

THE BEST QUESTION

This article defines the best question a divorce lawyer should ask her client in their first meeting and explains why. (For simplicity, I refer to the lawyer as “she” and the client as “he.”) The best question she can ask is “What kind of relationship do you want to have with your ex-spouse after the divorce?” I offer three reasons why I believe this to be the best question.

First, it talks about the future. The great gift of no fault divorce is the elimination of blame and fault. The law basically no longer cares who did what to whom. The question is, “What are you going to do now?” More specifically, “How will you raise your children, share your incomes, pay for health insurance, divide your property, plan for your eventual retirement?” Those questions are the important ones, and the lawyer is in a great position to guide the client forward, a challenging task when he wants to tell the story of the marriage or all the bad things that happened in the past. (A colleague told me that when he got divorced he went to the one and only Monroe Inker, who told him to write the story of his marriage and he stayed up for 24 hours writing his story and it was the best thing that happened to him in his divorce.) The good lawyer listens, asks open ended questions and listens some more. “Why?” is also a beautiful question, so easy to ask with a genuine sense of curiosity, and if you ask it make sure the next voice you hear is not your own. What I hear from my mediating clients continues to surprise me, even after 36 years of asking.

Second, it focuses on what the client wants, and forces him to think. The more the client knows what he wants, the more power he has. The lawyer empowers the client by helping him to figure out what he wants, often the most elusive question. The struggle the husband or the wife in a divorce may be having is not with the spouse but with what Morton Deutsch calls the “intrapsychic conflict” with himself. [The Resolution of Conflict, Yale University Press (1973) p. 33.] “What is most important to me?” It is one of the biggest challenges of divorce to answer that question, and the answer is key to the future. I tell my clients of the mediating wife who could not decide if she wanted to stay in the marital home, and her dilemma still haunts many of my mediations: “I love the house, but it is an albatross around my neck.” She never could figure out what she wanted and after 3 meetings we agreed mediation was no longer of use to them. The divorce process should be guided by the client. SJC Rule 1.2 of Professional Conduct says, “A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.” Why?

Third, his answer should define every action taken by his lawyer in the divorce process. The answers will range widely. Many parents want to maintain a civil relationship, for the sake of the children or otherwise. On the other hand, the couple is getting a divorce: they may want nothing

more to do with each other, especially if they have no children or cats. You may have a spouse whose answer is so distasteful to you that you may not want this person as a client, and it helps to find that out from the get-go. One of the first questions in a divorce is what kind of process to follow, and should Keep SJC Rule Five Alive by explaining alternative methods of dispute resolution including mediation, arbitration, conciliation and parent coordinators or special programs such as Only One Childhood in some western counties. For example, if the client says she wants to maintain a civil relationship with her ex-spouse for the sake of the children I believe the lawyer should recommend mediation as a process most designed to promote cooperation between parents because so much evidence proves children of divorce thrive when they see their parents treating each other civilly. Mediating parents are given a place to talk, an opportunity for which they are usually very grateful. On the other hand, the client who wants to hurt his spouse will insist that service of the divorce complaint and summons will be made by a usually burly constable, by surprise and in a public place such as at work: then they are off to the races.

Peter Drucker wrote voluminously about management by objectives (MBO), defining common goals in the beginning and using those goals to define strategies and behavior to reach them. [Five Most Important Questions, John Wiley & Sons (2015)]. The lawyer who asks her client “what kind of relationship do you want to have with your ex-spouse after the divorce?” and hears the answer can follow basic management techniques in the ensuing process, constantly checking with her client to be sure the actions they are taking are most conducive to the desired relationship afterwards. The lawyer will generally find the experience rewarding, and the vast majority of her clients grateful.

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