



GETTING PAID

Introduction:

The topic for this month's newsletter is one near and dear to the heart of every attorney. How can you be sure that you will be paid for your services when history teaches us that clients are rarely elated when the divorce is finalized. As you may remember from a previous practice tip you can not order a retirement plan to pay a portion of the QDRO distribution directly to you. Third party distributions are banned under the ERISA law which governs retirement accounts. Retirement plan assets can only be paid to former spouses or dependent children under the Retirement Equity Act of 1984 which established the use of QDRO's in marital dissolution actions. If you are employed by the non-participant spouse there is a very good chance your client is already broke when they show up and ask you to handle their divorce.

Tip of the Month:

Never prepare a Qualified Domestic Relations Order until all the provisions have been agreed to by both parties and you have a signed agreement.

A nightmare we have run into occasionally is when we are asked to prepare an order with vague settlement language and upon review the opposing counsel decides to call in another expert and renegotiate all the QDRO provisions. This situation is more likely to arise when the settlement provisions are stated in the transcript of the trial and few if any of the QDRO settlement options are even discussed. The attorney for the non-participant may say something like "my client should be granted 50% of the marital portion of the pension and any death benefits that are available if the participant predeceases her." The attorney representing the participant agrees and the Judge simply says "ok, that is settled". We then prepare an order giving the non-participant 50% of a fraction of the pension when the pension goes into pay status. We define the fraction as the total months married while employed up to the marital property cutoff date divided by the total number of months of employment at the time of retirement. In the event the participant should predecease we order the pension be paid in the form of 50% pre and post retirement Joint and Survivor with the former spouse being named the beneficiary of the survivor annuity until the non-participant's death. The participant balks when he or she realizes that the overall pension will be reduced by 10% or more to fund the Joint and Survivor option and that the non-participant will benefit from the participant's future raises because the pension will not be determined until retirement.. Now they want to go back and redefine "50% of the marital portion" and "death benefit" (participant wants the non-participant to be the beneficiary of the life insurance portion only. This is usually a small amount and costs the participant nothing.) More litigation is now inevitable. To avoid this nightmare prepare a separate agreement clearly identifying the terms of the QDRO.

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Lets start out with the obvious. DO NOT PROMISE RESULTS THAT ARE UNREALISTIC. THIS IS A GUARANTEE OF A FUTURE FEE PAYMENT PROBLEM.

When you first meet with a potential divorce client always consider a retainer. If the client cannot come up with a retainer and you have trouble seeing how you can be paid consider telling the potential client that he or she can not afford your services.

Explain that divorces today are really exercises in valuation. All the marital assets must be identified and valued. This means potentially hiring real estate appraisers, jewelers, auto appraisers, yacht brokers, pension and retirement asset evaluators, on-going business appraisers and potentially many others depending on the complexity of the case. All of these experts must be paid and your time in working with them must be compensated.

Obtain a financial statement that includes all sources of income. If one partner earns substantially more than the other and your State law permits, file a motion ordering that your fees or a part of them be paid by the heavy earner to insure fairness in litigation ability.

Have a services contract available that clearly states what the potential costs would be under a number of possible contingencies. If negotiation is successful than the costs should reflect the total fees based on an hourly rate plus any additional fees for valuations, depositions, discovery and court costs.

If mediation is a possibility than those potential costs should be added to the negotiated settlement fees. If the case actually winds up being litigated in court show the client the anticipated preparation costs and higher courtroom service fees. This can serve as an additional incentive to be more realistic in settlement expectations.

If information is not forthcoming explain the possible need for investigative accounting services or even private investigators to locate suspected hidden assets or confirm extramarital dalliances if fault is an economic distribution factor in your State. Clearly show these potential costs and get approval for use of these resources if the need arises. If approval is not forthcoming for use of these resources get a release that lets you off the hook if potential assets are revealed after the divorce is finalized.

To avoid "sticker shock" after the case is concluded always set up an on-going monthly payment schedule based on an estimate of the total costs as the case progresses. If possible, schedule payment of valuation fees as they are incurred.

Ideally the balance owed at the conclusion of the action should be small and very manageable. Unfortunately even with your best efforts this might not be the case. What then is the only source of real money if a substantial part of your fee is still outstanding?

If there is a defined contribution pension account and your client is awarded a lump sum settlement transferred to an Individual Retirement Account (IRA) with a Qualified Domestic Relations Order you can not order a portion be paid directly to you but you can get an agreement that he or she will withdraw funds from his or her assets (without naming the retirement account) to pay you the balance. If she or he fails to pay then you can proceed with a collection action. You still can't touch the retirement account but any other assets are subject to seizure. To avoid that, most clients will withdraw the money from the retirement account to settle the bill. Your client is well aware that he or she can withdraw these funds (and pay the taxes only on the withdrawn funds). If the client does not make a

lot of money the tax penalties are negligible. If the marital residence is to be sold and the proceeds split to settle the divorce action then there, too, is a substantial source of real money.

Sometimes you have to play hard ball but if the client is advised all along the way of the costs being incurred it is usually much easier to justify your fees and you will be willingly paid even - if a little begrudgingly. That's just human nature.

[Model Property Settlement Language](#)

Download our settlement language form and let the experts at LawDATA, Inc. [draft model property settlement language](#) (<http://www.lawdatainc.com/SetLanForm.pdf>) that deals specifically with the pension plan to which the order is addressed and the facts of your case.

Mr. Commerford has been active in the valuation of pensions and the preparation of Domestic Relations Orders for his attorney clients since the founding of LawDATA, Inc. in 1984. He has presented Continuing Legal Education programs, dealing with the valuation and distribution of retirement assets incident to divorce cases, for State Bar Associations throughout the country and written many articles on the subject for legal publications.

For any questions or ideas for upcoming articles you can reach Paul Commerford at paul@lawdatainc.com.

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