

## CHAPTER FOURTEEN

### Working With an Attorney

AN OPENING QUESTION when faced with a legal problem is: “Is it necessary to hire an attorney?”

The answer--as you probably can guess--is: “It depends”

There is not a single, easy-to-apply answer for all situations. The need for an attorney varies with the situation. Many factors should be considered.

Among them:

- **How important is the issue?** For example, in a divorce, if there is a lot of money in dispute or if custody of children is genuinely at issue, an attorney’s help probably is necessary. Conversely, if the dollar amount in dispute is low and no other important matters are at issue, an attorney’s help may not be necessary.
- **How well do you understand the issue?** If you have been served with a pile of legal papers from someone who is suing you and you don’t understand what the papers mean or what you should do next, you should consult an attorney. If you do understand the legal issues and the steps you need to take, your need for an attorney may be less.
- **How emotionally involved are you and how much negotiation is necessary?** The old adage goes, “A person who represents himself has a fool for a client.” Much of the time (maybe most of the time) that is true, but

some people are good at representing themselves. A key issue in deciding to represent oneself instead of hiring a lawyer is one's level of emotional involvement and ability to take a detached view of the controversy. If a person is very angry at the opposing party (such as in a bitterly contested divorce or contested adoption), it is best to have independent legal help to present the case in an organized, professional way. If a person can keep a lid on his or her emotions and present logical arguments in negotiations, the person may be able to represent himself or herself effectively.

- **How user-friendly is the court system?** Some court systems are set up to help people handle their own legal disputes. The court may have forms with clear explanations to help people initiate legal actions or respond to a legal action. Clerks and judges might be willing to tell people step-by-step what they need to do and what their rights are. Other court systems are the opposite (or somewhere in between). Procedures may be complex and difficult for even lawyers to follow. Clerks and judges may seem to go out of their way to be nasty, and make litigants feel like they are sub-human for taking up thirty seconds the clerk's or judge's time. To get a sense of the degree to which the court system accommodates people who represent themselves, a visit to the courthouse or a call to the clerk of court with some polite questions may give an answer. You also might ask friends about their experience with the local court if the friends have had issues similar to yours.

- **How much does legal representation cost?** An important factor in deciding to represent oneself, of course, is the cost of legal representation. For some, the cost of full-scale legal representation may not seem affordable. When involved in any legal dispute, one needs to do a cost-benefit analysis and ask “Is pursuit of this case (or some issue in the case) sufficiently important to be worth the cost in money, time, and emotional energy?” If the stakes are high, full-scale representation may be worth the money and even save dollars or something else of great value later on. If the stakes are small, legal representation may not be cost-effective. One needs to calibrate the level of representation to the importance of the issue and the resources available to pursue the matter. This may mean, full-scale representation, limited purpose representation, or no representation. (Limited purpose representation will be discussed more at the end of this section).

Here are some examples of specific situations in which lawyers are or are not necessary in connection with a divorce:

A man and woman have been married for two years. No children. They both work and are capable of self-support. They decide the marriage is a mistake. Although they each have some anger at the other for the failed marriage, they are able to agree on how to divide the property they have. (Each keeps what they brought into the marriage, and they will divide approximately equally a joint money market account after they pay off their MasterCard debt).

If the man and woman's main goal is to end the marriage and go their separate ways and neither wants financial support from the other, neither the man nor the woman may need a lawyer. If the court system is user-friendly, they may be able to process their own divorce. If the court system is complicated or if they do not want to be bothered with learning how to do the paperwork, one of them may hire a lawyer to process the divorce and the other can choose to be unrepresented and consent to the terms of the divorce. If the unrepresented party becomes uneasy about what his or her rights are or about the fairness of the agreement, that party should seek legal advice.

Another example: A woman and man have been married for twenty years. They have three children, ages nine to sixteen. The husband owns his own business--a group of snack shops. The wife stayed home to take care of the children for eight years; she has worked part-time since then. The husband wants a divorce. The wife does not, but she realizes the divorce seems inevitable. They dispute many issues, including the value of the husband's business, the disposition of the home, the wife's request for alimony, and the amount of child support. In this case, both the wife and husband need representation. There are many financial issues to sort out. Expert advice probably will be necessary to determine the value of the business, division of property, and support for the wife and children. If the wife does not trust the husband's financial statements, that is all the more reason to obtain legal help. If one party is seeking a portion of a retirement or profit-sharing plan established

by the other, a lawyer's services will be necessary to draw up the appropriate papers to divide the parties' interest in the plan and avoid adverse tax consequences.

A final example: Husband and wife, both thirty-five, dispute custody of their children ages, five and seven. Both want sole custody. Both have been actively involved in raising the children. The husband and wife will need representation if the issue of custody will be contested in court. The emotional issue of custody usually is too sensitive for a mother or father to put on their own trial. Before going to court, however, the parties may wish to see if they can settle their dispute through use of a mediator. A mediator usually is a mental health professional or a lawyer who will work with the parties to attempt to reach a solution acceptable to them and in the best interest of the children. The next chapter will discuss mediation and other alternative means of dispute resolution.

When seeking legal help, or when considering whether or not to represent yourself, keep in mind it is not always necessary to hire a lawyer for full-scale representation. One can hire a lawyer for a limited purpose. For example, at the beginning of a dispute (or in the middle of a dispute), a lawyer can be hired just to give advice or review a document. You can pay the lawyer for one to three hours of consultations--explaining the facts of the case to the lawyer and seeking the lawyer's advice about your rights, additional steps you will need to take, and the likely outcome of the case. You then can tailor

your plans for handling the case based on the perspectives gained from the lawyer. The use of a lawyer for limited a limited purpose rather than full representation sometimes is referred to as **unbundling** of legal services.

Lawyers also can be hired for the purpose of negotiating a settlement without the client committing to hire the lawyer for a long, expensive trial. Even if a person already has a lawyer, he or she can consider hiring another lawyer-- not for full representation, but for a second opinion. Just as patients often want a second opinion before undertaking major medical treatment, it can be prudent to seek a second legal opinion before taking a major legal action that could impact one's life for years to come.

### **Finding a Lawyer**

Just as there are specialists in medicine, there are specialists in law. Some lawyers practice exclusively or primarily in family law. The need for a specialist will vary with the case. If there are complex issues of property or custody, it probably is best to seek a lawyer with substantial experience in family law. If a person wants to adopt a child to whom the adopting parent is not related, it also is best to work with a lawyer with significant experience in the area, particularly if the adoption involves a child from another country or if the adoption is arranged privately rather than through an agency.

If one is adopting a child that is already in the family and no one is contesting the adoption, the procedure is more routine and could probably be

handled by a non-specialist. For example, if an aunt and uncle were adopting a nephew following death of the parents or if a stepfather were adopting his stepchild without opposition from the biological father, the adoption should be quick and simple. (It might even be done by the adoptive parents themselves without need of an attorney.)

Hiring a specialist in family law does not necessarily cost more than hiring an attorney in general practice, although if one is seeking an attorney with a very high reputation in any field, the fees are likely to be higher than for other attorneys.

Seventeen states certify attorneys as specialists in areas of practice. The requirements for specialist certification vary from state, but usually require several years of experience in the area of specialty and demonstration of knowledge in the area, such as through an examination (beyond the basic bar examination necessary for lawyers in most states). Six states that certify specialist in family law or domestic relations are: Arizona, Florida, California, New Mexico, North Carolina, and Texas.

In states without official certification of specialists, lawyers often specialize; they are just not officially recognized as such by a state licensing agency.

There is a national organization that also certifies family law specialists. It is called the **American Academy of Matrimonial Lawyers**. The academy is a private organization. It has about 1,500 members. In order to become a

member of the academy, a lawyer needs to have devoted 75 percent or more of his or her practice to family law for a period of at least ten years. Written or oral examinations are required along with recommendations from judges and other lawyers. Membership in the academy does not automatically guarantee that the lawyer is good, but it does mean the lawyer has substantial experience in family law.

A person looking for a referral to a member of the American Academy of Matrimonial Lawyers can contact the academy at 150 N. Michigan Avenue, Suite 2040, Chicago, Illinois 60601; telephone: 312-263-6477; Web site <[www.aaml.org](http://www.aaml.org)> The academy also has chapters in many states.

State, county, and city bar associations also usually will make referrals to lawyers. Bar associations vary in the degree to which they screen lawyers to whom they make referrals. Some bar associations will make referrals to lawyers who declare themselves available to practice in a particular field. Other bar associations may require lawyers to submit proof that the lawyer has experience in the area. When calling a bar association's general telephone number, ask for the association's lawyer referral service.

If the person looking for a lawyer is low on funds, a possible source of help is a law school's legal clinic. Legal clinics sometimes will take family law cases at no charge or a low charge to the client. Clinics are staffed by law students working under the supervision of professors and attorneys. If the law

school clinic is not able to take the case, the clinic may be able refer the client to other low-cost legal services.

Legal Assistance Foundations (LAFs) have been established in some areas. LAFs are not-for-profit organizations that offer free or discounted legal help in civil cases, including family law cases.

Another source of referrals to lawyers working in family law can be the Yellow Pages, newspaper ads, or the Internet. As with any advertising, the phrase “Let the buyer beware” applies. Quality of lawyering is not necessarily proportional to the size or stylishness of an advertisement. If the advertisement proudly proclaims that the lawyer not only handles divorces, but also handles drunk driving cases, wills, personal injury claims, real estate, bankruptcy, and incorporation, the client most likely will be dealing with a lawyer who is a generalist rather than a specialist. The lawyer also may prefer high-volume, quickly-handled cases to complicated, time-intensive cases. As noted before, that can be fine for some cases, but not for others.

Friends and colleagues (including lawyers who work in areas other than family law) may be able to recommend a lawyer. If the friend is basing the recommendation on personal experience, try to find out more about the friend’s case and how similar the friend’s case is to yours--what was at issue? Property? Support? Custody? How complicated was the case? How diligent and approachable was the lawyer?

Within family law, lawyers also may specialize or have areas in which they are particularly good (or not so good). Some lawyers are masterful at finding hidden assets and dealing with complex financial issues, but the same lawyer may not be as talented at handling the high emotions and more subjective issues of a custody case. Some lawyers are good at both. Lawyers who handle adoptions may not handle divorces, and vice versa.

When talking with a lawyer, try to get a sense of the lawyer's experience and enjoyment of the types of issues in your case.

### **Lawyers' Fees'**

The amount of a lawyer's fee varies with the level of experience and locale of the lawyer. The more experience, expertise, and skill a lawyer has, the higher the fee (usually, but not always). Lawyers in urban areas generally charge more than lawyers in rural areas. The rates of suburban lawyers often are in between.

Most family lawyers charge on an hourly basis. Their fees will be equal to the total of the hours spent on the case times the lawyer's hourly rate.

Different lawyers within a firm may have different hourly rates. Some lawyers charge different rates for appearing in court and for working in their offices.

(The courtroom rate is higher on the theory that working in court involves extra skills and pressure. Other lawyers view their office skills and courtroom skills as equally valuable, and, thus, charge the same rate for both types of service.)

A lawyer's time that is billed to a client is not just the time the lawyer spends with the client or in court. Lawyers may spend a significant amount of time in their offices reviewing documents, conducting research, planning strategy, talking to witnesses, talking to the opposing counsel, drafting letters, and preparing papers for filing in court.

If other lawyers in the office or **paralegals** spend time on the case, their time usually will be billed too. A paralegal is a person with specialized legal training who, although not a lawyer, assists the lawyer with legal tasks. Under a lawyer's supervision, a paralegal may do many of the same things a lawyer does, but, in most states, a paralegal may not represent a client in court.

A lawyer's secretary also helps the lawyer handle cases, but the secretary's time normally is not billed separately. (In some offices, if a secretary must work overtime because a case is on an expedited schedule or is usually demanding, the secretary's time might be billed separately.)

In addition to fees for the lawyer's (and paralegal's) services, clients also usually pay **costs**. Costs are the out-of-pocket expenses that are associated with a case. Costs may include:

- **Court filing fees** (a fee paid to the court by a person who files a lawsuit or responds to one);
- **Fees to a process server** (who delivers papers to the opposing party advising the opposing party that a lawsuit is has been filed);

- **Subpoena fees** (to persons who must appear in court or deliver documents to a party);
- **Court reporter fees** (to the court employee or private service that records court proceedings or **depositions** and then prepares a written transcript of what took place; a deposition is a procedure by which an attorney prepares for a possible trial by asking questions of a party or witness under oath);
- **Fees of experts** (for example, fees to an accountant to ascertain the value of a business or fees to a psychiatrist or psychologist to conduct a custody evaluation);
- **Photocopying and telephone expenses** (particularly if the quantity of photocopying is large or if there are long distance phone calls or faxes);
- **Travel expenses** (if the attorney must travel out-of-town in connection with the case).

Although most attorneys charge hourly rates, some will charge a fixed fee for handling an entire case. Attorneys who advertise that they will charge only a certain amount for a “simple divorce” (an amount often in the range of \$400 to \$1,000) usually mean that the stated amount will be the attorney’s fee if the case is *very* simple. In other words, virtually nothing is contested and the paperwork is routine. If a case becomes more complicated, higher fees will be charged. The “costs” of a case (described above) usually are in addition to fees.

If a lawyer is not willing to enter into a fixed fee arrangement, it is appropriate for the client to ask the attorney about the range of possible fees and costs and the factors that will make the fees higher or lower.

Many lawyers are reluctant to commit to a fixed fee since the amount of effort necessary to handle a case can be difficult predict at the beginning of a case, particularly if it is uncertain how many issues will be in dispute and how contentious the opposing side will be. In addition, use of an hourly fee, instead of a fixed fee, can control a client and limit expenses that are not cost-effective. If a client sees that fees are mounting, the client will be less likely to telephone the attorney over every small dispute or insist that the attorney expend substantial efforts regarding a piece of property that is worth a relatively small amount.

Attorneys in family law cases typically charge a **retainer** or an **advance on fees**. This, in effect, is a downpayment on the attorneys fee's and costs. In some cases, the attorney may seek the entire fee up-front. If a case is handled for an amount less than the retainer or advance, the attorney should return the unused portion of the fee.

**Contingency fees**, like those used by attorneys who handle personal injury cases, generally are prohibited in family law cases. With a contingency fee, an attorney collects a fee only if a particular result is achieved, or, alternatively, the attorney may collect a portion of whatever monetary award is received by the client. Courts do not want to give attorneys a vested interest in a

divorce. If, for example, an attorney were to receive a portion of whatever property award a client received in a divorce and the client wanted to reconcile with his or her spouse, the attorney could be in a position of opposing what was best for the client because the attorney wanted to receive a fee.

So, contingency fees generally are prohibited in family law cases. An exception will be made in some states if the amount of money that is due a client is certain. If, for example, a client is owed a fixed amount in *past-due* child support or alimony, an attorney might be able to enter into a contingency fee to collect the past-due support since the likelihood is minimal of a conflict of interest related to the client's possible reconciliation.

If a client hires an attorney for representation beyond a consultation, most attorneys will give the client a written fee agreement stating the services that will be covered, the cost of services, and the times at which payment will be due. The client may choose to sign the agreement when it is presented, but it is quite permissible for the client to take the agreement home, read it over, and think about it before deciding whether to sign. In any case, the client should read the agreement carefully and ask the attorney any questions the client may have about the agreement.

In divorce cases, courts usually have the power to order one party to pay the other party's attorney fees. The basis for such cost-shifting is a substantial difference in the income or property that each party has. If, for example, the husband earns a great deal more than wife, the husband may be ordered to pay

all or a portion of the wife's attorney fees. If both parties have similar earning capacity or if both parties receive ample amounts of liquid assets as part of the divorce, the husband and wife are more likely to pay their own fees.

Another reason for having one party pay the other's party's legal fees is **bad faith** by the party from whom fees are sought. If one party does something he or she should not do (such as not paying child support or interfering with other party's access to the child), the party who engaged in misconduct is likely to have to pay the fees of the other party.

If one party is ordered to pay the fees of the other party, that is not a blank check for any amount of fees. The fees must be reasonable. A court can look at the facts of the case and decide what is a reasonable fee for the issue before the court.

### **Helping the Lawyer Help You**

Well-prepared clients help their cases go more smoothly. Clients can save time and money by gathering facts and carefully considering what goals they want achieve.

If property or support is contested, financial information usually must be gathered. A client can prepare inventories of the parties' assets and liabilities, itemizing the value or cost of each significant item, if known. Statements of the parties' income and expenses also are usually necessary. Useful places for the client (or attorney) to find financial information include copies of tax returns,

checking account records, and charge records. If a client does not know certain information, the client can make lists of what is known, what is not known, and where more information might be located.

If either of the parties was divorced before, the client should try to obtain copies of the earlier divorce papers, particularly the marital settlement agreement and final order of the court. If custody is at issue, the client could make lists of reasons why custody should be with the client. The reasons should be as specific as possible and include names addresses, and telephone numbers of persons who might be able to testify in support of these arguments. The client also should list what their spouse's arguments are likely to be and what evidence the spouse would have in support of his or her position.

Divorce is a time of stress, and it probably will not be easy to methodically and logically gather information. But the process can be therapeutic--by taking steps to gain more control of one's current environment and future.

Although divorce is a time of stress, it also is a time to plan for the future. Clients should develop goals for the short-term and long term, and try to figure out how the issues of property, support, and time with children will fit into those goals. By identifying which issues are most important and which issues are less crucial, clients will help themselves and their attorneys resolve the problem in an orderly way while developing a reasonable plan for the future.

Many attorneys will ask their clients to fill out detailed questionnaires regarding finances and custody issues (if applicable). The forms should be filled out promptly and returned to the attorney. It will help the attorney organize the case and determine what information and arguments need to be developed.

Some attorneys will ask their clients to write a narrative statement about the marriage and divorce. The statement might include a description of:

- (C) significant events in the marriage,
- (C) reasons for the divorce,
- (C) child-raising responsibilities,
- (C) contributions each party made to the marriage (financial, homemaking, or both),
- (C) good qualities and bad qualities about each party,
- (C) the client's short-term and long-term goals and reasons for them; and
- (C) the client's perceptions of the spouse's short-term and long terms goals and the reasons for them. A written narrative may help the attorney and client understand the issues better. And writing the narrative may be cathartic for the client.

In the heat of a contested divorce, it may be tempting to be on the telephone with the attorney daily to blow off steam and seek advice. In most cases, that will not be an effective use of the attorney's time or the client's money. Usually it is best to save up a batch of inquires and then discuss them with the attorney. If something urgent arises, such as the other party changing

the residence of the children or hiding major assets, the attorney should be notified promptly.

Clients need to understand that attorneys are not always able to take client's calls immediately. Attorneys often are busy with trials or meetings with other clients. A well-organized attorney, however, will be able to return calls within twenty-four hours or will arrange for a staff member to call the client. Often, a client can pass on an inquiry or piece of information to the attorney's secretary or paralegal, who will discuss the matter with the attorney and then call the client back.

It is important for the client to be honest with the attorney. If there are skeletons in the closet (or a few loose bones) regarding finances, extramarital relationships, or other issues, it is best to be candid with the attorney about such matters so they can be dealt with if necessary. A client usually is worse off when adverse information comes up for the first time in the middle of a trial or the middle of negotiations since the attorney may not be fully prepared to respond to the disclosures.

Family law attorneys hear many secrets of people's private lives. The attorney is not likely to be shocked or upset by the client's disclosure. Under rules of confidentiality, an attorney must keep a client's secrets. If a client reveals that he or she did something illegal in the past, the attorney must keep the secret. An attorney, however, cannot help a client pursue present or future illegal conduct. If the attorney has given information to the court or opposing

side that the attorney later learns to be false, the attorney usually is obliged to correct the information.

In a bitter divorce, it is common for clients to want their attorney to act as an avenging angel--to make life miserable for their spouse and the spouse's attorney. That is not the proper function of an attorney. An attorney's job is to give calm, reasonable advice and to pursue the case in a diligent manner. Diligence and competence does not require antagonism or treating opposing counsel or opposing parties with disrespect.

An attorney who yells and screams is usually out of control and not serving the client's interest. The system of justice works better, and cases generally turn out better, when attorneys deal with each other (and with the court) in a civil manner.

## **Sidebar**

### **Documents to Assemble**

To help your lawyer analyze your case and give better advice, it can be helpful for you to assemble documents about your marriage. The documents can include:

- (C) Tax returns (state and federal) for the last three years; perhaps earlier years as well
- (C) Records of bank accounts -- checking, saving, money market; certificates of deposits
- (C) Investment account records
- (C) Statements from pension plans or profit sharing plans
- (C) Recent pay stubs for yourself and spouse
- (C) Credit card statements and records pertaining to other bills and expenses
- (C) Deeds to home and other real estate; lease of apartment
- (C) Automobile titles
- (C) List and description of insurance policies -- health, home, life, and disability
- (C) Divorce decrees and settlement agreements from earlier marriages
- (C) Resumes or curriculum vitae
- (C) Written premarital agreement, if there was one
- (C) Other documents you think are relevant

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