

Responding to the Panicked Call

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It's Monday morning. You hear your receptionist's voice over the intercom, "There's a potential new client on line two to speak with you." You respond, "C'mon, you know the drill. Take the information and set an appointment if the case is a possible. And no crazies this week, please. That guy you gave me last Thursday was certifiable."

The receptionist replies: "Sorry, but you'll want to do this intake yourself. The caller's name is Wanda and she'll only speak with you. She was referred by Judge Solomon."

Things have changed. Judge Solomon is the presiding judge of your superior court's family law department. Time slows. You want this case, and you want to do a dazzling job with it.

You answer line two in your most cordial and professional voice: "Good morning. How may I help you?" Wanda tells you, "Susan Solomon referred me to you. She won't judge my case because we know each other socially." You say, "Tell me briefly about your situation, please."

Wanda tells you that she has recently separated from her husband Harold. She and Harold have one child together—five-year-old Katie. Wanda is afraid that Harold will kidnap Katie. She wants you to go to court immediately—today, if possible—to obtain restraining orders against Harold and an order giving Wanda sole physical custody of Katie.

You know how risky seeking ex parte relief can be. If Harold presents as a reasonable and non-threatening parent, Wanda runs the risk of being seen as a vexatious litigant and you run the risk of being seen as a fee-grabbing alarmist with no professional judgment. On the other hand, if you decline filing for ex parte relief and Harold actually kidnaps Katie, you'll feel terrible—for Katie, Wanda, and yourself.

You are being offered a hot potato.

Your Face-to-Face Meeting

Your immediate need is to meet personally with Wanda. You ask her to come to your office right away, although this requires you to reschedule other clients. If Wanda declines visiting your office with no good reason to support her refusal, warning bells will toll—you may not want this case.

You know from long experience that, as soon as she has given you a couple of facts, Wanda will ask the Two Terrible Questions: "How much will this cost me?" and "What are my chances of success?" Although you have developed finely tuned strategies by which to avoid



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answering the Questions, it is the kind of uncomfortable interchange you prefer to handle in person.

You need to meet with Wanda personally for two reasons: to assess her and to impress her.

You must assess Wanda's credibility at once. You are in desperate need of reliable data because you have imminent and crucial decisions to make.

When Wanda arrives at your office, you print out Judicial Council Form FL-312 ("Request for Child Abduction Prevention Orders")—a convenient checklist of the Family Code section 3048, subdivision (b)(1) child abduction risk factors. You ask Wanda the questions and write down her answers.

Whether you end up accepting or declining the case, you want to make a favorable impression on Wanda. If you decline the representation, you don't want Judge Solomon or anyone else thinking that you did so casually. Even if you decide to decline the case, you can provide Wanda useful information about legal principles and procedures. If Wanda leaves your office without a lawyer, she will at least leave with a mind full of information, knowing that she has commanded the full attention of an erudite, compassionate attorney.

The decision whether to file for the ex parte relief Wanda seeks is one of the most important, and one of the most difficult, decisions family law attorneys face. We'll illustrate the challenge we all face by observing a couple of family law practitioners with widely disparate practices: Fabian Fees and Penelope Placid.

Fabian Fees' Response to the Panicked Call

Provided his client can pay the retainer, Attorney Fabian Fees will file the ex parte motion every time. The profit motive stifles whatever misgivings Fabian may have about Wanda's truthfulness or about Wanda's chances of success. Fabian files two ex parte motions every month, and wins one every other year. What little respect

the bench had for Fabian is further reduced every time he appears on the ex parte calendar.

Each time Fabian files a groundless ex parte motion, the resulting train wreck has serious adverse effects on both litigants and the child(ren). Fabian has stoked the enmity already existing between the parents, and has greatly escalated the cost (both emotional and financial) that will attend the remainder of the legal proceedings. The child(ren) will suffer, perhaps forever, due to Fabian's brief and disastrous involvement in their lives.

Penelope Placid's Response to the Panicked Call

Attorney Penelope Placid has never filed an ex parte motion, and never will. She sees her role as one of peace-maker and de-escalator. Penelope believes that:

1. Wanda's relatives and friends have filled her with horrific tales of parental kidnappings and abuse, thereby sending Wanda into a state of panic;
2. Deep down, Wanda knows that Harold won't kidnap Katie; and
3. What Wanda needs to hear from a lawyer is the truths: that parental kidnapping is a crime and rarely occurs.

Penelope may well be correct on all points.

Unfortunately, if Penelope practices long enough, one of the "Harolds" will kidnap one of the "Katies," and Penelope may, in retrospect, recognize warning signs she had ignored. Penelope, with her fine-tuned moral sense, will find it difficult to deal with the guilt she feels over a kidnapping she might have been able to prevent.

Representation and Interviewing Techniques

The panicked call is a problem to which no one can supply a foolproof answer. Whatever response you make to the panicked call will be risky.

Don't let your desire to impress Judge Solomon affect your professional judgment. If you don't feel right about Wanda's case, decline it. Advise Wanda (preferably in writing) to consult with other lawyers and obtain other opinions.

If Wanda hires you but decides not to file for ex parte relief, dictate a memorandum in Wanda's presence (or write Wanda a letter) detailing the discussions you have had with her regarding the various advantages and risks of each approach (including the risk that a kidnapping may actually occur) and the fact that Wanda (not you) made the ultimate decision whether to seek ex parte relief.

Even if you obtain the requested custody and restraining orders, Harold will remain physically able to kidnap Katie unless all of his visitations are supervised. Document the fact that you explained this to Wanda.

Although you would dearly love opportunities to inde-

pendently verify (or disprove) Wanda's allegations, such opportunities are seldom available to you. Therefore, almost all of the data you need to give good advice will depend on whether Wanda reported facts accurately and fairly.

Test whether Wanda is able to accept, and express, some culpability for problems that have occurred. Beware the potential client who married Hitler, but is herself Mother Teresa.

What follow are a couple of techniques that help test Wanda's veracity: having Wanda tell Harold's story and white-boarding Wanda's statements.

Having Wanda Tell Harold's Story

One interviewing exercise is to ask Wanda to tell Harold's story, using Harold's words. You may choose to introduce the exercise this way: "Wanda, if Harold were sitting in that chair [gesturing] right now and I asked him to name three complaints he has about you, what would Harold say? I'm not asking what the truth is—we'll explore that aspect of the situation later. For now I would just like you to tell me what words would come out of Harold's mouth if I asked him that question."

You're in trouble if Wanda replies, "Harold has no complaints about me. How could he?"

White-Boarding Wanda's Statements

Another interviewing technique is to write Wanda's statements, as she makes them, on a white board in your office. Four advantages of this technique are:

1. White-boarding permits you to create an outline, with potentially supporting and rebutting factors written under each factual assertion.
2. White-boarding requires Wanda to be speak specifically, because you are writing down her words. She may decide to abandon or moderate certain of her extreme assertions after seeing them in print.
3. White-boarding objectifies Wanda's assertions, making it easier for her to see them the way a third party will.
4. You can photograph the whiteboard and keep the photo in Wanda's file, thereby documenting her factual allegations and your legal analyses.

Conclusion

Fortunately, lawyers don't commit malpractice when they make mistakes—only when they make unreasonable mistakes. The panicked call is a problem we all share. You have chosen a most challenging, maddening, and rewarding career, counselor.

Good luck with that hot potato! ■