



The Initial Divorce Client Interview: A New Approach

Kenneth H. Waldron, Ph.D. and Allan R. Koritzinsky, J.D.¹

Our request...

**If you are a divorce lawyer, please consider using this approach.
If you are a divorce client, please give your lawyer a copy.**

¹ Kenneth H. Waldron, Ph.D. and Allan R. Koritzinsky, J.D. are the authors of four books. Waldron, K. & Koritzinsky A., *Game Theory and the Transformation of Family Law: Change the Rules- Change the Game. A New Bargaining Model for Attorneys and Mediators to Optimize Outcomes for Divorcing Parties* (Unhooked Media); *Winning Strategies in Divorce: The Art and Science of Using Game Theory Principles and Skills in Negotiation and Mediation* (Unhooked Media); *The Road to a Successful Marriage is Unpaved: Seven Skills for Making Marriage Work* (Austin Macauley); and *Planning a Sensible Divorce: Avoid the Toxic Dance of a Messy Divorce*. (Austin Macauley). Both authors, separately and together, have written numerous journal articles and other professional publications. We also invite you to check out our free articles, booklets, blogs and checklists on our website: marriageanddivorce.org.

1. INTRODUCTION

(Divorce Games and Emotions)

- A. Most divorcing spouses and divorce-related professionals define divorce as a legal event, dominated by the distribution of property, debt, future income, and time and control of minor children. Efforts by divorce lawyers, mediators and court-connected classes and services go to great lengths to encourage collaborative and cooperative negotiations to resolve the distribution challenges, but these efforts all have had an uphill battle. Even well intended lawyers often regress, along with their clients, to competitive tactics in the distribution battle.

- B. Strong emotions distract the spouses (and the lawyers) from focusing on the divorce as a life-changing event. Your authors posit that putting the focus on divorce as a life-changing event with planning and collaboration can at least reduce the impact of interfering emotions. Focusing on or at least containing the strong emotions at play can diminish their negative impact on the outcomes.

- C. Focusing on a new definition of divorce and addressing emotions at divorce is the focus of this Booklet, starting with the Initial Client Interview. The underpinning of our writings are based on Game Theory principles.²

There are three challenges that must be addressed at the outset of every divorce, beginning at the time of the Initial Client Interview: This means starting with a discussion about three important matters:

- **the definition of divorce itself**, which is currently misdefined. In fact, divorce is primarily a life-changing event and only secondarily a legal event.
- **the fact that there are two “games” at play** at the time of divorce: The two games are the *Divorce Planning Game* and the *Divorce Legal Game*.
- **the challenge of managing emotions** the spouses bring to the divorce. These emotions need to be managed, or they will interfere with the planning needed for a sensible divorce.

The initial client interview is designed to build a team between the lawyer and the client. Teamwork **is** required! More on this in a moment. However, before getting started on the Initial Client Interview, we take a short detour to discuss the definition of divorce.

2. DEFINITIONS OF DIVORCE

(A life-changing event)

While a divorce has the necessary ingredients of a legal event, your authors define divorce as primarily a life-changing event. Some life-changing events are unwanted and

² For more about Game Theory, see our website, marriageanddivorce.org.

come without warning (e.g., loss of a job, serious health issue), and some are chosen with anticipated rewards (e.g., marriage, giving birth, etc.). What they have in common is that people are on one life path, and then, sometimes suddenly, are on a different path.

In divorce, spouses who had been on the life path of a marriage are now faced with a different life path: heading to a divorce. This is a life-changing event!

3. EMOTIONS

(Where spouses become adversaries unless things change)

Because distribution is always a Zero Sum Game, spouses who are almost always dominated by ill feelings toward one another at the time, find themselves positioned as adversaries in disputes. This is a basic principle of Game Theory, too complex to cover now, but discussed in our book on Game Theory. (See Footnote 2.) Because most life-changing events are initially dominated by strong emotions, these emotions must be understood and at least contained. This allows everyone to focus on the Non-zero Sum Game of planning, dominated by cooperation and collaboration- and not by emotions.

A divorce is a unique life experience because emotions usually overshadow all other considerations, at least initially.

EMOTIONS AT PLAY

There are Deep Feelings and Secondary Emotions at play.
All of them need to be addressed.

DEEP FEELINGS (Primary Emotions)	DEFENSIVE MOTIONS (Secondary Emotions)
Sadness	Anger
Fear	Blame
Anxiety	Blame
Insecurity	Emotionally running away- getting cold and distant

MORE REGARDING EMOTIONS AT PLAY

1. **Deep Feelings.** Deep Feelings at the time of the divorce can take the form of spouses feeling discouraged. In addition, an escalation of already defensive emotional patterns in the marriage can also occur, making things worse.
2. **Defensive Emotions.** Defensive Emotions are only slightly under the surface, which can compound the emotional challenges already at play. Lawyers, sometimes positioning their clients for advantages in future disputes, can inadvertently add to the emotional intensity. All of this distracts the spouses from focusing on the divorce as a life-changing event.

A refocus is needed. Putting the focus on divorce as a life-changing event with planning and collaboration can at least reduce the impact of interfering defensive emotions. Focusing on or at least containing the strong emotions at play can diminish their negative impact on various outcomes.

This refocus starts with the Initial Client Interview.

There are three areas of inquiry, regarding the Initial Client Interview:

Inquiry #1: This involves focusing on the **emotional obstacles** to making a good plan for the future.

Inquiry #2: This involves focusing on the spouse's **long-term goals**, helping set the stage for goal-based planning. Planning to meet long-term financial and family goals by definition reduces fears of loss.

Inquiry #3: This involves the lawyer informing the parties of the **legal requirements of the divorce**, but avoiding taking premature positions before addressing the life-changing event planning process.

4. THE INITIAL CLIENT INTERVIEW³ **(Three sets of questions to ask the client)**

- If the lawyer views a divorce as life-changing event, the questions asked of the client will channel the client into a Non-zero Sum Game of planning.
- If the lawyer views a divorce as predominantly, or perhaps solely, as a legal event, the questions asked of the client will channel the client into the Zero Sum Game of distribution. Unfortunately, this means that the spouses are in a legal event where they are adversaries in disputes, grasping at maintaining a meaningful role in their children's lives and at gaining as good an economic outcome as possible.

Teamwork: The lawyer and the client. They need to work together as a team, where the primary focus is on the divorce as a life-changing event. In addition, the goal is to find the appropriate balance between these two divorce events- where and when it is a life-changing event or a legal event.

³ The Initial Client Interview is the perfect segue to introduce our Six Settlement Step, found in Section 5 of this Booklet. However, please be patient. We will get there shortly. Together, they represent our "**Settlement Bookends**". i.e., starting with the interview and ending with the settlement.

As a reminder, there are three separate inquiries and questions for the lawyer to ask the client:

Inquiry #1- A Focus on Emotional Obstacles:

Introduction for the Lawyer: "... There are several options for how we negotiate with your spouse and his/her attorney. The most effective and efficient way is to negotiate in four-way meetings. In that way, everyone has the same information at the same time. You and I would meet and prepare for each four-way meeting in order to work together and to make sure that what is important to you gets addressed. That allows for ideas to come up and be modified to work best for both spouses and avoids misunderstandings, jumping to false conclusions and making decisions with incomplete information. However, it can also be emotionally challenging for spouses to be face to face...."

1. Describe for me the emotional climate currently existing between you and your spouse?
2. Most of the feelings that you describe are about the past. Will you be able to set them aside and focus on your future (and, if applicable, the future of your children)?
3. Do you think it would be helpful to meet with a counselor once or twice, so that you can focus on planning for the future instead of fighting about the past?
4. Do you fear that your spouse's emotions will get in the way of our planning for your futures?
5. Are there some rules that you might suggest for you and your spouse in order to stay focused on planning for a good future for both of you (and, if applicable, for your children)?

Inquiry #2- A Focus on Long-term Goals:

1. What financial condition would you like to be in 5 to 10 years from now? How about your spouse?
2. What kind of work would you like to be doing before retirement?
3. What is your thinking about retirement – yours and your spouse?
4. Regarding the children⁴:
 - a. Number and ages of the children?
 - b. What are their personalities, current school activities, special needs, etc.?
 - c. What are the current relationships the children have with each parent? What

⁴ Jumping ahead, here are two examples of where we are heading if one or both of the parents could have these kinds of conversations. **Example One:** "I would like to retain the family residence" likely minimizing disruption to the children's lives. **Example Two:** "I think we should have 50/50 custody," likely indicating a desire for both parents to have a high level of involvement with the children and might also mean minimizing financial commitments to one another.

- about with other with other family members, neighbors and friends?
- d. What are your goals for your children? What are your spouse's goals for your children?
 - e. What are some of your goals for your children regarding holiday experiences? How about the goals of your spouse for holidays?
 - f. Is academic success of the children important to you? How about your spouse?
 - g. What would you like your children's experience to be like now that their parents will be living separately?
 - h. When your children are grown, what would you like to hear them say about their experience with separated parents?
 - i. What kind of parental involvement of both parents would you like to have, separate from any custody schedule (e.g., access when the children are at the other home)?
 - j. What type of relationship would you like your children to have with each of their parents in the future?
5. Is owning a residence important to you? How about your spouse?
 6. In the long-term, what do you think a really healthy relationship with your ex-spouse would be like?

Inquiry #3. A Focus on the Legal Event of Divorce:⁵

1. Spouses
 - a. Years of marriage?
 - b. Ages?
 - c. Jobs?
 - d. Incomes?

2. If children
 - a. Number and ages of children?
 - b. Health and special needs?

⁵ **CAVEAT:** The lawyer needs to decide in each individual case whether now is the time (i.e., at the initial client interview) or if it is premature to discuss any legal positions on any pending issues at this early juncture. As a general rule, the discussion at the individual client interview regarding any pending legal issues is simply to inform clients as to the legal issues that will eventually need to be decided: first, to meet the requirements of law, and second, to determine what legal agreement is the best future plan for both parties.

3. Health and special needs of spouses?
4. Any spousal abuse?
5. Details regarding and marital/divisible and non-marital/non-divisible estate?
6. Whether there is a Pre or Post Marita Agreement?
7. Whether there is any spousal abuse?
8. Discussion regarding the distribution/allocation regarding children
 - a. Custody?
 - b. Placement/Schedule?
 - c. Child support?
 - d. Relocation issue(s)?
9. Discussion regarding the distribution/allocation- Financial Issues
 - a. Property division?
 - b. Child support?
 - c. Spousal support?
10. Any other miscellaneous outcomes or positions of import?

**All of the above questions above are just examples.
There are plenty of other questions that could and
should be asked, In the discretion of the lawyer.**

More Notes to the lawyers. This is what we mean by the teamwork referred to above. The client and the lawyer need to work together as a team, to find the appropriate balance between two events- where divorce is treated, first as a life-changing event and second as a legal event, with legal decisions that support the long-term plans of the spouses:

- When legal questions are important at the moment, the focus should be on specific legal questions.
- When life-changing questions are important at the moment, the focus should be on future family and financial goals for both of the spouses and the children.
- All this will involve a discussion of non-competitive goals and about the distribution of what the clients have to distribute at the present time that can be a first step to reaching goals.

**The initial client interview marks the first time when divorce
is viewed first and foremost as a life-changing event.**

- If the lawyer views a divorce as first and foremost a life-changing event, where there is cooperative planning for the spouse's and their children's

futures, the questions emphasized in the initial client interview will be quite different from those usually asked in the context of a legal event, as described above.

- The discussion of the current situation will be similar, but the purpose will be substantially different, including topics not usually included when the focus is only on the legal event.
- The questions asked if addressing a life-changing event will be for the purpose of understanding the family's starting point regarding family and financial goals. This will be more like a conversation- not developing arguments for and against desired outcomes in the legal event.

This is certainly a new approach when thinking about divorce!

Here are a few more examples:

- If divorce is treated as a legal event: *“What is your position about a physical custody schedule for the children?” “What is your position about what to with the house or about your getting a part-time job outside the house?”*
- If divorce is treated as a life-changing event: *“The two of you are likely to need some flexibility with one another and perhaps the involvement of other caregivers taking care of the children. Are there grandparents involved now, or other relatives or neighbors who help or could help?” “What do you believe is needed so you can handle the finances and sharing the children while living in two homes?”*

Summary: The differences regarding the two divorce events are profound:

- They will generate very different types of questions if the focus is on divorce as a life-changing event or if the focus is on divorce as a legal event. If the former, the discussion will be about the financial and family goals. If the latter, the discussion will be about legal outcomes.
- Most clients entering a divorce are likely to be dependent on their lawyers to shape the process going forward. The shape and focus of the initial interview can guide them into a healthy focus on cooperative planning for themselves, and when applicable, for their children.

5. SIX STEP PLANNING MODEL FOR REACHING AN OPTIMAL SETTLEMENT AGREEMENT

Step 1: Isolate and manage the current strong emotions: i.e., the Deep Feelings/Primary Emotions and the Defensive/Secondary Emotions. Planning is a better salve for these emotions rather than competing for limited supplies of money and time with the children.

Step 2: Apply your new Mindset regarding the two games played at divorce. These are the Legal Game and Planning Game.

Step 3: Detail the current situation: Understand the facts of the current situation. In addition, the discussions during the planning process will inevitably add additional information regarding the current situation.

Step 4: Identify and discuss the long-term family and financial goals: Long-term goals are not about distribution. They involve a discussion of non-competitive financial and family goals.

Step 5: During the settlement discussions, allow the magical *convergence of expectations* to occur during the settlement process. This convergence will likely happen if you follow our six Game Theory Principles.⁶

Step 6: Negotiate the optimal two-part Settlement Plan:

- a. Part One: This requires planning the steps to go from the current situation to reaching long-term goals with a focus on divorce as a life-changing event. These steps are not the legal agreements – at least not yet. This step will inevitably include a discussion identifying likely obstacles to reaching their goals and making a plan to overcome them. This is the only step in which the past can and should be addressed, particularly as it might identify obstacles to achieving goals.
- b. Part Two: This requires the legal distribution planning. This is where and when lawyers can be extraordinarily helpful in this planning process. Specifically, they are key in helping the spouses focus on the life-changing event first – not on the legal event. Of course, they are expert at negotiating and drafting the legal agreements in the long-term Marital Settlement Agreement.

The take-away here is a simple one: imagining a future that could be very different!

⁶ See also our Game Theory Principles Checklist, found in the Resources Section of our website.

6. CLOSING

Summary and Wrap-up. Most divorce lawyers enter their profession believing they are in a serious service profession. That is, they want to help people going through a difficult time. Lawyers can help clients shift their focus from being absorbed by the legal event and helping them navigate a significant life-changing event. Better yet, this can be a much more satisfying role and one that will ultimately make their lawyer skills much more effective and put to much better use. Imagine a future when most ex-spouses continue to work with one another post-divorce, to accomplish important long-term goals for each of them and for their children. Your authors will reach their goal when this becomes the norm, not the exception.

**Long-term goals are not about distribution.
They involve a discussion of non-competitive
financial and family goals.**

Thus, the relevant question is not *“Do you want to both have custodial time with the children?”*
The relevant question is, *“When your children are grown, what would you like to hear them say about their experience of your divorce?”*

The question is not, *“Do you want to retain the house?”*

The relevant question is, *“What lifestyle would you like to be living 5 or 10 years down the road?”*

**Spouses are not likely to focus on divorce as a life-changing event
UNLESS their lawyers guide them in that direction,
starting with the questions asked at the Initial Client Interview.**

The future for divorce could be very different if and when critical practice changes are made, as recommended in this Booklet:

- Where divorce lawyers practice Goal Based Planning as the norm.
- Where clients who spread the word that their divorce lawyers were incredibly helpful, rather than simply good fighters. This is your authors’ fondest hope. For this reason, we want to prompt an attitudinal and mindset change and reverse the current trends present in the current family law system.
- Where we re-establish a valuable place and new role for the divorce lawyer. This is a significant component in understanding what a divorce really means: primarily a life-changing event.

OUR HOPE FOR THE FUTURE

Imagine a future when most ex-spouses continue to work with one another post-divorce, to accomplish important long-term goals for each of them and for their children.

We hope this will become the norm- one day soon!!