

How To Set The Table

(Or: On Your Mark...Get Set...)

You are at the beginning of a case. What steps should you take?

There are many articles on the subject of what to advise clients at your first interview. What follows are some different ideas typically not mentioned there. Caveat: This is not intended to be all inclusive. Nor is this intended to be advice. However, these points may be useful to you as part of a checklist. Think outside of the box. Modify this as you wish.

Preparing For the Initial Meeting with Your Client

Have a phone intake sheet for your staff to use when the prospective client first calls. Use that to identify the key issues. This will save valuable time at the meeting.

After you have run your conflict check, then prepare for the meeting.

First, have materials in your possession for you to refer to, as necessary, on each of those subjects. The more the client understands the applicable law, the more he/she will be able to assist you. “Knowledge is power.”¹

For example, I suggest the following as the minimum, depending on the facts of the case and what appear to be the issues:

a. Custody and Visitation:

1. Worksheet that your county family law facilitators use for alternative parenting arrangements. Use this to discuss various alternatives.
2. Article discussing the process in your particular county. You should be able to obtain this as well from the family law facilitators.
3. Checklist of what a parent should and should not do. There are many good online articles, or you can prepare your own list.

b. Retirement Plans:

1. Article discussing both options: In-kind division, and asset distribution and cash-out. I recommend WILLIAM P. HOGOBOOM ET.AL., CALIFORNIA

PRACTICE GUIDE: FAMILY LAW ¶8:1126 - 1129.5

c. Spousal Support:

1. CAL FAM. CODE §4320 (permanent support).²
2. Other statutes related to spousal support in the Family Code (CAL FAM. CODE §§ 4320 et. seq.³

d. Child Support:

1. Blank Dissomaster. Clients have no idea how the dissomaster works. Educate them. They will appreciate it. It will only take a couple of minutes. Perhaps prepare a "what if" dissomaster with the client so that the client will understand the process. *Caveat:* Always, whether or not you give the client a copy of the computation, add a written disclaimer on the dissomaster that it is not intended to be accurate, because at this point you do not have sufficient information to accurately fill out the dissomaster.

e. Standard Family Law Restraining Orders (ATROs)

1. The Standard Family Law Restraining Orders (ATROs) on the back of the Summons. Always give the client a copy at the first meeting and explain these fully. Document your file that you have done so.

f. Real Property and Personal Property:

1. If transmutation is an issue: CAL. FAM. CODE § 852; *In re Marriage of Valli*, 58 C4th 1396, 171 CR3d 454 (2014).
2. Blank Schedule of Assets and Debts: to discuss with client, then have client later fill out in draft. Although the Preliminary Declaration of Disclosure is not due immediately, the best practice is to always have the client begin to gather the records and information as soon as possible.
3. Division of assets and debts: have WILLIAM P. HOGOBOOM ET.AL., CALIFORNIA PRACTICE GUIDE: FAMILY LAW available. I also recommend as required reading *In re Marriage of Cream*, 13 Cal. App. 4th 81 (1993), which is a gem of a decision.

g. Student Loans:

1. CAL. FAM. CODE § 2627, 2641(b)(2)⁴
2. WILLIAM P. HOGOBOOM ET.AL., CALIFORNIA PRACTICE GUIDE: FAMILY LAW ¶8:811 et. seq.

h. Domestic Violence:

1. CAL. FAM. CODE § 4325.⁵
2. CAL. FAM. CODE § 4320(i).
3. CAL. FAM. CODE § 3044.⁶
4. Copies of one or more cases with the current case law interpretation of “disturbing the peace of the other party” to include “conduct in destroying the mental or emotional calm” of the other party.⁷

i. Vocational Evaluations:

1. CAL. FAM. CODE § 4331.

Procedures During Your First Meeting

If any pleadings have already been filed, the client should come in 30 minutes beforehand with any prior pleadings so that you can review them beforehand.

Most clients immediately want to tell you their story. At the outset, tell the client that you may be interrupting from time to time to ask questions. Do so only when it is important. You need to listen, even if much is irrelevant. At this point, you do not know what matters. Empathic listening is key both for learning about the case, and creating a relationship with this person.

You should be able to find something in common with the client. Do not underestimate this aspect. It is part of establishing a trust relationship. What does the person do? What are their hobbies? How about their past? Chances are that you will have some shared bond. When the client smiles, you know you're on to something.

In his/her first narrative, the client may not wish to go into much detail regarding potential problems with the case. This is human nature. The client wants to make a good initial impression. Accordingly, after the client has finished, ask further questions. The goals at this point are (1) to clarify what the client has said; (2) to see if there are other issues which the client has not identified; and (3) to find out problems in the case.

At some point, educate the client that the case may take a long time. There are variables which you cannot control, such as the conduct of the other party and attorney; orders after hearing that the client may not like; circumstances which no one can foresee, etc. In other words, tell the client that he/she needs to have the mind-set of a marathoner, not a sprinter. Give the client FL-

107-INFO (“Legal Steps for a Divorce or Legal Separation”).

Review some of the false ideas that clients often have, such as:

1. “There is common law marriage in California if people live together more than 7 years.”
2. “If we have equal timeshare then there will be no child support.”
3. “Under California law women always get custody.”
4. “Whatever money I made during the marriage is mine because my spouse was never employed.”
5. “I bought the house before marriage, so it is completely mine.”
6. “The (bank account, car, house, etc.) has always been only in my name, so it belongs to me.”
7. “We will be divorced after six months.”
8. “The Court will order whatever custody and visitation the children want.”
9. “Spousal support is always half of the length of the marriage.”
10. “As long as we live together the Court will not consider us to be separated.”
11. “We have separate credit cards. He (or she) is solely responsible for his (hers); I am for mine.”
12. “I won't leave the house because if I do, my spouse gets ownership.”

If the other party has an attorney, tell the client if the attorney has certain tendencies. Is opposing counsel typically cooperative? Willing to discuss settlement? Engages in inflammatory rhetoric in court filings?

Paint a realistic picture, not an unreasonable one. Do not sugar coat any problems.⁸

At the same time, do not make them sound worse than they are. If steps can be immediately taken to either resolve a problem or lessen its' impact, review those steps with the client.

If you do not know the answer to a question, tell that to the client. Sometimes you can find the answer in a few minutes of brief research. If it involves some research that you may need to do, but will take some time, suggest that you can find out, but will need to research the issue first. If the client agrees, set a realistic deadline with the client as to when you will get back to the client.

Discuss the issue of breach of fiduciary duty. Clients typically do not know anything about this. As we all know, this can be an extremely important matter. I recommend the excellent

treatment of this subject in WILLIAM P. HOGOBOOM ET.AL., CALIFORNIA PRACTICE GUIDE: FAMILY LAW ¶8:612 *et. seq.*

Warn them that any written communication that they make may be evidence in court. Be sure that they understand that therefore, they should use caution in social media. I sometimes suggest to my clients that it would be better if, during the case, they avoid use of social media as much as possible.

Instruct your client not to delete anything from the client's hard drive.

If the client has previously been represented by counsel, and has not been satisfied with that representation, ask the client for an affirmation that the client will give you a "fresh start." Often clients develop a jaundiced view of attorneys in general.

Have a candid discussion about fees. Make sure that where appropriate, you have the client sign a Legal Services Agreement. Make sure that your Agreement has all of the requisite language. I always suggest that the client not sign at that moment, but take the Legal Services home to review. That way, there is less chance that at some point, the client will say that the client did not understand a portion of it. If the client signs (either at that point or later), always make sure that both you and the client have a fully executed copy.

At the end of the interview, each of you must make a decision. Does the client want to retain you? On your part, is this a case which you want to take? Why? Or are there "red flags" which you can feel in your gut, warning you not to take the case?

Thinking Ahead

Family law cases are similar to chess. Always think several steps ahead. Put yourself in the mind of the other attorney. What is he/she likely to do?

One often overlooked subject: the importance of immediate collaboration with other experts. Examples include:

1. **Criminal Defense Attorney:** If there is a domestic violence accusation against your client, or an allegation of child abuse, immediately begin to collaborate with a criminal defense attorney, irrespective of whether criminal charges are pending. It is always a good idea to have a written Confidentiality Agreement in place first, prior to any writings between the offices.⁹ Have that attorney review all of your draft discovery

responses and all pleadings filed with the court to prevent an inadvertent waiver of your client's Fifth Amendment Rights. If there is no criminal investigation yet, there may be. If the other side schedules a deposition, discuss various options with the criminal defense attorney.

If there is an allegation that your client caused property damage, the criminal defense attorney cannot approach that party and attempt to resolve that issue. However, the criminal defense attorney may be able to guide you through efforts to resolve the same issue as part of a settlement of the family law DVRO issues.

- 2. Vocational Evaluator:** If earning capacity / imputed income is an issue, it is a good idea to ask your client, in the first interview, for permission to get contact a vocational evaluator. Explain the potential cost. It will be significant. In my experience, in Northern California, some counties permit vocational evaluators to provide declarations and oral testimony in the beginning, at a hearing on temporary support (although the applicable statute, CAL. FAM. CODE § 4331, is in the portion of the Family Code dealing with permanent spousal support). Other counties do not.

If the client does not want to do so, then for your own protection, immediately document that by a written communication to the client.

If the client agrees, immediately contact the vocational evaluator and ask opposing counsel if he/she is willing to stipulate to the appointment of the vocational evaluator without your having to file a motion (query: should the failure to stipulate, in a case in which earning capacity is clearly relevant, sanctionable conduct pursuant to CAL. FAM. CODE § 271 if you are not asking that the expert be the Court's expert under CAL. EV. CODE § 730?). If you are the one retaining the expert, see if opposing counsel will stipulate pursuant to § 730. However, do not stipulate to the vocational evaluator being appointed as a § 730 expert if the evaluator has been retained by the other side.

If opposing counsel declines to stipulate, then file your motion, documenting your "meet and confer" efforts for the court in your own declaration. Remember that if the case only involves child support, not spousal support, then by law a vocational evaluator cannot be appointed. It typically takes a vocational evaluator some time to do a complete evaluation. The sooner the expert can start, the better.

- 3. Forensic Accountant:** An accountant can provide spreadsheets with potential settlement options, with mathematical calculations. Additionally, if there are issues involving valuation of a business, the amount of support which a payor can afford (also known as "spendable income analysis"), or the amount of support that the payee spouse will require, the accountant can assist here as well. Additionally, there are sometimes hidden tax consequences, such as "hot assets", which an accountant can identify, even though a division of community assets is by law a nontaxable event under the Internal Revenue Code.
- 4. Financial advisor:** If there are substantial, diverse assets, the client may want someone to provide advice as the case progresses. What are the client's goals five years from now? Ten years from now? Is growth or financial security more important to the client? Or both? Is ownership of a house better than ownership of stocks, bonds, other liquid assets? In large asset cases, you may need to work with both an accountant and a financial advisor.

Conclusion

There is nothing as important in a family law matter as preparation.¹⁰ Start your case off the right way at the beginning.

Endnotes

1 — Francis Bacon, *MEDITATIONES SACRAE* (1597)

2 — Be sure to clarify that §4320 is only for permanent spousal support, not temporary spousal support. Always explain that the term “permanent” does not necessarily mean that. Explain the half-the length of the marriage presumption in Family Code §4320 (1).

3 — For instance, if the opposing party has “separate property, or is earning the party’s own livelihood, or there is community property or quasi-community property sufficient to give the party proper support (Family Code §4321); “where there are no children, and a party has or acquires a separate estate, including income from employment, sufficient for the party’s proper support” (Family Code §4322); if there is co-habitation (Family Code §4323); if there has been a criminal conviction for a domestic violence ((Family Code §4325); etc.

4 — Any loan incurred during marriage for a spouse's education or training which remains unpaid at the time of dissolution or legal separation must be assigned for payment to the spouse who obtained the education or training and is disregarded in effecting a net equal division of the community estate.

5 — "Rebuttable presumption for conviction of domestic violence." There were significant changes made to this section effective January 1, 2019. The changes only apply to convictions that occur on or after January 1, 2019. They are extensive. I recommend that every family law attorney review them. For example, "The court may determine, based on the facts of a particular case, that the injured spouse is entitled to up to 100 percent of the community property interest in his or her retirement plan." CAL. FAM. CODE § 4325 (d).

6 — "Rebuttable presumption from showing that person seeking domestic violence has perpetrated domestic violence; Factors; Finding; Evidence" (relating the physical and legal custody).

7 — I suggest that you have a copy of *In re Marriage of Nadkarni*, 173 Cal. App. 4th 1483(2009).

8 — "...a wealth of behavioral studies of client and attorney decision-making show that lawyers and clients often develop unduly optimistic views of their litigation prospects, often with unfortunate consequences." (Civility and Mediation (*Contra Costa Lawyer Magazine* - April 2017) By Mark LeHocky - ADR Services, Inc.

9 — Consider having language which, at a minimum, includes something like this: "John Jones and Jane Smith anticipate that, from time to time, there will be a need during this case for the sharing of information which is confidential, as either within the attorney-client privilege or the work product privilege or both. This may also include but not be limited to the exchange of documents, memoranda, records, reports, telephone conversations, letters, emails, texts, and the like from time to time. The parties hereto agree that any and all information or documentation which is shared between them relating to (the mutual client's name) case is confidential, and is within both the attorney-client and the work product privilege; and any and all documents, letters, memorandums, emails, texts, or other communications between them relating to this litigation are to be disclosed with an expectation of confidentiality.

10 — There are many wonderful quotes about the value of preparation. For pure enjoyment, google "Preparation quotes." My favorites: "I will prepare and someday my chance will come." (Abraham Lincoln). "By failing to prepare, you are preparing to fail." (Benjamin Franklin). "Opportunity does not waste time with those who are unprepared." (Idowu Koyenikan); "I believe luck is preparation meeting opportunity. If you hadn't been prepared when the opportunity came along, you wouldn't have been lucky." (Oprah Winfrey)