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Disclosure

In any settlement model, full disclosure is important. After all, "reasonable knowledge of relevant facts" is part of the very definition of *fair market value*.[1] In divorce, full and voluntary disclosure is so important to settlement that it warrants a special chapter in this book. Every state, in one manner or another, mandates both parties to make full disclosure of their financial circumstances. Thus, in addition to being good settlement strategy, full voluntary disclosure complies with legal requirements anyway.

Benefits of Full Voluntary Disclosure

In computerspeak, there is "pull" technology, in which data/programming must be requested; and "push" technology, in which data/programming is provided without being asked. In negotiationspeak, pull disclosure is where the party with less knowledge has to ask for it and sometimes compel production; push disclosure is where the party with more knowledge simply provides it without even being asked. Some parties and, unfortunately, some attorneys think that discovery should be governed by pull disclosure, where the spouse with less information has to find it, like a game of hide-and-seek.

This attitude is not consistent with successful settlement strategies. As one mediation specialist, Yishai Boyarin, noted, if "there is not enough reliable information on the table, the full scope of the interest

1. Rev. Rul. 59-60.

of the parties cannot be known."[2] And "the interests-based approach can only work if both the parties agree to disclose the information pertinent to the conflict in order to openly engage in finding solutions that provide for mutual gain."[3]

Think of a poker game. Would you play without knowing that there were fifty-two cards in the deck? If you felt that a card was up the dealer's sleeve, the proper strategy would be to simply not play. Similarly, it would be foolish—and, in fact, it would constitute malpractice—to settle a divorce case without having full disclosure from the other side.

Since most family law attorneys represent both men and women and both the monied side and the nonmonied side (of course, in different cases), they are intimately familiar with what information the other side will need to sit down at the bargaining table. Since they know what information the other side will need, why not simply provide it at the outset, before the other side even asks for it?

Voluntary and complete exchange of information is primarily designed to put the other party at ease to negotiate. Of course, this will not happen in every case. In particular, highly paranoid parties will not appreciate the effort. In one such case I handled, when we voluntarily produced substantial information, the wife said to her lawyer, "See? They're trying to put us off the scent." However, even in this case, the effort of providing full voluntary disclosure was worth it: only the wife was paranoid, not her lawyer, who reassured her that the effort was genuine.

In addition to putting the other side at ease, full voluntary disclosure is important because courts are highly impressed when a lawyer makes discovery easy for the other side. When courts are faced with discovery disputes in divorce, they generally do two things, neither of which is good for the party defending discovery. First, unless the request is outrageous (and sometimes even then!), the court will order in favor of the party requesting the information on the theory that everything in a marriage should be open information. Second, the court will assume that the motion was necessary because someone (guess who?) was trying to hide information.

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2. Yishai Boyarin, *Generating Win-Win Results: Negotiating Conflicts in the Drafting Process of the Uniform Collaborative Law Act*, 38 Hofstra L. Rev. 495, 503 (2009).
3. *Id.* at 502.

Methods of Providing Disclosure

The best method of furnishing full voluntary disclosure is to provide not just a financial statement but a fully annotated one with backup information. An annotated financial statement should include tab numbers for each asset and debt. Then, following the financial statement, there should be a corresponding tab with backup information for each item, e.g., a bank statement, retirement plan statement, Kelley Blue Book car appraisal, or whatever is necessary for the other side to ascertain the nature and, if possible, value of that item. If information is not currently available (such as an appraisal on real estate or a business), there should be a blank page after the tab with a note that information will be supplied when available. Then, when information becomes available, it should be provided with instructions regarding to which tab the information belongs.

Since the binder is difficult to replicate, you should make three copies—one for the opposing counsel and one for each party. The binder does not have to be completely paper; since more and more information, such as tax returns, can be provided without killing trees, you can place a flash drive rather than paper behind the tab for certain information.

Speaking of saving paper, an even more efficient means of sharing bank accounts and other information is to simply provide online access. Years ago, a client would take piles of canceled checks to his lawyer if the other side requested to audit the checking account, obligating the lawyer to copy them since all information in a divorce should be immediately available to both parties. Today, lawyers can simply give the other side the information necessary to access the account itself, usually a user ID number and PIN. Of course, it is imperative to remind whichever client is awarded that account to change the PIN after the divorce.

When such information is not available online, you can have your client sign an authorization for whatever institution has the relevant information. The authorization should require that the information be provided to both sides simultaneously and that the authorization will expire upon the granting of the divorce. You should annotate your file to make sure that a letter terminating the authorization is sent out immediately following the divorce. The cost is minimal: I tell clients that it will cost only two first-class postage stamps (one for a self-addressed, stamped envelope to make it convenient for the institution

to respond). It would be impossible for the other side to claim that they are being stonewalled when they have permission to get all the information they want when they want it.

Summary

Full voluntary disclosure is important for both sides. If your client has access to necessary information, provide it voluntarily and completely. The sooner the other side has the information they need, the sooner they will be ready to sit down at the table with you and negotiate.

Although providing substantial information in an organized form on a voluntary basis may cost the client more in the short run, it equals out in the long run. First, it will have to be provided anyway. Second, and more important, it will set a stage for negotiations where the script focuses on the substantive issues, not the ancillary ones. And that, of course, is the desired agenda.