

# "HOW TO HELP US HELP YOU: THE LAWYER/CLIENT PRESENTATION TEAM"<sup>©</sup>

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This monograph is intended to provide you with information about the Family Part litigation process in which you are participating or about to participate. Although we hope to resolve your matter without a full blown trial, nevertheless, we must prepare the case so that we can present evidence in the proper fashion in the event your spouse refuses to settle the case in a fashion we and you deem reasonable in view of the circumstances. The purpose of this monograph is to provide you with a general understanding of how we work and what the law requires, so that we can work together effectively as a client/lawyer team to advocate and present your concerns.

## Communication

The basis of our relationship, like any relationship, is effective and accurate communication between us. We depend upon you -- in the first instance before the case or discovery starts -- to provide us with information and facts about your marriage, finances, children and any other information you wish us to convey.

Obviously, without your specific assistance in telling us details, we have no knowledge of, or insight into, your life. In the first instance, we can learn things about you and your family and your finances only from you because you are the one that has been involved over the years and from day to day.

Therefore, it is important for you as your case proceeds to memorialize in writing or email specific facts, circumstances or questions that are important to you. That way there is no confusion between us as to issues or questions that you have.

Obviously, there will be times when emergencies require immediate responses and you should not hesitate ever to call us. Writing or emailing, however, serves the function of making sure that you have covered all bases because when you sit down to write or to email you probably will reflect and identify all issues that may be of concern to you at that moment. Written correspondence also assures us that we know precisely what you are thinking, avoids the possibility of miscommunication between us and gives us and you a record of the factors and issues you wish to call to our attention.

When telephone communication is involved, it is important to be specifically precise with any message you leave as to any specific problem you wish us to address. If I am in Court, a deposition, or a meeting when you call, and unable to speak to you, the more precise the message left with the secretary, the easier it is for me to respond quickly and efficiently. Do not hesitate

to ask a secretary to read back to you your message so that you can be certain that she has heard it and recorded it properly.

In my experience, many things clients know, which they may not deem pertinent, in fact, are very pertinent. If you have even the slightest thought or question about a particular event in your marriage, or with respect to your children or financial circumstances, you should not censor that thought or question, but rather share it with us. Invariably, that thought or question when communicated to us, leads us to ask questions in return that serve as a spring board to us for the acquisition of additional information. In short, do not censor your thoughts or feelings and communicate them to us so that we can assist in briefing you with information that we need to represent you effectively.

### The Process

A case -- litigation -- usually formally starts when a Complaint for Divorce has been filed<sup>1</sup> and receives a docket number. Litigation can be concluded by settlement or trial. We know that any sensible litigant hopes to resolve a dispute in a way that they and their professional believe to be fair and appropriate through voluntary control over the action -- settlement -- rather than having a lengthy, expensive trial at the conclusion of which a decision is made by a stranger, a judge.

However, it is our experience that in order to obtain the best possible settlement, you must prepare yourself for the trial that will occur if the settlement does not happen. This way you are able to negotiate from a position of preparation and strength so that if the other side is not willing to be fair, you are in a position to present your case thoroughly to a trier of fact, a judge. That is why it is important to conduct discovery, review documents and carefully discuss with us any and all facts that you possess that may be pertinent to the case. This does not mean that negotiations cannot precede the filing of a Complaint for Divorce. Depending upon the emotional makeup of the parties and strategic consideration, that may be a more practical course to follow. But every case is different and must be judged individually.

### Evidence

Evidence is what is presented to a judge and upon which the judge bases a decision. Although we hope the case will be resolved, until it is, we must prepare as if it will be tried before a judge. Therefore, we must always be in the process of marshalling evidence. Testimony, if competently based, is evidence. Documents too are evidence. Obviously, when it is a question of one person's word against another's, documents or other witnesses that tend to corroborate a story or issue will increase the chances of that story and perspective being accepted by the Court.

However, courts operate using certain evidence rules that are employed to evaluate

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<sup>1</sup> Family law is usually controlled by state law and each state has different procedures and processes. Your lawyer will be familiar with the procedures and practices in your jurisdiction .

whether evidence can be introduced and whether it is competent. For example, if you believe that your husband or wife has a bank account in Switzerland, it is important for us to know the basis for that belief. If you know it because you saw account documents, or your husband or wife told you they had done so, then it is important for us to know that. It is also important for us to know whether your belief is based upon some third party telling you or your having read in a magazine article that safe deposit boxes and accounts in Switzerland are a good way to hide cash.

Please do not be insulted or offended if I, my partners, or our associates ask you hard or skeptical follow up questions when you tell us bits and pieces of information. We will at all times be trying to ascertain the source of the information so that we can make some evaluation as to whether the information as presented to us based upon its source is sufficient proof or whether additional work must be done to obtain the information so that it can be presented in proper evidential form. We will be asking these questions to assist you and to help your case and to avoid embarrassment as the case proceeds.

I once represented a man whose wife filed countless affidavits claiming that he had hidden cash and assets and that his tax returns did not truly reflect his earnings. When it came time to examine her at a deposition and during trial, we learned that her assertions were not based on competent evidence, but rather conjecture, speculation or improper hearsay from third parties who knew very little about her husband or his dealings. In other words, during the pendente lite phase of the case she had made statements in motions about which she had not been cross-examined by her own attorney. When we had an opportunity to question her in a deposition about those statements, her credibility was impeached because it became clear that the statements she made were not based on competent evidence. We do not want this to happen to you; that is why we will press you for details and the basis of your opinions and conclusions.

Obviously, we are interested in any documents or pieces of papers that are relevant to issues in the case. Do not ever hesitate to obtain documents and to provide them to us for our review. Talk to us before attempting to access your spouse's computer as there are legal parameters that must be evaluated as to whether there is or is not a reasonable expectation of privacy. Generally, if you have in the past been given or used your spouse's password, there is not a reasonable expectation of privacy, but every situation is different so inquire specifically. A relevant document or email may be unimpeachable testimony: it may be the proverbial lynch pin or "smoking gun" in the case. The old adage that "a picture is worth a thousand words," is particularly pertinent to litigation. Do not hesitate to search for and canvass "crevices" for documents or to present them to us for review. In addition, if you contemplate that custody or children time sharing is going to be an issue, then it would be important for you to secure at the beginning of the case family photographs, videos or other documents demonstrating the interaction between family members and the children.

## Case Stages

Cases in the litigation system, be they civil, matrimonial or probate, all go through various stages and have peaks and valleys as the case progresses through the system. At times there will be intense activity; at other times things on the surface will appear inactive, although much work will be going on behind the scenes with respect to financial investigations, or psychological and other mental health investigations if there is a child custody or time sharing dispute. Described below are typical stages of matrimonial proceedings:

### 1. Pendente Lite Support

At the beginning of the case, it is important, whether you are a payor (one who pays money) or a payee (one who receives money), to set and fix in some fashion support being paid for children or spouse. Sometimes that is done by inaction, because one party or the other is receiving a sum sufficient to maintain a life style or accepting a sum insufficient to maintain a life style without protest. In such cases, depending upon whom we represent, we may not wish to initiate a formal agreement or make a formal court application if things are acceptable to our client. If you are getting or giving what you want without a formal Court application, then there is no need to "rock the boat" and, in fact, rocking the boat may cause change of a status quo for the worse or create unfavorable tax consequences. However, each case is factually different and there must be discussions between lawyer and client before a decision is made about how to proceed.

If the status quo is unacceptable to a party, then a pendente lite support application usually is filed to obtain and fix an appropriate support amount. It is important to evaluate, at the beginning of representation, the support being paid and its sufficiency or insufficiency, or if we represent the payor, whether it is excessive. If too much is being paid, or too little received, then it is important to take steps to change the payment practice. If this is not done and additional money is required to live, and you wait until final hearing to request it, then the obvious response will be that the request for additional money is not credible because for many months the amount voluntarily provided was not protested. On the other hand, paying too much money enables the argument that the sum paid can be afforded indefinitely because it was paid voluntarily for so long.

Obviously, this is one of the most critical periods of the case. If you are the supported spouse, during this time the martial life style previously enjoyed must be continued as closely as possible if you are not to be worn down and give up because of the frustrations of not having sufficient money to do the things that had become a normal part of your life. On the other hand, if you are the supporting spouse, you should not be paying a sum in excess of that which a court may adjudicate. You need to live too, and the more you pay voluntarily the more a court will conclude you can pay. The facts of each case are different, and must be carefully reviewed with counsel before action is taken.

#### a. Life Style Proof

When a substantial life style was created and lived through "unreported" cash or business perqs., and the tax return does not accurately reflect the level of cash flow, then you have a life style proof problem. At the beginning of the case, experts may have not yet been able to conduct reviews. Something concrete must be latched onto to persuade the Court to accept as credible your version of the facts. This is very difficult to do without objective documentary proof. You probably have ample proof of your life style through the scores of pictures taken during the marriage. Pictures of a house on rolling hills with lakes, swimming pool or tennis courts probably will support the inference of income greater than the \$150,000.00 per year reported on tax returns; pictures of affluent cars in the driveway and luxurious family vacation settings demonstrate the same thing. Also, documents that are submitted in support of loan applications to banks usually have very positive assertions concerning financial circumstances. That is why we ask you to seek out documents and pictures at the very beginning of the case.

## 2. Other Motion Practice and Discovery

During the early stages of the case lawyers sometimes have disputes about documents that are to be turned over in connection with financial investigations. When those disputes cannot be resolved, we will bring an application before the Court setting forth information we will require and the reasons why we require it. After both sides have had an opportunity to present their positions, the Court will make a decision, sometimes with oral argument, and sometimes without it. Sometimes, once the case has started formally, it may be more efficient and economical to simply subpoena required documents from financial institutions. These strategic decisions must be discussed with counsel.

Occasionally, there are issues of law that lawyers try to have a Court determine during the pendente lite phase of the case. If there were no disputed issues of fact with respect to the eligibility of an asset for distribution, it might be appropriate to make an application for the Court to make a determination of law about eligibility during the beginning of the case that is called motion *in limine*. There are times when it may be necessary to add other defendants based upon investigations that occur. For example, if one of the party's has been plotting a divorce and conveyed property to a third party, it may be necessary to add the third party as a defendant to obtain complete relief with respect to the property. There are a myriad of circumstances where a motion may be appropriate and we discuss these issues as they arise with the client before making a mutual decision as to how to proceed.

## 3. Case Information Statements (CIS) and Interrogatory Answers

Case Information Statements are court required forms that the Court Rules require to be filled out and filed within a certain time period following the commencement of the litigation. The form will look confusing and complicated to you when you review it. You should not be intimidated by it because it is a tool that enables you and us to organize and focus on the issues in your case and make sure that we are exchanging information vital to your representation. The form is intended to provide the Court with pertinent personal and financial information and to alert the Court to specific or special issues in the case. It frequently is amended during the course

of the case as discovery unfolds and additional facts are revealed.

We believe that the proper completion of this form is critical to effective presentation of your case. The form is filled out and signed by you under oath and the penalties of perjury. Therefore, if there is knowingly erroneous material in the form, it can be used to impeach your credibility at trial. The form looks complicated and certain aspects of it are, particularly those sections that ask you to identify specific sums of money you pay for different things on a monthly basis.

No one keeps track of these expenditures during a normal, non-divorcing life, in the way necessary to accurately fill out this form. We will assist you in refreshing your recollection and arriving at the number you actually spent for different categories. We do not simply turn these forms into the Court after you have filled them out. We review them carefully and interview you and question you about the numbers and the basis that you used to arrive at the numbers. Remember, for every conclusion or opinion you have that you wish us to act upon, it is important for you to tell us why and the basis for that opinion. That is the best way we have of preparing what you say and of having your certification as to truthfulness withstand the scrutiny of our adversary's cross-examination.

Case Information Statements are routinely amended throughout the process. At the beginning, there is simply sometimes not sufficient information to fill them out with complete certainty and therefore riders and schedules are added making clear what the information provided is based upon and that it may be limited and subject to further investigation. That way we avoid having you impeached with respect to credibility when we make clear at the beginning that we are not yet sure and why we are not sure.

Interrogatories are a form of discovery. Questions are sent by one lawyer to the other lawyer for his client to answer under oath. This is the way the lawyer begins investigation of financial issues or personal issues in a custody case. When we receive answers from the adversary prepared by the other party, we forward them to you for your review and your comments which will help us isolate problem areas or facilitate additional investigation. Before your answers to Interrogatories are returned to the other side, certified by you, we review them, and if we have questions about what you have provided to us, we discuss them with you. Your Interrogatory Answers will not go out to the other side without substantial discussion between you and us to make sure that you have understood the question and that you have appropriately responded to it.

In litigation, a lawyer's job is not to accept the other party's word for something unless you reasonably agree that your spouse is accurately setting forth facts or there is independent confirmation of them. Consequently, if there is some question about whether money has been taken out of various bank accounts at different times, and no confirmation is provided by the adversary, we have the ability as officers of the Court to subpoena records from banks and other institutions so long as they are authorized to do business in New Jersey or located in New Jersey. Of course, there is an expense to all of these procedures but it is a tool that is available to us to

investigate financial and personal information. Since Interrogatories must be answered within certain time periods, it is important that you try to provide the information we request within the time frame about which we advise you.

#### 4. Depositions

Depositions are questions asked by an attorney of the adverse party or witness, in a lawyer's office, with a certified court reporter present taking down the testimony. Like Interrogatory Answers, deposition testimony is given under oath and is sworn to under the penalties of perjury. The purpose of depositions is to find out as much as you can from the other party or witness about what he or she knows, or if it is an expert, how the expert did his work and what he or she relied upon to reach the opinion found. The purpose is to avoid surprise at trial. In addition, depositions help pin witnesses or parties down to a story so that they may be impeached by a prior inconsistent statement if their testimony is different at trial.

If there is going to be a trial, you do not want to place a witness on the witness stand, or ask a question on cross-examination of another side's witness, unless you know what the answer will be or what the substance of the knowledge of the witness will be. Only then can you truly be prepared to conduct an effective trial. Before your deposition, we meet with you and prepare you. Although you must always tell the truth, there is a way to answer questions so that your answer is responsive but not otherwise inappropriate. Depositions also are part of discovery.

#### 5. Expert Witnesses

Expert witnesses usually are employed with respect to financial issues, including valuation of assets, ascertainment of income streams and available cash, and regarding issues pertaining to custody and visitation. We recommend experts to you when we believe it is warranted in connection with the issues in your case. However, in most instances, the costs of these experts will be borne by you. If you are the non-employed or less financially advantaged spouse, courts may award experts fees (or legal fees) to be paid to you by your spouse, or order the fees paid out of marital assets during the course of the case. Assets are valued in different ways by different people and people who value real estate, or a pension plan usually do not also have the skills to value a close corporation or business. At times it may be necessary to retain experts to value the changes in asset values and to explain the reasons why assets change in values between different pertinent legal dates, such as filing of the Complaint for Divorce, the marriage, or some other pertinent legal date. It may also be necessary to retain accountants to help assess the marital lifestyle, how much was spent annually, and the categories of expenditures. We will counsel and assist you in every step of the way in making decisions about experts and their engagement when necessary.

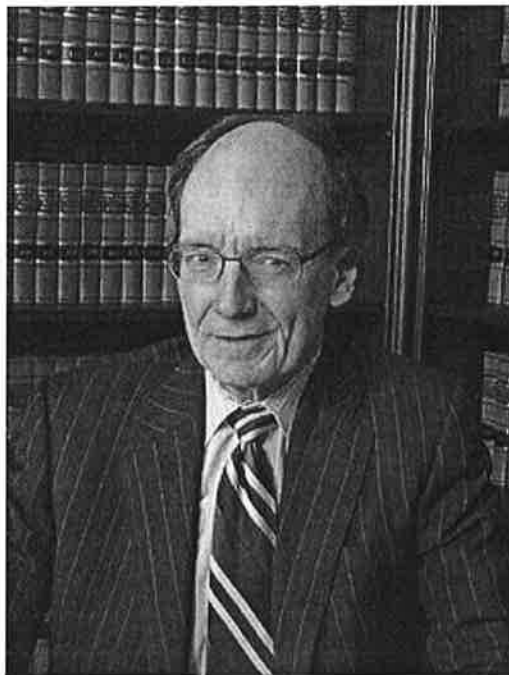
#### 6. Our Relationship

You should appreciate that our relationship is a two way street. We need to communicate

clearly with each other since a divorce or other matrimonial proceeding may not be a pleasant experience and there can be inevitable frustration, reflecting the difficult emotional times that you are going through. It is inevitable that many questions will arise in your mind as the case proceeds, both with respect to the issues in the case and probably with respect to what is being done and what should be done. For us to service you well, we must have an open channel of communication from you and to you, and we must each speak openly and candidly to each other about the case and our feelings and thoughts. We pledge always to let you know what we think and what the consequence may be of a particular course you wish to pursue, to the extent that we can make a prediction based upon the law and what you are presenting to us.

It is inevitable that there will be frustration. At some point the frustration may even occur between us. If we feel frustrated with something you are doing in the case, we will respectfully and openly discuss this with you. You are entitled to the benefit of our reactions to everything in the case. We expect the same from you. We cannot know if you are displeased or dissatisfied, if you do not tell us. We cannot know if you disagree with the strategy or tactics we employ or an issue we are pursuing if you do not tell us.

I encourage you at every step of the case to talk to us openly about your feelings concerning the case and our relationship. If there is something you do not understand or do not like, ask, so that we can discuss it together and come to a common decision.



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