Separation and Divorce in South Carolina,

A Client's Guide

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Chapter 1 INTRODUCTION

Why this book?

DISCLAIMER. Law deals with life. The law is complicated because life is complicated. No two legal situations are identical. The statute laws, the case law and court decisions, and the rules of court just for South Carolina take up hundreds of volumes. This book deals with generalities. It is not a substitute for a lawyer and you should not act in reliance on any statement in this book until your own lawyer has advised you.

SEXISM. I am not sexist. Neither basic human decency nor my wife, my daughter, my mother, my law partner, my favorite court reporters, my office staff nor the other strong women in my life would permit it. In this book, purely for brevity, I use the generic masculine pronoun unless referring specifically to a wife or mother.

With those two housekeeping details completed, I now continue with the substance of this book.

I am a divorce lawyer. More broadly, though, I am a family law practitioner. I represent clients in matters dealing with divorce, child custody, child support, alimony, property division, and any domestic relations issues. Note that I am not your lawyer until you and I agree.

I charge for my time and my employees' time hourly rounded to the next tenth of an hour. You should pay your lawyer to do certain things for you in a domestic relations case. You can do certain things for yourself and should not have to pay anyone to do for you. When you save your lawyer time, you save your money. The first major purpose of this book is to help you get the best legal representation at the least expense.

Lawyers are sometimes poor at maintaining good public relations. The chief complaint of clients is not that the lawyer got a poor result. The chief complaint is that the lawyer did not explain procedures, strategy, and actions to the client. The second purpose of this book is to help you understand what the lawyer is doing for you as your lawyer and to help you understand why they are doing it.

Trial lawyers are competitive and have large egos. I am a trial lawyer. I like winning and I hate losing. The better prepared your lawyer is for your case when you go to court together, the better chance you have of getting a favorable result. A third purpose of this book is to help your lawyer better prepare so you may get a more favorable result.

I tried to make this book readable, informative, and relevant. I hope you enjoy it, although you are probably going through a difficult period in your life and the subject is emotionally difficult. I recognize using this book effectively requires time and effort.

If you read and understand this book the benefits to you should be substantial. You will save money in legal fees. You will get better representation in both settlement negotiations and trial. You will be more knowledgeable about family law and you will be more confident

in your situation. You will better understand the proceedings. You will have a better relationship with your lawyer, whether me or someone else. You will be a stronger person, both emotionally and financially.

My purpose is not to teach you to be a lawyer. That takes three years after college plus practical experience. My purpose is to have you as a happy and satisfied client. I want the legal aspects of your domestic relations problem handled in a way that does not increase the pain and anguish you may be feeling.

I first published this book as a printed book in September 1982. Since then many changes have occurred in the laws and in the rules of court, requiring many revisions.

I originally wrote this book for my clients but it should be valuable for anyone going through separation and divorce.

For Other Lawyers' Clients

Your lawyer will not do everything the way I do it. This does not reflect negatively on either your lawyer or me. Our general principles and the ultimate goals are the same.

Hourly rates in the legal profession vary. Your lawyer may charge more or less per hour than I charge. Your lawyer may charge for his services on some basis other than an hourly rate. He may charge a flat or fixed fee. He may charge at the end based upon several factors. His fee may contain a combination of these rates. Generally, a lawyer may not ethically charge a contingent or percentage fee in a domestic relations case.

The initial retainer fee varies greatly from lawyer to lawyer. The larger the retainer fee, the greater the chance that the lawyer will not earn it all. Have a firm understanding whether the lawyer will refund you any unearned portion of your retainer fee. Most lawyers apply your retainer fee toward their hourly rate or costs. If a lawyer charges a fixed amount just to take your case and that amount will not apply to your hourly fees, you may wish to consider another lawyer.

I offer these suggestions in dealing with your lawyer:

1. Always make an appointment. Lawyers appreciate clients who are considerate of their time. I never met a lawyer who welcomed clients with no appointment.

2. Make your own appointment. Let no one else make your appointment for you. Many lawyers believe that clients who do not make their own appointments are not serious or committed to the case. The worst-case scenario is for a mother to make an appointment for an adult son.

3. Do not be a know-it-all. You will acquire much knowledge from this book but if you must use it repeatedly to educate your lawyer, you are using the wrong lawyer.

4. Have a firm understanding about your lawyer's fees and costs. Having that understanding in writing protects both you and your lawyer. Ethical lawyers use written

fee agreements. Legal fees are usually negotiable; however, your lawyer understands what his time and efforts are worth. Ask intelligent questions about fees and costs. If the fee quoted by your lawyer is still unsatisfactory, find another lawyer; everyone will be happier in the end.

5. Avoid unnecessary telephone calls and emails. Absent an emergency, save your questions so you can ask several during one call. Do not call your lawyer at home unless it is an absolute emergency or he has asked you to call. I avoid this problem by not having a home phone. Most lawyers have a minimum fee per telephone call and you can save yourself money by avoiding unnecessary telephone calls. The part of family law practice that most lawyers dislike is the telephone calls from clients, particularly the unnecessary telephone calls.

6. Never, never, contact a judge about your case or a judge's staff about your case. This embarrasses your lawyer and may cause you much more serious problems. Do not call the clerk of court or anyone other than your lawyer or his staff for information about your case.

7. Do not quote a police officer, your friend who is a real estate paralegal, someone who works in the magistrate's office, or the internet about your legal rights or what the result in your case should be. These are notoriously bad sources for legal advice. Your belief you need advice from those sources insults your lawyer.

8. Pay all fees and costs promptly. Lawyers appreciate prompt payment and will generally respond with a better effort for the client.

9. If you become dissatisfied with your lawyer, write a diplomatic and restrained letter stating your dissatisfaction and requesting a conference to discuss it. Your lawyer can probably explain. The South Carolina Bar provides the Client Assistance Program headed by Jill C. Rothstein to help clients with these problems. You may be contact Ms. Rothstein by telephone at 803-799-6653, ext. 159, or e-mail at jrothstein@scbar.org. Ms. Rothstein is both helpful and pleasant in helping clients resolve issues with lawyers.

10. If you have differences with your lawyer you cannot resolve, go to his office, pay all fees and costs, ask for your file, and take it to another lawyer. If your case is already pending in court, your lawyer must get an order relieving him as your attorney of record. If you discharge your lawyer, consent to an order relieving him as your attorney of record.

11. Occasionally give your lawyer a pat on the back, show appreciation. Lawyers are human and need reinforcement. The best pat on the back is to recommend him to your friends.

12. Do not tell lawyer jokes unless you want to insult your lawyer. Most lawyers are honest, believe their professional colleagues to be honest, and will resent any suggestion that lawyers are not honest. Most lawyers work long hours, fifty hours a week or more, and resent suggestions that lawyers do not work hard. Lawyers spend little time protecting clients from the bad acts of other lawyers but spend much time protecting their clients from the bad acts of non-lawyers.

13. Many clients believe that lawyers should be grateful for their business. Most good lawyers have more clients than they need. The demand for good lawyers exceeds the demand for good clients. Many lawyers are quick to sever ties with difficult clients. Most lawyers are wary of potential clients who discharged one lawyer. Many refuse to represent potential clients who discharged more than one lawyer. Do not assume that finding a new lawyer will be easy if you discharge your old one. My brother Clarkson recommends the Tarzan principle, "Do not turn loose of one vine before you have a hold on another.

14. If your lawyer recommends you accept or make a settlement offer, do it. Lawyers make far less money from settlements then from trials. When your lawyer recommends settlement, it will save you money and cost your lawyer money. He is protecting you.

Chapter 2 Frequently Asked Questions

Will you please explain . . . ?

Q#1. Must I have a lawyer to get a divorce?

A. No, at least that is the short answer, just as you do not have to have a doctor to remove your appendix. Both the South Carolina Judicial Department and the South Carolina Bar provide self-help forms. The Judicial Department web site is www.sccourts.org and under the tab "General Public" it has "Self-Help Resources." The Bar website is www.scbar.org and under "Public Services" it has a tab for "Self-Help Resources. I provided this information but I do not recommend it. Every divorced lawyer I know, even those who practice in family court, hired a lawyer to represent him or her. These lawyers understand what the self-help advocates do not.

Q#2. What are the grounds for divorce?

A. In South Carolina, the grounds for divorce are adultery, physical cruelty, habitual drunkenness, desertion for one year, and continuous separation without cohabitation for one year. The last ground, the only "no fault" ground, probably accounts for ninety percent of all divorces in South Carolina.

Q#3. Can my spouse and I use the same lawyer?

A. No. The *Bible* teaches that man cannot serve two masters.[1] Likewise, a lawyer cannot represent both the husband and wife in the same case. An ethical lawyer should not represent both parties in a divorce. A lawyer is even ill-advised to prepare a separation agreement for both parties. A frequent problem I encounter is that one spouse thought that a lawyer was representing both parties only to find out later that the lawyer only represented the other spouse.

Q#4. How long will it take?

A. Like most questions in family court, this one is not simple and the answer is only a guess. See Chapter 30, The Final Hearing, page 63, for statutory minimum time periods on the different fault grounds. Sometimes the time periods can be reduced if the opposing party waives notice requirement and the right to answer. Delays in family court are common, and rarely caused by the ground or grounds of divorce. Issues with child custody, visitation, child support, alimony, equitable apportionment of property, and attorney's fees cause the delays. Scheduling is a major problem of delay, but scheduling time varies depending on the state of the court's docket. Delays can be lengthy. The Supreme Court of South Carolina requires cases to be dismissed 365 days after filing the summons and complaint, unless the parties have requested a final hearing. This cause all cases to be tried

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[1] *Matthew* 6:24.

within one year of filing, but it does not work that well or easily. A simple divorce on a one-year separation with no collateral issues is usually quick, six weeks to two or three months. My best estimate without knowing more is six to nine months where the parties reach an agreement before settlement but probably nine months to one and a half years for contested issues. Once a settlement is reached, most judges are accommodating to the parties in getting the approval hearing scheduled quickly, often within one or two weeks.

Q#5. Will you will properly represent me?

A. You must have some confidence in me or you would not have come to me. I am qualified. If you hire me and I do not properly represent you, then you may (a) cancel my services under our written Retainer Fee Agreement; (b) fail to recommend me to your friends; (c) sue me for malpractice, or (d) report me to the South Carolina Commission on Lawyer Conduct. Despite these threats that may be used against me, the simple answer is that I am a professional, I get much satisfaction from my work, and I try to avoid taking cases on which I do not want to work.

Q#6. How much is your fee?

A. We have two lawyers and two legal assistants in my office. Fees vary depending upon the case. We sometimes use independent contractors or experts. The client is responsible for all court costs and expenses. We charge a non-refundable minimum retainer fee, usually $3,500, but sometimes more, that is applied toward these charges. Accurate estimates of fees are nearly impossible because of many factors over which we have no control. See Chapter 32, Fee Agreement, page 66, and Appendix A, Retainer Fee Agreement, page 72.

Q#7. Must I tell you everything?

A. Yes. Full disclosure to your lawyer is essential to avoid possible problems and to obtain the best results. Everything you say to your lawyer is confidential and may not be revealed without your permission. It would be a serious breach of ethics to reveal confidential information without your consent.

Q#8. Who decides who gets custody of the children?

A. Either the parents agree on child custody or the judge decides. See Chapter 8, Child Custody, page 21.

Q#9. Must I have a separation agreement?

A. No. In the past, I rarely recommended separation agreements. Recent changes in the law have made separation agreements more effective for some purposes. Other good lawyers use separation agreements frequently. See Chapter 12, Separation Agreements, page 33.

Q#10. May I date before the divorce is final?

A. No. See Chapter 13, Dating, page 35.

Q#11. What if my spouse will not sign for a divorce?

A. "Signing for a divorce" is a myth. The only signature needed on a decree of divorce is the signature of the trial judge. Your spouse cannot prevent you from obtaining a divorce to which you are entitled. You may sign various documents, such as a Uniform Child Custody Jurisdiction and Enforcement Act affidavit or a financial declaration, but you will not "sign for a divorce."

Q#12. How is alimony and child support decided?

A. Either by agreement or by the judge. See Chapter 14, Divorce—The Money Problems, page 36.

Q#13. Must I to go to court?

A. Most probably. A divorce requires proof in open court. Other issues can be settled out of court but even a settlement must be approved by the court before it is binding. The best way to avoid court is thorough preparation for court and letting the other side know that you are ready and willing to go to court. Read Joel Chandler Harris (Uncle Remus), The Wonderful Tarbaby.

Q#14. What happens in court?

A. Each side presents its case and the judge decides. See Chapter 18, Trial Procedures, page 42; Chapter 17, The Temporary Hearing, page 40, and Chapter 30, The Final Hearing, page 63.

Q#15. I'm scared. What should I do in court?

A. We will spend enough time on this before court. See Chapter 19, Trial Tips, page 43.

Q#16. Who can appeal?

A. Any party who believes that he or she has lost the case in the trial court may appeal by filing written notice of appeal within thirty days of the court's order. You should not yet be concerned with an appeal.

Chapter 3 THE INITIAL CONSULTATION

What should I bring?

To promote a good beginning to an important relationship, each of us must be prepared for our initial consultation. We expect you to read this book before we meet.

My Favorite War Stories # 1: Did the Client Read the Book?

The client wanted an immediate appointment. I explained the need to read this book. The client balked. I suggested that the client get another lawyer if he were unwilling to read the book. He promised to read it.

The Client Intake forms were skimpily prepared. After a few questions, I knew he had not read a page.

Client asked if I could also represent his wife. He had not read so much as the Frequently Asked Questions in Chapter 2.

In the end, I learned representing an uncooperative client is not worth it, no matter how much the fee. He never understood the process and we were constantly at odds.

Now my policy is to refuse to represent anyone who is unwilling to read this book. This should be titled My Least Favorite War Story.

When you first contact our office, you will be instructed to read this book from our website, www.mcdowlaw.com. We ask that you then complete the Client Intake form from the "Getting Started" tab on the website, which is transmitted directly to our secure server. We will then contact you, typically within one business day but dependent upon our schedules and the urgency of your case, regarding the consultation fee and to schedule the initial consultation.

Be prepared and organized for the initial consultation. You should be prepared to discuss the major problem areas. Have a general understanding of what relief you seek and what you want us to accomplish. Many clients find it helpful to make an outline to bring to the initial consultation.

If you received any letter from a lawyer, any summons, or any legal documents, let us know in your initial contact and upload with your Client Intake form if possible. If you are not able to upload, call to find out about email, fax, or other options. The law imposes critical time deadlines and you cannot afford to default or fail to respond to deadlines.

Recent pay stubs showing year-to-date earnings for you and your spouse are helpful, as are W-2 forms and tax returns for the prior year. Court rules require attachment of four recent pay stubs to your financial declaration.

Do not bring your children to our office. We love children but your children must not be subjected to your domestic problems in a lawyer's office. If they are old enough to understand, then they should not be present. If they are not old enough to understand, then they need a baby sitter–which we do not provide.

At the initial consultation, we want to talk only to you. We do not want to talk with your witnesses, your spouse, your children, or anyone else. We want your story and want you to talk freely. We may need to give candid advice that might embarrass you if others were present. Also, the attorney-client privilege, your assurance of confidentiality, may be legally lost if someone else is present during our consultation. I can talk with your witnesses and others later.

Many clients schedule the initial consultation because they know what they want and want to begin immediately. Other clients schedule the initial consultation because they are unsure of their rights or what they want, but want to insure any decision they make is an informed and intelligent decision. Any reason for the initial consultation satisfactory to you is satisfactory to us.

This book will answer some of your questions, but not all of your questions. It may raise other questions. You will have questions. Part of our job is to answer your questions. To avoid forgetting your questions, bring them in a note to yourself.

Our fee for the initial consultation is $300 which covers one hour. If we go beyond one hour, you will be charged the regular hourly rate. If you decide not to proceed then you will be billed only for the actual time. Be prepared to pay the initial retainer fee, usually $3,500, at the initial consultation. The fee for the initial consultation is included in the initial retainer fee.

Chapter 4 HONESTY

Why should I tell the truth?

Benjamin Franklin said, "Honesty is the best policy." This statement was not based on morality or religion. Franklin recognized the person who tells the truth will be better off in the end. My father advised, "Always tell the truth to your doctor and your lawyer or it may be fatal in either case." Daddy's advice may not have been original but it is good advice. When you tell the truth, you do not have to remember what you said.

Our clients are better than anyone else's clients. This does not mean that our clients are perfect. No matter how bad your spouse and no matter how much your spouse may be at fault, some facts probably reflect unfavorably upon you. When preparing your case, we must know the bad facts. To represent you effectively, we must be prepared to deal with whatever is brought before the court, although it may be bad or may be untrue. Usually there is some valid explanation or some way to reduce the impact. We want to be prepared for any unpleasant fact.

We see our role as lawyers as first determining the truth and then explaining to the court why the truth is favorable to our client and why the truth entitles our client to a favorable result.

My Favorite War Stories #2: Making the Best of the Truth

> The husband sought a divorce upon the grounds of habitual drunkenness. I represented the wife with a severe alcohol problem. She admitted her alcoholism. I argued that she needed alimony because the disease of alcoholism impaired her ability to earn income. The family court judge agreed with me and awarded alimony. The happy ending: My client is now a recovering alcoholic and is leading a happy and productive life.

If you make a false statement to your spouse or to another person, then the other side may use the false statement in court to impeach you to show your testimony should not be believed because you are not an honest person. See My Favorite War Story #3: A Pointless Lie, page 14, for a good, or bad, example of what can happen when someone lies.

If your spouse or anyone else asks you a question outside of court, you always have the right to respond, "I will not discuss that" or "That is not your concern." You may even state, "My lawyer advised me not to discuss that" and it will be true because I advise all clients not to discuss their cases except in my office and in court.

Perjury is a dishonest statement on a material fact under oath. Perjury is a felony, punishable by up to five years in jail. Criminal prosecution, while a risk, is not a great risk. The greatest risk of perjury is that if the trial judge recognizes perjury, he will not grant relief to the person committing perjury and will probably rule for the other side.

My Favorite War Story #3: A Pointless Lie

> My client told me this was her fourth marriage. She had a good case, a 20-year-marriage, a bad husband, a need for alimony and attorney's fees, and an entitlement to a good property division. When I questioned her in court, she was an excellent witness, honest, sincere, and sympathetic.
>
> On cross-examination the other lawyer, a very fine attorney who has since become a judge, asked my client how many times she had been married. She replied four. He asked if that included this marriage and she said yes. He asked her the names of her husbands and she named four. I did not like where this was going because I knew that the other lawyer knew something that I did not know. He then asked her, "What about Sam Smith?" She replied, "I did not think that anyone knew about that."
>
> The judge believed nothing my client said. He resolved all issues favorable to the husband. I was sick and she was broke, all because she did not tell the truth about a matter that made no difference so long as she was honest.

Our clients tell the truth, even when the truth hurts. We expect the trial judge to believe every word of our clients' testimony. You will benefit because our past clients have told the truth and our future clients will benefit because you told the truth.

If a witness tells the truth when the truth is embarrassing or unfavorable, then that witness enhances his own believability and makes the remainder of his testimony more believable.

Our policy on perjury is inflexible. We will not tolerate it. When we recognize that our witness is not telling the truth, then we ask the judge for a recess. We advise the witness he must correct the perjured testimony. If he does not correct the testimony, we advise the trial judge of the perjury, unless the witness is our own client in which case we ask the trial judge to relieve us immediately as his attorneys.

If the witness who commits perjury is an adverse party or witness then there is little we can do except try to expose the perjury and hope that our client will be believed. We never encourage criminal prosecutions by individuals. Several family court judges who believe a witness committed perjury, order a transcript of the proceedings delivered to the circuit solicitor's office with the recommendation the witness be prosecuted for perjury.

Honesty is the only acceptable policy.

Chapter 5 RECONCILIATION

What if we get back together?

The laws and public policy of South Carolina favor marriage and discourage divorce. We concur in that policy. If married people can resolve their differences and resume their marriage, then they are encouraged to do so. Also, we recognize reconciliation is often impossible or would be detrimental to our client.

If the parties in a divorce case reconcile or make up, then each is considered to have forgiven or condoned any past misconduct of the other. This means that the past conduct can no longer, except in limited cases, be presented to the court.

Some lawyers will advise a client guilty of misconduct to seek a reconciliation and condonation to avoid a poor result in court or to nullify a written agreement. We do not. The only legitimate reason to reconcile is that two married people want to make their marriage succeed.

If you and your spouse honestly want to reconcile, have your lawyers take steps to protect the rights of each of you if your marriage fails. The innocent spouse needs a reconciliation agreement approved by the court before the case is dismissed.

My Favorite War Stories #4: Reconciliation Agreement

> I represented the wife. Her husband had moved in with another woman. We had a strong case for alimony and a favorable division of property and expected to do well. The night before the temporary hearing, the husband appealed to the wife for a reconciliation. She wanted him back and began to waiver. At the temporary hearing she announced that would reconcile. I insisted as a condition of the reconciliation the husband agree if he left again, the wife would receive the marital home, in which the parties had equity of approximately $100,000, the only major asset of the marriage. The family court judge and the husband's attorney were vocal in their criticism, saying I was trying to break up the marriage and keep the people apart, but they agreed to my condition. The parties put the reconciliation agreement the court record and the court issued an order of dismissal based upon the agreement. Two months later the husband left. The wife got the house. The husband appealed to the Supreme Court of South Carolina, which affirmed the award of the house to the wife.

Follow these guidelines: (1) Keep your lawyer advised of all reconciliation efforts and attempts. (2) Do not move back into the marital home or allow your spouse to move back into the marital home without getting your lawyer's advice. (3) Do not engage in sexual intercourse with your spouse unless you intend a reconciliation and condonation.

Chapter 6 MEDIATION AND ARBITRATION

Isn't there a better way?

Alternative dispute resolution, to avoid litigation, is all the rage. The theory is parties who cannot live together can resolve their problems to their mutual satisfaction helped by a mediator or arbitrator. Proponents argue this also saves legal fees and costs. Mediation favors the aggressive bully and hurts the non-assertive or timid spouse. Frequently, rather than saving fees and costs, arbitration or mediation simply creates another layer of expense. We spend almost as much time preparing our clients for mediation as we would spend in trial. See My Favorite War Stories #5: Making the Best of Mediation, page 17, for an example of a mediation that back-fired for the party who arranged it.

Mediation is mandatory in contested domestic relations cases in family court other than temporary hearings, contempt of court proceedings, and Department of Social Services cases.[2]

Mediation should not be necessary. Good lawyers should settle cases and protect the rights of their clients with the least hostility, antagonism, and expense. If the lawyers cannot settle, then mediation is required.

Understand these points and you will fare better in mediation:

- Two bad things and two good things can happen at mediation. Bad: you fail to settle or you settle for a bad result. Good: you settle or we learn much about the opposing party's case and goals which help us prepare for trial.

- Mediators frequently terrorize litigants into settlement with two arguments. Litigation is expensive. You can reach a better resolution of your problems than a judge can. While these points are valid, they must not control you.

- Mediators frequently want to talk with the parties without the lawyers present. I universally oppose this. My client hired me because I have knowledge and expertise the client does not have. I advise my clients to respond, "I do not want to discuss any issue without my lawyer present to advise me."

- No one can require you to settle. Allow no mediator, lawyer, guardian *ad litem*, opposing party, or anyone else to pressure you into a settlement you oppose. Accept no settlement unless you believe it is fair, reasonable, and what you want. No settlement at mediation is bad but a bad settlement is even worse.

- Many times parties mediate successfully but then family, friends, paramours, co-workers, significant others, and other busybodies convince a party the settlement is awful.

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[2] Rule 3, ADR Rules.

This causes problems. I favor allowing anyone who might torpedo the settlement to be present at the mediation site so each party may talk with his or her significant others. Most mediators and lawyers disagree with me on this.

- Most mediated settlements are written agreements signed at mediation. Once a party signs the agreement, repudiation is often impossible and repudiation attempts can be expensive and disastrous.

- Mediation may be your last opportunity to get a favorable result while keeping your legal fees low. Try to take advantage of this opportunity.

- Neither hostile and acrimonious statements nor outrageous demands are conducive to settlement. Do what you can to make the opposing party to want the result you want.

- Be patient. Most successful negotiations are reached late in the day. Most impasses occur early.

- You and your lawyer must be on the same team with the same strategies and goals. This requires discussion and agreement before going to the mediation. Only one thing can be the most important. You and your lawyer must prioritize your settlement goals.

- Most mediators put the parties and their lawyers in separate rooms with the mediator going back and forth with offers and counteroffers. This is the most common practice but it is also the most expensive as it take almost twice as long. Also, it deprives the parties from hearing each other, which sometimes makes settlement more difficult as some parties just need to be heard.

- Relax and be on your best behavior. Do not frown, cross your arms, jiggle your leg, drink water, or display other bad body language. Exhibit what Mark Twain described as the confidence of a Christian holding four aces. Be pleasant, look people in the eye, and smile.

My Favorite War Stories #5: Making the Best of Mediation

Before the husband had a lawyer, the wife's lawyer arranged for the parties to attend mediation. Part of the mediation agreement was that they would attend without their lawyers. The husband first came to see me on Friday and the mediation was scheduled for 10:00 Monday morning.

The husband and I spent four hours working Friday afternoon preparing for the mediation, and about five hours each afternoon on Saturday and Sunday afternoon. Preparation for a final contested hearing would have been easier and cheaper but my client was prepared for the mediation.

We discussed what his initial offer would be and prepared documents to demonstrate how he arrived at that offer. We decided he would not

> budge from that until shortly before lunch, a time we thought the wife and the mediator would be ready to declare an impasse and quit. We planned the afternoon session so he would make some concessions late in the afternoon with the idea of agreeing to a settlement about 4:30 or 5:00.
>
> The result was outstanding for the husband, far better than I could have negotiated and far better than he could have done in court. I learned that mediation is like a trial; the side that works the hardest is more likely to get the better result. I also learned that mediators and mediation can be manipulated.

Arbitration differs from mediation. A mediator seeks negotiation and agreement by the parties. An arbitrator considers evidence, determines the facts, and decides the rights of the parties. An arbitrator does what a judge does with two major disadvantages, the dissatisfied party cannot appeal the arbitrator's decision, and the parties must pay the arbitrator's fee. Arbitration is rare in family court.

The mediator's fee is almost always divided equally between the parties, subject to reapportionment at a final hearing. Most mediators charge $300 or more per hour and require an advance, often $1,000 by each party. With two lawyers and a mediator each charging $300 per hour, an eight-hour-mediation could cost the parties $7,200 or more. Consider that I will spend nearly as much time preparing for mediation as we spend in mediation itself.

Arbitration and mediation are another level of expensive bureaucracy designed to reduce the case load of the courts, taxing the litigants without additional expense to the taxpayers. South Carolina and California each require mediation. The difference is California pays the mediator while South Carolina requires the litigants to pay the mediator. Other very good lawyers disagree with this view.

Because mediation is required, we urge our clients to make the best of it.

UPDATE: Since I originally wrote this book I became a trained, certified family court mediator and have participated in many successful and satisfying mediations.

Chapter 7 COUNSELING

There's nothing wrong with me. Why go?

Professional counselors may accomplish many desirable results. I recommend my clients see a counselor in three situations: They want to reconcile their marriage. They want help with the emotional problems that accompany separation and divorce. They want a credible expert witness who can establish their mental and emotional fitness relating to custody or other issues. These are legitimate reasons to see a counselor.

By the time one party hires a lawyer, the marriage is usually beyond repair and no amount of counseling will save it. Still, one should try if there is any hope. Even if the counselor cannot save the marriage, he may help the parties deal with the emotional problems of separation and divorce and help them remain friends even after they are no longer husband and wife.

At the final hearing, the trial judge will ask if there is anything he can do, such as order marriage counseling, to help you and your spouse reconcile. If the answer will be yes, then you should see the marriage counselor before you hire me, but understand that you cannot force your spouse to see a counselor or remain married.

You can find a marriage counselor under “Counselors,” "Family Counselors," or “Marriage Family Child & Individual Counselors” in the yellow pages or online. Do not! Get recommendations from your lawyer, your doctor, or someone you respect who is in a position to know. Some ministers are trained and qualified as marriage counselors but many are not.

Many counselors are unwilling to testify in court, even providing in their contracts they will not testify by deposition or in court. This is like buying a pistol with no ammunition. It makes a nice threat but it not helpful when you need it. Counselors from other states are problematic because they are not easily subpoenaed or deposed.

If your counselor might testify as an expert witness, credentials and resumes become important. Helpful credentials include doctoral degrees, professional publications, teaching or lecturing in seminars or classes, previous qualification as an expert witness by a court, professional awards and honors, and regularly reading professional publications. The counselor must exhibit a good demeanor and convincing manner on the witness stand. It helps having a counselor with a good working relationship with your lawyer.

Have a firm understanding with your counselor regarding confidentiality. Do not make admissions of fault that may come back to haunt you in court unless you are satisfied that your counselor will go to jail before revealing your confidence. Remember that your spouse or anyone else except your lawyer can quote you in court if they heard you make the statement. See My Favorite War Stories #6: Some Counselors Are Risky, page 20, for an example of how an unethical minister-counselor devastated one client. The legislature improved this situation with a confidentiality statute that became effective on December 8,

1989. This statute primarily applies to counselors, social workers, and mental health professionals excluding doctors. Caution is still advisable.

My Favorite War Stories #6: Some Counselors Are Risky

> The husband was from Rock Hill. My client, the wife, was from another state. They attended his family's church. They had marital problems, including the wife's adultery. They went to their minister for counseling. The wife confessed her adultery to the minister. The husband subpoenaed the minister who testified to the statements the wife made. The family court judge granted custody of the young son to the husband. This happened almost fifty years ago, but I remain suspicious of ministers as marriage counselors to this day.

If you go to counseling, go in good faith. Cooperate with your counselor. You have everything to gain and little to lose.

Chapter 8 CHILD CUSTODY

Who gets the children?

This was an easy question in earlier times. Children were property and the husband owned all property. He got custody. Later, courts adopted the Tender Years Doctrine stating a child of tender years should be with the mother. She got custody. These were tolerable systems because each provided a predictable result which avoided custody fights.

Later, the courts adopted the principle that custody should be awarded according to the best interest of the child. This remains the test today. It is an awful system because no one knows what is in the best interest of the child so the results are not predictable, which creates fights. Professor Martin Guggenheim says when someone argues for the best interest of a child, they are usually arguing for the best interest of some adult.[3]

When I was a young lawyer, joint custody meant parents had equal time, authority, and responsibility with the children. Today, joint custody has become a meaningless term. This means one must look at the actual time, authority, and responsibility rather than the term used for custody. Parents and the public favor joint custody. The courts, particularly South Carolina's appellate courts, view joint custody with disfavor. Most trial judges will approve an agreement for true joint custody but rarely award true joint custody in a contested case. If the children of divorced parents were polled, they would most probably oppose true joint custody.

My Favorite War Stories #7: Joint Custody from a Child's Perspective

> I know an adult in his mid-thirties who hates two York County lawyers, the lawyers who represented his parents in their divorce. They agreed upon true joint custody with the parents alternating custodial weeks. Their child felt he was drug from pillar to post without a home of his own.

Today, the answer to who gets the children is more complicated and less certain.

My job is to represent my client. I do not represent the opposing party, grandparents, guardians, or the child. I represent my client. I try to prove facts supporting my client's position and disprove facts opposing my client's position. Different cases put me on different sides of the custody issue. My personal opinion is the parent who was the primary caretaker of the children during the marriage should have custody, the other parent should have visitation, and the parents should work together to help their children become happy,

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[3] *What's Wrong with Children's Rights*, Martin Guggenheim. Harvard University Press, 2005.

healthy, and productive adults. Guardians *ad litem* and counselors should not be used to involve the children in a custody fight between parents.

Custody fights are emotionally and financially draining. Custody fights scar children and their parents, sometimes permanently. Sane rational parents who love their children will do all within their power to avoid a custody fight.

If a party voluntarily allows the other parent to have custody, the judge will give this great weight in deciding custody. Never voluntarily surrender custody if you intend to regain custody. If you want your spouse to have temporary custody, then have a written agreement stating the facts and the terms so that you will not be prejudiced later.

An ill-conceived statute requires judges to consider a child's preference in awarding custody. Children should be neither forced nor allowed to choose between parents. Most judges sometimes consider the wishes of an older child but give little or no weight to the wishes of a younger child. A sixteen-year-old may be allowed to choose the custodial parent. A judge will not be swayed by the wishes of a six-year-old.

My Favorite War Stories # 8: We Want To Live with Daddy

I represented the husband in a temporary hearing. The only real issue was custody of two young children, probably four and six years old. My client assured me that the children wanted to live with him. The hearing was going reasonably well but I knew that we needed something extra to persuade the judge he should grant custody of young children to the father. I suggested that he talk with the children. He did. He asked, "With whom do you want to live?" They responded joyously, "We want to live with our daddy." The judge was obviously impressed and asked why they wanted to live with their daddy. They innocently responded, "Because he promised us candy any time we want it if we live with him." We lost. The wife got custody.

If custody is an issue, you must prove both your ability and your willingness to care for your child. Too many parents and lawyers present custody cases in broad generalities and conclusions rather than specific facts. Be prepared to describe to the court the living arrangements the children will have with you, such as where they will attend school, who will be with the children if you are absent, and the effect of your work schedule. Many people believe all they prove to get custody is the other side committed marital fault. This may have been true as recently as the early 1970's, when adulterous spouses frequently lost custody, but it is not true today. Custody is frequently lost when one party relies too heavily on the marital fault while offering little as to the best interest of the child. See Chapter 24, Presenting the Case for Custody, page 51.

Regardless of which parent is awarded custody, each parent has these following rights:

"The mother and father are the joint natural guardians of their minor children and are equally charged with the welfare and education of their minor children and the care and

management of the estates of their minor children; and the mother and father have equal power, rights, and duties, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of the minor or any other matter affecting the minor. Each parent, whether the custodial or non-custodial parent of the child, has equal access and the same right to obtain all educational records and medical records of their minor children and the right to participate in their children's school activities unless prohibited by order of the court. Neither parent shall forcibly take a child from the guardianship of the parent legally entitled to custody of the child."[4]

Parents who love their children will not let those children be involved in the custody fight. Do not discuss the case with your children. Do not ask or encourage your children to express a custodial preference. Do not say or suggest anything negative about the other parent to your children. Treat the other parent with dignity and respect. Parents should allow children to be children. Parents should allow their children to love each parent without taking sides.

My Favorite War Stories # 9: The Best Gift I Ever Gave My Children

As a family court lawyer, I know the children of divorce are more likely to suffer from poor self-esteem, are less likely to achieve academic success, are more likely to drop out of school, are less likely to have permanent relationships with persons of the opposite sex, are likely to marry earlier and divorce earlier, and suffer from a host of other problems. The only known way to avoid these problems is for the divorced parents, including stepparents, to treat each other with dignity and respect.

I knew I had a problem. It was the summer of 1981. My children were ten, eight, and six. Under our joint custody arrangement, they spent the school year with their mother and most of the summers and holidays with me. Near the end of the summer, my middle child Randolph asked "Thomas (the children then called their mother and me by our first names), "Why don't you and Croom like each other?" I replied, "We like each other fine. We are not in love or we would still be married but we like each other fine." This did not deter Randolph. "Dodie, Mary Croom, and I do not think you like each other very much." I told him I was sorry they felt that way.

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[4] South Carolina Code Ann. § 63-5-30. Rights and duties of parents regarding minor children.

I called Croom and said, "We have a problem. The kids think we don't like each other." She asked what I suggested that we do about it. I told her I had to take them back to her in Maryland the following week and that I would like to take her, Sandy her new husband, and the children to supper so they could see us get along; that how we acted would have more effect than anything we could say. She said she must check with Sandy and call me back.

When she called back, she said that I could take them to supper on one condition, that since I could not make the round trip in one day and would have to spend the night somewhere, that I spend the night with them. I agreed.

On the appointed day, I arrived in Maryland with the children and a station wagon full of their belongings. Croom, Sandy, and I unpacked and then the six of us piled into the station wagon and went to a local seafood house for a wonderful supper. Everyone was on their best behavior and participated in the conversation. After supper, we returned to their house and continued to talk until bedtime. The evening was not my idea of fun and relaxation and it probably was not Croom and Sandy's ideal evening either but it was worthwhile. The children saw their mother, stepfather, and father together in a social situation treating each other with dignity and respect.

The children finished college, married, and presented me with seven wonderful grandchildren, demonstrating none of the characteristics common to children of divorced parents. I attribute much of this to the fact that Croom and I, despite our differences, worked together and treated each other with dignity and respect.

My advice to clients is that if they love their children, they should prove it by treating the other parent with dignity and respect.

Of all the chapters in this book, this is the one in which I am the most at odds with other lawyers and judges because of my strong disagreement with what others may perceive as the best interest of the child. This chapter is the strongest diversion between my professional advice and my personal opinion.

Chapter 9 THE GUARDIAN AD LITEM

Why appoint a stranger to represent my child?

A guardian *ad litem* (GAL) represents the interests of the children in child custody cases. The family court judge may appoint a guardian *ad litem* if he finds that the court will likely not be fully informed of the facts without the appointment of a guardian or if both parties consent to the appointment of a guardian. Some family court judges insist upon the appointment of a guardian in all contested child custody cases. If a judge appoints a guardian, most often the parties and their lawyers agree upon the guardian but the appointment is within the judge's discretion.

A guardian serves as the eyes and ears of the family court speaking for the child or ward. The guardian may hire a lawyer, subpoena witnesses and records, and generally do anything that a party or an attorney may do in obtaining information about the ward. The guardian may only make a recommendation if requested by the judge. The judge is not bound by the recommendation but usually gives it strong consideration.

I am a certified guardian *ad litem*; however, I generally oppose the appointment of a guardian in custody cases. I agree with Robert N. Rosen, a respected domestic relations lawyer from Charleston:

> "The biggest problem, however, is that there is no need for guardians at all, and lawyers now have a golden opportunity (and, in my opinion, a duty to their clients) to do away with GALs in most custody cases.
>
> I have rarely been involved in a custody case in which the GAL contributed anything except to the cost. That contribution is usually significant."[5]

Robert's article should be required reading for every litigant, lawyer, and judge before a guardian *ad litem* is appointed. The article also discusses the qualifications and duties of guardians.

If a guardian is appointed, then your cooperation with the reasonable requests of the guardian is essential. Assume all requests of the guardian are reasonable. Treat the guardian with the same respect you intend to show the trial judge; however, you do not want to appear stiff, too formal, insincere, or humorless. Being honest and natural in your relationship with the guardian should serve you well.

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[5] South Carolina Lawyer, January 2003. See Appendix B, Getting Rid of the GAL, page 78, for the complete article reprinted with the permission of the South Carolina Bar.

Chapter 10 Parent-Child Relationships in Divorce

How do I handle the children?

Separation and divorce is difficult for you and your spouse. It may be even more difficult for your children, sometimes called "the innocent victims of divorce."

You and your spouse can ease the burden of separation and divorce on your children. Whatever your spouse's attitude and actions, you must help your children through this period. By helping your children, you help your case.

The following are guidelines I developed not only from my professional experience, but also from my personal experience.

1. Children are not pawns and they are not weapons. Never try to use your children to hurt your spouse or to help your case.

2. Children should maintain good relationships with each parent. Regular visitation with the non-custodial parent should be encouraged no matter how much you may resent the other parent.

3. The children probably love both parents despite either parent's shortcomings and faults. This should not be changed. Parents must not bicker or make derogatory comments about each other around of the children.

4. Neither children nor their love can be bought. Do not try. If your spouse tries to buy the children's love or support, do not compete.

5. Children sometimes try to use parents by telling the parents unfavorable things about the other parent. Stop this immediately. Also remember that children may exaggerate, even your own precious darlings. If you learn something bad about your spouse from your children, do not repeat it; the hearer will assume, at best, you had inappropriate conversations with the children or, at worst, you pumped them for information.

6. Children strongly want to believe that their parents will reconcile and life will return to normal. Once a couple separates the chances of a reconciliation are statistically poor. Do not hold out false hopes of reconciliation.

7. Children may try to make you feel guilty so they can have their way. Do not feel guilty, and even if you do, do not let it affect your good judgment.

8. Children should not feel like visitors in a parent's home. If financially possible, the non-custodial parent should maintain separate rooms, clothes, and toys for the children. This creates a feeling of belonging, decreases the need for packing for visitation, and decreases bickering among parents about what was or was not packed and what was or was not returned.

9. Children and parents are under a strain at the beginning of visitation. Avoid short visitations of only a few hours, except for special occasions. Longer visitations, 24-48 hours, allow everyone to relax and enjoy each other's company. My personal and professional preference is for no visitation less than forty-eight hours. I oppose special visitation for Mother's Day, Father's Day, children's birthdays, and parent's birthdays.

My Favorite War Stories #10: Christmas on December 26

My ex-wife and I did not agree on much but after several years of rotating Christmas Eve and Christmas Day, we agreed that it would be best if she always had Christmas Eve and Christmas Day and I always had December 26 through January 2. We also agreed that having the entire Thanksgiving holiday weekend each year would be best for me.

At Thanksgiving, my entire family was together. The adults drew names of adults and the kids drew the names of kids for Christmas presents. Later, after five college graduations, we only have one drawing.

Each family celebrated Christmas Day in its own way but on December 26, after my children arrived, the entire family would gather at someone's home for a meal followed by each person opening the one present they received because of the drawing.

It is a very special occasion. One year the children had to come before Christmas. Everyone was out of sorts for the entire holiday.

10. A spouse who was a lousy parent during marriage will often become a better parent after separation. Allow your spouse the opportunity of improving as a parent.

11. Telephone calls can help children and the non-custodial parent maintain a close relationship but telephone calls can also disrupt activities and create problems of homesickness with the children. Work out guidelines and then live within the guidelines.

12. Parents who abuse each other will rarely deliberately abuse children. Absent specific past child abuse, do not worry about the children being with the other parent. Even if your spouse never changed a diaper or fixed a meal, do not assume that he cannot handle overnight visitation. If you worry about your own ability to handle the children overnight, try it. You may be a better parent than you think. Everyone benefits.

13. Children often resent dates.[6] Do not expose children to dates before divorce. After divorce do not expose children to dates unless you and a particular date have a serious relationship.

14. Sometimes children do not resent dates but become very fond of a particular date. If you then break up with that person, it can be like another separation and divorce for the children.

15. Children often resent stepparents, stepbrothers, and stepsisters. Do not force relationships. Do not encourage children to call stepparents "mother" or "father" or give hugs or other signs of affection. First names are usually best. Affection may come with time.

16. If you are the non-custodial parent, do not have a child's hair cut or ears pierced without the permission of the custodial parent. I receive many complaints about this each year. Hair styles and ear piercing are the prerogatives of the custodial parent.

What is reasonable visitation will depend upon the circumstances and will vary from family to family. I generally recommend:

a. Forty-eight hours every second weekend (that is every other weekend, not the second weekend of each month).

b. One week at Christmas. When I was younger and less experienced, I recommended that the parents alternate Christmas Day each year. I now believe that it is easier, simpler, and better for the custodial parent to have Christmas Eve and Christmas Day each year with the other parent's visitation to begin at 3:00 p.m. on Christmas Day if the parties live reasonably close or at 12:00 noon on December 26 if the parents live over 100 miles apart.

c. I prefer that the non-custodial parent get the entire Thanksgiving weekend with the custodial parent getting the entire Easter or spring break. As an alternative, if visitation falls on the Thanksgiving weekend, then it should begin the evening before Thanksgiving and continue until the normal Sunday ending.

d. I prefer that the custodial parent get the entire Easter or spring break with the non-custodial parent getting the Thanksgiving weekend. As an alternative, if visitation falls on the Easter weekend, then it should extend from the day that school is out until the evening before school begins again.

e. Two to four weeks each summer. There is a tendency to separate the weeks of the summer visitation, such as one week during each summer month or two periods of two

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[6] See Chapter 13, Dating, page 35.

weeks each. It is far better for the children and the parents if the entire summer visitation is consecutive.

f. I strongly oppose visitation for the mother on Mother's Day, for the Father on Father's Day, or any special visitation provision for any birthday of a child or a parent. Mothers should spend Mother's Day with their own mothers and fathers should spend Father's Day with their own fathers. Celebrate birthdays on the first visitation following the birthday. I know of one case where the lawyers and the guardian *ad litem* agreed upon Halloween visitation. Other lawyers may strongly disagree with this opinion. Shuffling children back and forth on these days is not fair to the children and is not fair to their parents.

g. Any other visitation agreed upon by reasonable parents who love their children.

My Favorite War Stories #11: The Birthday Turkey

> I rarely had my children on their birthdays so I developed the tradition of the Birthday Turkey. The Birthday Turkey, known as the BDT for short, lives in an extinct volcano in the Andes and on good little kids' birthdays he flies out of his volcano, swoops down into the kid's bedroom and leaves an unwrapped birthday present under the bed. The first visitation after a birthday, the child who had the birthday upon arriving at my house, would run to his or her bedroom to see what the Birthday Turkey left.
>
> Once, when my niece Margaret was being car-pooled, another five-year-old said she was having a birthday. Margaret asked, "What is the BDT bringing you for your birthday. The little girl, obviously puzzled asked, "What's the BDT?" Margaret, clearly amazed, said, "The Birthday Turkey. You mean, your family does not have a Birthday Turkey?"

Good and reasonable parents rarely follow the visitation schedule because they can agree to changes and alterations suiting the parents and the children. Definite schedules are still advantageous because each parent then knows what visitation will be if they cannot agree to variances.

Reasonable use of the telephone also varies by circumstances. As a general guideline, older children should be permitted one call per day to the non-custodial parent. The non-custodial parent should be permitted two calls per week to older children. Telephone calls should be limited to fifteen minutes. It is the responsibility of the non-custodial spouse to end the call at the expiration of a reasonable or agreed time. During extended visitations, such as Christmas or summer, the custodial parent should have the same telephone rights. When a parent complains he or she is denied access to a one or two-year-old child, my initial reaction is that the complaining parent is using the telephone to harass the other parent. One and two year olds are not great conversationalists, particularly on the telephone.

Telephone calls should be avoided during visitations of forty-eight hours or less, particularly to younger children, as the call interrupts the visitation and frequently causes the child to suffer an acute attack of homesickness.

Telephone calls should not be made early in the morning (before 8:00 a.m.), late at night (after 8:00 p.m.), at mealtimes, during known favorite television shows, or at such other times as are likely to cause inconvenience or annoyance.

If you learn only one thing from this book, I hope it will be to treat the other parent of your child or children with dignity and respect.

Chapter 11 Husband-Wife Relationships After Separation

But we couldn't get along before . . .

Many separated couples get along better after the separation. Others continue to fight. People who could not live together will have some problems, particularly if children or other circumstances require some contact.

The Golden Rule is always good law and good advice. Treat your spouse the way you would like for your spouse to treat you. Frequently ask yourself, "How would I react if my spouse did that?" From a moral viewpoint, you will feel better about yourself if you follow *The Golden Rule*. From a practical point of view, your spouse might become more reasonable and more willing to settle. Also, your exemplary conduct may impress the judge.

Do not spy on your spouse without your lawyer's specific instructions. You can get a private detective if you need one, but talk with your lawyer first. Never follow your spouse. Assume that a private detective follows you day and night documenting everything you say and do.

Do not fight with your spouse. If an argument starts, simply say, "I do not want to fight. I'll talk with you later." Then leave or hang up.

Treat your spouse with respect and politeness. Good manners are always appropriate. Do not gossip with friends or relatives who may quote or misquote you to your spouse. Whatever you say will probably get back to your spouse and create a problem. If you need advice, then re-read this book or talk with your lawyer.

I oppose the pick-up and delivery of children at neutral sites such as a shopping center or police station because it sends a bad message to the children that the parents cannot get along. I frequently remind clients that “He (or she) is the person you chose to be the father (or mother) of your children.” People who slept together and produced children should exchange those children without unpleasantness.

Never open your spouse's mail and never sign your spouse's name to a check or to anything else. The worst and dumbest combination is opening your spouse's income tax refund check and forging your spouse's signature on it. Talk to your lawyer if a particular situation arises that concerns you.

Never sign an arrest warrant or have your spouse arrested. A police officer, magistrate, clerk’s office employee, or a friend may advise you to have your spouse arrested. Do not do it. I have never known of a person that benefitted by having a spouse arrested. I witnessed several cases where signing an arrest warrant was an absolute disaster for the person signing the warrant.

My Favorite War Stories # 12: Getting Arrested Can Be Good

It was a bitter divorce. The husband went to the wife's home one evening to goad and bait her into attacking him. She finally clawed his face until it looked like raw hamburger. He laughed at her and

> then went to the police station to get a warrant for assault. The wife called me from jail about 10:00 p.m. When the divorce case came before the court for a final hearing, the judge was outraged that the husband had the mother of his children arrested. This event was significant in that the wife eventually obtained a very favorable result. In addition, the magistrate dismissed the assault charges.

Do nothing your spouse will interpret as mean, vicious, or vindictive. Do not have your spouse's electricity, water, or telephone service stopped without first talking with your lawyer. Likewise, do not cancel insurance coverage.

Never threaten your spouse. You do not want to get a reputation as a bluffer nor do you want to reveal your strategy.

Do not sell property or dispose of assets without the permission of your spouse, your lawyer, or the court.

Avoid the appearance of living in luxury. Do not make unnecessary major purchases. An appearance of lavish living irritates a separated spouse. Worse yet, judges and adverse attorneys see it as evidence of ability to pay alimony or child support or a lack of need for alimony or child support.

Joint bank accounts are a problem. If you leave money in the joint account, then your spouse may withdraw it. If you withdraw it, then you appear sneaky and underhanded. Probably the best compromise is to withdraw the money and open a new account in both names that requires both signatures for withdrawal. Then advise your spouse what you have done and explain that you are protecting the interests of each of you. Do nothing to cause a bank to return a spouse's check. If you are planning for a separation, establish separate accounts.

Behaving in an exemplary a manner is not a sign of weakness. As Teddy Roosevelt said, "Speak softly and carry a big stick."

Many lawyers urge their clients to negotiate settlements with their spouses. I do not for five reasons. First, parties who can settle such issues are not likely to be divorcing. Second, no agreement binds either party until the family court approves and adopts it. Frequently parties agree to provisions no judge will approve. Third, good lawyers advise clients to repudiate harsh, ill-advised, or unfavorable provisions before the family court approves them. Fourth, negotiations by the parties undermine the position and authority of their lawyers, making settlement difficult or impossible. Fifth, some of the most expensive cases in which I have been involved are where the parties attempt to negotiate their own settlements and only succeed at prolonging the case and increasing the expense. An exception exists where the lawyers ask the clients to negotiate a particular point, most often the division of household goods and furnishings.

Chapter 12 SEPARATION AGREEMENTS

Do I need a separation agreement?

A separation agreement can serve many useful purposes. It defines the rights and obligations of the parties. It may save taxes. It may save an appearance in court. It may reduce or avoid antagonism. It lets one acquire property exempt from division as marital property. It may halt the period where adultery will be a bar to alimony.

The law wisely requires each party to understand the separation agreement and freely agree with full knowledge of the facts. Also the agreement must be fair and equitable. Preparing a separation agreement which meets this test and is acceptable to each party, is difficult.

Each party to a separation agreement should have his or her own lawyer. See Chapter 2, Frequently Asked Questions, page 8, FAQ #3. This is true even in the most amicable separation. The family court judge should reject any separation agreement when one party is without his own, separate attorney. Family court judges do this more often, but still too many separation agreements are being "rubber stamped" by judges, leaving one party at a considerable disadvantage.

No separation agreement is binding upon either party until the family court approves it as an order.

My Favorite War Stories # 13: Separation Agreement Horror Stories

The husband had a lawyer who prepared a separation agreement. The wife did not have a lawyer. The trial judge approved the separation agreement. Later the wife came to me to challenge the fairness of the separation agreement. The judge ruled in the husband's favor. On appeal the South Carolina Court of Appeals ruled in the husband's favor. Although the husband was an apparent winner, he incurred a lot of legal expenses that would have been unnecessary if the separation agreement had been originally handled so that it would not have been open to challenge.

In a similar situation the husband had a lawyer and the wife did not. The husband's lawyer prepared a separation agreement that both parties signed, but the husband's lawyer did not have it approved by the family court. Over a year later the wife became dissatisfied and sued seeking far more relief than she received in the separation agreement. The judge properly refused to approve the separation agreement. The husband's lawyer did a poor job of representing the husband at trial. The wife prevailed on all of the financial issues to the detriment of the husband. The husband discharged his lawyer and

> came to me to appeal. The South Carolina Court of Appeals sustained the judgment of the family court.

It is my personal and professional practice to use separation agreements only sparingly. Usually a court order, which may be very similar to a separation agreement, is a better means to protect clients' rights.

Many separation agreements contain language that seems to allow the parties to date. A typical provision is, "Each party may live separately and apart with such persons and at such places as he or she may choose." These provisions are probably void as a matter of public policy and offer you no protection from an accusation of adultery if you date after separation. These provisions are of no value and are often harmful. See Chapter 13, Dating, page 35. Lawyers who include such language in separation agreements commit legal malpractice.

A popular misconception holds that a separation agreement is necessary to have a "legal separation." It is not. Everyone has heard of a “legal separation” but no one has heard of an “illegal separation.”

Never, absolutely never, sign a separation agreement without first having your lawyer review the separation agreement and advise you. Every year many unhappy people return to the family court seeking to set aside an unfair or inadequate separation agreement signed without legal advice a year earlier. The expense is great and success is rare.

Chapter 13 DATING

When may I date?

A common misconception is a person separated from his or her spouse may date or go out with members of the opposite sex. Lawyers generally have done a poor job of advising their clients as to dating.

The prohibition is not against dating; the prohibition is against adultery. Problems arise in trying to convince a hard-nosed adverse attorney and a skeptical judge what began as an innocent date did not end as adultery. If you and a date go to a public event or a restaurant with a group of people and are never alone together, then no reasonable person will find that adultery occurred; however, I do not recommend that you try it.

Few people are caught in the actual act of adultery. Adultery must usually be proved by circumstantial evidence. Two circumstances must be proved: First, the person is inclined to commit adultery, and second, the person had the opportunity to commit adultery. My domestic relations professor taught: "Everyone is inclined to commit adultery. Therefore all you really need to prove is opportunity." Opportunity may be two people alone in a home together, in a motel together, or a parked automobile together.

Separation is not divorce. This is true even where a written separation agreement, or even a court ordered separation, exists. Separation is the worst of two worlds. It has the disadvantages of being married, the disadvantages of being divorced, but has the benefits of neither.

Judges often make important decisions, such as child custody, alimony, the division of property, and attorney's fees, against the spouse at fault because of his adultery, habitual drunkenness, physical cruelty, or desertion. Of these, adultery probably has the greatest impact on the judge's decision.

A counselor friend of mine advises that no one should go out until they are comfortable staying home. The best rule is do not date until you are divorced.

Chapter 14 DIVORCE—THE MONEY PROBLEMS

How can I survive on that?

Show me a couple with marital problems and I'll show you a couple with financial problems. Despite exceptions, this is frequently true.

People do not fight over divorce; people fight over matters incidental to the divorce such as child custody, child support, division of property, and attorney's fees. If two people have financial problems living together, those problems increase with separation, divorce, and the costs of separate households. After more than 50 years of practice, I still do not understand how the payor spouse can afford support nor do I understand how the payee spouse survives on so little.

Part of my task as your lawyer is to insure you can survive financially once the divorce is final. A common mistake of clients, particularly wives, is underestimating financial needs. When reality registers, usually after the decree is final, it is too late to correct that underestimate. A similar mistake, particularly by husbands who feel guilty, is overestimating ability and willingness to pay child support and alimony.

The Family Court Rules require that each party file a financial declaration of income, expenses, debts, and assets. The trial judge and your spouse's attorney will have your financial declaration. We will also have your spouse's financial declaration.

The financial declaration is the most important document in family court. Most lawyers and litigants pay insufficient attention to the financial declaration. Litigants resist serious and thorough work on their financial declarations. Lawyers too often delegate the financial declaration to a legal assistant without adequate supervision. I delegate the financial declaration first to the client and then to a legal assistant, but accept the ultimate responsibility for our clients' financial declarations. We offer a Financial Declaration Workbook for help in completing your financial declaration.

In setting support, the judge is trying to balance the needs of the spouse requiring support with the ability of the paying spouse to provide support. Many judges rely heavily on the financial declarations of the parties, particularly when the financial declaration seems accurate. Inaccurate financial declarations create hazards. If a spouse's income is understated or expenses are overstated then the judge may not believe that spouse on other issues. Likewise, if income is overstated or expenses are understated, the judge may order one spouse to pay more than he or she can afford or award the other spouse less than he or she needs. Inaccurate financial declarations may also make it easy for the other party to show later a "change of circumstances" supporting a modification of the original order setting support.

Chapter 15 EQUITABLE APPORTIONMENT

Who gets the property? Who pays the debts?

The family courts no longer divide property according to the name in which title is held. The courts now recognize that a non-working spouse may contribute toward acquiring property by performing duties as a homemaker, managing other family property, or supporting the career of the primary breadwinner. This is the principle of equitable apportionment of property and debts, sometimes called equitable division, equitable distribution, or special equity. A common example is the wife first works to put the husband through college, trade school, or graduate school, making it possible for the husband to earn a substantial income, and then stays home to raise the children, manage the home and family finances, and support the husband's business or professional career.

The family court first decides whether property is marital property or non-marital property. Non-marital property is property acquired before the marriage, acquired by gift or inheritance, excluded as marital property by written agreement, or property acquired in an exchange for non-marital property. Marital property includes all real estate or personal property either party acquired during the marriage or was used by the spouses as marital property.

Transmutation is the process by which nonmarital property becomes marital property. For example, if one party owned a mobile home before the marriage it would be nonmarital property; however, if used as the marital home during the marriage, it might become marital. If the parties used marital money to make payments on it, then it would most probably become martial. If the parties titled it in both names after the marriage, it certainly becomes marital.

After deciding what property is marital property, the family court then decides its value. If the parties do not agree on the value, the judge will decide the value based on testimony and exhibits. Each party may hire expert witnesses to appraise the property and testify to its value. The family court may appoint an additional appraiser.

After determining the value of the property, the family court will then decide what percentage of the marital property each spouse receives. The court considers the source of the property but also considers 15 statutory factors.[7] While judges frequently divide marital property equally, an equal division is not a certainty.

The critical key to a successful apportionment of property is a thorough and complete identification and valuation of the property on the financial declaration.

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[7] S. C. Code Ann. § 20-3-620. See Chapter 27, Presenting the Case for Equitable Apportionment, page 59.

Most lawyers and most Family Court judges will go to great lengths to avoid becoming involved in a division of household goods and furnishings, commonly referred to by lawyers and judges as the pots and pans. As with all issues, an agreement is the best way to divide pots and pans. Three methods of dividing household goods and furnishings are generally recommended:

(a) One spouse picks an item, then the second spouse picks an item. This continues until all items have been divided. Who goes first can be determined by a flip of a coin or an arbitrary decision. A list should be made showing all of the property divided and who got what property. When this method is used, I advise my clients to forget sentiment and pick based upon value.

(b) The method I prefer is for the parties to make three lists: (1) All property the moving spouse is taking from the marital home with the consent of the resident spouse. (2) All property the resident spouse is keeping with the consent of the moving spouse. (3) All property upon which the parties cannot agree. Frequently compromise and trading can reduce the property on list #3. "I'll let you take the coffee pot if you'll let me have the blender." All property in category #3 should remain in the home, unless agreed otherwise or until either the lawyers or the courts can resolve the issue.

(c) The parties have a private auction in which they are the only bidders. Each items is auctioned. After the auction, each party takes the property he or she bought and the parties divide the proceeds.

My Favorite War Stories # 14: Two Approaches to Personal Property

I represented the husband. At the judge's urging the lawyers agreed that the parties would divide the personal property by alternating choices until the property had been selected. The wife went first and chose an item of great sentimental value to the husband. The husband then chose the most valuable item available. This continued on succeeding picks until the wife had ninety percent of the sentiment and the husband had ninety percent of the value.

Even when the household goods and furnishings are divided by agreement, it remains necessary to have all of the relevant information concerning the property in the financial declaration because that division may affect the division of other property.

Chapter 16 DOMESTIC VIOLENCE

He (or she) will kill me.

In 1984, South Carolina adopted its "Protection from Domestic Abuse Act." This well-intentioned act provides for a legal action known as a "petition for an order of protection." It allows the court to hold an emergency hearing within twenty-four hours and provides for other hearings within fifteen days.

This act places certain duties and responsibilities upon law enforcement officers responding to calls in which there are allegations of abuse of one spouse by the other.

This act requires the clerk of court to maintain simple forms that enable a victim to proceed without a lawyer. Most persons entitled to proceed under this act would otherwise be entitled to more relief than is available under the Protection from Domestic Abuse Act. Proceeding without a lawyer in this manner may cause less relief rather than the full relief to which the parties is entitled. Any relief that the court may order will only be valid for sixty days, except a restraining order, which is valid for six months.

I advise seeking a lawyer when you have a legal problem. As I said in Chapter 2, Frequently Asked Questions, page 8, FAQ #1, you may be your own surgeon and remove your own appendix, but I do not recommend it. Likewise, you may be your own lawyer.

Chapter 17 THE TEMPORARY HEARING

When do we go to Court?

Often a party cannot wait until a final hearing for relief. In such cases, a temporary hearing determines the rights and obligations of the parties pending the final hearing. The temporary hearing may involve only limited issues such as temporary custody, support, and use of the marital home pending a final hearing.

Many lawyers and judges believe that the temporary hearing should be very brief because the result will last for only a limited time. I disagree. The temporary hearing is important because the result at the temporary hearing may influence the judge at the final hearing. The result is the outcome of the final hearing is frequently similar or identical to result at the temporary hearing.

If the rules of court are followed, unless good cause is shown, the court will limit the evidence at the temporary hearing to the pleadings, affidavits, and the financial declarations of the parties. This means the court hears no in-person testimony, barring compelling circumstances.

The 55 active family court judges in South Carolina probably handle temporary hearings 55 ways. Some allow no testimony, some require testimony, some rely upon affidavits and financial declarations, and some pay no attention to affidavits and financial declarations. Some judges consider hearsay, conclusions, irrelevant matter, or anything else in the affidavits. The better judges will consider only those matters in the affidavits that would be admissible as oral testimony.

Effective advocacy at the temporary hearing requires the lawyer's familiarity with the practices, prejudices, and idiosyncrasies of the presiding family court judge. Effective strategy with one judge may offend another judge.

The temporary hearing is often an excellent opportunity for you to obtain a fair and decisive result by thorough preparation, including well-drafted pleadings, an accurate financial declaration, and affidavits by you and your witnesses presenting the facts. Many lawyers believe more is better in presenting affidavits at the temporary hearing. My experience is few judges read more than one or two affidavits. My practice is to prepare only my client's affidavit, absent a compelling reason for additional affidavits.

The trial judge's impression of you is important. Even if you do not testify, it is important you make a good impression. Discuss dress, grooming, and manners with your lawyer before the hearing. See Chapter 19, Trial Tips, page 43.

Some judges exercise "judicial muscle" to force a settlement at the temporary hearing. Valid arguments exist for and against this use of judicial muscle. Usually I favor this approach by the trial judge because these settlements often rely heavily upon accurate financial declarations, good pleadings, persuasive affidavits, and the lawyer's command of the facts. The downside is that the party refusing the settlement risks a result worse than the

settlement urged by the judge. This would not happen in a perfect world but the world of family law is far from perfect.

After the temporary hearing the judge will ask one lawyer, usually the lawyer the trial judge deems the winner, to prepare a temporary order. The temporary order controls the rights and obligations of the parties until a subsequent or final order or decree replaces it.

The best temporary hearing is no temporary hearing. Preparation for a temporary hearing, particularly the affidavits, is not only expensive but the benefit is only for a limited time. Good lawyers strive for settlement of temporary issues allowing the parties to survive without being prejudiced at the final hearing.

Chapter 18 TRIAL PROCEDURES

What happens in court?

Most often, judges hold a pre-trial conference or status conference, ahead of a final hearing. The purpose of the pre-trial conference is to acquaint the judge with the case, to settle all or some issues, to stipulate facts, to decide the time for trial, and generally to shorten the trial and make it smoother. Unfortunately, the pre-trial conference is sometimes a waste of the lawyers' time and the clients' money.

Before taking any testimony at a final hearing, the judge must ask you and your spouse, if present, whether or not there is any possibility of reconciliation. He may also ask this at a temporary hearing.

Before taking any testimony, the lawyers should make short opening arguments to advise the judge what they intend to prove through their witnesses and exhibits, although many family court judges discourage opening arguments.

The parties present proof through testimony and exhibits. The moving party, usually the plaintiff, presents his or her case first. The lawyer calling the witness will question the witness. This is direct examination. The opposing lawyer then questions or cross-examines the witness. This may continue with redirect examination and re-cross-examination until there are no more questions of that witness. After the plaintiff calls all of its witnesses, the defendant will then call its witnesses and following the same procedure. The plaintiff may, but rarely does, call reply witnesses.

Unless an exhibit is admitted into evidence by agreement of the parties, a witness must first identify it. If a party objects to an exhibit, then the judge must rule on its admissibility.

After finishing the testimony, the lawyers may summarize or argue their positions in closing arguments to the judge. Judges who discourage opening arguments generally discourage closing arguments.

After the close of all testimony and arguments, the judge will decide the issues. Some judges prefer to decide the case immediately and announce their rulings. Other judges prefer to think about their decision before announcing it so they "take the case under advisement." In either event, the judge should issue a written order or decision within thirty days.

Chapter 19 TRIAL TIPS

How should I act in court?

Dress appropriately. Do not overdress but do not underdress. Avoid flashy clothes and colors. Appear neat and clean. Wear little or no jewelry. Women should wear skirts or dresses. Dress for court as you would dress for church or an employment interview. A lawyer cousin of mine once said, “How you dress reflects your attitude toward the court and your attitude toward yourself.”

Delays in the start of court are common, because the judge wants a pre-trial conference with the lawyers, because the court held an emergency hearing, or the judge is simply behind schedule. Avoid your spouse and your spouse's witnesses. You may speak to them course, but do not discuss the case and do not argue with them. Having something to read, such as book or some records from your file, is beneficial to prepare for your case and to avoid boredom during the wait. Go to the bathroom and get a drink of water before going into the courtroom, just as you would before starting a trip and for the same reasons.

Do not appear cocky, loud, boisterous, or overconfident. "He who laughs last laughs best." Assume that every by-stander is the judge and act accordingly.

Treat the judge with absolute respect. Stand when he enters the room. Address the judge as "Your Honor" and punctuate your responses with "sir." One retired judge once told me that most judges appear casual or uncaring about these small signs of respect. However, he added, “Notice that when the judge enters and says ‘keep your seats,’ he never says it until everyone is already standing.”

Body language is important. Do not sit with your arms folded across your chest. Listen attentively and respectfully to each witness and the judge. Do not jiggle your leg, drum your fingers, or otherwise indicate impatience, nervousness, or a lack of self-control. The court provides water at each table for the lawyers and litigants. Do not drink it during court. Especially, do not take water to the witness stand and do not ask for water while you are testifying. The need for water is often perceived as a sign of untrustworthiness or nervousness. As a deodorant commercial once advised, “Never let them see you sweat.”

In court, do not react to a witness's testimony in any manner. Do not show agreement or disagreement with the testimony of any witnesses. You will have your opportunity to testify. Judges strongly dislike expressions or reactions to the testimony of a witness just as many viewers reacted negatively to Al Gore’s sighs and rolling of his eyes during his first debate with President George W. Bush.

Avoid talking to me while the judge or a witness is talking. I can listen to only one person at a time and I already understand your case. I will try to remember to give you a pen and note pad so you can make notes for me during the trial. If I forget, remind me.

When testifying, keep your answers as brief as possible. Listen to the questions. Treat your spouse's lawyer with absolute respect. Do not argue with your spouse's lawyer or the judge.

If you make a mistake in your testimony and you are the first to catch that mistake, say, "Excuse me. A minute ago I said '_____' but I should have said '_____." If your spouse's attorney points out an error or contradiction in your testimony say "I am sorry. You are correct. I should have said '_____." Do not try to cover or deny a mistake. Honest witnesses make mistakes but honest witnesses do not try to cover or deny their mistakes.

Do not lose your temper. "He whom the gods would destroy, they first make angry." Every lawyer's dream is for an opposing litigant or opposing witness to lose his temper. Lose your temper and lose your case.

Avoid sarcasm and wit. You may have the world's greatest sense of humor but it has no place in the courtroom. Later you can share with me what you wanted to say and we can each have a good laugh. If someone says the funniest thing you have ever heard then you may laugh, but only if the judge laughs first. If the judge says something funny then a polite laugh is appropriate.

Be a good winner and a good loser. If justice prevails and we get a favorable result, then you need not gloat. If we get a bad result, we may be returning to court and you will want to have left a good impression. Also, judges are not always comfortable with their decisions, particularly in close cases. If you demonstrate glee at winning, the judge may be more inclined to rule favorably on your spouse's motion to reconsider. If you throw a tantrum, the judge may be less inclined to rule favorably on your motion to reconsider.

If the other lawyer prevails on even a single point or sub-point, I will always congratulate the opposing lawyer the trial ends as a matter of professionalism and good manners.

Chapter 20 DISCOVERY

Why must we help them prepare the case against me?

Discovery, a modern procedural development, is a formal method of obtaining information from the other side before trial. The primary forms of discovery are oral depositions taken from the other party or a witness, written interrogatories or questions to the other party, requests for production and inspection of documents or property, requests for admission, and requests for physical and mental examination. Properly used discovery makes trial preparation easier, reduces costs, and improves the quality of justice. The abuse of discovery is burdensome and expensive.

Many routine cases employ no discovery, but it is common in cases involving contested custody, large amounts of support, and equitable apportionment of property involving significant wealth.

A deposition is the out-of-court testimony of a party or witness taken under oath, to discover facts or to preserve testimony for a later hearing. Each side may attend the deposition and each lawyer may question the witness. Taking the deposition of the other party and his or her witnesses will also reveal what their testimony will be under oath. I never discourage my adversary from taking the deposition of my client or witnesses because it helps me prepare for trial and helps the witness become comfortable while testifying. If your deposition is taken, it is my duty to prepare you for your deposition so you will know what to expect and how to conduct yourself. Appendix C, Page 83, outlines of some points we will discuss in preparing for your deposition. Do not worry about your deposition.

Interrogatories are written questions sent to the other party through his or her lawyer. General questions relate to the names, addresses, and anticipated testimony of witnesses; photographs, plats, sketches, or other prepared documents that relate to the claim or defense; and names and addresses of expert witnesses. Specific questions may deal with marital fault, custody issues, or financial issues. I frequently use interrogatories to obtain information before taking a deposition. If the other side sends interrogatories, I will ask you to prepare a draft of the answers to some questions. Then I will edit your answers to insure accuracy, clarity, and good faith. You and I will review the final draft together before you sign it under oath.

Requests for production and inspection of documents or property are used primarily to inspect and copy documents such as tax returns, canceled checks, evidence of ownership of property, and evidence of debts. When these records are available to both parties, it is frequently possible for the lawyers to agree upon some facts that would otherwise take tedious hours to prove in court. If the other side submits requests for production, Clients are frequently hostile and reluctant to produce the documents. I encourage cooperation and good faith. Even when I do not want to produce a document, I prefer not to let the other lawyer know that I attach any significance to the document.

Requests for admission ask for an admission of either specific facts or the genuineness of a document. Good faith answers will save hours of preparation and trial time. The rules provide a strong incentive to admit true facts. If a request to admit a fact is denied and later proven true, the judge may assess costs, including attorney's fees, against the person who refused to admit the fact. Denying that which is true will cause the offender to lose credibility with the trial judge.

A request for physical and mental examination is available but is rarely used in a domestic cases. Possible uses would be where one side claimed a physical inability to work or where mental stability was an issue in a custody case.

My Favorite War Stories #15: A Discovery Nightmare

The other side served request to produce that included "Appraisals: Produce for inspection and copying all appraisals of real and personal property issued in the last three (3) years. Include the appraisals performed by any person or entity on the business as any market analysis performed on the business."

The request was clear and the request was appropriate. My client produced one appraisal regarding his business. The other side kept asking for any other appraisals. I checked with my client who insisted there was no other appraisal. The other side moved before the court to compel production of another appraisal. I told the court the second appraisal was "a figment of the other lawyer's imagination" and expressed outrage at his having filed a motion to compel.

The other side produced evidence of the second appraisal and my client produced it. The second appraisal was about fifty percent higher than the first.

My client had to answer questions before the judge on why he tried to conceal the appraisal, why he was dishonest with the court, and why any of his testimony should be trusted. These questions, as you would expect, were damaging to my client's case.

The irony was that the appraisal was not admissible. Even had the appraiser been admissible, I could have discredited the appraisal because the appraiser ignored the rules for establishing the value of a closely held corporation. The damage from the appraisal was zero but the damage to my client's credibility and believability was devastating.

Despite its many positive benefits, discovery has a tremendous potential for oppression and abuse. It is my duty to the court to be fair and reasonable in our discovery requests, and it is my duty to you to protect you from unreasonable, oppressive, or abusive discovery. I intend to fulfill both obligations.

Clients resist discovery responses with the same vehemence they resist preparing a financial declaration. This is a mistake for two reasons. First, it is much more expensive for me to drag this information from you. Second, I will most probably get more benefit from your responses than the opposing lawyer, which better prepares me for trial.

More is better than less. My brother Clarkson, an excellent lawyer, in a discussion of discovery responses said, "You have to give them the needle but be sure to give them the haystack." Following this philosophy, my preference and policy is to resolve all doubts for production. If I provide 10 pages of responses, the opposing lawyer will probably read every word. If I provide 500 pages, the opposing lawyer may skim through them. If I provide 2,000 pages of responses, the other lawyer may not look at them.

Work is a matter of attitude. Mark Twain described this in *The Adventures of Tom Sawyer*. "Work consists of whatever a body is obliged to do, and that Play consists of whatever a body is not obliged to do." If you approach your discovery responses as play or a game, you can have fun while improving your case. You can also save a lot of money and avoid embarrassment in court.

Chapter 21 PROVING YOUR CASE

How will the judge make his decision?

We will prove your case in court by the testimony of the witnesses and with physical evidence or documents. You are your most important witness. A very simple case may not require other witnesses. A very difficult or complicated case may require many witnesses.

Sometimes expert witnesses are presented. A few examples of the use of expert witnesses include a certified public accountant to prove economic facts; a social worker, a teacher, a psychologist, or a psychiatrist to prove what is in a child's best interest; a medical doctor to prove the existence or effect of a physical injury; or a personnel counselor to prove a person's ability to produce income.

Witnesses may be subpoenaed and required to testify. A witness who is hostile or does not want to testify is a dangerous witness to call. Many willing witnesses prefer a subpoena to show an employer that they were in court or so that they can honestly claim that they “had no choice” and "had to testify."

Demonstrative evidence includes photographs, tax returns, report cards, insurance policies, deeds, mortgages, bills of sale, credit applications, or other physical objects that may prove a particular fact. Photographs are simple but effective. "A picture is worth a thousand words" may understate the value of the photograph. Some pictures are worth a lot more. Photographs may be used to prove physical injuries such as bruises, a person's presence at a place such as a motel, or the suitability or unsuitability of a home for the children. Again, these are only a few examples.

We will spend sufficient time discussing the details of what we need to prove and how we will prove it.

Chapter 22 WIRETAPPING

May I tap my spouse's telephone?

Tapping a telephone is easy. The equipment, a tape recorder and telephone recording device, is available at Best Buy or Amazon. Tapping a spouse's telephone may be a simple way to obtain information regarding adultery, care of the children, and other family court issues. Like most simple answers, it is not a good one. If you really want to scare your lawyer, hand him or her an audio tape and say, "Listen to this." He or she may evict you from the office before you can say, "Just kidding."

It is a federal crime to record telephone conversations to which you are not a party. This includes the use of FM transmitters to intercept and broadcast conversations, use of a scanner to receive cellular phone conversations, or intercepting electronic mail or voice mail of another without consent. For violations of federal laws against wiretapping, the penalty is $100 per day or $10,000, whichever is greater, plus payment of attorney's fees and costs for each separate offense. Video tape recording of another or interception of walkie-talkie transmissions may subject a person to an invasion of privacy law suit under the South Carolina Constitution.

Even lawyers cannot ethically record a telephone conversation without disclosure and consent and it may be an ethical violation even with disclosure by consent of all parties. It is unethical for a lawyer to advise a client to record conversations. A situation in which a person may legally engage in wiretapping may exist; however, you must see another lawyer for that advice. My advice is "never wiretap."

If your spouse chooses to leave an abusive, threatening, obscene, or otherwise ill-advised message on your voice mail or answering machine, that is a different situation. Save the message and prepare a written transcript of the message for me. Save the tape but do not bring it to me. We may need the tape for trial but I do not need it in my file.

You may follow, photograph, or video record your spouse if you do not break other laws. The problem arises at trial. Judges hate litigants who invade the privacy of the opposing party by following, photographing, or video recording their spouse or opposing party.

Chapter 23 SOCIAL MEDIA

I have 2,236 Facebook friends.

Ben Franklin said, "If my enemy would only write a letter." Today, he would say, "If my enemy would only post on social media." I wish it were within my power to erase my client's internet presence and restrict their internet usage to exchanging emails with me. Family court lawyers spend much time worrying about the inappropriate, insensitive, and stupid comments clients make on social media.

My advice to clients is not to post on social media. If you must post on social media, do not mention your spouse, your children, your paramour, you friends, what you have done, where you have been, what you drank or smoked, what you want to do, or anything interesting or humorous. Do not post any pictures, especially pictures with you and your paramour beside a marijuana plant. Every friend you have on Facebook is a potential witness to some fact or photograph you posted.

If your spouse posts on social media, take and save screen shots on those posts. We can decide later whether they are helpful.

Many lawyers spend a lot of time, money, and effort having computers examined by forensic experts and subpoenaing records from social media or internet providers. I do not. There are better ways to get the same evidence.

Chapter 24 Presenting the Case for Custody

How will the judge know that I should have the children?

Custody battles are generally between parents. Occasionally a grandparent or other person seeks custody. The general rule is that if either natural parent is a fit custodial parent, then the court will not award custody to a grandparent or other person.

The object in litigating custody is to prove that awarding custody to you will serve the best interests of the children. This always means proving that you are a fit custodial parent, and, unfortunately, it often means proving that your spouse is not a fit custodial parent.

My Favorite War Stories #16: A Successful Trial Strategy

It was the most contentious custody case I ever tried. We were not favored to win. It was a nightmare in every respect, involving at least four judges, each party hiring a new lawyer, several counselors and psychiatrists, school officials, ministers and church members, three guardians *ad litem*, and the Department of Social Services. The trial lasted five days.

In preparing for trial, Erin and I met with our client. We devised a strategy whereby we would not ask our client, the wife, a single question that required her to say anything negative about her husband and that she would avoid negative statements, if honestly possible, when responding to the other lawyer's cross-examination. She admitted her mistakes without blaming her husband.

I developed the negative facts regarding the husband from my questions to him and to his witnesses. This was not difficult because he had written some e-mail messages that he probably regretted.

The result was that our client appeared as a positive person who honestly admitted her mistakes while the husband appeared as a negative, mean-spirited, and defensive person.

The trial judge granted sole custody to our client and ruled favorably to her on the other issues. Erin and I learned much from this case. Since then, we try to avoid our client appearing to attack his or her spouse.

The parent who already has custody has a considerable advantage over the parent who is seeking custody. This is true even when no previous court order provides for custody. The longer a parent has had actual custody, the more of an advantage it becomes. The parent who actually has custody has the advantage of being able to show how he or she cares for the children on a daily basis. The parent seeking custody must overcome this advantage by explaining in some detail how he or she intends to care for the children if awarded custody.

It is not enough for the parent living in a one-bedroom efficiency apartment or in a crowded home with relatives to testify, "I plan to look for an apartment or a mobile home or buy a home." Stronger testimony would be, "I have arranged to rent a three-bedroom apartment at 860-H Lucas Street so that the children will not have to change schools and will be in the same neighborhood with their present friends. I intend to purchase a home in that area when I know what my financial ability will be, which I cannot do until this case is decided, and I can find something suitable with three bedrooms in the same area, so that the children will not have to change schools."

Your plan for custody should include shelter, food, clothing, medical and dental care, education, religious training, transportation, child care, and provision for all other needs and problems that must be faced to provide for the best interests of the children. Schedules are important to show that you can be with the children when they are not in school or to show that you have adequately planned for the children when they are not in school.

In presenting your custody plan, supplementing your testimony with pictures is effective. Subjects for pictures include the interior and exterior of your proposed home including bedrooms, furnishings, family areas, play and recreation areas, sidewalks, rarely traveled streets, and the children at play with other children in the neighborhood. Other good subjects for photographs include the appropriate schools, churches, and extra-curricular activities, plus the day care centers the children will attend, and the homes of relatives who may help you with child care.

Be prepared to testify about what needs of the children you have met in the past. The person who was a good parent before separation will probably be a good parent after separation, although parents who have not participated fully in child-rearing may cultivate and improve their skills as parents to a surprising degree after separation. Getting up and changing diapers, feeding, bathing, clothing, disciplining, and training children before separation does a lot to establish your credentials as a parent. Your past activities with the children can be persuasive. Conferences with teachers, attendance at school activities, and participation in parent-teacher organizations help show concern for the children.

The best witnesses to support your case for custody are the parents of your children's friends. Their testimony will show that you have a good relationship with your children and other children. It will also show that you spend time with your children, and that other parents trust you with their children.

Relationships, particularly adulterous relationships that could adversely affect children have a bearing on custody decisions. Live-in relationships are a frequent basis of disqualification for custody. Adulterous relationships become less of an issue if the adultery did not take place while the children were in the care of the adulterous spouse or if that parent marries the paramour.

These considerations are not complete but should give you some ideas about how you go about proving that you should have custody. The reverse of your positive points may show your spouse as an unfit parent or as a less desirable parent than you.

Presenting the Case for Visitation

Visitation is a form of custody and many of the same principles apply. Unless one is a thrice-convicted child-abuser, the non-custodial parent will almost certainly be awarded visitation. The amount of visitation, however, is much less certain, particularly with very young children.

Presenting a case for visitation is similar to presenting the positive facts for custody. Most trial judges are receptive to any serious, well-considered proposal for visitation. The most frequent reason for limitation of visitation is the judge's belief that the non-custodial spouse is unable to care for a young child for long periods or overnight.

Many clients want the other parent's visitation to be supervised. I discourage supervised visitation because I believe that supervised visitation is no visitation. Trial judges often require that visitation be exercised in a "safe, sober, and moral atmosphere," meaning no drugs, alcohol, and no paramour during visitation.

Chapter 25 PRESENTING THE CASE FOR CHILD SUPPORT

How much child support will I receive (or pay)?

In theory, considering the needs of the children and the ability of each parent to meet those needs determines child support. Parents who were just getting by financially, or who suffered financial problems during their marriage, will have substantial difficulty meeting the financial needs of their children after separation. Generally both the parents and the children will suffer some financial hardship.

The disparity of child support awards in the past spurred a trend to reduce child support to a mathematical formula. The South Carolina Department of Social Services prepared child support guidelines at the direction of the legislature. The major factor considered is the combined income of the parents. Expenses affecting the calculation of child support under the Department of Social Services child support guidelines include prior support obligation, the cost of health insurance for the children, the cost of day care expense if the custodial parent works, and other factors the judge considers relevant. The family court judge follows this guideline, unless he gives specific reasons for departing from it.

Each parent will want to prove the other's actual earnings. If your spouse is an under-achiever or is under-employed then you may want to show that your spouse has an earning potential far greater than actual earnings. If a spouse willfully or voluntarily decreased income, then the court will consider ability to produce income, rather than actual income, in setting child support.

If you are a custodial parent, then explaining to the court the actual needs of your children is important. Showing special needs that other children may not require, such as braces, dancing lessons, or private school tuition, is effective. If you have been a good record-keeper, then a review of your records will provide documentation of your children's actual expenses. The total of those expenses will probably surprise you. If you are a non-custodial parent, then explaining to the court how much money you will necessarily spend on the children for visitation is important. For example, if the children live in a different city or state, then transportation costs may be associated with visitation. You will probably spend more for housing so that the children can stay with you for visits.

The financial declarations are the primary consideration of the Family Court in deciding child support and other financial issues in the marriage. It is mandatory that your financial declaration be as accurate as you can make it. Proving to the family court that not only is your spouse's financial declaration inaccurate, but that your spouse deliberately tried to mislead the court with that inaccurate financial declaration, may cause the judge to doubt all of your spouse’s testimony.

Chapter 26 PRESENTING THE CASE FOR ALIMONY

How much alimony will I receive (or pay)?

Until November 29, 1990, the rule was that an adulterous spouse does not receive alimony, even if the adultery occurred after the separation. See Chapter 13, Dating, page 35. Then the legislature amended the statute that now states:

No alimony may be awarded a spouse who commits adultery before the earliest of two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order approving a property or marital settlement agreement between the parties.[8]

The better practice, and my advice, is not to engage in sexual acts with anyone other than your spouse until your divorce is final.

My Favorite War Stories #17: An Expensive One Night Stand

My client was a good woman who left a promising and lucrative career to be a step-mother. Even her husband admitted she was a very good step-mother. Even before the separation the husband flaunted his girlfriend, taking her to public events and providing an apartment for her. Because the husband earned a lot of money, I expected a large award of alimony for my deserving client. Several days before the final hearing, after about eight months of separation, the husband's private detective found my client with another man. My client kissed away a lot of alimony with a one night relationship. The result was harsh but it was consistent with the laws and public policy of South Carolina.

South Carolina recognizes four types of alimony: Permanent periodic alimony simply means payments every week or month for an indefinite period, usually until the death of one party or the remarriage or continued cohabitation of the party receiving alimony; Lump sum alimony is the payment of one fixed sum as alimony, however, this fixed sum may be paid in periodic installment payments; Rehabilitative alimony consists of regular payments for a specified period to allow the receiving spouse to obtain additional training or education to become self-supporting; and Reimbursement alimony is to compensate an innocent spouse for financial contributions to the marriage, including educational expenses and living expenses.

The old rule on taxation and deductibility of alimony was that, in general, the alimony recipient paid income tax on alimony while the payor claimed payment of it as a deduction. Effective January 1, 2019, Congress changed the rule, neither taxing nor allowing the

[8] South Carolina Code Ann. § 20-3-130(A).

deduction of alimony payments. When setting alimony, Judges understand the tax consequences and make adjustments accordingly.

The alimony statute requires the family court to consider the following factors that are the exact wording of the statute:

(1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce or separate maintenance action between the parties;

(2) the physical and emotional condition of each spouse;

(3) the educational background of each spouse, together with the need of each spouse for additional training or education in order to achieve that spouse's income potential;

(4) the employment history and earning potential of each spouse;

(5) the standard of living established during the marriage;

(6) the current and reasonably anticipated earnings of both spouses;

(7) the current and reasonably anticipated expenses and needs of both spouses;

(8) the marital and non-marital properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action;

(9) custody of the children, particularly where conditions or circumstances render it appropriate that the custodian not be required to seek employment outside the home, or where the employment must be of a limited nature;

(10) marital misconduct or fault of either or both parties, whether or not used as a basis for divorce or separate maintenance decree if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage, except that no evidence of personal conduct which may otherwise be relevant and material for the purpose of this subsection may be considered with regard to this subsection if the conduct took palace subsequent to the happening of the earliest of (a) the formal signing of a written property or marital settlement agreement or (b) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;

(11) the tax consequences to each party as a result of the particular form of support awarded;

(12) the existence and extent of any support obligation from a prior marriage or for any other reason of either party; and

(13) such other factors the court considers relevant.[9]

My experience is that most judges place great weight on the length of marriage, the disparity in incomes, and the standard-of-living during the marriage. Many judges will not consider alimony in a marriage of less than ten years.

The court awards lump sum alimony where unusual circumstances make it preferable to periodic alimony. An example might be when a husband has, or is about to receive a large sum of money, and there is reason to believe that he will flee the state to avoid payment, will dispose of his assets, or is otherwise unreliable.

In proving a case for rehabilitative alimony it is necessary to show the expected costs of the spouse's additional education or training, the time that it will take, and the reasons why it is expected to make the spouse self-supporting. The factors used in determining periodic alimony also apply.

When alimony is the issue, what I am really trying to show the judge is that my client is a good person who was a good spouse, who acted responsibly in the marriage and deserves to be treated well in the breakup of the marriage.

[9] South Carolina Code Ann. §20-3-130(c).

Chapter 27 PRESENTING THE CASE FOR EQUITABLE APPORTIONMENT

How do I prove my financial contribution to the marriage?

Legal title makes little difference in the division of real estate or personal property that the parties acquired during their marriage. See Chapter 15, Equitable Apportionment, page 37.

Direct contributions, such as salary and earnings, are relatively easy to prove. This information is generally available from income tax returns. Also you may go to the Social Security website or physical office and get your entire record of Social Security Earnings for your entire life. This record may be very useful. It is poetic justice that persons who cheat on their income tax returns often have a difficult time proving their direct contributions.

Indirect contributions, such as services as a homemaker, are more difficult to prove. Anything that you did during the marriage to improve the financial health of the family unit may be relevant. The services of a wife in maintaining the home, rearing children, preparing meals, and furthering the husband's career are traditional examples. Lawyers and judges often overlook indirect contributions by the primary breadwinner.

Many judges start with the assumption that there should be an equal division of the property and that the person who wants more than fifty percent of the property has the burden of proving his or her entitlement. Recent South Carolina cases suggest that an equal or fifty-fifty is the norm. Many domestic relations lawyers believe that a spouse will receive forty percent of the marital estate "just for showing up."

Section 20-7-472 Code of Laws of South Carolina 1976, provides that "In making apportionment, the court must give weight in such proportion as it finds appropriate to all of the following factors:

(1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce or separate maintenance or other marital action between the parties;

(2) marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce as such, if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage; provided, that no evidence of personal conduct which would otherwise be relevant and material for purposes of this subsection shall be considered with regard to this subsection if such conduct shall have taken place subsequent to the happening of the earliest of (a) entry of a pendente lite order in a divorce or separate maintenance action; (b) formal signing of a written property or marital settlement agreement; or (c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;

(3) the value of the marital property, whether the property be within or without the State. The contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as

homemaker; provided, that the court shall consider the quality of the contribution as well as its factual existence;

(4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets;

(5) the health, both physical and emotional, of each spouse;

(6) the need of each spouse or either spouse for additional training or education in order to achieve that spouses's income potential;

(7) the non-marital property of each spouse;

(8) the existence or nonexistence of vested retirement benefits for each or either spouse;

(9) whether separate maintenance or alimony has been awarded;

(10) the desirability of awarding the family home as part of equitable distribution or the right to live therein for reasonable periods to the spouse having custody of any children;

(11) the tax consequences to each or either party as a result of any particular form of equitable apportionment;

(12) the existence and extent of any support obligations, from a prior marriage or for any other reason or reasons, of either party;

(13) liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage;

(14) child custody arrangements and obligations at the time of the entry of the order; and

(15) such other relevant factors as the trial court shall expressly enumerate in its order.

Chapter 28 PRESENTING THE CASE FOR ATTORNEY'S FEES

I can't afford to pay your fee.

Domestic relations cases are difficult for the lawyer just as they are difficult for the client. The lawyer must expend considerable time and considerable energy for which he must be paid. No insurance fund or other painless source of payment exists in domestic relations cases. You must pay the fee. This may be particularly difficult when you are going through the emotional pain and financial uncertainty of divorce. Legal fees are unusual expenses but should be worth every penny. The alternative of not having your rights protected would be disastrous.

If you have a meritorious case, if your spouse's misconduct caused the dissolution of the marriage, or if you cannot afford to pay your attorney's fees, then you may be entitled to a court order requiring that your spouse pay your attorney's fees. Likewise, the court may require you to pay your spouse's attorney's fees if the circumstances are reversed.

Factors that the judge should consider in setting an attorney's fee include the nature, extent, and difficulty of the services rendered; the time and labor necessarily devoted to the case; the professional standing of the lawyer; the risk that the lawyer would not be paid without court-ordered attorney's fees; the beneficial results accomplished for the client; and the fee customarily charged in the community for similar legal services.

In a small or uncomplicated case the trial judge may arbitrarily set an attorney's fee at some amount, sometimes less than $1,000. In a long, complicated, and difficult case there may be lengthy testimony from the lawyer seeking attorney's fees and from other lawyers who testify as expert witnesses. In such a case the trial judge may order an attorney's fee of many tens of thousands of dollars. In the situations between these two extremes, the lawyer seeking the attorney's fee may produce an affidavit as to the extent and value of his services.

While the attorney's fee provisions affect you, presentation of the claim for attorney's fees is primarily a problem for the lawyer seeking the fee to present and to resolve. Normally the judge will allow some time, usually thirty days, for the attorney's fee to be paid.

Note that the attorney's fee award from the Court is separate from your agreement with your lawyer to pay his fee. Most often, an award of attorney's fees by the Court means reimbursement to you for attorney's fees you will have already paid. See Chapter 32, Fee Agreement, page 66.

Chapter 29 PROVING THE GROUNDS FOR DIVORCE

How will the judge know it was my spouse's fault?

This chapter, probably more than any other, deals with general statements of law. Do not rely upon anything in this chapter as the basis for any action or inaction without first talking with your lawyer.

Adultery must be proven by clear, cogent, and convincing evidence while a preponderance of the evidence will prove the remaining grounds for divorce. These are technical terms meaning that the law requires more proof to establish adultery than to prove other grounds for divorce.

Generally, another witness or physical evidence must corroborate the proof of the grounds of divorce. Some judges do not recognize physical evidence as corroborative and require a second witness to corroborate your testimony. A corroborating witness will frequently testify that he heard the wrongdoer admit committing the act that is the basis for the divorce.

Common defenses to any "fault" ground for divorce include condonation, recrimination, and collusion. Condonation means the innocent party forgave or condoned the act. Condonation occurs when parties continue to live together after marital misconduct by one party, when parties reconcile after a separation, or when the parties engage in sexual intercourse. Recrimination is an act of marital misconduct by the other party enough by itself as a ground for divorce. If both parties are at fault, then neither base a divorce based on fault. Collusion is the term used when two persons intentionally conspire to get a divorce on grounds that do not exist. If a family court judge finds collusion, then the parties and their lawyers are in deep trouble.

One rarely proves adultery by direct eyewitness testimony. Most adultery is committed in private away from the eyes of others. Therefore, most adultery is proved by circumstantial evidence. The circumstances to prove adultery are opportunity and inclination: an inclination to commit adultery and the opportunity to commit adultery. The real test is whether the judge believes that the person committed adultery. Family court judges were not born yesterday and they are quick to believe that adultery was committed if two persons romantically attracted to each other are alone in a motel room, a home, or a parked automobile. Photographs of the persons together make good corroborative evidence. The most common defenses to adultery are that adultery did not occur, there is an innocent explanation, or that the proof is insufficient.

Physical cruelty means actual personal violence or such a course of physical conduct as endangers the spouse's life or health. A single slap generally cannot prove physical cruelty. Photographs of injuries, doctor's testimony, or persons who saw the event or the injuries make good corroborating evidence. Common defenses to suits for physical cruelty are self-defense or accident.

Habitual drunkenness is the fixed habit of frequently getting drunk but it does not require continual drunkenness. It is necessary to prove that the use or abuse of alcohol or narcotic drugs caused the breakdown of normal marital relations. Corroborating evidence is usually the testimony of a witness who frequently saw the spouse under the influence, or police records that show convictions for alcohol related offenses. Common defenses to habitual drunkenness are that the habitual drunkenness existed before the marriage, the person continued to work regularly, there were no ill effects from drinking, or the parties drank together and the complaining party encouraged the drinking.

Proving desertion requires evidence that the parties ceased living together, the deserting party does not intend to return, the deserted party did not consent, the desertion was not justified, and the desertion continued for at least one full year. Common defenses to desertion are the complaining spouse approved the leaving or that the parties lived together or engaged in sexual intercourse during the past year. Desertion has become less common as a ground for divorce since the legislature made a one year separation a ground for a no fault divorce.

My experience is too many lawyers and litigants spend too much time trying to prove how bad the opposing party is and not enough time showing what a cooperative and positive attitude the client has.

Chapter 30 THE FINAL HEARING

When will it be over?

The court cannot hold a final hearing for divorce on the grounds of adultery, physical cruelty, or habitual drunkenness until sixty days after the plaintiff files the summons with the clerk of court. As a practical matter, the court will not hold the final hearing on these grounds until ninety days after the summons was filed because the decree of divorce cannot be final until ninety days after filing. No minimum time exists for a divorce on the grounds of the separation of the parties without cohabitation for a period of one year. No matter what the ground, the defending spouse has thirty days to respond to the complaint, although the defendant may waive the time. These are minimum times. Frequently contested cases take six months to a year or more to reach a final hearing.

The law requires the judge to ask if there is any possibility of a reconciliation or if he can do anything, such as order counseling, to help reestablish the marriage. At the final hearing, unlike the temporary hearing, the court will hear all witnesses, and will decide all issues.

The term final hearing is a misnomer. Child custody and child support are never final while any child is a minor because the court may change child custody or child support on proof of a substantial change in circumstances. Likewise, the court may modify or end alimony any time before the death of either spouse or the remarriage of the spouse receiving it, absent a provision it is nonmodifiable.

If a party disobeys or violates a provision of the decree of divorce, then going back to court to enforce the decree of divorce may be necessary.

If a party appeals from the final decree of divorce, then the appellate court, usually the South Carolina Court of Appeals, may do several things. These include affirmance of the trial court leaving the decree of divorce in effect, reversal of the trial court and alteration or modification of the decree of divorce, reversal of the trial court and return of the case to the family court for a new hearing, or a mixture of these actions regarding different issues.

Chapter 31 CHOOSING YOUR LAWYER

I do not have a clue about lawyers.

Every good lawyer I know, and also some bad ones, has more work than he or she can handle. One of the best, Jack Kimball, now a retired judge, once said to me, "Practicing law is the only profession of which I know that you have to undertake more than you can possibly do just to stay even."

There are many bad ways and bad sources for finding lawyers. The internet, television, the yellow pages, recommendations from family, friends, neighbors, and co-workers may vary from excellent to dreadful. The best recommendations are from people who were represented by the lawyer in a similar case. No matter how strong the recommendation, the most important factor is your gut feeling after you talk with the lawyer. See Rule Six below.

The maxim, "you get what you pay for" does not apply to hiring lawyers. **Rule One**, never assume that an expensive lawyer is either competent or conscientious or vice-versa.

Lawyers are communicators. Effective trial lawyers, including any lawyer who tries family court cases, must communicate effectively, visually, orally, and in writing. People frequently tell me that their child would make a good lawyer because the child "will argue with a fence post." Wrong. Good lawyers do not argue; they question, they listen, they explain. I tell each client at the initial interview, "First I want you to answer every question that I ask you. Then I will answer every question that you ask me and listen to everything you want to tell me. The only reason that I get to go first is that I will need some of your answers to answer your questions." **Rule Two**, never hire a lawyer unless he or she asks good questions, listens to your answers, and listens to your concerns. **Rule Three**, hire a lawyer who respects you and your ability to help with your own case.

Frequently people tell me they chose me because "you are a fighter." I tell them they should not want a fighter unless they want the emotional stress, the damaged relationships, the delay, and the expense that goes with a fight. They should seek a good negotiator who is able and willing to try their case if the negotiations are unsuccessful. Good negotiators maintain good relationships with other lawyers. Knowing when to settle and when to try the case requires considerable judgment. When a husband and wife go to trial, one of them is making a mistake. **Rule Four**, find a lawyer with good negotiation skills who can and will try your case if the other side is not reasonable.

A professional appearance suggests professional ability and standing. A person's appearance reflects his respect for oneself and respect for one's audience. If you come to my office with your hair in curlers or with a three day growth of beard and you are barefooted with a dirty tee shirt and ripped blue jeans or shorts, then you effectively communicate what you think of me. Likewise, if I meet you for our appointment with a mouth full of gum or tobacco, a sports shirt, and no tie then I effectively communicate what I think of you. A lawyer who appears in court with less than a dark suit, dress shirt, and tie, or comparable dress for a woman, suggests a lack of respect for the case, the judge, and himself or herself.

One should not judge the book by the cover, but one is not likely to buy a book with a poor cover unless it comes highly recommended. **Rule Five**, in your search for a professional lawyer, look for a professional appearance. I sometimes wear loafers to the office on "lack of pride Friday" and I may wear shorts or jeans to the office on weekends, but I generally wear a dark dress suit with a white dress shirt, and tie-up shoes to show my respect for my clients, my staff and myself.

In March 1969 a woman fired me and went to another lawyer. I was devastated. The next week another woman fired that lawyer and came to me. A great truth was revealed that day–not every lawyer is suited to every client and vice-versa. **Rule Six**, you and your lawyer must be comfortable with each other. If you have reservations about a lawyer, do yourself and the lawyer a favor by continuing your search. Clients want clear answers without exceptions or reservations. This is rarely possible because the law is complicated and the answers to most questions are not black or white; they are gray. I regularly explain to clients that the law is not a science, that exact answers are rarely available, that my advice may change as the circumstances change, and that people do not pay lawyers a lot of money to answer easy questions. Clients who believe that their case is simple are the most difficult clients to satisfy. **Rule Seven**, if you think your case is simple do not hire me; take it to a lawyer who agrees with you.

My Favorite War Stories # 18: A Simple Case

My brother represented a businessman who insisted that his was a simple case. He could never understand why the other side did not settle. He did not understand why a trial was necessary. He believed there was only one side to the case and that was his side.

After one day of trial, he asked my brother if all of his cases were this difficult. After the second day of trial, when the judge had taken the case under advisement before deciding, he asked if there were any possibility of winning the case. After two years of contempt for the law and lawyers, he found great respect during the trial. The case had a happy ending with a mostly favorable result.

Chapter 32 Fee Agreement

What is your fee?

Discussing my fees and requiring payment from clients is the part of practicing law I least enjoy. It is my preference to discuss this thoroughly during the initial conference so it will never again be necessary. You are responsible for the payment of my fee. We may ask the court to require your spouse to pay all or part of your attorney's fees; however, the payment of those fees as they come due is your responsibility.

You must have a written fee agreement, or at least a written fee memorandum, with any lawyer who represents you. The agreement should define the rights and obligations of both the lawyer and the client and should protect both.

My agreement states the purpose of my representation, which decisions are your prerogative, which decisions are my prerogative, my hourly fee and the amount you must pay at the beginning, how my time is charged, my billing practices and when the fees and costs are due, my responsibility to keep you informed on the progress and status of your case, your right to discharge me as your lawyer, and my right to withdraw from representation.

It is better to have a written fee agreement signed by both the lawyer and the client before any work is done. The problem is that, because the fee agreement reflects the circumstances of your particular case, I cannot prepare the fee agreement until our initial conference. If you hire me at the initial conference, I try to prepare the retainer fee agreement before you leave my office.

One lawyer told a client, "I have a one track mind. I can either worry about your case or my fee." Two practices help lawyers avoid worrying about fees. Some lawyers require a retainer fee large enough to cover the entire estimated fees and costs. Other lawyers require that a surety or guarantor sign an agreement to be responsible for the fee. Some require both.

A retainer fee is the amount a lawyer charges to accept your case or to begin work on your case. The problem with charging a large retainer fee is that many deserving people cannot afford legal representation. The problem with requiring a guarantor or surety to guarantee payment is that not all deserving people have family or friends with the financial means to guarantee payment. My preference is to charge a smaller retainer fee, usually $3,500 but sometimes more. Then, if the client fails to make payments as agreed, I withdraw from representation. Before you sign a fee agreement or contract be sure you understand the agreement and the writing reflects the agreement you understand. If you think this is simple, consider these questions:

What does the retainer fee include? Some lawyers charge the retainer fee plus all hourly fees and costs. This means you pay the retainer fee for the lawyer's availability to represent you and pay separately for the lawyer's services.

Is the retainer fee refundable or non-refundable? If you fire your lawyer the day after paying a large retainer fee, some legitimate arguments exist why the lawyer is entitled to keep at least part of that fee above the hourly rate. For example, the lawyer can no longer represent your spouse against you, reducing the lawyer's potential client pool by one. For the next six years, the lawyer must maintain records of his financial dealings with you. My fee agreements usually provide that the retainer is non-refundable.

Does the lawyer's hourly rate suggest the lawyer's level of competence? One effective lawyer in York County charges only $150 per hour. Unfortunately for you, she rarely practices in family court. Some of the least effective lawyers in York County charge $300 or more per hour with one charging $400 or more. Unfortunately, many practice regularly in the family court.

How does the lawyer calculate the hourly rate? An hourly rate of $300 seems to be $5 per minute but appearances are deceiving. Most lawyers charge minimum or rounded periods, such as one-tenth of an hour or six minutes, one-sixth of an hour or ten minutes, one fourth of an hour or fifteen minutes, or even one-half hour or thirty minutes, with each fraction of a unit rounded up to the next full unit. A three-minute phone call at $240 per hour would seem to be $15 but using the common fractions stated earlier the fee for that call may be $30, $50, $75 or $150. I charge one-tenth of an hour for any part of the first six minutes and then I round upwards in three-minute increments.

What does the lawyer charge for paralegal assistant time? Some lawyers charge an hourly rate for paralegal time, generally one-fourth to one-third of the lawyer's hourly rate. Other lawyers may charge a flat rate for particular work done by a paralegal. Other lawyers do not charge for paralegal time. The lawyers to beware are those who show the paralegal's work as the lawyer's work and charge the lawyer's hourly rate. Most lawyers do not charge for secretarial time but it is sometimes difficult to distinguish between paralegal work and secretarial work.

Under what circumstances may you fire your lawyer or may your lawyer stop representing you? Once your case is filed with the clerk of court, your lawyer is the "attorney of record." The lawyer remains the attorney of record until the case is finished or until a family court judge signs a court order allowing the lawyer to be relieved as the attorney of record. If your lawyer wishes to be relieved and you refuse to consent to the court relieving him, then the lawyer must state the reasons he wants to be relieved in a motion to the court. Consent is better so you and the lawyer are not required to state your differences in court in the presence of your spouse's lawyer.

See Appendix A, Retainer Fee Agreement, page 72, for my standard retainer fee agreement.

Chapter 33 MISCELLANEOUS BITS AND PIECES

What about ... ?

A divorce voids your will, unless that will was made in contemplation of divorce. The best advice is sign a new will at the time of separation and then another will after your divorce. As a practical matter, almost no one prepares a new will in contemplation of divorce. Also, a marriage will void your will unless it was made in contemplation of marriage. These are issues to discuss with your wills, estate, and probate lawyer rather than your family court lawyer.

"Quickie divorces" in foreign countries or other states may be of doubtful validity and can create more problems than they solve.

Separation often causes boredom and boredom is the best breeding ground for most vices. If you do not smoke, do not start. The same applies to drinking. If you drink, increase neither the amount nor the frequency of your drinking. Gambling is a double-barreled vice. You probably cannot afford to lose and you do not want to create the impression that you can pay a lot of alimony or support or you do not need alimony or support.

You are starting a new life. Plan that life to avoid past mistakes.

Avoid a remarriage on the rebound. I recommend waiting at least one year after the divorce is final. Second marriages often suffer from problems which may be caused by pressures from the first marriage, such as children, alimony and support, or encounters with the previous spouse. Consider a pre-nuptial agreement before remarrying.

Do not make hasty decisions with lasting consequences. Do not change jobs, sell a house, or move to another area without much thought and planning.

Chapter 34 My Pet Peeves

What you can do to drive me nuts

If you hire me to work for you, then you are the employer and I am the employee within the terms of our retainer fee agreement. Were clients perfect, they probably would not be clients. I understand that sometimes clients will do things that irritate my staff or me. I am sympathetic to clients who make mistakes, even irritating mistakes, because I understand the stress and pressure of separation and divorce. I rarely seek to withdraw from a case because of my client's conduct. I ask and hope you will avoid these mistakes.

1. Call me and ask me what is happening in your case. We spend time and effort in keeping you advised of the status of your case. When a document comes to my office, we scan it and send it to the client, usually by email. When we prepare a document, we send the client a copy. Our bills are itemized with enough detail for you to understand what is done. I frequently send my client a copy of my email instructions to my staff. If anything of consequence occurs, we call the client or send an email. Before sending settlement offers, responding to settlement offers, or sending an important letter, we frequently review it with the client before sending it. Calling to ask about the status of your case is a waste of our time and your money.

2. Negotiate with your spouse. One person should be responsible for negotiations and in a domestic relations case that person should be the lawyer and not the client. I have had cases where a client negotiated successfully but those cases are few. Far more frequently, client negotiations cause anger and hostility, unnecessary concessions, or agreements that are unacceptable. Some lawyers encourage their clients to negotiate with their spouses. If you want to negotiate with your spouse, hire another lawyer instead of me.

3. Be dishonest with me. I can handle most situations if I know the truth, I can prepare for the truth. Usually there is a way to minimize or explain an unpleasant truth but I cannot do that if I do not know the truth.

4. Do not pay your bill for fees and costs. We work hard and try to hold fees and costs to a minimum but we expect those fees and costs to be paid when they are due, usually ten days after the bill. If you have a problem paying on time, contact my office and make payment arrangements before the bill is past due, not afterwards.

5. Do legal research on the internet. Clients who do legal research on the internet believe that the law is black and white. It is not. I cannot think of a time that a client has advised me of a relevant principle with which I was not familiar. However, I have spent a lot of time, for which I have charged a lot of money, explaining why some point of law from the internet is not relevant or not applicable. Clients make the substantive decisions but I make the procedural decisions and legal research falls within the realm of procedure. Despite this admonition, you may go http://www.scstatehouse.gov/code/statmast.php to find the South Carolina Code of Laws including the South Carolina Equitable Apportionment of Property Act, the alimony statutes, and the guardian *ad litem* statutes. At

http://www.sccourts.org/courtReg/ you can find the South Carolina Rules of Civil Procedure and the South Carolina Rules of Family Court.

6. Bring a child to my office. Your goal should be to protect your child from the effects of separation and divorce to the greatest extent possible. You cannot do that by taking the child to a lawyer's office.

7. Call the police or the Department of Social Services. Calling the police or the Department of Social Services only makes a bad situation worse. Often the excuse is that "I just wanted proof of what happened." Your testimony is proof but what a police officer or Department of Social Services worker would say is most probably hearsay that is not admissible in court.

8. Get legal advice from a police officer, an employee of the clerk of court's office, or from a magistrate or municipal judge. These people are usually dedicated public servants but they are also traditionally the three worst sources of legal advice and result in many bad recommendations.

9. Call or write a family court judge for any purpose. The judge cannot ethically talk with you or consider anything that is not shared with the other side. You have no legitimate reason to contact a judge.

10. Fail to treat your spouse with dignity and respect. Separation and divorce cases are difficult enough when people treat each other decently and they only become more difficult and complicated when one party is a jerk. You cannot control how your spouse treats you but you can control how you treat your spouse. Mark Twain said, "Always do what is right. It will gratify some folks and astound others."

If you can avoid most of these ten deadly sins, then you will most probably have a good relationship with my staff and with me.

Chapter 35 American Literature for Clients

Who is Brer Rabbit and Who Cares?

This chapter may be a tribute to my mother and to my high school English teachers and the lessons I did not appreciate until years later.

Before I started school, my mother read *Uncle Remus* by Joel Chandler Harris to me. At bedtime I always begged for one more story. At ages four and five I did not understand how stories such as *The Wonderful Tar-Baby* and *The Briar Patch* would help me negotiate for clients 70 years later.

First, Brer Rabbit lost his temper with the Tar-Baby, became violent, and got himself into an awful jam. Then Brer Rabbit had to talk himself out of that jam. He showed a perfect willingness to be barbecued, to be hung, to be drowned, and to be skinned but he expressed an awful fear of being thrown in the briar patch. Brer Fox threw Brer Rabbit into the briar patch, exactly what Brer Rabbit wanted. One lesson is do not lose your temper or become violent. The second lesson is that sometimes the best way to avoid a contested case is to show a perfect willingness to go through with it.

When my client tells their spouse and anyone else who will listen they want to settle the case and they do not want to go to court, my job becomes much harder because the other lawyer knows that I am under pressure from my own client to settle.

As a child, I loved Mark Twain's stories and I still love them today. Every client should understand Chapter II of *The Adventures of Tom Sawyer*. Understanding how Tom let the neighborhood boys whitewash the fence for him is a valuable lesson with many applications in life. If Tom Sawyer wanted to avoid court, he would never say so. His response would be "All I know is, it suits Tom Sawyer."

O Henry's *Ransom of Red Chief* is the story of kidnappers who not only fail to collect the ransom, they pay the father of the child to take him back. This story demonstrates both the power of psychology and the likelihood that when a non-custodial parent "kidnaps" the children, he will most probably bring them back. I keep books with each of these stories on my office bookshelf. Consider reading these stories to your own children but absorb the lessons for yourself.

Chapter 36 APPENDIX A

Retainer Fee Agreement

[Client] as Client and McDow & Urquhart, LLC as Lawyers, which includes Thomas F. McDow and Erin K. Urquhart, agree as follows:

1. ***Attorney-Client Relationship***. [Client] ("Client") hires or retains McDow & Urquhart, LLC ("Lawyers") to represent Client in a domestic relations case. This retainer fee agreement includes the entire agreement between Lawyers and Client.

2. ***Fees and Costs***. Domestic litigation is expensive. Lawyers will attempt a reasonable resolution of the case; however, we cannot control the actions or positions taken by the opposing party, which can affect the cost of your litigation. Client agrees to pay Lawyers for Lawyers' time, efforts, and professional representation $300 per hour for lawyer time,[1] $90 per hour for legal assistant's time, and reimbursement of all court costs and expenses with a nonrefundable minimum[2] retainer fee of $_____,[3] which will apply toward Lawyers' hourly fees and costs (see paragraph titled Retainer Funds below). The retainer fee is not the total fee for Lawyers' services. Lawyers keep time in tenths of hours billing each six minutes or portion of six minutes as one-tenth of an hour. Lawyers charge $200 at the outset as an administrative fee for opening and closing the file, although the actual time involved usually exceeds one hour, to avoid the necessity of sending additional billing statements to Client after the case is completed. Lawyers also charge for postage above standard mailing, such as for large packages or certified mailings.

3. ***Additional Costs***. Lawyers will advance some costs in advance, such as filing and motion fees. Other fees, such as expert witness, guardian *ad litem*, and mediator fees must be paid in advance by the Client unless the Client arranges otherwise in writing in advance. Client authorizes Lawyers to incur such expenses, as Lawyers deem necessary and at Lawyers' sole discretion.

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[1]When Lawyers work on the same case at the same time, they may charge a combined rate of $390 per hour.

[2]The justification for the minimum nonrefundable fee is because Lawyers will be precluded from other employment conflicting with Client's interest and the continuing duties Lawyers have to Client, even after the end of the attorney-client relationship.

[3]$300 of which Client paid in advance of the initial appointment.

4. ***Billing Statements, Retainer Funds, and Responsibilities.*** Lawyers send monthly billing statements by email unless Client makes specific arrangements for paper billing statements to be sent through the United States Postal Service. Billing statements are sent on the last business day of each month. Within 10 days of billing, the Client replenish funds in the Lawyers trust account to maintain a balance of $_____. Client instructs Lawyers to draw against this their funds held in retainer to pay Lawyers bills each month. Any unused funds in trust remaining at the end of the case, other than the original retainer fee, will be returned to Client. It is Client's responsibility to review each billing statement and notify Lawyers, in writing, within thirty days of any problem with the billing statement. It is also Client's responsibility to ensure Lawyers have Client's current email address and current mailing address. Email is the preferred medium for written communications between Client and Lawyers.

5. ***Scope of Representation***. The purpose of Lawyers representation is to resolve Client's marital or domestic issues with [Opposing Party] by settlement, mediation, litigation, or otherwise and to defend all marital or domestic claims asserted by [Opposing Party]. Client specifically seeks A, B, and C. Representation includes no ancillary action such as a criminal case in any court, any civil action in any court other than family court, or any appeal to the South Carolina Court of Appeals or the Supreme Court of South Carolina; however, Lawyers and Client may contract to include such representation. Representation includes no action nor proceeding Lawyers consider illegal, unethical, or reprehensible acts. Client's case ends with the filing of a decree of divorce, decree of separate maintenance and support, final order, order of dismissal, order granting or denying reconsideration, or any other court order normally ending a case. A motion to reconsider a final order is within this representation. Any subsequent action to enforce or modify the decree or other order will be a new and separate case.

6. ***Advice and Disclosure***. Client has disclosed all facts to Lawyers in either oral or written communications. Client will continue to advise Lawyers of all information and developments concerning Client's case. Lawyers will keep Client informed about the status and will promptly comply with requests for information. Lawyers will promptly and timely advise Client of all significant actions in Client's case including all settlement offers. Lawyers will explain a matter to Client to the extent necessary to permit Client to make informed decisions regarding the representation. Lawyers will send Client by email copies of all significant documents received by Lawyers and all significant documents prepared by Lawyers for Client.

7. ***Lawyers' Duties***. Lawyers will devote the time and effort to Client's case, subject to laws, rules of court, and the Code of Professional Conduct, to obtain the best possible result for Client consistent with Client's wishes. Because settlements depend upon the cooperation of the adverse party and the adverse attorney and because favorable

court decisions depend upon witnesses and judge, no lawyer can guarantee or warrant any result in any case. Lawyers make no promise or guarantee about the results. Nothing in this agreement and nothing in Lawyers' statements to Client should be interpreted or construed as a promise or guarantee of any result.

8. ***Telephone Calls***.[4] Lawyers try to accept all incoming telephone calls unless they are on another telephone call, meeting with someone else, or sometimes when working on another case or preparing for trial. Lawyers will try to return all telephone calls within twenty-four hours if Client leaves a message including the facts prompting the call, what Client must know or what action Client wants Lawyers to take regarding those facts, and a telephone number at which Lawyers can reach Client. Likewise Client will try to return all telephone calls from Lawyers or Lawyers' legal assistant within twenty-four hours. Client understands Lawyers or Lawyers' legal assistant may leave no message other than asking the Client return the call. This protects the confidentiality of the attorney-client relationship.

9. ***Time***.[5] Lawyers will try to bring this matter to a prompt and speedy conclusion. Client understands the law imposes time limitations.[6] Client also understands delays are incurred by conflicts in Lawyers' schedule, conflicts in the opposing lawyers' schedule, and backlogs caused by crowded court dockets.

10. ***Confidentiality***. Communications between Client and Lawyers and Lawyers' employees are subject to the attorney-client privilege. Lawyers will not reveal information relating to representation of Client unless Client consents after consultation, except disclosures impliedly authorized to carry out the representation. The attorney-client privilege may be waived if either the lawyers or the client disclose the communications to third persons.[7]

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[4]The single greatest complaint by clients is their lawyers did not answer or return their telephone calls. Lawyers and clients should have an understanding regarding telephone calls at the outset.

[5]The second greatest complaint by client is their lawyers took too much time to complete the case.

[6]An adverse party has thirty days to respond to a complaint, a party has thirty days to respond to discovery requests, and a divorce on a fault ground cannot be granted until three months after filing the summons.

[7]Common examples resulting in waiver of the attorney-client privilege are the presence of a third person, such as a relative or friend of the client, at the time the disclosure is made or

11. ***Substantive Decisions***. Substantive decisions, such as whether or not to submit an offer to the adverse party or to accept or reject an offer from the adverse party, are solely within the discretion and control of Client.

12. ***Authority***. Client authorizes Lawyers to obtain all necessary or desirable records, to bring any necessary or desirable actions or proceedings in any court, to have all pleadings or orders served upon any party or attorney for a party, to file all necessary or desirable documents with the court, to obtain and have served subpoenas for any necessary or desirable witnesses, to take any necessary or desirable depositions, to exercise any necessary or desirable discovery procedures, to retain a certified public accountant, to retain an expert witness on attorney's fees, to retain a private detective, to obtain any necessary assistance, to conduct settlement negotiations, to disclose confidential information as necessary in the preparation and presentation of Client's case, to associate another attorney or law firm as may be necessary or desirable, and to conduct the preparation and presentation of Client's case in any manner consistent with the laws of South Carolina and the United States, the Code of Professional Responsibility, Lawyers' judgment, and Client's wishes.

13. ***Strategy, Professional Courtesies, and Continuances***. Matters of strategy and procedure are generally within the authority of Lawyers; however, Lawyers will consult with Client on general matters of strategy. Matters of strategy include the use of depositions and discovery. Professional courtesies and continuances are solely within the discretion of Lawyers who may grant extensions of time, consent to continuances, or extend other traditional professional courtesies.

14. ***Recovery of Court-Ordered Attorney's Fees***. If the Court orders the other party to pay attorney's fees to Client and those fees are paid to Lawyers, then those fees will be disbursed: first, to pay any outstanding fees and costs owed to Lawyers; second to reimburse Client up to the amount Client has paid Lawyers; and third any remaining funds will be paid to Lawyers. Client understands the family court's ruling on attorney's fees is not indicative of the fees earned by Lawyers or Lawyers' entitlement to payment of those fees. Client is ultimately responsible for payment of all fees to Lawyers regardless of the Court's determination of attorney's fees.

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the publication of a document prepared by the lawyer to a third person such as a relative or friend of the client.

15. ***Fee Disputes***.[8] The Supreme Court of South Carolina created the Resolution of Fee Disputes Board of the South Carolina Bar "to establish procedures whereby a dispute concerning fees, costs or disbursements between a client and an attorney ... may be resolved expeditiously, fairly, and professionally ..."[9] "Any client-applicant for the services of the Board must consent in writing to be bound by a final decision of the Board. Thereafter, the attorney is also bound."[10] "In attorney-client disputes, no application will be accepted from an attorney unless accompanied by the client's written consent to jurisdiction and consent to be bound by the final decision of the Board. Thereafter both parties are bound."[11] Client and Lawyers agree all fee disputes, including the nonpayment of fees, will be submitted to the Resolution of Fee Disputes Board, each party consents to jurisdiction of the Board, and both parties will be bound by the final decision of the Board and this Retainer Fee Agreement satisfies the consent requirements of the Resolution of Fee Disputes Board.

16. ***Second Opinions***. Lawyers do not object to Client getting a second opinion from another lawyer. Client is not required to get Lawyers' permission before obtaining a second opinion and this Retainer Fee Agreement may be presented as evidence of Lawyers' consent to the second opinion. If requested by Client, Lawyers will cooperate in providing any information to another lawyer to help Client obtain a second opinion.

17. ***Premature End of Agreement***. Client may end this agreement any time for any reason; however, Client understands the termination is not complete until the family court has approved it as provided in Rule 11(b), SCRCP,[12] Client is

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[8]The rules relating to the Resolution of Fee Disputes Board are found at Rule 416, South Carolina Appellate Court Rules. Lawyers will provide a copy to Client upon request. Also, a copy may be obtained at the South Carolina Judicial Department web site, www.judicial.state.sc.us, under Rules and Forms.

[9]Rule 416, SCACR, Rule 2.

[10]Rule 416, SCACR, Rule 9(A).

[11]Rule 416, SCACR, Rule 9(B).

[12]Rule 11(b), SCRCP, requires, "Change of Attorney. An attorney may be changed by consent, or upon cause shown, and upon such terms as shall be just, upon application, by order of the Court, and not otherwise. Written notice of change of attorney must be served as provided by Rule 5."

responsible for the fees and costs to obtain an order relieving Lawyers as attorneys of record. Lawyers may end this agreement for good cause including (1) Client persists in a course of action involving Lawyers' services which Lawyers believe is criminal or fraudulent; (2) Client has used Lawyers' services to perpetrate a crime or fraud; (3) Client insists upon pursuing an objective Lawyers consider repugnant or imprudent; (4) Client fails substantially to fulfill an obligation to Lawyers regarding Lawyers' services or payment therefor and has been given reasonable warning Lawyers will withdraw unless the obligation is fulfilled; (5) the representation will cause an unreasonable financial burden on Lawyers or has been rendered unreasonably difficult by the client; (6) the relationship between Lawyers and Client has deteriorated to where Lawyers cannot represent Client; or (7) other good cause for withdrawal exists. Client will sign any document necessary to allow Lawyer to withdraw.

18. ***Receipt***. Client received a copy of this retainer fee agreement signed by the parties at Rock Hill, South Carolina, on [Date]. Lawyers have a scanned copy of the original retainer fee agreement. The scanned copy will be treated as an original when printed.

McDow & Urquhart, LLC

_____

McDow & Urquhart, LLC
514 Oakland Avenue, Second Floor
Post Office Box 891
Rock Hill SC 29731-6891
Telephone 803-327-4151

_____

[Client]
[Client Address]
[Client City, State, Zip]
[Client Telephone]

Chapter 37 APPENDIX B

Getting Rid of the GAL[1]

How to save your client from those expensive, unnecessary officious intermedlers

By Robert N. Rosen[2]

Former Gov. Jim Hodges has now signed the Private Guardian *ad Litem* Reform Act which does potentially reform the law of private guardians. The Act is the result of widespread public dissatisfaction with the GALs in the family court. The anti-GAL forces, the pro-GAL forces and the Bar could not agree on what it was GALs did or what they should do. The act, therefore, is a compromise which tries to solve a number of problems. *The biggest problem, however, is that there is no need for guardians at all, and lawyers now have a golden opportunity (and in my opinion, a duty to their clients) to do away with GALs in most custody cases.*

I have rarely been involved in a custody case in which the GAL contributed anything except to the cost. That contribution is usually significant. This is not to say that guardians cannot be useful. Of course, they can be, and there are undoubtedly some cases which guardians have helped settle or have given useful advice. But, the same would be true in a wreck case or a medical malpractice case. If there were a guardian involved, he or she could also give some useful advice to both the plaintiff and the defendant. In general, GALs merely add another lawyer with another hourly rate to talk to the same witnesses, sit at the same depositions and present an opinion which is usually as valuable (or as lacking in value) as the opinion of the lawyer for the wife or the lawyer for the High School. Many times their opinions are worthless. GALs add nothing to the litigation except another batch of subjective opinions based on their own childhood experiences, their own marriage(s) and children and their own view of the world. Family court lawyers admit all this privately to each other, while they pander to and praise GALs who are on their side.

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[1] Reprinted from the January 2003 edition of *South Carolina Lawyer*, the bi-monthly magazine of the South Carolina Bar with the consent of the South Carolina Bar. Robert Rosen is an excellent lawyer, frequent speaker at continuing legal education seminars, and well-known author of many works of nonfiction and fiction.

[2] Robert N. Rosen, a founding member of the Rosen Law Firm of Charleston, has practiced family law since 1973. He is a graduate of the University of Virginia (BA), Harvard University (MA) and the University of South Carolina School of Law (JD). He has been listed in *The Best Lawyers in America* for over ten years, is rated "A" by the *Martindale-Hubbell* law directory and is a fellow of the prestigious American Academy of Matrimonial Lawyers. Mr. Rosen has represented parties in numerous divorce, custody, support and property cases in Family Court, the South Carolina Court of Appeals, and the South Carolina Supreme Court. He is the author of five books, including *A Short History of Charleston* and *Straight Talk about South Carolina Divorce Law*. For more information, see www.Rosen-lawfirm.com and www.straighttalkscdivorce.com.

It is, therefore, my unshakeable belief that avoiding a guardian *ad litem* is an important service to your client because: (1) it saves money; (2) does away with another wild card in the case; (3) is one less person to have to listen to, accommodate, humor and deal with; and (4) and most importantly, the GAL can always recommend against your client, which is usually fatal, as judges generally place entirely too much value on their "impartial" recommendations.

I chaired the committee of the South Carolina Chapter of the American Academy of Matrimonial Lawyers which submitted proposed language for the new statute. The most important language suggested by the Academy is now § 20-7-1545(A) which reads as follows:

In a private action before the family court in which custody or visitation of a minor child is at issue, the court *may* appoint a guardian ad litem *only when it determines that*:

(A) without a guardian ad litem, the court *is likely not to be fully informed about the facts* of the case *and* there is a *substantial dispute* which necessitates a guardian ad litem; or

(2) both parties consent to the appointment of a guardian ad litem who is approved by the court. (emphasis added)

This is a major change in the law. This statute overturns the present rule that a GAL *must* be appointed. Presently, family court judges are under the impression that it is *mandatory* for them to appoint a GAL in every custody or visitation case. The intent of the new statute, however, is to do away with GALs in most cases. The statute states unequivocally that the court *may* appoint a guardian ad litem as opposed to *shall* do so and then *only* when it determines certain things. Thus, the law has changed 180º. The clear intent of the statute is that there will be far fewer guardians appointed at all.

Family court judges will likely find the habit of appointing guardians is difficult to break. As others must do in breaking bad habits, judges should be urged to go through withdrawal. They will then be able to live without guardians. Most custody cases involve a husband who is mad at his wife because she ran off with a boyfriend; husbands who believe they are smarter than their wives and can raise the children better (which maybe they can); and fathers who want joint decision-making, and joint custody as if there were no divorce. Then there are those custody cases in which the mother is a bad mother, is genuinely unfit because she is a drug addict, has mental problems or is just a lousy parent. None of these situations require a guardian. All require a common sense solution by an impartial judge. In virtually all cases, the litigants will have lawyers. The lawyers will undoubtedly bring out every bad thing there is to know about the other party and every good thing about their clients. It is possible or even likely that the family court judge looking out over his or her bench may see one parent represented by an incompetent lawyer and the other parent represented by a very aggressive lawyer. In that instance, the court ought to consider appointing a GAL. The new statute says the court can appoint a guardian *ad litem* if it determines that, without a GAL, "the court will likely not be fully informed about the facts of the case." A lousy lawyer may fail to inform the court about important facts. But the adversary system works in murder cases. It works in wreck cases. And it works in custody cases. Thus, if there are two even barely competent lawyers in the case, the family court

like the common pleas court, and the federal court, *will* be fully informed about the facts of the case. Of course, at any point during the pendency of the case, if the court gets the idea that both attorneys are hiding something and that the court needs its own investigation, this would be an appropriate situation for the appointment of a GAL.

The remainder of § 20-7-1545(A)(1) states that in addition to the court finding that it would not be fully informed about the facts, the court *must* also find that "there is a substantial dispute which necessitates a guardian *ad litem*." People fighting over hours of visitation or visitation in general are not involved in "a substantial dispute" which necessitates a GAL. If the statute is properly interpreted, the court ought to rarely, if ever, appoint a GAL in a visitation dispute. Many custody cases are not really "substantial disputes" either.

Section 20-7-1545(A) puts the burden on the trial judge to make findings of fact when a party makes a motion for a GAL. Whether the trial judge can appoint a GAL *sua sponte* is debatable. The judge needs to know what the case is about, how serious the parties are about custody and, even if they are serious, whether there is any real reason to have a GAL. Implicit in finding that there is "a substantial dispute," is the consideration of how the litigants are going to pay a GAL.

The proponent of appointing a GAL (including the judge if he or she acts without a motion) has a heavy burden. The party must file a motion and provide affidavits setting forth why a GAL is needed when both parties to a custody case ordinarily are aware of the facts, may depose hostile witnesses and conduct discovery. These affidavits must support a finding that without a GAL in the case, the court is likely not to be fully informed about the facts. What does that say about the lawyer making the motion? It appears that attorney should confess that he or she is incompetent and unable to present a case without the help of a GAL. "Your Honor," the pro-GAL lawyer says in effect, "I am unable to fully inform you about the facts without another lawyer, social worker or layperson helping me."

Counsel ought to point out to the court that there may be no need for a guardian *ad litem* at the beginning of a case and that a GAL can be appointed later if a party demonstrates a valid need for a GAL. A lot of these cases resolve themselves. After waiting six months to get into mediation and blowing off steam with an expensive mediator (which is now mandatory in many custody cases), the angry husband might realize that, even though his wife committed adultery, she is still a good mother. You would have saved your client thousands of dollars by avoiding having a GAL running around and learning what everyone else already knows and sitting around reading the newspaper or drinking coffee during the mediation at $150 per hour.

The remaining sections of the new Act are further arguments against appointing a GAL because unfortunately, the duties and responsibilities of a GAL are now quite extensive, expensive and burdensome. Section 20-7-1549 requires a GAL to conduct an independent, balanced and impartial investigation which must include obtaining and review relevant documents, school records, medical records, meeting with and observing the child on at least one occasion, visiting the home settings if deemed appropriate, interviewing parents, care givers, school officials, law enforcement and others with knowledge relevant to the case, obtaining the criminal history, attending all court hearings related to custody and

visitation, and maintaining a complete file (which is not subject to subpoena under the Act) and presenting the court and the parties with "comprehensive written reports." Now your client must pay tremendous sums for even more unnecessary make-work than was the case before the Act. GALs may now truthfully say that they have to cross every "t" and dot every "i." Is there a better reason not to have a GAL at all?

Section 20-7-1545(A)(2) provides that the court may appoint a guardian with both parties' consent. There is, however *no* valid reason for a lawyer to *ever* consent to the appointment of a guardian. Indeed, I believe it is negligence *per se* and legal malpractice for a lawyer to consent. Some of my fellow family court practitioners disagree. They feel they can pick a guardian they have confidence in to "do the right thing" or help them win because of their relationship with the GAL. This, however, is extremely risky business. Section 20-7-1555 now requires disclosure by the GAL of relationships or adverse interests. In trying to get the parties to settle, the guardian is doing the same job as the mediator who can assess the situation and "do the right thing." Section 20-7-1551 now provides that GALs cannot mediate or attempt to mediate. Lawyers can always hire a social worker to conduct an impartial investigation for settlement purposes only. That way you do not create a monster who can run amok and turn on your client.

Another argument for not appointing a guardian is the cost. The general Assembly was clearly concerned that, in many cases, guardians overcharged clients. Section 20-7-1553 has cut off the guardian's ATM card. Section 20-7-1553 now requires the family court judge to "set forth the method and rate of compensation for the guardian including an initial authorization of a fee based on the facts of the case." Once again, the judge has to make findings of fact. GALs no longer have a blank check to intimidate litigants and badger them into paying them unlimited amounts of money. The judge has to set the fee not on some open-ended theory but based on the actual facts before the court, who the witnesses are and the time involved. If the GAL determines that it is necessary to exceed this initial fee, he or she must then move for an order for more fees. Once again, the court must make findings of fact.

Section 20-7-1553(D) provides that either party may at any time during the action petition the court to review the reasonableness of the fees and costs submitted by the GAL or the attorney for the GAL. This will create a lot of litigation. Judges will now have to decide whether the guardian's activities are reasonable or not as the case moves along. The litigants are now free to fight with the guardian prior to the final hearing and to ask the court to limit their fees and unnecessary work at any state of the litigation. Obviously, this is another excellent reason for the judge not to appoint a guardian at all. If no GAL is appointed, the judge will not have to hear numerous motions about how the guardian is wasting everyone's time and the litigants' money, which is, after all, their primary job.

While the statute is far from perfect, it has struck a major blow for common sense. If the courts follow the statute, the number of GALs should decreased dramatically. Clearly the family court cannot routinely find that without a GAL the court will not be fully informed about the facts, because if that were the case, there would have been no need for the statute at all. If every case requires a GAL, the statute is meaningless. It is black letter law that the courts "start with the assumption that the legislature intended to enact an effective

law, and the legislature is not to be presumed to have done a vain or futile thing in the enactment of a statute." 73Am.Jur2d, *Statutes*, § 164. If the General Assembly meant the family court to continue to always appoint GALs, § 20-7-1545(A) would be rendered meaningless. In construing any statute, the South Carolina Supreme Court has held that the court's purpose and the cardinal rule of statutory construction is to ascertain the intention of the general assembly. *Burns v. State Farm Mut. Auto Ins. Co.*, 377 S.E.2d 569 (S.C. 1989). Clearly the legislature intended (as it said) to "reform" the guardian system.

Chapter 38 APPENDIX C

Your Deposition

The principles applicable to your deposition testimony also apply to trial testimony.

1. Tell the truth.

2. Reasons for taking depositions:

    a. Get information that leads to other evidence.

    b. Get admissions to hurt us and help them.

    c. Limit future testimony.

    d. Establish contradictions.

    e. Evaluate you as a witness.

3. What can we gain from this deposition?

    a. Establish your honesty and candor.

    b. Convince the other side they do not want to litigate a case where you will testify.

    c. Practice and experience in testifying under oath and answering questions by your spouse's lawyer.

4. Appearance at your deposition.

    a. What to bring. Bring nothing, unless I instruct you otherwise. You cannot testify from notes.

    b. Neat and clean.

        i. Bathed and deodorized. You may perspire but do not let the other side know.

        ii. Shaved. If you have a beard or mustache, make sure that it is neatly trimmed.

        iii. Hair. Neat haircut. Avoid wild hairstyles that might shock an old fogy.

        iv. Dress. Conservative is best.

v. Jewelry. Avoid jewelry other than a watch (no Rolex), earrings, engagement ring, and wedding band and avoid these if they will attract attention. The engagement ring and wedding band can be effective if you are the wronged spouse but have a negative effect if you caused the separation.

c. Demeanor

i. Calm and relaxed. If you and I have done a good job preparing for this deposition, then you should be calm and relaxed.

ii. Pleasant. Be cordial and pleasant to other parties and the adverse lawyer but do not be chatty and do not discuss the case. Good manners are always appropriate.

5. Procedure.

a. People present. The minimum number of people present will include you, the court reporter, the other lawyer, and me. Your spouse, other witnesses, other lawyers, or even a spectator may be present. No one's presence should cause you any concern.

b. Court reporter. The court reporter is a professional who will take down every word said. Later the court reporter will transcribe your testimony so the court and each party will have a copy of the deposition.

c. Other lawyer. The other lawyer may be friendly but he or she is not your friend, at least not in a deposition. This should not concern you because you will be prepared and he or she will be at least marginally civil. The worst threat is a lawyer who appears friendly, because an obviously hostile lawyer will least keep you on your guard.

d. Right to read and sign testimony. You may read and sign your testimony. Most lawyers advise their clients to waive this right. I generally advise witnesses to avail themselves of this right although it will require you to get a copy of the transcript from me, read it, make notes of any errors, sign it, and return it.

e. Oath. The court reporter will place you under oath or swear you to tell the truth. You may affirm rather than swear if you prefer; however, the legal consequences are the same.

f. Questions. The other lawyer will ask you questions about your background and your knowledge.

i. Background questions may include your family history, your employment history, your medical history, your criminal record, and anything else that may shed light on the case. Most questions will be legitimate even if they appear nosy.

ii. Knowledge of the case. These questions will include the facts that led to this case, the background on those facts, damages caused by the facts, and future damages caused by the case.

6. Questions by me. I may question you; however, I most probably will not ask you questions except to correct a mistake or misunderstanding.

7. Answering questions

    a. Be honest.

        i. Do not worry about whether the answer is good or bad, helps or hurts. If it is honest, it is sufficient.

        ii. Remember that even small errors in your testimony will create doubt of your credibility as to all of your testimony.

        iii. If you make a mistake, correct it as soon as you recognize it. If you the opposing lawyers catches a mistake, promptly admit it and apologize.

    b. Be polite.

        i. If you get angry or show irritation, you have helped the other side and have done a disservice to you and our side.

        ii. Yes sir and ma'am.

    c. General.

        i. Repeat the question to yourself. If you do not understand the question, you cannot give the correct answer.

        ii. If you do not understand the question, ask that it be repeated.

        iii. Do not look to anyone else for help.

        iv. Give yourself a second to think. Take this second to think even on the simple questions so it will not be apparent on the more difficult questions.

v. Objections. If either lawyer says "objection" or "I object," stop. Wait until the lawyers resolve the objection before you answer the question.

vi. Do not volunteer. Answer only the question you are asked. Assume no question you think the questioner intended to ask but did not ask.

vii. If it is a yes or no question, answer yes or no. If it is a question requiring an explanation, answer yes or no first and then give the explanation.

viii. If you do not know the answer, then the only honest answer is "I do not know." Saying "I do not know" is not an honest way to avoid a question you would rather not answer.

8. After the deposition.

a. Continue to conduct yourself as lady or gentleman.

b. Do not discuss your testimony in the presence of the other lawyer or the other party.

Chapter 39 APPENDIX D

Glossary

- **Action**. A case. A legal claim or law suit, often called a "cause of action." Stuffy lawyers talk about actions rather than cases or law suits.

- **Affidavit**. A written statement under oath. An affidavit is not a substitute for personal testimony except in temporary hearings held pursuant to Rule 21(c), SCRFC.

- **Answer**. A legal pleading responding to a complaint or petition in which a defendant states the facts that he or she intends to prove to establish his or her defense. In Family Court, answers usually include a counterclaim.

- **Appeal**. A request for a higher court to review a lower court's decision. South Carolina has two levels of appeal for family court cases, the South Carolina Court of Appeals and the South Carolina Supreme Court.

- **Burden of proof**. The party bringing the case has the burden of proving his or her allegations. The most common burden of proof is by a preponderance of the evidence. Some issues, such as adultery must be proven by clear and convincing evidence. The strictest burden, beyond a reasonable doubt, only applies in criminal case.

- **Clerk of Court**. The person who is responsible for maintaining the records of the court. Also, the office of the person responsible for maintaining the records of the court.

- **Complaint**. A legal pleading, generally attached to a summons, in which a person states the facts that he or she intends to prove and the relief that he or she seeks. Generally synonymous to petition.

- **Counterclaim**. A legal pleading in which a defendant or respondent states facts that he or she intends to prove to be entitled to receive affirmative relief from the court.

- **Court Reporter**. Official stenographer who records the proceedings in court verbatim. Previously court reporters relied upon shorthand but most modern reporters use either a steno-mask or steno-type machine to record every word said. Also, they use a tape recorder as a backup.

- **Defendant**. The person being sued or defending a lawsuit. Sometimes erroneously referred to as respondent.

- **Deposition**. Out-of-court testimony taken under oath and transcribed by a court reporter.

- **Divorce *a vinculo matrimonii***. An absolute divorce, which is what most people mean when they use the term divorce. It is contrasted with divorce *a mensa et thoro*, which is a divorce from bed and board or a limited divorce similar to a legal separation.

- **Equitable Apportionment**. Also known as equitable division. A legal theory that is part of the statutory law of South Carolina permitting the family court to divide marital property between the parties no matter which party holds legal title to the property.

- **Financial Declaration**. A form in family court on which each party is required to show, under oath, their income, expenses, debts, and assets so the judge and the adverse party may make intelligent informed decisions.

- **Guardian *ad Litem***. A person appointed by the court to represent and protect the interests of a person who is legally unable to represent or protect his or her own interests because of a legal disability such as minority (under-age), incarceration, or insanity. Frequently called simply the guardian or GAL.

- **Interrogatories**. Written questions from one party to another to be answered under oath.

- **Joint Custody**. Previously a custody arrangement allowing equal, or nearly equal, access to the children by each parent. The parents share the responsibility and authority to make decisions regarding the children. The term joint custody has been misused to the point it is now almost meaningless. Joint custody with one parent being named as the primary custodial parent is, for all practical purposes, sole custody to one and visitation to the other but is sometimes used by lawyers and judges to allow a noncustodial parent to believe that he or she is getting more than visitation.

- **Judge**. The person who decides legal and factual issues in a domestic relations lawsuit. Often called "the court." The judge only decides issues presented to him or her. Coming to an agreement may avoid the necessity of a judge's decision.

- **Motion to Reconsider**. A motion to have the trial judge reconsider his or her ruling. These have strict deadlines and are sometimes prerequisites for appeal.

- **Moving Party**. The person who is seeking affirmative relief, usually the plaintiff in the overall case but either party on a smaller issue such as a motion. The moving party has the "burden of proof."

- **Order**. A written decision of the court resolving an issue. The court issues many kinds of orders, including final orders, decrees of divorce, decrees of separate maintenance and support, temporary orders, consent orders, *ex parte* orders, orders appointing guardian *ad litem*, orders relieving an attorney of record, scheduling orders, pre-trial orders, orders providing for service by publication, and orders of dismissal.

- **Paralegal Assistant**. A non-lawyer employee of a law office who has sufficient specialized training to do many routine tasks that would otherwise be handled by a lawyer. My favorite definition is a person who does his or her own typing but does not do anyone else's typing. Theoretically a paralegal assistant is more knowledgeable than a secretary but less knowledgeable than a lawyer; however, I know several legal secretaries who have more knowledge and ability than their employers.

- **Party**. A named participant in a law suit such as a plaintiff or defendant, not something to which you want to be invited.

- **Petition**. A legal pleading stating the facts that the moving party intends to prove and stating the relief that the moving party seeks. Generally synonymous with complaint. When used in family court practice, it is most probably used incorrectly.

- **Petitioner**. The person suing or bringing the lawsuit or legal proceeding. Generally synonymous with plaintiff. When used in family court practice, it is most probably used incorrectly.

- **Plaintiff**. The person suing or bringing the lawsuit or legal proceeding, sometimes erroneously referred to as petitioner.

- **Respondent**. The person being sued or defending a lawsuit. Synonymous with Defendant. When used in family court practice, it is most probably used incorrectly. Also the party in an appeal to a higher court who is not appealing.

- **Retainer Fee**. The initial fee paid to a lawyer to represent a particular client or to handle a particular matter. Lawyers are a stuffy lot who prefer to say they were "retained" rather than "hired." This fee may or may not be the entire fee. Both the lawyer and the client should clearly understand all fee arrangements.

- **Rule to Show Cause**. A court order signed by a judge or clerk of court requiring a person to appear in court to show cause why specified relief should not be granted to the moving party. Contempt proceedings are initiated by a rule to show cause.

- **Service of Process**. Delivery of a legal document to a person. This is generally done by a sheriff or deputy sheriff, a private process server, certified mail, or publication in a newspaper.

- **Summons**. A court document that advises a person that he or she has been sued and must respond to the complaint or petition within a specified time, generally thirty days.

- **Temporary hearing**. A hearing, set by motion, to give the judge a brief overview of the issues in your case and to issue an order to govern what happens until there can be a more complete hearing, usually the final hearing. Typically the only evidence is submitted by affidavit.