

TOOL 5: WORKING GROUP DISCUSSION QUESTIONS

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Discussion Question 1. Role of the Family Law Attorney

Husband, who is having an affair with another woman, wants a divorce from Wife of twenty-five years and consults a lawyer without telling Wife. The major asset in the marital estate is a real estate business that presents “key man” valuation difficulties. The only other major asset is a marital home in joint names. The only child of the marriage is thirteen years old, and Husband does not want to involve him in the conflict. Husband wants to maintain a strong relationship with Son during the divorce process and thereafter. Wife is an elementary school teacher who played no formal role in the development of the real estate business but was married to husband at the time he founded it and supported him emotionally and financially during the business’ development. Husband says he wants to be “fair” to Wife in the settlement but expresses concern that the Wife is very angry at the prospect of divorce and wants to “take husband for everything he is worth.”

Possible discussion points:

- What should be the goals of Husband’s lawyer’s representation?
- What are the shortcomings of the existing legal system for divorce that prevent or limit reaching these goals?
- What changes should be made in the existing system to support achieving these goals?
- Is there any reason why lawyer should not make Husband aware of dispute resolution options such as: collaborative law, mediation, early neutral evaluation, and unbundled legal services? Should an advisement of this sort be required by ethics rules?

- Would it better serve clients if lawyer were able to partner with a psychologist or a financial planner to provide interdisciplinary services?
- What are the barriers to the recommended approach to the situation?
- What are the possible solutions?

Discussion Question 2. A Holistic Center for Out-of-Court Divorce

A non-profit organization is considering establishing a Center for Out-of-Court Divorce (Center) in the town where you practice and wants the opinion of the divorce bar on the concept. The Center’s goal is to support separating and divorcing families through family reorganization with resources and services that promote a focus on the best interests of their children, and responsible management of their conflicts. Services are provided by a single organization in a single setting which for many families results in an agreement approved by the court. Center staff includes lawyer-mediators, mental health professionals, and financial planners experienced in working with divorcing and separating families. The Center accepts referrals from family courts, lawyers and mental health professionals as well as “walk-ins.” Both parents must agree to participate in Center services; the Center does not provide individual representation. Couples pay for services on a sliding scale based on their income. Couples fill out an application and are screened to ensure that they’re appropriate for Center services—no ongoing protection orders or criminal domestic violence, substance abuse, or mental illness. The couple agrees to a service plan developed by the Center staff which can include mediation, co-parent counseling, and support groups for the parents or children, or both. Financial planning is also available to advise parents on budgeting for a second household or filing for bankruptcy. If the parents reach an agreement in mediation, the Center drafts the necessary legal documents, advises the parents that they should seek independent counsel to review them, and presents the formal agreement to the court for final approval. The Center estimates that its average cost for services for families would be about \$4,000, but there are ample scholarships for anyone who cannot afford to pay. Time from initial intake to completion is estimated to average six months. The Center also has the capacity to serve as a place where new graduates (social work, psychology, and law) can do fellowships or residencies and can provide educational programs for the public.

Possible discussion points:

- Should the domestic relations bar encourage the creation of the Center and would it refer families to it?
- Does this strike you as a good option for some families? What worries you about it?
- What changes are needed in current procedures to maximize the number of appropriate families referred to the Center?
- What are the barriers to these approaches?
- What are possible solutions?

Discussion Question 3. Judicial Review of Divorce Agreements

Husband and Wife agree to divorce. They have reached agreement on division of their marital assets, maintenance payments, child support, and parenting/custody. Assets divided include a small business and a pension plan. They have agreed on a joint custody and time-sharing arrangement for their two children, ages 8 and 12. Both think the agreement is fair. They have “written up” their agreements using forms available on the Internet developed by the court system. They paid the appropriate fees. All forms have been appropriately completed, signed by Husband and Wife and submitted to the court.

Possible discussion points:

- What is the role of the court in reviewing the agreement?
- Should the court hold a hearing before approving the divorce agreement?
- Should the answer differ if Husband and Wife each had counsel?
- Should the answer differ if the parties do not have children?
- Assuming it was permissible, should the answer differ if both parties were jointly represented? Would it better serve families if joint representation of both parties were permitted under circumstances such as these? When would joint representation not better serve families?
- What are the barriers to these approaches?
- What are the possible solutions?

Discussion Question 4. Triage and Differentiated Case Management

The Chief Judge of the State asks for the input of the family law bar on how separation, divorce, and parenting cases should be classified for purposes of management and handling prior to creating a statewide judicial rule. She envisions a “triage” or tracking system, and wants the bar’s input on what allocation of limited judicial resources would best serve divorce clients. In her referral letter to the bar she notes that the judiciary budget is stagnant with no expectation of a significant increase in the future. The same is true of the budget for civil legal aid.

Possible discussion points:

- Would a court-wide differentiated case management system better serve clients’ needs than a system in which each judge sets his or her priority for cases?
- What characteristics of a case (such as the presence of children, the size and complexity of the marital estate, the level of conflict between the parties, the possibility of mental illness, drug or alcohol abuse, or the threat of violence) should be relevant in determining to which track the case is assigned?
- What should this tracking system look like? How should initial determinations of case assignments be made? By whom? How should the different “tracks” be categorized? By case complexity? By level of conflict between the parties? By whether counsel represents either party? Should the case classification determination ever be revisited? When?
- What are the barriers to these approaches?
- What are the possible solutions?

Discussion Question 5. **Litigation Management and Cost Containment**

Parents who are hostile and suspicious of each other are in the early stages of divorce litigation. Pleadings have been served, but disclosure has not begun. The case has been assigned to a judge. Potential issues in the litigation include valuation and division of a family owned real estate business, the marital house and custody/parenting of the parents' sole child. Each parent has a job and enough income and assets to pay counsel a retainer amount of \$15,000 against an hourly rate of \$350. It will, however, create economic difficulty for each spouse to pay an additional retainer or fees above the \$15,000 initial retainer. Negotiations before the action was commenced lead both sides to believe that chances of settlement are currently "off the table" and litigation must proceed.

Possible discussion points:

- How should a lawyer (for either party) handle this case?
- How can the court system best manage situations such as this case to reduce expense but still provide a speedy and just resolution to the divorce?
- What are the barriers to these approaches?
- What are the possible solutions?

Discussion Question 6. **Trial Practice**

The client's property distribution suit is ready for trial. Disclosure is complete. The key issue involves valuation of a closely held business potentially worth several million dollars, and the parties are way apart on their figures. Each side has hired a well-regarded expert witness to value the business who has submitted lengthy reports. Both sides estimate that they will need three trial days for their expert to testify and an additional two trial days for relevant additional testimony. The judiciary budget has not been increased in years. The same number of judges who presided over divorce and parenting cases in 2000 do so today, despite an increase in the number of petitions filed. The trial date has been postponed three times already. The judge who will preside over the trial advises the lawyers that her calendar is packed with cases, many of them involving self-represented litigants who take extra judicial time. She has three hours of trial time available next week, three hours three months later, and three hours three months after that.

Possible discussion points:

- What steps should the lawyers take in this situation?
- What steps should the court take in this situation?
- Assuming no increase in judicial resources, what are ways the system can be redesigned to alleviate situations such as the one here?
- What are the barriers to these approaches?

Discussion Question 7. Self-Represented Litigants

The Chief Judge of the State asks for the input of the family law bar on how the court system can best address the increasing number of self-represented litigants in divorce and parenting cases. In her referral letter to the bar she notes that the majority of litigants in divorce and parenting cases are self-represented. She would like the bar's input on how the growth of self-represented litigants has affected divorce and parenting cases and how problems, if any, can be addressed. She anticipates no growth in the judiciary budget for the foreseeable future. The same is true of the budget for civil legal aid.

Possible discussion points:

- Has the increase in self-represented litigants affected legal practice? How?
- What measures should be taken to address the increase of self-represented litigants? For example:
 - Simplify forms and expand self-help centers?
 - Mandate mediation and parent education programs?
 - Clarify the line between providing “legal advice” and “legal information” so that court help centers can expand their role?
 - Provide programs for unbundled legal services?
 - Create Limited License Legal Technicians (LLLTs), similar to nurse practitioners in medical care, to advise and assist clients in need of individualized legal assistance with non-complex family law problems?
- What are the barriers to these approaches?
- What are the possible solutions?

Discussion Question 8. Informal Domestic Relations Trial

A survey of stakeholders in family law cases conducted by the state court reflects frustration about trials when both or only one party is self-represented. Litigants complain that they are bewildered by complex rules and do not “feel heard” in court because of complex trial procedures. Lawyers complain that judges bend over backwards to help self-represented litigants. Some judges complain that they do not feel comfortable providing self-represented litigants with help and advice in complying with court rules because doing so makes them look like they favor one side over the other.

In response, the state court rulemaking body proposes that litigants can mutually agree to opt for an Informal Domestic Relations Trial (IDRT) in parenting disputes, economic disputes, or both. In the IDRT:

- Parties speak directly to the judge.
- The judge questions parties to ensure that they cover everything the judge needs to know to decide the case.

- The judge solicits additional questions from the other party or that party’s lawyer. If the questions seem helpful, the judge will ask them.
- Neither party interrupts the other or questions the other party.
- Most of the time, the parties are the only witnesses. An expert such as a doctor, counselor, custody evaluator, or appraiser can testify. Other witnesses are allowed only if the judge agrees they are needed.
- The Rules of Evidence do not strictly apply. The parties can provide any relevant documents or other evidence that they want the judge to review. The judge gives everything submitted whatever weight the judge deems appropriate.
- A lawyer for the party can help the party prepare and can sit next to the party during the trial to offer advice. The lawyer can also:
 - Identify the issues in the case;
 - Respond when the judge asks whether there are other issues that the judge should inquire about;
 - Question expert witnesses; and
 - Make short arguments about the law at the end of the case.

Possible discussion points:

- Should the domestic relations bar urge the State to adopt an IDRT and encourage litigants to use it? Are there disputes where it should be used and others where it should not?
- What are the barriers to this approach?
- What are the possible solutions?

Discussion Question 9. Children of the Divorce

Divorcing parents bring cross motions. The parents live near each other in the same school district. Father wants the current joint custody arrangement dissolved and sole custody for him with visitation to Mother. Mother also wants the joint custody arrangement dissolved, but wants sole custody to her with visitation for Father. The child who is the subject of this motion is a twelve-year-old boy. Both parents claim: that the child wants to live with that parent; the child is suffering emotionally because of the acrimony surrounding the divorce (e.g., his school performance is declining, he is getting into trouble with peers; he has lost interest in school activities); and that the other parent is interfering in the relationship with the child.

Possible discussion points:

- What steps should the lawyers be able to take in this situation?
- What should the court be able to do?
- What duties, if any, should the lawyers for the parents have to the child?
- Should the court get the child’s input before resolving the motion? How?
- Should the lawyers seek, or the court order, a neutral forensic evaluation?
- Should any of the responses be different if the child were “alienated” from one parent? If a parent was accused of drug abuse or there are intimations that one parent suffered from mental illness or substance abuse? For any other reasons?
- What resources should be available in the community to address these situations?

- What are the barriers to these approaches?
- What are the possible solutions?

Discussion Question 10. Domestic Violence

Lawyer represents Wife who is seeking a divorce from her Husband of five years. Wife tells lawyer the following: last night when she told Husband for the first time that she wanted a divorce, Husband got very angry and smacked her across the face. She, in return, threw a lamp at his head but missed. Husband also screamed various ugly words at her and accused her of having an affair with her best friend's former husband. Wife quickly packed a bag and moved out to temporarily live with her Mother. The police were not called. Wife tells lawyer that this is the first time that Husband has physically hit her though they have had angry arguments in the past that involved shouting, finger pointing, and shoving. This was the first time that she threw anything at him.

Possible discussion points:

- How should the lawyer respond to this information?
- Should a family law attorney be required to screen for domestic violence?
- How would the presence of children in the family change the response?
- What should the court be able to do in this situation? Does the court system adequately serve the needs of Wife and the family? If not, why not?
- What resources should be available in the community to address this situation?
- What are the barriers to these approaches?
- What are the possible solutions?

Discussion Question 11. Unmarried Parents

Father is an auto mechanic. Last summer Father was involved in a romantic relationship with Mother, who worked as a receptionist when he met her. Mother got pregnant and gave birth to Son. Mother quit her job to raise Son and has no income other than government assistance. Father and Mother decided not to marry. They have had a falling out and no longer have a romantic relationship. In fact, their current relationship could be described as "hostile." Mother and Son are living with Maternal Grandmother who also receives public assistance.

Father is willing to acknowledge paternity of Son and states that he wants to be actively involved in Son's parenting. He is willing to pay child support and wants a regular parenting time schedule and joint decision-making. Father has not paid child support because Mother would not let him visit with Son. He has not visited with Son in several weeks due to Mother's opposition to his doing so. Mother states she wants Father to pay and has threatened to go to the local child support agency and garnish his wages. She told him she does not think he is capable of taking care of an infant. Father says he will rely on his mother to help care for Son. He also has a new girlfriend whose mention seems to infuriate Mother.

Mother believes Father's new girlfriend is a substance abuser. She believes that Father too abuses drugs. Mother does not think Father is capable of taking care of an infant and will delegate Son's care to his mother and the new girlfriend. Mother believes Father is only interested in taking care of Son to reduce his child support obligations. Mother wants Father to pay support. She is worried, however, that if she seeks support Father will seek custody of Son.

The local legal aid organization has a large backlog of requests for representation. Father makes too much to qualify for legal aid. Mother qualifies for legal aid (her household income is less than 125 percent of the federally recognized poverty level). Her case does not, however, have the elements (e.g. domestic violence, child abduction threat) that make it a legal aid priority. Pro bono organizations in the community are "maxed out" and not accepting new clients unless they have the same priority characteristics as the legal aid society.

Possible discussion points:

- Does Father or Mother or both need a lawyer? If so, how are they going to get one?
- What should the court be able to do in this situation?
- What are the barriers to these approaches?
- What are the possible solutions?

Discussion Question 12. Education of a Future Family Law Attorney

A first year Law Student wants to be a divorce lawyer in her local community when she graduates. She is one of the few in her class to express that career aim. When she tells most of her classmates and the lawyers that she knows of her ambition they say things like: "that isn't real law"; "you will be an emotional wreck"; "the divorce bar has a bad reputation;" or "there is no financial future in such a practice because the divorce rate is declining and most people who get divorced don't have lawyers." A few of her friends and colleagues, however, encourage her and emphasize the importance of the family law attorney's role in serving clients and helping them and their children reorient their lives in a time of transition.

Possible discussion points:

- What courses and experiences should Law Student have during her law school career to help her realize her career ambitions?
- What can the family law bar do to help her realize her career ambitions?
- What are the barriers to these approaches?
- What are the possible solutions?