquired by publication, to be followed, where practicable, by notice to the defendant or by additional substituted service upon the defendant.¹⁶

4. The requirements of jurisdiction are as follows:

(a) When, at the time the cause of action arose, either party was a bona fide resident of New Jersey, and had continued so to be down to the time of the commencement of the suit, except that no suit for absolute divorce shall be commenced for any cause other than adultery, unless one of the parties has been for one year next preceding commencement of the suit a bona fide resident of the state; or

(b) When, since the cause of action arose, either party has become, and for at least one year next preceding the commencement of suit has continued to be, a bona fide resident of the state.

B. RESPONSIVE PLEADINGS

□Answer/Counterclaim

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R. 5:4-1 3.

1. An answer should be filed when the defendant desires to contest the divorce as well as collateral issues pursuant to R. 4:5-3. It requests that the complaint be dismissed, which, in the case of a complaint for divorce, indicates to the court that the defendant still wishes to be married.¹⁷ The defendant should categorically deny the charges in the complaint that are false, explain them, and give a "proper" interpretation, or admit them. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an allegation, he or she shall so state, which statement shall have the effect of a denial. A general denial as to all allegations is not permitted. See R. 4:5-3.

2. In addition to contesting the elements of the complaint, the party filing an answer may desire affirmative relief. R. 5:4-2(d) permits a counterclaim to state any matrimonial cause of action or causes of action which exist at the time of the service of the counterclaim.

□ Appearance

1. R. 5:4-3(a) provides that a defendant may enter a written appearance and, without filing an answer, be heard on the issues of custody, visitation, alimony, maintenance, division of property, counsel fees and costs, and other issues incident to the proceedings.¹⁸ Any issues raised in the original responding pleading other than those mentioned above presumably would require an answer in order to contest them. The rule also provides that the filing of the appearance should be governed by R. 4:4-6, and the latter provides that such filing negates defective service.

□ Default

1. When a properly served defendant has failed to file a responsive pleading, the Clerk will enter a default on the docket as to such party. The request is formally made by a written request to the Clerk of the Superior Court for entry of default. The request for default and the supporting certification should be filed within 6 months of the actual default. After that time, default can only be entered on application to the court by Notice of Motion, which must be served on the adversary party at least 5 days prior to the return date.

III. DISCOVERY

¹⁷ Fehnel v. Fehnel, 186 N.J. Super 209, 211 (App. Div. 1982).

¹⁸ Scalingi v. Scalingi, 65 N.J. 180, 182 (1974).

□ Interrogatories

□ Document Demands

□ Depositions

1. Discovery is the process by which the parties, prior to trial, "discover" the truth and validity of allegations set forth in the pleadings, and the facts that the parties need for use at trial. The discovery rule is designed to further the public policies of expeditious handling of cases, avoiding stale evidence, and litigation and providing uniformity, predictability and security in the conduct of litigation.¹⁹ The discovery rules were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel.²⁰ If the discovery rules are to be effective, courts must be prepared to impose appropriate sanctions for violations of the rules.

2. The methods of discovery usually include interrogatories, requests for admissions, depositions, production of documents or things, inspection of property, and physical or mental examinations. R. 4:10-1. Accordingly, discovery is the backbone of matrimonial actions -- for without it, a client cannot determine whether to accept a proposal for settlement on an informed basis, nor can an attorney proceed to trial in a full state of preparedness.

¹⁹ Zaccardi v. Becker, 88 N.J. 245, 252 (1982).

²⁰ Oliviero v. Porter Hayden Co., 241 N.J. Super 381, 387 (App. Div. 1990).

3. All proceedings of discovery must be completed within 150 days of the date of the service of the original complaint, unless on motion and notice, and for good cause shown, an order is entered before the expiration of said period, enlarging the time for such proceedings to a date specified in the order. R. 4:24-1. However, in view of congested trial calendars in which contested cases do not come to trial until well after the expiration of this time, discovery, in practice, is usually conducted right up until the actual trial,²¹ especially where evaluations as to the trial date may be needed.

IV. MOTION PRACTICE

1. Pretrial motions are useful in obtaining discovery and other forms of pendente lite relief such as:

□ Available Relief

- restraints on dissipation of assets**
- temporary alimony**
- temporary child support**
- temporary custody**
- visitation provisions**
- maintenance of various forms of insurance**
- payment of carrying costs for marital home or other properties**
- appointment of experts**
- counsel and expert fees both on the motion and pendente lite**

□ Orders

²¹

Torraco v. Torraco, 236 N.J. Super 500, 501 (Chancery Div. 1989).

V. SETTLEMENT NEGOTIATIONS

Wish List

Draft of Property Settlement Agreement

Settlement Conferences (2-ways and 4-ways)

VI. ESP

VII. TRIAL