



Divorce, Pensions and Retirement Benefits

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IF YOU HAVE TO INITIATE LITIGATION - YOU PROBABLY LOST THE CASE!

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Practice Tip of the Month:

“Due Diligence” and why it’s important to you and your divorcing client.

Most attorneys who practice Family Law have at one time or another represented a criminal suspect. In those situations, to ethically properly represent them, you really are not concerned about their guilt. Your job is to give them the best defense possible in order to avoid or mitigate their potential criminal liability. In civil cases, and particularly divorce cases, the opposite is almost always true. You are dealing in a highly charged emotional situation with a client whose motives you may not be absolutely certain of. Expect lies and exaggerations. Proper use of the discovery process directed at retirement plan providers and employers will usually eliminate problems in those financial areas and should always be undertaken.

But there are other areas in the process that may not be as easy for you to determine the veracity of your client. Perceived injustice on the part of your client could cause he, or she, to furnish fraudulent or perjured information to hurt a spouse. If there is strong indication on the part of your opposing counsel that such statements are fraudulent or perjured and they can become the basis for financial gain, it is your responsibility to get your client to tell you the truth and conduct any “due diligence” investigation necessary if they refuse. A client who comes to you for a civil divorce and winds up in potential criminal liability because of your failure to properly use the “due diligence” process could result in serious ethical and administrative problems for you. As counsel for an emotional, legally unsophisticated, individual in serious, life-changing, situation, you have an ethical responsibility to help protect them from themselves. Failure to do so can have dire consequences for all.

Introductory Special!

Free Pension Appraisal

If you are an attorney who has never used our services, then let us prepare a free pension appraisal (a \$150.00 value) so that we can demonstrate to you the outstanding support and expertise we provide to every one of our attorney/clients. We make this offer knowing that once you try us you will become a regular client.

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IF YOU HAVE TO INITIATE LITIGATION – YOU PROBABLY LOST THE CASE!

For regular readers of these newsletters over these many years, you are aware of my position when it comes to divorce cases. They are not to be “won or lost”. Period! Whether you practice in a Community Property or Equitable Distribution State the scenario should be the same. Representing a divorce client is a process that is totally dependent upon your fact-gathering skills and the knowledge and expertise to use these skills to insure that the settlement process is fair to your client.

If you have availed yourself of the many resources out there you understand the case-law in your State, you know how pensions and retirement assets work and how to utilize those resources to achieve compromise and deal with marital debt. All of the marital assets have been valued. You are aware that the Settlement Agreement dictates everything and you enter into negotiations with the agreement already prepared in a manner that is most beneficial to your client. You may have employed an expert to draft those areas of the settlement dealing with the retirement assets if you lack confidence in actuarial areas but by the time you enter negotiations you know exactly how the plans work and what is most beneficial to your client. Your client understands you will not prevail in every area and you are aware of those areas in which compromise is acceptable and those in which it is not. You have fallback positions to insure there are no impasses.

Your opposing counsel may not have done their homework but that is o.k. because you have the facts at hand and his or her arguments will be emotional and out of ignorance. He or she will have to begin negotiating off of your settlement agreement, which will address all the issues at play.

If your opposing counsel is well prepared and approached the settlement hearing in the same manner, resolution will be even easier. What you are attempting to do is reach a solution that is as equitable as possible for both parties and if both attorneys understand that, the give and take will be meaningful and agreement reached.

Only when you enter negotiations unprepared do you really risk winding up in Court. Interestingly, only one attorney has to be fully prepared to reach settlement. If neither attorney did their homework there is an excellent chance that there will be no settlement and litigation will result. This is the worst case scenario. There is no way your client wants a Judge, who will only have cursory knowledge of the issues, to make a decision as to equity. It is always a crap-shoot. The cost of litigation and the more likely, less than favorable outcome to your client, puts your fee in jeopardy.

You can see why I say that if you have to litigate you probably lost the case. Once impasse is reached, the settlement is no longer in your control and you are no longer really representing the best interests of your client. You may get lucky and get a Judge who is knowledgeable on retirement assets and does a fair job, but based on my experience, pension and retirement issues that are adjudicated in court rarely resolve themselves equitably. Unfortunately, few Judges have the expertise or the Plan knowledge to address all the issues at play in order to settle that issue in a manner that will be truly equitable.

As always, the basic rule to successfully resolving a divorce case is knowledge and preparation. Over the years, I have observed that of our attorney/clients those who are least likely to wind up in court are those who have made the effort to educate themselves on how to prepare and draft good settlement proposals. They wind up with reasonably satisfied clients, avoid mal-practice and get paid. Worthy goals for all!

Model Property Settlement Language

Download our settlement language form and let the experts at LawDATA, Inc. **draft model property settlement language** (<http://www.lawdatainc.com/SetLanForm.pdf>) that deals specifically with the plan to which the order is addressed and the facts of your case.

Mr. Commerford has been active in the valuation of pensions and the preparation of Domestic Relations Orders for his attorney clients since the founding of LawDATA, Inc. in 1984. He has presented Continuing Legal Education programs, dealing with the valuation and distribution of retirement assets incident to divorce cases, for State Bar Associations throughout the country and written many articles on the subject for legal publications.

For any questions or ideas for upcoming articles you can reach Paul Commerford at paul@lawdatainc.com.

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