

# Effective Representation in High Net-Worth and High Conflict Cases

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You've just hung up the phone with a new client. It's a great case with sophisticated financial issues, but you've never handled a case of this magnitude before. Now what?

For some attorneys, taking on a complex family law case may seem daunting, but it doesn't have to be that way. You can successfully navigate yourself and your client through the case, high conflict or not, by following these simple rules: (1) Be creative; (2) Don't go it alone; (3) Consider using technology to manage your case; and (4) Don't miss unusual assets or critical issues that often arise in the financially sophisticated matter.

## Be Creative

In the average case, options for creative settlement may be limited, especially when the parties' estate consists of a homestead with no equity and substantial credit card debt. But in the high net-worth case, there are exponentially more possibilities for creative resolution, especially when an estate consists of varied marital and nonmarital assets such as retirement accounts, deferred compensation, stock options, investment accounts, closely held businesses, etc. The key is to think outside the box. Our laws often place our judicial officers in a one-size-fits-all posture, but parties are not so constrained in reaching their agreements. There is little excuse, other than their own intransigence, for not settling a case when a breadth of settlement options are available to the parties.

The biggest barrier to settlement is when either you or your client does not understand important aspects of the case or does not have the information necessary to resolve issues. In general, following the tips suggested below will ensure that you know what the parties have and how their assets could be divided, or allocated, in order to arrive at a solution to the satisfaction of both parties. In the event that settlement is not ultimately possible, you will then be well-prepared to present the case to the court in a comprehensive and understandable manner, maximizing your client's trial position.

## Use Experts

In order to effectively manage a complex case, it's critical to assemble the right team. There is a cadre of well-credentialed professionals who can provide valuable assistance in your high net-worth case, e.g., asset/business valuation, forensic accounting, cash flow analyses, financial planning, nonmarital asset tracing, vocational evaluation, and alternative dispute resolution (ADR). Your job is to sort out the type of expert(s) and individuals best suited for your case and whether such experts should be jointly retained as "neutrals" or retained solely by you and your client.

For example, if either party is concerned that assets may have been hidden or that records are not accurate, consult a forensic accountant. Be wary, however, that such help is often expensive and may not yield satisfying results. Such help may indeed locate or track income or assets; or it may fail to do so (yet even when this is so, it may have the benefit of convincing your client to abandon an ultimately fruitless issue). But at the very least, it may be beneficial to engage an expert for preliminary due diligence to determine whether more in-depth analysis would be beneficial and likely to be cost-effective.

If your case involves multiple streams of income or nontraditional methods of compensation, a cash flow analysis from a CPA or similar expert may be helpful. While FinPlan (a computer program that can run



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alternative scenarios and generate reports, tracking tax impact and budgetary information for family law cases) is useful in smaller cases, cash flow experts who are accustomed to complex family law cases have developed their own programs that apply more sophisticated analyses. More importantly, the cash flow expert can help you identify and understand certain underlying financial principles, such as the differing tax rates for capital gains, dividend, and employment income and the impact of deductions, tax-loss carryovers, etc. With these analyses, the cash flow expert may actually expand settlement options by showing the advantages to both parties of structuring portions of property settlements as lump sum spousal maintenance, maximizing the benefit of tax exemptions, or restructuring the division of tax-pregnant assets. This education of both you and your client may be ultimately quite valuable in providing more negotiating tools and, if necessary, information to offer the court in trial.

Similarly, a good financial planner can be invaluable, particularly if your client was not previously well-informed or involved with the parties' marital finances. To be confident and empowered to settle the case, your client should be educated on how his or her finances will work post-decree. A question such as "Will I be able to afford to keep the house?" may be much more easily answered with the help of such a planner. A financial planner can help in that regard by developing a personal budget, cash flow scenarios, and possible settlement or trial positions.

If you've retained a neutral expert to value multiple assets or perform a cash flow analysis or nonmarital tracing, consider allowing that person to take charge of informal financial discovery as well. Compared with a barrage of formal discovery launched between attorneys, this informal process can be more efficient and cost-effective. In especially contentious cases, if significant discovery disputes arise, the appointment of a special master to supervise discovery will be beneficial. A discovery special master can prevent the case from stalling in the discovery phase by providing responsive and timely solutions to problems that arise.

Once financial information is fully gathered, settlement discussions may be enhanced by having an experienced neutral dispute resolution professional facilitate the negotiation. With the explosion of ADR in the past decade, there are a number of types of experts and processes to consider. In addition to, or instead of, mediation, you may opt for other forms of ADR such as early or late neutral evaluation, a moderated settlement conference (where the mediator is allowed to seek input from an assigned judicial officer as necessary), or a consensual special magistrate. Consider carefully which form of ADR is best-suited for your case. Also consider how the personality and style of the expert that you are considering will fit with the other experts, attorneys, and parties involved in your case. It is not simply a question of training; it is also a question of the complexity and type of the information and the personalities involved. Making a good "fit" throughout can make or break successful negotiations.

Finally, although your first reaction may be to "fake it" to cover your lack of confidence in a complex case, by doing so you may unwittingly risk losing out on advantageous settlement opportunities; or—even worse—you may unknowingly expose your client to significant adverse consequences such as an adverse tax impact that could have been avoided. Asking for help is not a sign of weakness. In addition to utilizing experts, consider strengthening your knowledge base and confidence by retaining a more experienced attorney as a consultant or, if the case warrants, co-counsel.

### **Use Technology**

Early in your case, consider the amount of discovery and data that are likely to be collected and from where. Most likely, there will be a substantial amount of documents, which at a minimum should be date-stamped. There may also be e-discovery. Consider whether storing and organizing discovery with a trial support product makes sense. These tools allow you to better manage voluminous discovery by scanning and storing documents electronically and also offer the ability to key-word search the scanned documents. Likewise, if there will be a number of depositions, consider using a court reporter who is proficient with real-time transcription. There are a number of useful features to real-time transcription, including having an instantaneous draft copy of the deposition transcript and the ability to key-word search the transcript. Used wisely, these technological tools can help you better manage your discovery, save you time, and ultimately save your client money.

### **Don't Overlook Unique Assets or Issues**

There are a number of issues that can arise in high-net worth cases that you may not see in the average case. For example, if a closely held business is being valued, be cognizant of whether certain discounts may apply such as "key man" or minority shareholder discounts. Likewise, although personal goodwill is

generally not included in the value of a closely held business, it may be appropriate to value institutional goodwill.<sup>1</sup> Also, be attuned to whether “double-dipping” may occur, i.e., if one spouse’s capitalized earnings are used to value the closely held business, but that spouse’s earnings are also used for purposes of awarding spousal maintenance, there is a potential for double-dipping.<sup>2</sup>

Does either spouse have a noncompete in place, the purpose of which is to protect the goodwill of the spouse’s former employer or to secure intangible property? If so, it may be a marital asset. But if the purpose of the noncompete is to limit the former employee’s postmarital employment, it is not. Does either party own stock options, restricted stock, restricted stock units, or nonqualified benefit plans? Do the parties have capital loss or charitable contribution carryovers or theft/net operating loss carryback/carryovers (think Madoff) that can be divided between them? Do either or both spouses have significant deferred compensation or other type plans? Are either spouses the beneficiary of a trust? All of these potential marital assets may have unique valuation and division issues.

Unique tax issues may arise in your case. For example, if the parties are joint owners of a business that is a pass-through entity for tax purposes (e.g., S-corporation, partnership, and most LLCs), and the wife is awarded 100 percent ownership pursuant to the judgment and decree, the Internal Revenue Code still requires the husband to report his proportionate share of the business income (or loss) on his individual income tax return for the fiscal year through the date of the assignment of his interest to the wife. In such cases, a provision should be made in the judgment and decree for reimbursement of the business income-related taxes by the wife to the husband. It may also be appropriate to take into account the future tax consequence for other assets, such as real property or retirement accounts when valuing the marital estate.<sup>3</sup>

If there is a significant cash property settlement award to be made in the future from one spouse to the other, the payor should provide some form of security to ensure payment is made. For example, the spouse could be granted a security interest in the shares of stock of the closely held business by way of a pledge agreement and a security agreement. In this event, it is critical that the actual shares are held by a third party in escrow to avoid subsequent transfer by the owning spouse.<sup>4</sup> Security can also be in the form of life insurance, a mortgage on real property, or signed promissory note.

Finally, don’t forget confidentiality, especially for your high-profile client. Discuss entering into a stipulated protective order early in the case with opposing counsel, and prior to the exchange of discovery. Also, although it may be difficult to obtain an order to seal the file, there is another technique that may achieve the same goal. Minnesota Rule of General Practice 308.03 provides that “whenever the findings of fact include private or sensitive matters, a party may submit a judgment and decree supported by separate documents comprising the findings of fact, conclusions of law and order for judgment.” The practical way to make this happen is to submit to the court a separate exhibit consisting of the sensitive findings and conclusions, and a bare-bones judgment and decree that references the exhibit. The exhibit is then withdrawn from the file and retained by the attorneys for the parties (and submitted to the court in the future should a party make a motion for modification). If you follow this procedure, make certain that your copy is not destroyed in your routine practice of destroying closed files in the future. Also, you should discuss this procedure with your judicial officer prior to submitting the final documents to ensure that the process is acceptable to the court.

Representing a client in a high net-worth case may be challenging, but it is also intellectually rewarding. It can also present the opportunity to be creative in fashioning resolution for your client. Following the tips outlined here will help make a complex case manageable, and will yield satisfying results for you and your client.

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<sup>1</sup> Baker v. Baker, 733 N.W.2d 815 (Minn. Ct. App. 2007).

<sup>2</sup> This issue has not been specifically addressed by the Minnesota courts although the cases of O’Brien v. O’Brien, 343 N.W.2d 850 (Minn. 1984), and Tournier v. Tournier, 2002 WL 2004645 (Minn. Ct. App. 2002), offer some guidance.

<sup>3</sup> Maurer v. Maurer, 623 N.W.2d 604 (Minn. 2001).

<sup>4</sup> Minn. Stat. §§ 336.9-313 and 336.8-301.