VOLUNTEER LAWYERS NETWORK

Tip of the Month – December 2008

Ten Tips for New Family Lawyers

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I originally wrote this article to commemorate my time as a law clerk in Family Court and to offer the following practical suggestions to practitioners who may be new to family law.[1] I have revised it slightly to reflect information that has come to my attention since the article's original publication. While some of these suggestions may seem obvious, I believe that they are worth repeating in light of the number of times I observed or experienced practitioners of all levels ignoring them.[2]

1. **Settle the case**. Use your best efforts to settle the case before bringing it to the court. Recognize that the relationship of the parties will likely continue well into the future. Settling the case provides a positive start to the new relationship that the parties will need to craft, either as parents, or perhaps as reticent financial partners. In addition, your chances of declaring all-out victory at the end of the proceedings are low, and the cost of pursuing the proceedings all the way to the finish may be prohibitive for your client. In the event that you are forced to proceed all the way to trial or an evidentiary hearing, it always helps to demonstrate to the court that you made honest efforts to settle the case, particularly if you are requesting conduct-based attorney fees.[3] In addition, if the proceeding occurs after entry of the Judgment and Decree, the Decree itself may require some form of alternative dispute resolution before filing a motion with the court. Finally, Minnesota law requires certain settlement efforts prior to filing any motion with the court, except motions for temporary relief.[4]

2. **Do not call the court's clerks for legal advice**. Do your own legal research. This includes questions that involve interpretation of court rules, such as filing deadlines.

3. **Do call the court's clerks with procedural questions that are not addressed by cases, statutes, and court rules**. Do not assume that you know the answer when you call the judge's chambers. Simply state your question. For example, does the judge prefer an informal telephone conference to resolve discovery issues, or does he/she prefer a formal motion hearing? How does the judge handle motions for temporary relief? Does the judge permit letter argument in lieu of filing a motion?

4. **Resist any temptation to "poison the well."** Do not call the court's clerks and recite the nastiest allegations you can think of about opposing counsel and/or their client en route to asking your question. Your efforts will be in vain because the clerks will not pass on your ex parte diatribe to the judge. Moreover, your credibility in the eyes of the clerk

will suffer and your client pays extra for the time that you spend bad-mouthing opposing counsel and/or their client.

5. **Call the court's clerks before sending any written correspondence to the court**. Many judges do not accept any unsolicited correspondence.[5]

6. **Raise discovery issues before trial or a hearing**. Remember that the Rules of Civil Procedure apply in Family Court.[6] If you are engaged in informal discovery and hit a roadblock, consider initiating formal discovery procedures. If in doubt, call the court's clerk to inquire as to whether the judge will address informal discovery disputes. If you have already served discovery requests on the other party and they fail to comply, file a motion to compel and obtain an order directing the other party to comply with your requests.[7] If the party disregards the order, move for sanctions.[8] If you have not followed the steps described above, do not appear at the hearing without evidence and assume that the court will automatically order the sanction that you are now requesting.[9] It is always preferable to present to the court a specific discovery order that the other party has not followed. Moreover, recognize that obtaining sanctions may not entitle you to victory on your underlying claim. Presenting evidence at a hearing is always better than presenting no evidence and requesting discovery sanctions.

7. **Check with the court's clerks to determine whether the judge wants courtesy copies of pleadings, exhibits, etc. in advance of your hearing or trial**. Some judges love courtesy copies. Other judges despise them. Judges frequently issue pretrial or trial orders that contain instructions with respect to courtesy copies. If there is no order (a common situation if you are litigating a post-Decree motion), contact the court's clerks for clarification. If you do submit courtesy copies, hand delivery of a courtesy copy to chambers is the surest way to guarantee that the judge receives your paperwork in time to consider it *before* the hearing. Make sure that your exhibits are well-organized and clearly tabbed and marked for quick reference by the court.

8. **Trial/motion practice tips**:

    a. **Prepare your client and make sure they attend (on time)**. Your client knows more about the case than anyone, and they need to attend every proceeding. Do not assume that the judge will not ask your client questions at a motion hearing (or, for that matter, any other proceeding). Preparing your client for questions has at least two benefits to you. First, it prepares you and your client for the hearing. Second, it forces you to confirm your client's position on a variety of issues and allows you to craft alternative proposals or arguments if the court does not accept your preferred argument.

    b. **Document your facts**. The court needs to have evidence upon which to base its ruling. You need to provide the evidence. For example, if you argue that your client should be reimbursed for medical expenses paid on behalf of the parties' child, you need to document that your client actually incurred the expenses, and that your client actually paid them. Do not assume that the court will believe your

client's testimony over that of the other party without documentary evidence to bolster your client's claim.

c. **Be organized**. Do not present a jumble of complex information without a concise summary. Voluminous documentation may be necessary to support a claim, but the information is far more effective if it is summarized and quickly accessible by the court.

d. **Do not dwell on the facts at oral argument**. Your client's affidavit should give the court facts from which to draw a conclusion and you need not dwell on the details unless the court asks questions about them. Focus your argument on why the facts as you have presented them compel the conclusion that you want the court to reach.

e. **Submit a memorandum of law with your motion and your client's affidavit**.[10] This has three desired effects. First, it provides a concise legal argument to the court and focuses the court's attention on any legal issues that must be resolved. Second, it should shorten your client's affidavit, because you do not need to make legal argument in your client's affidavit and your memorandum of law. Third, writing a memorandum of law forces you to consider whether your argument has a legal basis. You should clearly identify the authorities upon which you expect the court to rely to rule in your favor. Do not assume that the court is familiar with the statute, case, rule, etc., that constitutes the linchpin of your argument.

f. **Propose a solution**. Do not simply describe the problem and expect the court to fix it. Present a concrete solution in your memorandum of law or oral argument that the court can accept, reject, or modify. For example, if your client is requesting modification of the other party's maintenance obligation, you should have an actual number, based on documentary evidence and testimony, to propose to the court. If your client wants expanded parenting time, tell the court what the new schedule should be, and why. Judges like to hear or read your proposed solution; it gives them something to work with.

g. **Be courteous to everyone**. This includes the judge, his/her staff, opposing counsel, and the opposing party. Do not give in to the temptation to become emotionally involved in any dispute, no matter how big or small. It only serves to undermine your credibility before the court.

9. **Do everything you can to avoid requesting ex parte relief**.[11] It is difficult enough to make decisions on the basis of diametrically opposed testimony with little or no corroborating evidence. It is nearly impossible to make decisions on the basis of one party's statements alone. Most ex parte requests can be more effectively addressed by a motion and supporting affidavit for an accelerated hearing. If you must seek ex parte relief, make an effort to inform the other party that you are doing so and try to procure their attendance. It is better to have the other party available for the judge to contact than to expect the judge to issue an ex parte order.

10. **Be aware of the proper mechanisms for enforcing the court's Decree**. Family court cases are rarely "over" after the Decree is issued. But not all remedies are available for every violation of the Decree. For example, contempt is generally not available to collect money[12] or personal property owed to your client by the other party.[13] Conversely, nonpayment of child support or maintenance is grounds for contempt[14], as is "unwarranted denial of or interference with" court-ordered parenting time.[15] Unpaid child support and maintenance obligations are judgments as a matter of law and may be docketed in an expedited fashion.[16] Happily (or not, depending on who your client is), unpaid attorney fees are also proper subjects for contempt proceedings.[17]

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[1] This article reflects the opinions of the author alone. The opinions presented in this article should not be attributed to the Honorable Bruce A. Peterson, the Fourth Judicial District of the State of Minnesota, or any division thereof.
[2] By offering these suggestions, I do not mean to denigrate the family law bar, which generally does an excellent job of providing quality legal representation to clients in a state of crisis.
[3] *See* Minn. Stat. § 518.14, subd. 1(3) (2007) (permitting the Court to award "fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding").
[4] *See* Minn. Gen. R. Prac. 303.03(c).
[5] Note that some forms of unsolicited correspondence are permissible. *See, e.g.*, Minn. Gen. R. Prac. 115.11 (permitting two page letter to court for purpose of requesting permission to make a motion to reconsider).
[6] *See* Minn. Gen. R. Prac. 301 ("Rules 301 through 313 and, where applicable, the Minnesota Rules of Civil Procedure shall apply to family law practice except where they are in conflict with applicable statutes or the Expedited Child Support Process Rules, Minn. Gen. R. Prac. 351 through 379.").
[7] *See* Minn. R. Civ. P. 37.01 (detailing proper procedures for filing motion to compel discovery).
[8] *See* Minn. R. Civ. P. 37.02 (describing available sanctions for failure to comply with court orders related to discovery).
[9] *See* Minn. R. Civ. P. 37.04 (stating that the Court "*may* make such orders as are just, including any action authorized in Rule 37.02(b)(1), (2), and (3)") (emphasis supplied).
[10] *See* Minn. Gen. R. Prac. 303.03(a) (setting forth documents that may be filed with the Court in connection with a motion).
[11] Minn. Gen. R. Prac. 303.04 governs ex parte relief in Family Court proceedings.
[12] *See* Minn. Stat. § 550.02; *Burgardt v. Burgardt*, 474 N.W.2d 235, 237 (Minn. Ct. App. 1991).
[13] *See Behr v. Behr*, No. C8-95-428, 1995 WL 497337, at *2 (Minn. Ct. App. Aug. 22, 1995).
[14] *See* Minn. Stat. § 518A.72.
[15] *Id.* § 518.175, subd. 6(e).
[16] *See id.* § 548.091.
[17] *See Burgardt*, 474 N.W.2d at 237.