

Chapter Three

HOW DO I CHOOSE A DIVORCE LAWYER FOR LITIGATION OR FOR NEGOTIATION?

Why do I even need a lawyer? Can't I just do it on my own?

Not a good idea.

Especially if the dissolution of your marriage involves spousal support, the division of retirement assets, or any asset into which premarital or “separate” money may have been invested. You need legal information, and you need an attorney to properly draft your documents. It’s just too important not to do right. The IRS could come after you. The omission or inclusion of a simple word like “modifiable” or “reservation” or “waiver” in the same sentence as the words “spousal support” will have permanent implications for you.

You are not a lawyer. You may know some of the important points to resolve, but you don’t know what you are not even aware of. It is your attorney’s job to help you address points in the minefield of legal issues which you haven’t even thought of, such as, is a capital loss tax carryover a marital asset? Frequent flyer miles? Unused earned leave? Does life insurance have a cash value? Who is entitled to the dependency exemptions for the children?

Drafting your own documents is analogous to having your mechanic do your root canal, or having your barber do your home's electrical wiring. If the job isn't done right, something really important could blow up.

What if it's only a "simple" divorce, with no children and no assets? Can't I handle that on my own?

You still should probably not do your divorce by yourself. Divorce is a creature of state law, and marriages must be resolved by a court case with a final court order. Think of it this way - can you sew? If you tear open your hand, you could probably take a needle and thread, and close the wound, but the process will be painful, and the result may not be right in the end. Sure, a surgeon can practically do the stitches in his or her sleep, and it's no big deal to him or her. That's why you pay for his or her education, training and experience. You do not have that education, training and experience.

If you do your own divorce, it may feel like you are studying for that big exam, and writing that term paper, every day for a year. The divorce court clerks can't help you with your filings, because they can not give you legal advice, and are unauthorized to practice law. The local bar association or divorce court clerk may have some forms, but if you don't know what you are doing with the language in those forms, trying to get your divorce on your own will be a long and difficult process. You will quite possibly then wind up with an erroneous if not disastrous result.

Okay, so if I need a lawyer, what do I look for, or look out for?

What sorts of lawyers are out there?

All kinds.

First of all, you want a family law specialist. The lawyer who helped you with your traffic ticket, or who prepared your Last Will and Testament,

may know much less about the ins and outs of divorce than someone who practices family law exclusively. Would you go to your eye doctor for a heart problem, or to your dermatologist for a broken bone? The law is highly specialized. It is very hard for a general practitioner to have in-depth knowledge and great expertise in every area of the law.

Are the lawyers in the large firms the best?

There are good lawyers in big firms and bad ones, just as in medium size firms, in small firms and in solo practices. Most large firms are somewhat "tiered," with the senior partners charging very high fees, senior and junior associates charging less and the paralegal who does much of the paperwork charging at an even lower hourly fee. The big name lawyer "supervising the team" may actually have very little involvement with your case. You may find that there never seems to be just one individual who knows everything about your situation, and your billing invoices may show "meetings" between attorneys in the firm chatting with each other about your case, to bring each other up to speed.

And yes, you are paying for the marble hallway, original artwork in the reception area, and for the monogrammed napkins embossed with the firm logo. You are also helping to pay for your attorney's pricey suits, European vacations and luxury cars, but you get to tell all of your friends that your divorce is being "handled" by that prominent, well-known attorney. The one with the expensive cuff links or jewelry.

What should I look for in choosing a lawyer?

Experience and Ability. You want someone who knows what he or she is doing. If you are mainly concerned with resolving custody arrangements, ask your attorney just how many custody cases he or she has litigated and won. Would you feel comfortable hiring a surgeon for a delicate operation which he or she has never before performed? If you are concerned about your interest in a marital business, or in a professional

practice, ask your attorney how many cases he or she has handled that involved business interests. You want someone who is good at what he or she is doing, who has done it before, and who knows how to get the job done.

Understanding and Compassion. You want your attorney to actually listen to you, to answer your questions, to understand what you wish to achieve and to actually care about helping you to achieve it. During the initial consultation, see if the attorney you are interviewing constantly interrupts and talks over you, or whether he or she lets you express your concerns when you converse. It may help you a great deal, and mean a lot to you, to have an attorney who will provide some encouragement and support to you, as opposed to hiring an attorney who doesn't listen to you, or who makes you feel as if he or she is only interested in timing his or her speeches to you, and then billing you for them.

Organization. You want an attorney who is accessible, who responds timely to your requests, who doesn't forget the particulars of your situation, who is organized with respect to managing his or her calendar so you are not kept waiting, and who is organized in terms of managing the documents which will seem to multiply on their own in your file. It's nice if your attorney can remember your child's name in court. And yours.

Able to Educate. If you are going to present your case in court, you will need to understand the applicable statutes, and you will need to understand the procedures applicable to your county courthouse. Your attorney should be able to communicate to you the points you will need to convey to the judge, and must be able to explain to you the manner in which you will express those points.

Not Overbooked. Some attorneys just can't say no to any fee that walks in the door, with the result that they frequently overextend themselves, and often do not prepare adequately for trial. You need for

your attorney to pay attention to what is going on in your case, to keep you up to date, to timely return your telephone calls and emails, and to prepare you for your hearings. You don't want to be just another folder in the pile, especially if you stay on the bottom of that pile until the day before court.

What should I watch out for in choosing a lawyer?

Excessive fees spent pursuing unrealistic positions. Watch out for lawyers who pump you up with unreasonable expectations, so they can charge you for a big case. Danger signs include some of the following:

If your attorney tells you that the judge should and will give you at least \$10,000 per month in spousal support, ask that attorney just how many times he or she has achieved that result in litigated court cases, with incomes and facts similar to yours, as opposed to settled cases. Ask the attorney in which counties he or she litigated those cases, and then go look them up under the lawyer's name. Divorce cases are a matter of public record, and you should try to verify your attorney's big claims.

If your attorney tells you that the judge will punish your spouse for his or her adultery or desertion by giving you 70% or more of the marital assets, ask that attorney how many times he or she has obtained that result in litigated cases in the local courts. Then go look those cases up. Did the facts of the adultery include long-term deception, a child born out of wedlock or a sexually transmitted disease? Find out exactly how your local judges usually rule on fault claims.

And even if you were to get 70% of the home equity, and 70% of the retirement, if you fully and publicly litigated your case, do a reality check. Exactly how many dollars more than if there were a 50/50 split would you ultimately end up with once you pay off your attorney? Your attorney may be more interested in his or her own compensation than in yours.

If your lawyer tells you that your spouse will have to pay all of your attorney's fees, ask that attorney exactly how much money in fees any judge has ever awarded in his or her litigated cases. Was it more than \$20,000? More than 20 percent? Actually 50 percent? And what were the total fees in the case? \$50,000? \$80,000? \$100,000? Ask the attorney in which counties he or she litigated those cases, and then try to look them up. If there were large attorneys fees awards, just how egregious were the facts in those cases? Will your case actually be as acrimonious?

Is your attorney telling you that the local judges in a contested custody case will give sole physical custody, or shared physical custody, to you, a good father, even if there is absolutely nothing wrong with the mother, such as significant untreated mental health issues, substance abuse problems or cohabitation? Ask for the counties for the cases where the attorney obtained that result through litigation, and then try to look them up.

Does it make any difference to the other lawyer, or to the judge, whether my attorney is male or female, or young or old?

No.

Does it matter whether or not I use a lawyer local to where the case will be litigated?

Absolutely.

Each county is different. Unless your attorney practices regularly in several counties, and is known by the judges in each of those counties, it is usually best to have a local attorney familiar with the local practices, familiar with the local judges, and with whom the local judges are familiar. It just is.

Do attorneys have different styles?

Yes.

Some attorneys have reputations for never settling. They will drag you painfully through every step of the process, at great cost to both you and to your spouse. They may be aggressive and flamboyant about it, or rather passive and low key. Both types are expensive.

On the other hand, some attorneys settle cases very quickly. Too quickly. Some lawyers who don't like going to court will give away too much.

Some attorneys have been lawyers for decades, and still do things the old tried and true way. They may be unwilling to communicate with you by email, and do not have voicemail. Others may routinely check their email and voicemail remotely from home at night and on weekends, and don't mind shooting you quick responses to short questions electronically.

Some attorneys, (a small minority), can be somewhat hostile, and will not work amicably towards any settlement. They will expend a lot of effort throwing gasoline onto the fire. The problem with that approach is that you, your spouse and your children are what gets burned.

If your attorney tells you not to talk to your spouse, that "everything should go through the lawyers," and that you should "leave it all up to the judge to decide," your attorney may be making your divorce more costly than it need be. You should talk to your spouse. Just don't sign anything without your attorney's input, and don't let your spouse bully you. The more you and your spouse can work out together, the less you will each have to pay your lawyers to work out. Beware of any attorney who tries to increase hostility, and who tries to keep you from talking settlement with your spouse.

Some attorneys have reputations for being very good or very competent, very reasonable and very open to settlement. They are compassionate, conscientious and know the law.

Some attorneys have reputations as aggressive and tough negotiators, who will only settle once they have fully prepared the case for litigation. Other attorneys may consider those attorneys to be unreasonable for not settling earlier, before so much money is spent on attorney's fees unnecessarily.

A few attorneys may be pretty bad. The scary thing is that you may never even realize that your case wasn't handled properly, unless you obtained a second opinion on your case. Yes, you have the right to do that at any time. You can even switch lawyers, unless it's too late.

Does having two lawyers involved to negotiate or litigate a case mean that it has to get ugly?

No.

The lawyers do not have a personal stake in your case, except perhaps a friendly competition to win on the bigger issues, for bragging rights with other lawyers about their general successes. Lawyers can conduct a fully litigated case in a professional, courteous, respectful and ethical manner, and do not have to be mean to be adversarial. If the two attorneys in a case start to feel personal animosity for each other, the case is probably in trouble.

You do not want your attorney's objectivity to be colored by some personal agenda unrelated to the merits of your case. Watch out for any attorney who seems to have a personal chip on his or her shoulder. And no, your spouse's attorney isn't motivated by a personal desire to harass you. He or she has nothing against you, and would have let you hire him or her yourself if you had tried to do so before your spouse did.

Will the lawyer be expensive?

Yes.

Ask right up front how much the divorce could cost if it were to be fully contested. Not all lawyers want to scare you away with the information that a fully litigated divorce case could be upwards of \$30,000, \$50,000, or \$80,000. Each.

Watch out for lawyers who try to hook you in for a minimum down payment divorce, but who then bill hourly. Almost all attorneys bill divorce cases hourly. Once your case becomes contested, that minimum fee vanishes, and you start getting monthly bills for \$3,000, \$5,000, \$8,000 ... with no end in sight. Yes, *monthly*.

Will your attorney just stop working on your case if you don't keep up with the invoices? Or withdraw as your counsel, leaving you to represent yourself? He or she shouldn't do the former, and may do the later.

When you interview attorneys, ask each attorney how long he or she gives a client to pay the final bill. Has he or she sued former clients to collect fees? It could be unsettling for you to realize that all of that aggressiveness you wanted to unleash upon your spouse could be unleashed upon you, if your lawyer is not paid.

You want to hear that it will only be \$2,000 to get divorced, and when you put your \$2,000 down, you are hoping you won't have to make another payment for a long time, if at all. But to complete proceedings for temporary custody and support, you could easily spend \$10,000 to \$15,000 each. A properly litigated custody case alone, with witnesses, could easily cost \$20,000 each. Know what you're getting into before you're too deeply into it.

So watch out for, and don't get hooked by statements like: "You deserve more than fifty percent of the assets because of what your spouse did to you. The judge will impute income to her, so you won't have to pay support. The judge will impute income to him, so he will have to pay you more support. Don't worry about the attorney's fees."

You should be worried. Be very worried.



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