Understanding Your Divorce

The people, the processes, the possibilities

Studies have shown that for many people, separation and divorce rank second only to the death of a loved one in terms of emotional turmoil, pain, and stress. Not only are separation and divorce accompanied by feelings of guilt, rejection, embarrassment, and anger, but the legal process triggers feelings of fear and uncertainty. Reserves of inner strength are as necessary as the financial resources required to get through it.

The first step to conquering fear of the unknown is to learn as much as possible about the process. A good lawyer can clarify the legal procedures, help in establishing your goals, and propose a positive strategy to achieve realistic results.

Below are some common questions and answers about the separation or divorce process. If after reading these explanations you have additional questions, don't hesitate to ask your lawyer.

Q. What issues are involved in a divorce?

A. The break up of a marriage often involves five issues: property division, alimony, child support, custody/visitation, and divorce. Each of these can be resoved by consent (a negotiated settlement) or contested in court. Let's take a close look at how the divorce process works.

At the outset, it is important to note that not all states handle divorce in the same way. In this state, divorce is a "package deal." All issues must be resolved by the parties (through agreement) or by the court (through trial) before the divorce is granted. "My wife/husband won't give me a divorce" is sometimes heard in these jurisdictions, because the only alternative to long, messy, and expensive trial is a settlement driven or guided by the other party. *Divorce* is the end result of the process. When you get your divorce, everything else is already in place. Other issues in the case are raised by law or court rule, and all issues are presented to the court for a decision when one party files for a divorce.

Q. Where do I start?

A. Getting the right lawyer often is the first step. Whether the attorney you select has represented you previously or been recommended by a friend relative, or bar association lawyer referral service, the important thing is that you communicate well together and that you have confidence in his or her ability to handle your case.

You may want to consider hiring a lawyer who specializes in your particular kind of case.

What you say to your lawyer is "privileged information." Generally speaking, this means that what you tell your attorney must be held in confidence unless you give permission otherwise. In addition, your attorney has a duty to: (1) allow you to make the major decisions in your case, such as pleading guilty in a criminal case or accepting compromise or settlement in a civil case; and (2) remain open and honest with you in all aspects of your case, including your chances of success, the positives and negatives of your position, and the time and fee required.

Q. How much will all of this cost?

A. Lawyers set fees in a number of ways. The two major types of fees in domestic cases are flat-rate and hourly billing. A flat fee generally is paid in advance and does not vary depending on the time or work involved. No refund is due if the work takes less time than expected, and no additional charges are incurred if the case is longer or more complex.

An hourly rate is most common when the client's work will be substantial, but difficult to estimate. Thus, for example, a lawyer might charge an hourly rate in a contested custody or alimony case. It is fairly common for the lawyer to require part of the fee to paid in advance or "up front." This "retainer" is a deposit or down payment to make sure the client is serious about the case and financially prepared to cover all costs. The size of the retainer and whether any part of it is refundable will vary from case to case and lawyer to lawyer.

In certain cases, the court may order one party to pay some or all of the other's legal expenses. For example, the court usually can make such an award in cases involving alimony, child support, custody, and paternity. Remember, however, that the award of attorney's fees in such cases is not mandatory or automatic. Such an award depends on a variety of factors, such as good faith, need, lack of adequate support, and so on. The courts see these awards as a way to pay back or reimburse for attorney's fees already paid or presently due. A client will have difficulty retaining a good attorney based on the promise or hope of court-awarded fees. This is especially true because court-ordered fees are not always paid and additional legal work may be required to secure them.

Q. What questions should I ask the lawyer?

A. You should ask the lawyer some background questions to get an idea of whether you'll be getting the knowledge and experience you need for your particular case. Some cases may require a "brain surgeon" for the attorney, an others may not. Ask the attorney about his or her experience in the specific areas involved in your case. For example:

- How long have you been practicing law?
- How long have you been practicing family law?
- Is your practice exclusively family law?
- To which bar association family law sections do you belong?
- What offices have you held in those organizations?
- Are you a member of the American Bar Association Section of Family Law?
- Are you in any local or statewide boards or committees dealing with family law?
- Have you ever gone up against Lawyer X (opposing attorney) in a trial? What were the results?
- Tell me about your participation in alternative dispute resolution (arbitration/mediation).
- Are you certified as a mediator? As a family law arbitrator?
- How do you use associates paralegals, or a client to keep costs down and enhance your work on cases?
- What client handouts do you have that will help me understand my case and how you can help me with it?

Q. How can I make sure that my lawyer is doing what I want?

A. To ensure that your lawyer understands what you want, ask specifically: (1) "What will be done in my case?" and (2) "How much it will cost?" If you want these answers included in a written contract between you and your lawyer, ask for one. Then, read it before you sign it.

Ask also for an estimate of total charges and a list of services covered in the estimate. Inquire about what steps your attorney expects to take and how much time (or expense) they might involve. An experienced lawyer should be ale to outline the process for you with a fair degree of accuracy. Although many cases are resolved as standard "uncontested divorces" with no alimony, property, or child-related issues, may others are completely unpredictable. Don't expect a specific dollar amount to be quoted as "the entire fee" in anything but a standard uncontested divorce. In fact, be wary of an attorney who promises to handle your case for a fixed sum, since it is impossible to tell what will occur in all but the most routine, uncontested divorce case; one involving no issues of alimony, property division, custody or child support; no problems service divorce papers on the other party; and two parties who want the divorce.

The rules of most state bars require lawyers to communicate regularly with clients and to provide periodic case updates. If this is important to you, ask your lawyer to keep you current and provide copies of the "pleadings"- motions, complaints, counterclaims, petitions - that have been filed in your case, any order or judgment signed by the judge, as well as letters or e-mails exchanged between lawyers. At the conclusion of your case or upon his or her withdrawal, your lawyer should release your file to you upon request and with reasonable notice.

When you first meet with your lawyer, review the important facts of your case and outline your goals. Although we all have hopes, desires, and dreams, it is vital to keep goals realistic and achievable; don't expect your case to go anywhere if your goals are to embarrass or financially break the other side.

Your lawyer has a duty to be candid with you and explain the pros and cons, the strengths and weaknesses of your case. Do not tolerate failure to return telephone calls; nothing makes a client angrier - and justifiably so - than a lawyer who won't respond to a request for information. Also be careful not to get into a personality conflict with the other side (client or counsel), since your money will be wasted on an unproductive "spitting contest." Armed with the facts, you can consider your finances and decide "how much case you can afford."

Q. What if I am dissatisfied with my lawyer?

A. If you don't get along with your attorney, if she or he is not complying with your requests as to major issues in the case, or if you do not believe your attorney is capable of handling the case, seek a replacement. If the case is in litigation, you'll need to ask the court for an order allowing the attorney to withdraw. If the case is only in negotiation or mediation, ask the attorney to prepare a final bill so that you can pick up your file and retain the services of another attorney.

Q. What is involved in "going to court?"

A. If you must litigate, you need to know something about the process. You can't play ball if you do not know the rules. Litigation always starts with the filing of a complaint or petition along with a summons. The petition states the facts of the case and what relief is requested. The summons specifies that the other side has been sued and has a certain period in which to respond. The other side usually files an answer following the service of these papers.

Depending on state or local rules, additional documents may have to be filed by the spouses. They include financial affidavits or declarations, stating the incomes and expenses of each party, or property inventories, showing what each party claims to be marital or separate property and debts, as well as the value claimed for each item. Sometimes courts also require parties to file a copy of tax returns, pay stubs, or other financial documents.

Contested divorce case can take a long time to resolve. Although the entire case is pending, temporary, interim, or emergency hearings may be requested. For example, a party may ask for an emergency ruling on issues of custody or visitation, especially when a "tug of war" develops over the children or they are in serious danger. Courts often consider the need for interim in the weeks or months after a case filed. This is done to protect the financially disadvantaged spouse during the divorce process. Some courts use the time after filing to conduct a hearing on *interim allocation,* which means a temporary division or distribution of marital assets pending the final hearing. This also can be useful in providing each party with sufficient means to pay the lawyers, psychologists, or accountants required to assist in resolving the case of preparing for trial.

Q. I think my spouse is hiding information, but how can I be sure?

A. You might find the anser in the "discovery" stage of litigation. Discovery means "finding out information that the other side has." Many state court rules allocate to discovery the first 90 to 120 days after the lawsuit has been filed. Even more time is allowed in complex cases. This is probably the most important part of trial preparation - finding out what the case is all about from the other side's perspective.

"Informal discovery" usually means obtaining information from the other side without formal notices or requests. This can be done surreptitiously by making a copy of a spouse's bank statement and then returning the original to the home file. It also can involve getting copies of joint bank statements or financial statements form the bank, joint tax returns from your accountant or the IRS or joint deeds and real-estate closing statements from the attorney who closed your home loan. These are quick and inexpensive ways to get the documents your attorney needs.

Likewise, an attorney can request certain papers, receipts, titles, or deeds from the other side. If the adversaries are friendly and the martial dispute is under control (which often depends on the personalities of the attorneys and the level of animosity between the parties),it is possible to save hundreds or even thousands of dollars by agreeing on a "discovery plan." This allows each party to request (in writing) and obtain relevant documents, within reason, from the other side. Although no penalties or sanctions are incurred for failure to produce or reply (as is the case with formal discovery), considerable time and money can be saved if the parties and their lawyers are willing to cooperate.

Formal or traditional discovery, on the other hand, has structures, deadlines, definitions, and rules that must be obeyed. Here are some examples:

- *Interrogatories* are written questions sent to opposing counsel. They must be answered by the opposing party under oath, usually within 30 days.
- *Document requests* require the other side to produce documents at a specified place and time for inspection and photocopying.
- *A request for entry upon land* can be used to get into the office or home of the other party to inspect, inventory, and photograph (or video tape) what's there.
- *A deposition* is oral testimony given under oath in front of a court reporter. Generally, the deposition is taken in a lawyer's office, and no judge is present. It results in a typed transcript of the testimony and can be very useful in exploring facts or data held by the other side, accusations they are likely to make, and their thinking about the case. Although generally more expensive than interrogatories, a deposition tends to generate more complete and spontaneous responses. A deposition also allows a lawyer to ask follow-up questions.

Q. What will happen if we end up in court?

A. Going to trial doesn't just happen. It is the end to a long process that includes meeting with your attorney (rehearsing for the hearing, getting an overview of questions that *will* be asked and that *may* be asked, and reviewing documents that will be introduced as evidence), preparing witnesses and exhibits for introduction, and setting the case on the courts calendar for weeks or even months in the future. Lawyers frequently prepare written briefs summarizing and explaining points of law that may be at issue in the case. Sometimes a pretrial conference with the judge is scheduled to organize the case and focus the issues.

On the day of trial, the judge usually will "call the calendar," which means announcing the names of the cases for that day. Yes, *other* people will be getting a divorce, too, and yes, on *your day*! It is the job of the judge to figure out which cases can be tried that day and shich ones must be rescheduled or "continued." If a continuance is not ordered your case will be tried. The trial usually consists of several stages:

- *The plaintiff's* (or petitioner's) case involves testimony of the one filing the lawsuit, immediately followed by the opposing counsel's cross-examination. At this point, the plaintiff often introduces exhibits and documents. Then the witnesses for the plaintiff testify and are cross-examined by the other side. Likewise, they may offer documents into evidence.
- *The defendant* (or respondent) has the same opportunity - to give testimony, present evidence, and offer witnesses. Likewise, the plaintiff's attorney may cross-examine.
- *The attorneys* usually make opening and closing statements or arguments for their clients. They also may object to evidence or testimony.

Divorce or domestic relations cases are heard by a judge.

After both sides present their cases, each has an opportunity for rebuttal, which is testimony that denies or contradicts what the other side has presented. Lawyers will have the opportunity for final argument or "closing statement" in which they summarize their evidence and argue for the results they seek.

Then comes the court's decision. This may follow closing statements or it may come days or weeks after the trail has concluded if the judge takes the case "under advisement."

Once the decision is made, it is noted in the court record and announced (formally in court or sometimes informally by telephone conference). Parties who do not attend the decision conference will be notified by their respective attorneys.

Entry of the order, judgment, or decree is the next stage. Sometimes this is done by the court, but more often the attorneys write up a decision for the judge to sign. This often requires the attorneys to meet together or with the judge as they *prepare findings of fact* for the judge on contested issues. This process can take days, weeks, or even months in a complex or hotly contested case.

Q. Is there an alternative to a long trial?

A. Yes, several options are worth considering: mediation, collaborative law, arbitration, coaching, and negotiation. If handled correctly, these options generally are less expensive and less time-consuming than a trial. However, they require both parties to give a little to get a little. Generally, these options will not be available if there has been domestic violence.

- *Arbitration* is a process by which a neutral third party renders a binding decision on the issue or issues presented - alimony, pension division, child support, etc. The arbitrator acts in much the same fashion as a judge in a civil trial. He or she usually is paid by the parties (often in equal shares), and the proceedings generally are faster and less formal than a trial. The arbitrator's job is not to choose sides but to listen to the facts of the case and render a decision.
- *Mediation* is informal dispute resolution in which a neutral third party, a trained mediator, helps you and your spouse reach an agreement. The mediator's role is to assist the parties in resolving conflicts. Choosing sides or giving legal advice is not a mediator's role. The mediator does not make decisions, but rather encourages both parties to work together to make their own decisions. Mediation is an increasingly popular option and generally is cheaper than a trial. Sometimes a free or inexpensive court-sponsored mediation program is available for part or all of a case.

Every state has its own requirements for mediation. In some states or counties, mediation is optional, in others the court may require it. Independent of the courts, the parties can always hire a mediator to conduct a settlement conference if they are willing to share the cost.

- *A negotiated settlement* can be a productive way to settle disputes. In this scenario, both parties and their lawyers attempt to resolve all or some issues in the case. Taking some of the issues off the table will likely make the trial shorter and the process less expensive and less stressful. It also is a good way to bargain through items on the table and see if there is room for negotiation.
- *Collaborative law* means agreeing to negotiate a settlement without going to court. The parties agree to cooperate fully in settlement negotiations and to provide freely and promptly any documents or information requested. The attorneys help to facilitate negotiations and draft settlement documents, but they cannot go into court. If the matter remains unresolved and either party wants to litigate, both parties must fire their lawyers and retain new counsel.
- *Coaching* involves hiring an attorney to advise you on handling your own case. When a case is simple and straightforward, handling it yourself with a coaching lawyer can save you money while teaching you how to present your case to the judge. It could be useful if your ex-spouse has charged you with missing a child support payment but you have a legal excuse, or if you want to defend yourself in a simple visitation dispute. A coaching arrangement is not a good idea for complex divorce cases.

Mediation, collaborative law, and negotiation are give-and-take situations. Nothing can be demanded, and usually a good deal of compromise is necessary. It is important to examine exactly what you want to happen in your case and to be aware of you "bottom line." Fair negotiations and an open mind are essential to the success of these alternate resolutions. Bringing your anger over past events into the ring will ensure that any settlement offers will fail.

Q. When will these alternatives work?

A. Alternatives to rial work best when both parties are willing to work together to reach an amicable settlement that is in the best interest of all concerned. They are less likely to be successful if a case involves physical abuse, substance abuse, persistent anger or passivity, mental health problems of one or both spouses (such as severe depression), or if one spouse wants to use the legal process for revenge or to punish the other spouse. In these situations, attempting to reach agreement may be a waste of time and money for both parties. During the initial interview with your lawyer discuss all of your options and what may work best for your case.

Here are two questions that come up quite often when children are involved in a separation or divorce.

Q. Will my children have to testify?

A. Probably not. Sometimes the judge will request the children to testify "in chambers" (that is , in the judges's office). In some courtrooms, the children are interviewed by a case-worker, a psychologist, or a legal guardian (or guardian *ad litem*) who then speaks to the court about the children's wishes, concerns, and statements once the interview process is over. Sometimes a custody evaluation is ordered.

As long as the children are of suitable age and maturity, what they have to say may be very important. If you want your children to testify, be sure to discuss this with your lawyer so that you can understand fully the procedures that apply.

Q. At what age can my children choose where they want to live?

A. It is unlikely that the judge would simply let the children select where they want to live in a custody case; if that were the way custody cases proceeded, there would be little need for lawyers and judges, because the child's wishes would immediately resolve the case. Instead, rules govern children's testimony. In most states, a child can testify about his or her preferences for custody, but a judge has the final say when it comes to custody or visitation. This means that the child's testimony may be important, but the judge must consider all the evidence in reaching a custody decision instead of focusing exclusively on what a child wants.