

# Family Law Education Reform Project

## Hofstra Counseling on Dispute Resolution

### OVERVIEW

This exercise is designed to help students become familiar with the continuum of dispute resolution options for divorce disputes, and develop the skills of explaining options to clients and facilitate the client's informed decision between them.

### EXPLANATION AND COMMENTS

This is an exercise in developing counseling skills and in securing informed client consent to a course of action in the context of deciding between dispute resolution options. Students are asked to identify and explain the private market options (e.g. litigation, negotiation, collaborative law, mediation, expert evaluation and arbitration) that an upper middle client with children has to seek resolution of a divorce dispute and help the client decide between them. The memorandum to the students which follows this teacher's guide describes their role assumptions and the background facts leading up to the counseling sessions.

Before the session, students are asked to prepare an outline of key points they want to make to the client about the dispute resolution options.

### ABOUT THE AUTHOR

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Professor Schepard is the Chair of the Family Law Education Reform Project co-sponsored by Hofstra Law School and the Association of Family and Conciliation Courts. He is an attorney member of the Judicial Conference of the State of New York. Professor Schepard is also Program Director for the National Institute of Trial Advocacy's course in Modern Divorce Advocacy and has served as Program Director for NITA's Child Advocacy, Deposition and Trial Advocacy courses.

Professor DiFonzo has had a wide-ranging two decades of law practice before becoming a full-time professor, including stints as a federal prosecutor and as a litigator in the areas of family law, criminal defense, negligence, and professional malpractice. In all, he conducted over 30 jury trials and several dozen appeals. He has taught at Hofstra since 1995. From 1995-2003, he served as Director of the Criminal Justice Clinic. From 2005-2008, he served as Director of the LL.M. Program in Family Law.

## **Teachers Manual**

### **Counseling a Client about Dispute Resolution Options in Divorce and Parenting Disputes**

#### **Curricular Objectives**

This exercise is designed to help students:

- become familiar with the continuum of dispute resolution options for divorce disputes
- develop the skills of explaining options to clients, and facilitating the client's informed decision between them

#### **Overview of Exercise**

This is an exercise in developing counseling skills and in securing informed client consent to a course of action in the context of deciding between dispute resolution options. Students are asked to identify and explain the private market options (e.g. litigation, negotiation, collaborative law, mediation, expert evaluation and arbitration) that an upper middle client with children has to seek resolution of a divorce dispute and help the client decide between them. The memorandum to the students which follows this teacher's guide describes their role assumptions and the background facts leading up to the counseling sessions.

Before the session, students are asked to prepare an outline of key points they want to make to the client about the dispute resolution options.

#### **Integration With Course and Substantive Law**

A good place to conduct this exercise is after you give the students an overview of the dispute resolution continuum of options available to resolve divorce disputes. It is helpful if students are familiar with mediation, expert evaluation, arbitration and collaborative law before being asked to counsel a client about them.

#### **What is Informed Consent and Good Counseling to Achieve It?**

This exercise implicates the ethical rules about counseling a client and securing informed consent to a course of action. At a minimum, the *ABA Model Rules of Professional Conduct* define "informed consent" as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *Model Rule 1.0 (e)*. Many states require lawyers to discuss ADR processes with their clients as part of the process of "informed consent".

The counseling process thus has a strong element of the lawyer as information provider, or teacher. To satisfy this element, the student should:

- Identify what the reasonably available options are. For purposes of this exercise, they are assumed to be litigation, negotiation, collaborative law, mediation and arbitration. You can,

of course, narrow or expand the list as you see fit.

- Describe the available options accurately and understandably to the client, not just in general but as applied to the client's matter
- Identify the material risks of each option for the client accurately and understandably, again not just in general but as applied to the client's matter.

In addition to providing information, good counseling is good process and good human interaction. Good counseling invites a partnership between lawyer and client, and is not simply a rote, rushed description. The lawyer should express empathy where appropriate and use active listening techniques to help build an alliance with the client. The lawyer should ask the client questions to insure that he or she understands what is being described. The lawyer should invite the client to ask questions and to express concerns. Good counseling is also empowering- the lawyer facilitates a decision by the client rather than telling the client what to do. The lawyer's descriptions of the options and their costs and benefits may come with a recommendation as to how to proceed, but that recommendation should be delivered in a manner which leaves the ultimate decision to the client.

### **Evaluation criteria**

Review the student's memorandum and ask:

- Does the student understand the available dispute resolution options and their material risks?
- Did the student explain the options so that the client could understand them?
- Did the student try to establish a strong working relationship with the client?
- Did the student facilitate a decision by the client between options, rather than seek to influence her strongly in one direction or the other?

### **Materials for distribution to the students**

Attached hereto is a memorandum to the students describing the exercise.

**Memorandum**

**To: Family Law Students**

**From: Professor**

**Re: Counseling a Client About Dispute Resolution Options in Divorce**

For purposes of this exercise you are a member of a small law firm with a significant family law practice in a big city. When accepting a new client, you usually ask for a retainer of approximately \$7,500 and charge billable hours against the retainer amount at a rate of approximately \$300 per hour.

You have been retained by Ms. Lynne Allen who is considering seeking a divorce from her husband, Dr. David Allen. She paid you the regular retainer amount. The Allens have two children, Jane, age 13 and Joey, age 11.

You have met with Ms. Allen and have summarized the key facts of her situation in a memorandum to her file attached hereto.

Ms. Allen is coming to your office tomorrow to discuss how to proceed. You have informed her that you would be discussing a number of options including negotiation, mediation, collaborative law, expert evaluation and arbitration.

Your local court rule requires you to discuss possible ADR options with clients. There are experienced collaborative lawyers, mediators, financial experts and arbitrators in your community who could provide such services for a fee. The hourly rate for the most experienced mediators, financial experts, arbitrators and collaborative lawyers (all of whom have special training in the relevant professional role) in your community is the same as your hourly rate. Your state has also enacted the Uniform Mediation Act and the Uniform Collaborative Law Act which create evidentiary privileges for communications made in mediation and collaborative law, except for credible threats of violence and child abuse and neglect.

You have not yet communicated with Dr. Allen's lawyer. Ms. Allen has not yet informed David who is representing her.

Please draft a memorandum to your file summarizing briefly the benefits and risks of each of the dispute resolution options that you wish to discuss with Ms. Allen and any recommendation that you intend to make to her on this subject. Also identify any additional facts that you wish to gather from Ms. Allen that are relevant to your analysis of what dispute resolution options might be appropriate.

**Attorney Work Product  
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**Memorandum**

**To: Lynne Allen File**

**From: Attorney**

**Re: Overview of Matter**

David Allen (David) has commenced an action for divorce from his wife, and our client Lynne Allen. She has been properly served with the complaint, and a response is due next week. Given the deteriorating quality of their relationship, Lynne was not surprised that David would begin an action for divorce. She was, however, angry that David did so without notifying her in advance.

David is represented by Frank B. Chance, an experienced divorce practitioner who has a reputation for being somewhat aggressive, but not overly so.

This memorandum provides an overview of the facts that Lynne has told me to date.

**Background**

The Allens have been married for fifteen years and have two children together, Jane, age 13, and Joey, age 11. David and Lynne currently live in the marital home together, which is in lovely neighborhood and has a low mortgage. David moved out of the residence for about a month but returned because he feared living apart would negatively impact his relationship with the children. The Allens sleep in separate bedrooms and David spends some nights during the week at his girlfriend's house. The children know that their parents are having marital problems and have overheard them arguing. There is no history of domestic violence between David and Lynne.

David, a radiologist, told Lynne, a radio programmer, that he wants a divorce in order to pursue a relationship with his x-ray technician, Norma Starks (Norma). David and Norma have been having an intimate relationship for three years. David began seeing Norma after Lynne entered the work force four years ago. Lynne's job at the local radio station required David to become more involved with the day-to-day care of the children, from preparing meals, to putting them to bed. As a result he was not able to spend as many hours at his job. David felt like Lynne was not spending enough time with him or the children.

Lynne responded to David's anger by telling him he didn't take her career or her feelings seriously. David apparently confided his problems with Lynne to Norma. They soon began a sexual relationship.

Further strain was placed on the Allen's marriage when Lynne was promoted to full-time Assistant Programming Director three years ago. On a number of occasions, Lynne called David at work to ask that he take care of the children so that she could stay late at the station. This required David to give up research sessions so that someone would be home with Jane and Joey and "really

annoyed him.”

On two occasions Lynne arrived home extremely late smelling of alcohol and David was waiting for her. When David commented on her drinking, Lynne made light of it, saying she was only trying to relax.

Lynne eventually told me that those incidents resulted from a relationship she began with a successful radio executive shortly after she started working full-time. The executive, Mr. Porter (didn't catch the first name), is 41 years old, very attractive and has never been married. Mr. Porter showed an immediate interest in Lynne and in her budding career, just as David was growing increasingly resentful of her work. The affair started one night when they got together for dinner at a time when she was particularly angry with David. She has been seeing Mr. Porter regularly for dinner, drinks etc. Lynne called on David to watch the children while she and Mr. Porter met. She doesn't think that David knows of her relationship and she is sure that the children have no idea about it. She likes Mr. Porter but is unsure where the relationship is going. It could be a fling but at the very least, he seems very interested in Lynne and her career. Lynne was clear that Mr. Porter would like their relationship to become very serious.

### **Parenting Concerns**

David and Lynne are arguing more frequently, and often in front of the children. Jane and Joey's personalities seem to have changed greatly as a result of the tension in their parents' relationship. The school psychologist told the Allens that Jane and Joey's teachers have expressed concern about changes in the children's behavior. Meetings with school personnel have reinforced these concerns.

Lynne reports that where Jane was once intensely interested in school and friends, she has become critical of her teachers and peers. She spends a great deal of time at gymnastics and recently put herself on a strict diet and began losing weight. Over the past three months, Jane has lost nearly 15 pounds. She is now 5'1" and weighs 102 pounds. David is worried about his daughter's weight loss, although Lynne thinks she looks fine without her baby-fat. Jane is angry with her father over her parents' marital problems and refuses to spend any time with him, especially when Norma is around. She told her family that she wants to live with Lynne no matter what happens.

Whereas Jane blames their father, Joey takes his dad's side. He thinks that either Lynne or both parties are to blame. Joey and Jane used to get along well, but now they quarrel often. Jane is upset that Norma has made comments like "think of me as a second mother" and "feel free to call me Mom". Joey, on the other hand, thinks Norma is "friendly, sweet, and cool" and likes that she is interested in their lives. Joey complains about Lynne staying late at work. He has great difficulty sleeping, regularly waking up with nightmares and sometimes wetting the bed. He is ambivalent as to whether he lives with his mother or father after the divorce.

### **Financial Concerns**

We have not yet gathered financial information extensively. Lynne reports though that David's career may be at a turning point. Three months ago, the NITA Radiological Association

(the "NRA", headquartered in NITA City) offered David the position of Executive Vice-President. If he accepts, he will be the chief administrator in the national organization. David will have to give up his private radiology practice in order to accept the NRA appointment. He has not made any commitment yet, but feels like he could make a greater contribution to the field than he currently does by managing the \$200 million in research grants awarded annually by the association. If David accepts the job he will be making \$120,000 per year. For a position of this nature, this is generous compensation.

Lynne also reports that David has told her that over the past three years all four shareholders in David's radiology practice have experienced declining returns. This is due to decreases in third party insurance reimbursement rates, increased use of less-invasive procedures, rising costs of malpractice insurance, and competition by a new radiology practice at their primary hospital. She does not know much about the details of David's practice though.

### **Client Desires and Goals**

Lynne speaks ambivalently about a divorce. Sometimes, she says she still loves David and feels that there is a possibility that the marriage could work. Other times, she talks like the marriage is over and she does not want to stay married to David.

Lynne feels that David is too selfish about having things go his way. She often states that her career is very important to her and that she doesn't want to stay in a marriage with a man who doesn't respect her desire to be a success. .

Lynne feels that David's infidelity coupled with his unreasonable rigidity about her need for a real career is responsible for their marital difficulties. She is angry with him and feels that he has forfeited any "rights" he might have by his behavior. If David is unwilling to give up Norma, Lynne wants him to move out of the house and into his own apartment or with Norma. She wants him to decide this quickly, so that the shouting and the arguments will stop. She is worried about the effects these scenes are having on the children and on her. Lynne is unwilling to move out herself.

Lynne wants custody of the children and is opposed to joint custody. She recognizes that David is a committed father and should play a major role in the children's lives. However, Lynne is concerned that if David and Norma marry, Joey and Jane will be taken away from her. Norma will become their mother, and she will be shut out. She believes that Norma will do anything she can to win Jane and Joey over and to supplant her. She speaks of Norma in harsh and bitter terms. She feels that if David gets joint custody of the children, he will use his "power" to help Norma supplant her in the children's lives.

Lynne is willing, if granted custody, to give David "reasonable" visitation rights if the children want to see him but does not want them to be forced to do so. She wants to limit Norma's influence over them. She states that Jane does not want anything to do with David or Norma and cannot be coerced into a relationship with either. Lynne says that David is concerned about Jane's sudden weight loss, but Lynne says it was just baby fat and that Jane looks much better now with her waifish image.

Lynne is very concerned about financial security, especially about providing for the children's security. Lynne wants to keep the house. She wants to be sure that the children's standard

of living is not diminished by their father's accepting the NRA post, or his possible remarriage. Lynne believes that David should be primarily responsible for supporting the children. Lynne does not have the earning capacity that David does. If she makes more money because of her broadcasting success David can re-file for decreased child support based upon a change of circumstances. Lynne firmly believes that if David takes the job at the NRA he will be shirking his duty to support the children. Jane and Joey have become accustomed to a comfortable standard of living, filled with gymnastics lessons, boy scouts, and other activities. She also feels that since David is the one who caused the marriage to break down, he should have to pay for it. She believes that David forfeited any right to entertain the NRA offer because he caused their marital problems. She knows the post means an income drop for David, and refuses to "let him do that to Janey and Joey."

Lynne wants the value of David's practice to be as high as possible. Lynne has her suspicions that Dr. Allen and his colleagues are purposefully lowering the revenues of the company to protect themselves in divorce actions with their wives.