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Discovery in Divorce Proceedings: Tools for the Trade

Discovery in divorce is an important tool for attorneys that are often underutilized. Practitioners overlook the discovery process and often do not know what they are looking for or how the discovery process works.

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Discovery in divorce is an important tool for attorneys that are often underutilized. Practitioners overlook the discovery process and often do not know what they are looking for or how the discovery process works. Discovery mistakes can be costly for a client and time consuming. Thoughtful discovery will provide the necessary and important information for a client in dividing their assets.

In 1988, family law practitioners were granted the right to discovery through 23 Pa. C. S. 3505(c). Although that statute was later suspended by the Pennsylvania Supreme Court, discovery was later permitted in economic claims, complex support cases and only by leave of court in custody cases. It is quite unbelievable that family law attorneys did not have the right to discovery in divorce cases prior to 1988.

In the beginning of a divorce, every practitioner should be able to identify the client's goals in a case. What does the client want to achieve in the divorce action? Is the client more

interested in having cash as opposed to retirement or a house? Does the client need financial security for the next five years or the next 10 years? Once the attorney has identified the goals of the client, discovery should be tailored to meet those goals.

Most often an attorney just sends out the standard Interrogatories and request for production without reading what they are asking for or need. Sending a 60-page discovery request to a financially dependent spouse with no work history or assets is really a waste of time and money for the client. In return, sending that same request to a financially independent spouse might be the starting point, not ending point. Likewise, in cases which are not high conflict, the parties may choose to participate in an informal exchange of documents.

If you need information from the financially independent spouse, it might be wise to discuss these issues with your client so they will know what you are going to achieve from the first list of items. It may also be good to tailor some requests on the first set of discovery. For instance, if a spouse is a business owner, you may need business tax returns. Once



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you receive the responses in discovery, then the attorney should review the information in detail. Reading through a tax return may help identify additional assets which were not found in the initial round of discovery. Additionally, bank accounts might show a new pattern of transferring money into an unidentified account. It is important to meet with the client, review the discovery and identify and discuss issues which need further discovery. It is also important to create an Asset Chart for the client so they may see the types of assets and debt which exist such as property, mortgages, retirement

funds and cash. Often, this may be the first time a financially dependent spouse has an understanding of their marital estate.

Discovery is also a tool which can identify what may be marital or non-marital. Attorneys should request clients to provide account information which show premarital contributions to an account, gifts, or post separation contributions to an asset. As discovery gets more and more detailed, the practitioner should then focus on each individual asset and determine if further information is necessary. Some attorneys will direct their client not to provide financial information for any joint assets or tax returns. Although this may seem like the right advice in some cases, it may not be in all cases. For instance, although there might be a joint account, not all spouses may have online access to the account or even use the account. Failure to provide information regarding joint accounts may slow the process of getting a divorce.

After review of all documents, the attorney should then assess whether a deposition is necessary. This is important if there is confusion over ownership of an asset or debt, or to follow up on any questions which may have been unanswered in the Interrogatories. A deposition may also be necessary to learn of any issues which one spouse may believe is important to resolving the divorce such as, whether they would like to retain real estate, or issues regarding retirement assets. Depositions will also help an attorney gather information from the other spouse as to any arguments a spouse might use at the hearing and assist a spouse in preparing a better defense.

Certainly the family law attorney also has the right to file a motion to compel discovery and if appropriate, request attorney fees for any documents or responses that a client fails to produce or sometimes, won't produce. Completed discovery will provide an accurate and detailed picture of all marital and nonmarital assets and debts so the client may make an educated decision in finalizing the distribution of assets.

It is important that all discovery is complete prior to finalizing the divorce. First, if there is a future contempt or failure disclose raised, the practitioner can point to the full and fair disclosure clause of the property settlement agreement, including the list of assets and income which should be detailed in the agreement. Secondly, if the parties go before the court or the master to finalize the distribution of assets, the parties must certify all discovery is complete. This is very important because a party may be excluded from presenting evidence before the court if they have failed to provide disclosure of assets or an expert report.

In preparing a case for equitable distribution, practitioners should inform the client the date of separation is the starting point for valuation of any assets. Divorce Masters will require a value for each asset beginning date of separation and date of the distribution. Any increase in value, contribution or dissipation towards the value of the asset should be thoroughly explored so as to use the valuation date which serves economic justice between the parties.

Clients may also complain the discovery process is too costly. Discovery can be costly if the other

party does not cooperate. But cost should not be a reason to not utilize discovery. If a party can successfully argue for sanctions for failure to comply with discovery, attorney fees may be granted and evidence may be excluded. A party usually has to show how the financial information is needed and prejudice for failure to produce a document to successfully obtain sanctions against another party. Regardless, if discovery is utilized correctly, a client will be well prepared for a hearing or to strengthen any proposals toward a settlement.

Family law attorneys have many discovery tools that should be utilized efficiently and effectively. Client contact throughout the process and review of financial information is necessary to have productive and meaningful information gathering. Without a plan, discovery will waste the client's time and money. Additionally, the goals of the client will be overlooked if discovery is not carefully completed.

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