Cutting Costs Doesn't Mean Cutting Corners
How to Minimize Malpractice Risks

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No good deed ever goes unpunished: Cynical advice perhaps, but for lawyers attempting to minimize the cost of a client's divorce, it is advice worth remembering. When minimizing costs can be accomplished only by cutting corners, a client who suffers from "buyer's remorse" will find ample fodder for a malpractice action, a complaint to disciplinary authorities, or, at the least, unfavorable comments about his or her lawyer. To prevent such a result, lawyers must educate their clients to ensure that they make informed decisions and then document whether those decisions reflect the lawyer's advice.

When expense is not a factor in a divorce action, the client may incur any or all of the following costs: the fee for the lawyer's time spent gathering evidence through the discovery process, analyzing the information, attempting settlement, preparing for trial, trying the case, and implementing the judgment; filing costs; the cost of subpoenaing everything from bank records to medical records to credit card statements; deposition attendance and transcript fees; expert witness fees for consultations and reports, depositions, trial preparation, and trial testimony; and fees for photocopying, faxing, and the recording of deeds.

A lawyer who seeks to eliminate some of those costs must constantly balance the potential savings against the possible risk. In doing so, he or she is bound to encounter some difficult decisions. The key to resolving those decisions is the lawyer's having a clear understanding of his or her duties and ethical obligations to the client.

Initial interview

A comprehensive initial interview includes questions about the nature and extent of the marital estate, the parties' respective resources, and the complexity of the matter at hand. The interview should also include a full description by the lawyer of the types of costs the client can expect to incur, regardless of whether the client expresses concern about costs. The same information should be provided in a written fee policy or retainer agreement that includes space for the client to acknowledge in writing that he or she understands the terms of the document and the financial obligations about to be undertaken. (See "Sample Retainer Letter" on page 40.)

In most cases, clients *will* ask about the cost of getting divorced. The lawyer should avoid the urge to be optimistic, to offer an estimate based on quick settlement or one that assumes complete cooperation by the client's spouse and opposing counsel. Although no lawyer wants to lose a potential client by appearing more costly than the competition, the refusal to give an estimate or the failure to give a *realistic* estimate can lead to accusations of overreaching (if costs are excessive) or incompetence (if the lawyer scales down the process too zealously in an effort to accommodate a tight budget).

In responding to a client's wish to lower costs, the lawyer should clearly explain the potential adverse affects of any particular cost-saving maneuver, such as the possibility that an asset may not be discovered, an opponent's expert testimony may not be rebutted, or there will be one or more unwelcome surprises at the time of trial. If, to save money, the lawyer chooses a strategy of waiting until the last minute to do certain discovery or to disclose an expert, he or she should inform the client of any statutory deadlines or case law that could result in barring those actions from being taken at all. Those deadlines, along with any limitations the client has imposed on the lawyer, should be put in writing and acknowledged in writing by the client. (See "Documenting Advice" on page 41.)

When the client's primary goal is to keep costs down, each step of the case strategy should be evaluated according to how much the client stands to gain. For example, the client may suspect that his or her spouse who runs a business is pocketing cash and underreporting income, but the only way to prove the underreporting is to hire a "big eight" accounting firm to study the business. The client may decide that the cost of hiring such a firm is simply not worth the potential gain. Again, as a protection against complaints or lawsuits, the lawyer should put decisions like these in writing and be sure the client acknowledges them.

Above all, the lawyer must be certain that the client understands that any strategy designed to minimize costs is only as solid as the facts on which it is based.

Competent representation

Notwithstanding any limitation a client places on a lawyer, the lawyer remains responsible for exercising judgment and providing competent representation. The ABA Model Rules of Professional Conduct and Code of Professional Responsibility obligate lawyers as follows:

> Rule 1.1: Competence. A lawyer shall provide competent representation to a client. Competent representation requires the knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> Canon 6: A Lawyer Should Represent a Client Competently.

The commentary to Rule 1.1 states that a part of competent representation is the obligation to inquire into and analyze the factual and legal elements of the problem and to use the methods and procedures that meet the standards of competent lawyers. Alone, these guidelines could be interpreted to mean that a lawyer must make an objective assessment in every case and prepare accordingly, regardless of cost. However, Rule 1.2 and DR 6-101(A)(2) of the Model Code state the following:

> Rule 1.2: Scope of Representation. (a) A lawyer shall abide by a client's decisions concerning the objectives of representation...and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to adopt an offer of settlement of a matter....DR 6-

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101: Failing to Act Competently. (A) A lawyer shall not: ...(2) Handle a legal matter without preparation adequate in the circumstances.

Together, the rules on competence and scope provide an implicit guide for how to accommodate a client's directive to reduce litigation costs while guarding against a claim of incompetence. The key lies in consulting with the client at each step of the representation, discussing the costs of strategies that the lawyer knows a competent practitioner would undertake, and then abiding by the client's directives.

Is discovery a duty?

There is no rule or canon that explicitly requires a lawyer to do discovery, but any competent practitioner knows that discovery is necessary in an action for dissolution of marriage. (After all, many malpractice cases are *based* on the failure to do adequate discovery.) The Creeds of Professionalism adopted by the ABA House of Delegates in August 1988 encourage making "every effort to agree with other counsel as early as possible, on a voluntary exchange of information and on a plan for discovery" (Creeds of Professionalism C.5). Accordingly, the questions of what discovery, how much discovery, and by what means are proper subjects to discuss with the client.

Among the ways a lawyer can reduce the cost of discovery: Instead of issuing third party subpoenas, the lawyer can try to obtain documents and admissions from the opposing party; can have the client request records on joint accounts, debts, and credit cards; and can have the client review the materials that have been obtained to check for transactions that bear further investigation.

When using these techniques, both lawyer and client should stick to a definite schedule to ensure that discovery will be completed within the time allowed by any applicable statutes or rules of court. The lawyer should summarize the client's instructions for these techniques in the engagement letter. If it later appears that a subpoena is the only means to obtaining certain material, the lawyer should consult with the client before proceeding.

When the case involves custody or another matter that requires the testimony of third parties, it is not so simple to cut costs. A competent practitioner would not call a witness to testify without first interviewing the witness or taking his or her discovery deposition. However, in light of the cost of court reporter attendance, transcript fees, and the lawyer's time conducting the interview, the client may be reluctant to agree to a deposition. The lawyer has a duty to tell the client that the only way to be certain a witness will be helpful is through a pretrial interview. If the client still instructs otherwise, the lawyer should honor the client's wish, and then confirm the instructions in a letter to avoid any misunderstanding.

A duty to settle

Do lawyers have a duty to attempt settlement? Although this question is not explicitly addressed in the Model Code or Model Rules, the Creeds of Professionalism suggest that lawyers consider settlement with the following in mind:

> A. With respect to my client: ...(3) In appropriate cases, I will counsel my client with respect to mediation, arbitration and other alternative methods of resolving disputes. ...(6) While I must abide by my client's decision concerning the objectives of the representation, nevertheless I will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

In virtually every case, a settlement is more cost-effective than a trial. Accordingly, if the client's goal is to resolve the case as economically as possible, the lawyer has a duty to investigate settlement options. However, this duty does not invest the lawyer with magical powers that enable him or her to initiate settlement discussions without having the information necessary to negotiate a fair settlement or to persuade the opponent that settlement is the most cost-effective resolution.

Suppose the lawyer advises the client to settle, but the client believes that any attempt to do so would be wasted, given his or her spouse's personality. Therefore, the client instructs the lawyer not to make the attempt. Rule 1.1 indicates that the lawyer should honor the client's wish (assuming the lawyer intends to continue the representation). The lawyer should then document the client's decision as well

Sample Language for the Retainer Letter

You have instructed me that one of the goals of my representation is to minimize the cost of your lawsuit. I will work to achieve that goal by consulting with you before my office incurs any costs on your behalf and abiding by your decisions regarding expenses. I will expect you to pay for the following costs directly or on a monthly basis:

- Court reporter attendance fees (court reporters charge by the hour for the time that they spend in depositions).
- Court reporter transcripts costs (There is a separate fee for the reporter to generate a transcript).
- Expert witnesses. Experts typically request a retainer before beginning work, and they may charge an additional fee depending on the amount of work required. Some experts charge by the hour.
- Faxes.
- Photocopies.
- Messenger service.

If you choose not to authorize a particular expense that I believe is necessary for me to represent you competently, or if you give me an instruction that forces me to assume an unreasonable financial burden, I will be forced to withdraw as your attorney.

It is important that you understand the litigation strategy behind each decision that I ask you to make, and that you always feel free to ask questions.

as his or her own effort to handle the matter competently.

A need for experts

Does the lawyer have a duty to retain expert witnesses? The answer to this question might seem obvious as nowhere in the Rules or Canons is there a requirement that the lawyer finance litigation on the client's behalf. However, that does not mean that the lawyer is immune from attack if he or she simply assumes that the client cannot afford to pay for experts and does not raise the subject.

The competent handling of an action for dissolution includes knowing when the case needs a custody or valuation expert; when such a need arises, the lawyer should tell the client and stress that certain arguments can be made only by an expert. It is up to the client to decide whether the expert will be hired. (If the lawyer has made it clear from the outset that the client is responsible for hiring and paying any experts, the client will not expect the lawyer to do so.)

If an evaluation or custody expert *is* needed, there are a number of ways to minimize expenses: (1) Both parties could choose an expert jointly and agree to be bound by whatever that expert says. (2) The lawyer could locate appraisals done prior to the action and argue that they are still valid (if that is the case) or update the numbers as necessary. (3) A client who is knowledgeable about the business or other matter at hand could provide his or her own expert testimony.

Before the client chooses any of these options, the lawyer should help the client analyze the possible shortcomings of each and examine how each might adversely affect the outcome of the case. For example, if the opposing party asserts that the client's business is worth twice its book value, but the lawyer and client believe it could be worth more, the lawyer might advise the client to stipulate to the opponent's value.

In general, when giving advice on financial issues, the lawyer should invite the client to submit that advice to his or her accountant, financial officer, real estate broker, or other relevant financial expert to verify that the assumptions on which the advice was based are sound.

Language for Documenting Advice

For me to competently handle your case, we should [course of action recommended]. As I previously told you, this course of action could cost anywhere from [lower limit] to [upper limit], and that failing to do [task described] could mean [describe consequences, preferably in dollars]. During our discussion, I gave you the opportunity to ask questions after indicating that you understood the possible consequences of the decision at hand, you choose to [course of action] and incur the associated costs, or you chose not to proceed with the recommended course of action.

Should you wish to reconsider this decision, write me a note or contact my office by [date]. Otherwise, because it will be too late to change our strategy, I will follow your original instructions.

Trial preparation and follow-up

Although it is necessary for the lawyer to have a thorough understanding of the case to provide competent representation, that understanding may not require the lawyer's direct handling of every aspect. If the case goes to trial, the lawyer may be able to save the client money by having the client, a law clerk, or a paralegal analyze some of the pretrial information and prepare the exhibits.

But before doing so, the lawyer should create a checklist of the tasks necessary to prepare for trial as if there were no cost limitations. He or she should then review that list with the client and highlight any possible problems that may result from delegating the work or eliminating certain steps. It should be the client who decides which steps are to be taken and who will take them.

Although the task of documenting this process might appear time-consuming, there is an easy way to do it: By leaving a space next to each item on the checklist, the lawyer can simply record the client's decision on each as they review the list.

Similarly, a competent lawyer will know what tasks need to be done to implement a judgment, but he or she does not necessarily have to complete those tasks alone. When implementing the final divorce judgment entails spending time having deeds prepared and recorded, the lawyer can advise the client that he or she can save on costs by recording documents on his or her own. When a judgment specifies that the opposing party must turn over assets or sign documents, the lawyer can suggest that the client seek the assets and/or signatures directly, and solicit the lawyer's help only if the opponent refuses to cooperate.

Diligence and communication

If the lawyer wants to treat postjudgment matters separately, he or she should have made that clear at the outset of the case. Otherwise, the duty to provide competent representation could be construed more broadly. At a minimum, to satisfy the duty of competence—and for self-protection—the lawyer should tell the client what must or should be done and then document the client's choices.

Procrastination does not make problems go away. The lawyer should make it clear at the outset that hard strategy choices must be made early on. Although lawyers typically think of the duty to act diligently as a duty they owe specifically to their clients, the Creed of Professionalism encourages lawyers to extend that duty to opposing counsel as well—by discouraging a client's plan to use delaying tactics and by refraining from using delaying tactics of their own. Any delays the client insists on should be documented.

With respect to the duty that connects lawyer to client, the lawyer must recognize that postponing consultation with the client can only complicate the representation. Model Rule 1.3 states that "a lawyer shall act with reasonable diligence and promptness in representing a client." The Disciplinary Rules promulgated incident to Canon 7 on

Sample Language to Terminate Representation

You have instructed me to not to prescribe a course of action and have advised me that you can not/will not pay for my services or for those of an expert. I believe that this instruction will prevent me from representing you competently and/or will force me to incur unreasonable expenses on your behalf without any prospect of your repaying me. Your instructions have created a conflict between your interests and mine. Therefore, I am enclosing with this letter my motion to withdraw as your counsel as a result of the conflict of interest that has arisen between us.

representing a client zealously within the bounds of the law speak in terms of "being punctual in fulfilling all professional commitments" (DR-701(A)(1)).

Too often, lawyers internalize the pressures of their caseloads and fail to tell clients that they are concerned about the risks associated with delaying discovery or some other aspect of preparation. As a result, instead of being commended for reducing costs, lawyers end up defending accusations that a case has suffered due to the lawyer's lack of diligence or that the client was not given enough advice to make informed decisions.

To prevent such problems, the lawyer should contact the client as soon as he or she is aware of an issue that requires a decision and tell the client about the possible risks of delay. Lawyer and client together can choose to make the decision or delay making a decision, as they see fit. If they disagree, the lawyer may want to advise the client that although ethical rules charge lawyers with primary responsibility for technical and legal tactical issues, they also stress deference to client wishes on decisions that involve expenditures. (Rule 1.2 Comments).

Conflicts of interest

Rule 1.7 addresses conflicts of interest. The commentary that follows cautions: "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client." Canon 5 of the Model Code states: "A lawyer should exercise independent professional judgment on behalf of a client." The accompanying ethical considerations warn the lawyer against loaning the client money or advancing costs except when the client bears the ultimate liability for the costs and expenses at issue. For example, if the lawyer promises to obtain results for a flat fee and employs cost-cutting measures to do so, the client can later argue that the lawyer neglected client interests in the service of completing the case within the time constraints imposed by the flat fee.

Although it may be tempting for a lawyer working for a flat fee to have the client sign a blanket waiver that allows the lawyer to use discretion in preparing the case, doing so risks a later determination that the client did not have enough information to make that decision. A better way to avoid conflict is to have the client participate in all strategy decisions that will incur costs and to pay for them directly or acknowledge in writing that payment will be made at the end of the case. The lawyer should also ask that the client work directly with experts and other professionals to avoid the conflict that might result between lawyer and client if an expert's fees exceed his or her original estimate.

In addition, lawyers must be prepared to manage the conflict that arises when both divorcing spouses approach the same lawyer for representation. Canon 5 of the Model Code obligates a lawyer to exercise independent professional judgment on behalf of a client; Ethical Consideration 5-14 indicates that maintaining independence precludes a lawyer from accepting or continuing employment that will adversely affect his or her judgment on behalf of a client or dilute his or her loyalty to the client. Dual representation presents such a situation. A lawyer is asked to represent two or more clients who *may* have differing interests irrespective of whether the interests are conflicting, inconsistent, or diverse.

Model Rule 1.7, which addresses conflicts of interest, provides that a lawyer shall not represent a client if that representation will be directly adverse to another client, unless the lawyer obtains each client's consent after consultation. The rule further states that a lawyer will not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client, unless the lawyer reasonably believes the representation will not be adversely affected.

Under any set of rules, when client interests collide, the lawyer must withdraw as counsel for both parties. The safest way to handle the type of inquiry described above is for the lawyer to tell the spouses that he or she is willing to represent one of them and that they should determine which; the other spouse may wish to represent himself or herself or to hire another attorney.

The lawyer should then ask the "other" spouse to leave. If that spouse elects to proceed pro se, the lawyer should insist that he or she execute a statement acknowledging an understanding that the lawyer represents the client and the client alone, and that any documents the lawyer may prepare for the nonclient's signature are prepared as a courtesy only and are not an indication that the lawyer is his or her representative.

Choosing to represent

Because the Model Code requires that a lawyer represent a client competently, the lawyer should consider declining representation if, at the outset, the client places unreasonable economic restrictions on the representation. Although Canon 2 of the Model Code imposes an obligation to assist the legal profession in fulfilling its duty to make legal counsel available, it does not state that a lawyer has an obligation to act as an advocate for every person who wishes to be his or her client. Instead, it requires that lawyers not decline proffered employment thoughtlessly. (See "Sample Language for Declining Representation" on page 43.) Ironically, lawyers are often so focused on winning

potential clients that they ignore the reality that lawsuits cost money.

Once a lawyer has undertaken representation, he or she may withdraw from the matter if the client makes choices that result in an unreasonable financial burden on the lawyer or that render the representation unreasonably difficult (Model Rule 1.16). Lawyers practicing in jurisdictions governed by the Model Code may withdraw if the client engages in conduct that makes the lawyer's representation unreasonably difficult. (DR 2-109). (See " Sample Language to Terminate Representation" on previous page.)

Clearly, providing representation on a tight budget does not shelter a lawyer from his or her ethical obligations to either the client or the profession. The lawyer must bring the same expertise to a tightly budgeted case that he or she would bring to any other matter. The key lies not in giving the case less attention but in giving it a different sort of attention—working closely with the client to set realistic goals, planning strategies in advance, and documenting all of the client's choices. ■

Sample Language for Declining Representation

On (date), you consulted me regarding my representing you in an action to [describe matter]. One of your primary stated goals was to minimize the cost of your case. I believe, based on the restrictions you identified, I cannot become [professionally responsible] for your matter because those restrictions would prevent me from handling this matter competently. As a result, I consider the professional relationship between us that may have existed during our consultation to be ended. You may not expect me to take any action on your behalf.