PERILS OF A FAMILY LAW PRACTICE

FIRST, A WARNING. This is a very short manuscript. I DEMAND audience participation. Assuming there is still an audience given that I am the very last speaker. But seriously I seem to get a lot more out of conversations and real life stories than I do just listening to somebody lecture me. So my goal here is to hit some high spots and hopefully make this one big group discussion so that we all get something out of it.

SO:

I was asked to talk about the "Perils of a family law practice". What struck me when I started thinking about it was how different family law cases are from virtually every other kind of case. Unlike traffic tickets, family law cases are full of emotions. Unlike real-estate closings most of the rules in family law cases fall in gray areas, rather than the black and white. A judge in a family law case can do anything they want to do, so long as they do not "abuse their discretion". (What the heck does that even mean?). In custody cases they look to the "best interests of the minor child. (What the heck does that even mean?) Gray areas which are hard to predict at best. Unlike drafting a will a family law case goes on for what seems like forever. They are not one and done. Everyone probably has a story about a "family law peril". They usually involve either things that have gone terribly wrong with a case or involve a disgruntled client filing a bar grievance. These are a few that most of us have experienced and maybe we can find a way to avoid them.

1. The peril of the "Klingons".

No, not the ones from star-trek. These are a lot more local. These are the people that somehow found you and, despite the fact that they have not retained you to represent them, they seem to show up at your office every day for a "quick question" or they are calling your office asking questions of staff. Not only are these people nuisances but a PERIL is that you could get yourself in trouble talking to them. If you are like me you are just trying to get away from them but beware opening your mouth. You could be giving them legal advice and possibly bad legal advice if you don't know all of the legal ins and outs of their case. Do you really want to get sued by someone who has never even paid you. So how do you avoid this PERIL? Easy. Unless you are sitting down with a person in a consultation setting, DON'T TALK TO PEOPLE!!! It's tempting when some panicky guy grabs you at the courthouse but just say no. I tell people all the time "I'm sorry but I do not do consultations in the hall of the courthouse. If you would like to speak to me about your case you can call my office and set up an appointment. I charge a $100.00 consultation fee for a thirty minute visit." I then walk away. The same issue can come up with the Klingons showing up at your office time and time again, hoping to get a word in with you as you are heading for the bathroom or trying to get to the conference room. This is where you need to be rude. "I'm sorry but if you do not have an appointment you need to leave. If you would like to set up an appointment we can do that. We charge a consultation fee, etc.... Giving in will not make them go away. It will just make the situation worse. You either have a client or

you don't have a client. There is no such thing as a half client. The half client is the one who has no concept of your time and just wants to pop in and out for quick questions but never pay you anything. Forcing the payment of money generally solves the problem. So don't get sucked in.

2. The perils of getting in over your head:

a. Don't get in over your head in terms of your ability to handle the legal issues involved in the case. If you have only been practicing law for six months, you probably should not be handling a case involving six different business evaluations. Know your limits. If you see that the issues are beyond your ability either send the client somewhere else or agree with the client to associate in another more seasoned attorney.

b. Don't get in over your head in terms of your ability to handle the paperwork. Some attorneys will simply try to paper you to death with interrogatories, request for admissions, request for production of documents, etc... Do you have enough staff to process all of that. If you are a solo practitioner with one receptionist, you may find it difficult to keep up with the demands. Again, either refer it out or associate some other office in that has the staff that can keep up with the paper demand.

c. Don't get in over your head in terms of your ability to handle the client. Family law clients can be difficult. Most of them are suffering emotional overload and incapable of making rational decisions. Can you firmly handle that client? Will the client listen to you? If you can't handle them or they just won't listen to you, then get rid of them. These problems can usually be handled up front, by having hard conversations about reality at the very beginning. Lay it out so that there are no surprises and let the client know that if they do not follow your advice, you will fire them.

3. The peril of becoming a slave to your clients.

a. Charge a consultation fee. If they cannot afford the consult fee then they cannot afford to hire you. You will then either be working for free or you will be spending all of your time trying to chase the client down to get paid. If you feel sorry for someone, great, do their case pro-bono. But if you are trying to make money, weed out the problems before they start.

b. Put the client money in trust. I am now a huge believer in this. I know there are two lines of thought. Some take the position that when the money is paid, it is earned and goes straight into the operating account. With the right fee contract there is nothing wrong with this. Other's, like me, put the fee into trust until it is earned. In my years of practice I have done it both ways but I believe that putting the money into trust is the far better way. What happens if a client pays you and you put the money into your operating account and then spend it. Then the next week you realize that this client is just absolutely nuts. Will not listen to anything you tell them. Calls your office half dozen times a day cussing out your staff. Etc... They need to be fired. BUT, regardless of your fee contract you cannot fire them AND keep all of their money. Unless you have the money to give back to them, or at least a reasonable amount to refund, you are now a slave to that client. The way we do it is we put the money in trust and take it out as we

expend time and earn it. I do not have a single client that I could not fire tomorrow if I wanted to and an appropriate amount of money is sitting in trust to give back to them. I am not a slave to any of my clients and you should not be either.

4. The Peril of the deaf client.

Make sure your clients hear you. Domestic clients are usually on an emotional roller coaster. They often hear what they want to hear. To make sure they hear you start early, at the initial consult. And tell them the same thing each and every time you see them. No room for interpretation, this is what I said. And be brutally honest. If their case sucks tell them, again and again. I have a case going right now and I have explained to my client that we have problems if we go to trial. They are in mediation and also negotiating between themselves. Every time I see this person I say to them " Settle your case. We do not want to go to trial". The last time they left my office, as they were leaving, they turned around and looked at me and said "I know, settle this case. We don't want to go to trial". They heard me and they all need to hear us. If you do not pound points into your client, they will either forget, ignore, or swear you never said it. Then when they get in trouble they blame you and will be quick to say "my lawyer said I could do that". Do not leave any room for confusion, whether it hurts or not.

5. The peril of "the argumentative client".

You see these a lot in the family law context. They will argue with you when you are telling them the law, or when you are telling them the likely outcome of their case that they do not like. Usually because Google told them something different. You cannot represent somebody that is going to argue with you at every step. I recently had to say to a young lady in my office "I'm sorry ma'am but no matter how many times you ask me that question my answer is not going to change." Or my favorite was the guy who didn't like my answer and just continued to stand there and argue with me. I literally had to tell him to leave my office and he still just stood there arguing with me. Finally I said " Door or window?" He kept arguing. "Door or window?" More arguing "DOOR OR WINDOW!" "What do you mean", he said. I said "do you want to walk out that door or do you want me to throw you out that window!" He finally shut up and left. If you can't control them and they won't listen to you, for goodness sake get rid of them. They are not worth the pain and bar grievances that they will cause.

6. The peril of Mentally ill clients.

Mentally ill clients can be a real challenge. When COVID hit we started doing telephone consults rather than in person visits. I realized fairly quickly that although you can do a lot over the phone, you miss a lot not being able to see the person. A mentally ill client can hide behind a phone much easier than they can hide it from you in person. Now I am in no way saying you should not represent mentally ill family law clients. I have a ton of respect for those of you that can. BUT. Know your abilities. Can you handle this client? Can you adequately communicate with this client so that he or she understands what is happening? Is it mental illness or are they just whacked out on drugs? How do you tell? If they are mentally ill are they even competent to proceed? How do you find out? If your skill level and personality skills allow you to handle

this kind of client then good for you. Mine do not so I will be referring them elsewhere. The problem is that you are inviting a bar grievance if things don't go your way so make sure you can handle it.

CONCLUSION:

Some years ago a spoke at a seminar, the topic being "The Ten Commandments of handling a family law case". These are still rules to live by today and I have attached them to this manuscript as a reminder of certain things we can do to avoid some of the perils of family law.

TEN COMMANDMENTS

1. Thou shalt charge a consultation fee for domestic clients:

    a. Ensure you are not being seen for conflict purposes.

Some potential clients don't want you representing their spouse. They might have heard either good or bad things about you already. They don't want you to represent them but they don't want you representing their spouse either. So, they come see you to conflict you out of the case. Should you not get some compensation for this.

    b. Your time is your stock in trade.

In very few areas of domestic law can you charge a contingency fee. Pretty much equitable distribution is it. The only thing you can charge for is your time, unless you flat fee everything. Generally speaking, flat fees are not a great idea. I had the situation in an equitable distribution case one time when the other side had taken the case on a flat fee. At that point, their client had absolutely no incentive to settle the case whatsoever. She took the position that she would literally try every single issue. That attorney had absolutely no control over the case because the client really had no vested interest in resolving the case.

    c. Tool to weed out those who cannot afford your services.

Some people simply cannot afford you. These people need to go to legal aid, unless you feel real sorry for them and decide to do some pro-bono work. The reality is that if they can't afford your consult fee, then they probably can't really afford to hire you.

    d. First Impressions

Usually, the first contact that a client has with you is when they call your office to set up an appointment. Typically the client will ask about your consultation fee. What does it tell the client if you charge no fee? It tells them that you are free. That your time has no worth. If your time has no worth, then what is the value of the advice you give them? Is it worth listening to. The earlier you can establish with the client that your advice is valuable and worth listening to, the earlier you gain control over the case.

2. Thou shalt define the issues at the first consultation:

    a. What are the issues in the case (custody, support, alimony, ed)

Defining the issues quickly helps determine which facts are important. A domestic client will want to tell you their life story. Some things are important. Some are not. As an example, if both parties have the same incomes, there is probably not any alimony claim, so fault issues really become irrelevant. Politely tell them that they do not really need to tell you the personal details of every horrible thing their spouse has done because it legally does not matter.

Concentrate on the important/relevant issues. Don't get sidetracked.

b. Are there any emergency issues that need to be addressed right away or do you have the leisure of attempting a settlement either by way of direct negotiation or mediation.

In some cases, such as custody, there really is not much time to try to negotiate a settlement. Typically, these cases require the filing of a lawsuit pretty immediately. Some cases, however, such as equitable distribution, normally don't require the immediate filing of a lawsuit. You have time to try alternate dispute resolution techniques.

c. First opportunity to make an early evaluation of merits of case.

It is imperative that you be able to evaluate the merits of the case at the first appointment. That is really what the client wants to know. Do they have a case? Obviously, as an attorney, you can never guarantee any results. I don't even give percentages. I can usually tell, however, whether a custody case, or alimony case, has merit.

3. Thou shalt be brutally honest and up-front with the client regarding the merits of the case.

a. If their claim sucks, tell them.

No one likes to hear that they don't have a good claim. You have to tell them and the earlier the better. If a guy works second shift, goes to work at 3pm when the children are getting out of school, and not getting home until midnight, the stay at home mom is going to win unless she's a heroin addict. Tell them their case is a loser. Don't file it and then tell them the day of court. You lose all credibility. If the client knows up front that their case has no merit, it gives them, and you, the option of exploring potential settlements.

b. If they face support exposure, tell them.

These are hard discussions to have. Try telling a man who has committed no marital fault, and whose wife left him for no good reason, may have to support her for the rest of her life. Again, having these conversations earlier rather than later will build credibility with the client and make it easier to handle his case. Knowing early saves a lot of heartache down the road.

c. Lots of problems solved by giving them the bad news at the first appointment.

4. Thou shalt get paid up front.

a. Once you are in the case, you are in unless the court lets you out.

Once you have made an appearance in the case, you are in. To get out, you must file a motion to withdraw with the court and the court enter an order allowing your release. This causes unnecessary delay in the client's case, consumes your time that you are not being paid for, and, if done a lot, can cause you to lose respect with the court system.

b. An attorney should be able to concentrate on handling the client's case and not worrying about whether he has been paid.

When you go to court, you should be able to concentrate on the legal issues at hand. Not having conversations in the hall about whether or why you have not been paid. Your client deserves your attention to his case, not distractions about your compensation that you should have handled days, weeks, or months before.

c. A client that has paid has a vested interest in his/her case and therefore is more cooperative.

Sometimes, cases simply settle because the parties do not want to incur additional fees for trial. If the client isn't paying, this can make the client more uncooperative thereby diminishing settlement possibilities. Further, if a client is paying you, he is more likely to take your advice. (Ie. why pay for it and not use it)

d. Client does not benefit by lawyer withdrawing at last minute due to non-payment.

5. Thou shalt be on time for court and pay due respect to the court system.

a. Ethics require promptness in attending to court matters.
b. Looks bad to client if you are not there.
c. Judges get tired of the lawyers that always have to be tracked down to do their case.

6. Thou shalt know the law and local court rules.

a. Temporary custody rules.- generally short expedited hearings. Not full trials.

b. Custody mediation rules.- all custody cases go to mediation (initial and modification) unless waived by court. Grounds for waiver are basically real domestic violence and distance.

c. ED/Support rules.- affidavits and initial disclosures required at time of filing. Sanctions for not.

d. FFM rules- All alimony and cd cases required to be referred to FFM. Parties required to divide costs equally. Encourage open mind in mediation. Very successful.

e. Client should have been briefed at first visit as to the various mediations that are required and at what stages court will actually have hearings. Many people are going through the legal process for the first time. They know what they see on TV which is case going from start to finish in an hour. Clients are more comfortable when they know what each step is and happens at each step.

7. Thou shalt be courteous and accommodating to opposing counsel whenever possible.

a. Might be you needing the continuance next time.

b. Clients are served when the attorney's can work together as problem solvers rather than warriors. There was a time when I thought that it was in the client's best interest to fight at every step of the way. Since the advent of mediation, I've learned that clients are actually best served when they can settle their case rather than putting it in the hands of a total stranger. It gives them some control over their destiny.

8. Thou shalt counsel and advocate for your clients position.

a. Counsel means to advise, strongly at times. If you have followed the previous commandments, hopefully you have a client that respects you and allows you to control their case. You should be free to talk to them bluntly about their case and tell them what they need to do.

b. Being an attorney does not mean being a mouthpiece for an unreasonable unrealistic client. There are certain attorneys, unfortunately, that do not follow this commandment. Every time I have a case with these attorneys I know that we will be going to trial and that nothing will be resolved. This is because even though I am talking with the attorney, I am really dealing with his/her client, because all the attorney does is repeat any stupid, unreasonable position the client is taking. You may think you are doing your client a service because you are "fighting for them". You really are not. You are simply setting them up for failure, and yourself as well.

c. When you consistently advocate unreasonable positions, you lose credibility with the court.

d. Most rulings in domestic cases are discretionary rulings. The more credible attorney wins the close call. Think about it, in a typical domestic case, how many of the rulings are discretionary. "Best interest of the child", " Equitable distribution", "Reasonable needs and expenses". The list goes on. On appeal, the standard of review is "Abuse of discretion". In discretionary rulings, the Court of Appeals almost always rubber stamps the trial court's determination. Therefore, your best, and almost only shot, is at the trial court level. Credibility means everything.

9. Thou shalt prepare the final order promptly.

a. Judicial sanctions for not preparing order. The Court can issue a show cause order for failure to do an Order.

b. If not memorandum, order not enforceable until typed, signed, and entered. This can become really important. I have had cases before where my client the Wife was granted custody and the husband was granted visitation. The other attorney was to do the Order for visitation but did not prepare it in a timely manner. In the meantime, my client violated the Order and did not allow the husband to visit as ordered. The Husband's attorney filed a contempt motion which

was dismissed because the order was not done. He then refiled the motion after entry of the Order but my client could not held in contempt for any actions that occurred prior to the entry of the order.

c. Appeal times do not begin running until entry of order and service. Thirty days in civil cases.

d. Orders must be served. Appeal times do not begin running until service of order.

10. Thou shalt not forget to formally withdraw at entry of order.

a. If not withdrawn, stuck as attorney on appeal.

b. Future service issues. Technically, if you are not withdrawn, you can be served with future pleadings, regardless of how much time has passed. You may not even know where your client is living at this point but the other side has good service and could have a hearing on the merits without your client ever even knowing about it because you were served. Withdrawing is for both your and your client's protection.