

How to Keep a Divorce Confidential

Jake: So this week we're going to talk about a smaller topic, but an important one and something that we get asked about quite a bit. That's how do you keep your divorce information confidential in the overall process and the filings and what have you.

I was having this discussion the other day with a client actually, because I think what people not necessarily forget but what they're just not aware of is, a divorce is a lawsuit, a child custody case is a lawsuit, and lawsuits filed in the state of Texas are public information. I can go down to the courthouse, let's say because Brian rear-ends me on the highway and I sue him for it. Then there'd be a lawsuit out there and that district clerk of wherever County, our lawsuit was in that says "Jake sues Brian for rear-ending him on the highway and this is what he alleges this happens and this is the range of his damages." That's all public information.

Now, there's not a lot of people hanging out at the courthouse or the district clerk's office pulling filings every single day trying to figure out who's doing what, but it is something that's out there. We try to remind people, particularly as things move online, more and more access is available online to at least be able to pull the pleadings. Obviously, some things stay amongst the law firms like discovery and something's not filed with the court, that remains with the lawyers, but the actual pleadings that are filed in the divorce, the actual divorce decree, those are all public record and a lot of people don't want their divorce decree out.

They're being pulled by their neighbors or their coworker or somebody that just happens to be too nosy. Again, it doesn't happen much, but it's out there and it's something that we do have the discussion with clients about how to address that.

So Brian, if I don't, if I don't want anybody pulling up my divorce decree or pulling up my child custody order, or my pleadings or anything, what are the options available for me?

Brian: The most common one is to seal the file, either during the case or at the end of it. The way this works is you'd have to file a motion and get a court to agree to that. That's something of a moving target. I think there's different standards among different judges and in different counties about the practice of that. But that's the most common way you would stop there being access to any part of the file.

There's some other things you might be able to do that are related to access to particular parts of it, which we can talk about after that. But that's the most common way to address that.

Jake: Yeah, rule of civil procedure 76 talks about sealing the court records. I think a lot of practitioners forget about that or they don't give that option to their client, and I think you're right, Brian. I think there's, County to County, different judges have different attitudes about it and even then sometimes it's judge to judge. I know in Travis County, for example, a few years ago there was a judge who's now retired, but who wouldn't sign an order sealing. Even if everybody showed up and said "look, we're agreeing, we want this seal." He just wouldn't do it because his view was it's open records and the public has the right to access

these records just like anybody else and absent a really compelling reason, he wasn't going to do it.

Then there's other judges that just sign them with the attitude of "Why do I care? If everybody agrees that they want this case sealed, then let's do it." So that 76a Motion is really important.

I think the other thing to remember is whenever you settle a case, it's typical that if you settle a mediation, you're signing a signed mediated settlement agreement, or if you're settling outside of mediation and you're filing and signing an informal settlement agreement, or a Rule 11 agreement, or an agreed parenting plan or some combination and that's typically filed with court, we try to do some things.

First off, whenever you have a spreadsheet at the end of a mediation, a lot of times I change the values to Xs. So if you're thinking about a spreadsheet that divides up the entire state and it's got the house listed at 700,000, it's got the brokerage accounts listed at 1.2 million, it's got the bank accounts listed at \$5,000, whatever's in the 401k. If Brian's on their side of the case, he and I are negotiating back and forth and we're using those values. We know what we're getting, we know the deal that we're getting.

But, a lot of times at the very last deal before we sign it, I change all those values into Xs. I do this because you don't want somebody getting a hold of a signed mediation agreement, that's typically filed with the court and then there's values on it. All of a sudden, I know how much Jake has in his brokerage account, or how much Jake has in his checking account, or at least how much he had, at the time that he got divorced. So a lot of times I'll change those indexes.

The other things that you can do is, there's nothing under 6.602, which is the mediation statute section, that says that you have to file an MSA. It has to be signed by the parties and the lawyers have to have a bold underline warning saying that this is irrevocable. But it doesn't say it has to be filed. A lot of times I'll agree that we're not gonna file it.

Brian, can you talk to us about if we do that using an agreement to divorce, to divide a property, as opposed to listing all the property in the divorce decree and why you'd want to do that?

Brian: Yeah, exactly. Privacy reasons are precisely the reason why. Typically a divorce decree has for example, if you have kids, it has a section about kids, it has a section that says you're divorced. And the last section is the part about division of property. You can take that property part out and do an agreement incident to divorce, which just basically pulls that out of there. The decree will say there is an agreement incident to divorce, which is binding and that way you don't have to file anything related to the property. It looks a lot like the divorce decree, everybody signs it, there's a copy for each of the two lawyers in the two parties and it's binding.

If there's some type of dispute that involves enforcing that if somebody's not abiding by it, then you probably are going to have to file something that's more specific, but I've actually done a bunch of those and I've actually never seen one end up back in court.

So that's a way to keep the money part of it private, but that doesn't keep the rest of the case private. There's nothing a judge can do to stop that or there's no requirement or permission from a judge that says you're allowed to use an agreement incident to a divorce.

So that's a nice option if you want some financial privacy.

Jake: Yeah. Even if I don't list the values, if you have a really specific divorce decree I can at least have in my mind what your estate is or what's out there by just reading the property that's listed in your divorce. I don't want people to know if I bank at chase bank or I bank at Wells Fargo. You know what my street address is, even though you could probably look that up on the tax appraisal records, but it's just an added level of privacy.

So really boots and suspenders is probably sealing the file, use Xs and MSA, don't file your MSA, use an agreement incident to divorce as far as keeping things out of the public record.

We sometimes negotiate non-disparagement and non-disclosure clauses. Again, just like if I'm suing a doctor and we settle and the doctor says "Okay, but the terms of the copies of the settlement are confidential." We do that a lot of times, particularly for high net worth estates. You say, "we're not going to disclose or talk about the settlement as part of this agreement."

The other thing that people need to remember, at least during this day and age, is that when you're thinking about privacy, all these hearings and stuff, a lot of counties are broadcasting their hearings on YouTube. They viewed that as compliance with the open courts provision on the Texas constitution that says any hearing needs to be broadcasted on YouTube. Just like how before COVID I could walk into a courthouse and just watch a hearing. It's public.

You could be sitting through your two day divorce trial and somebody could just walk in off the street and watch it. That's why I think a lot of the courts are doing YouTube and streaming those. I have found success if you, particularly when you're talking about children, asking the court not to stream it on YouTube because of the sensitive information about children, particularly if you have kids that are old enough that their friends could watch on YouTube or that they could watch on YouTube. Most of the judges I think will honor requests to not do live streaming, but you got to remember to ask him, is that been your experience?

Brian: It is. And most people don't ask. I think most people assume nobody's going to watch a random YouTube thing, but you can be sure that a properly motivated person would be doing it. I think there's something about not how you're not supposed to record it, but if somebody is watching it at their house somewhere on YouTube and they're not a party I don't know how you're supposed to know if they recorded it, or even enforce it if they did.

I think that's really a potential problem and worth addressing with the court, who I think I agree will be sympathetic to it.

Jake: Yeah. Especially if both sides are showing up and saying "Judge, we don't want this live stream" and you have a good reason, even if it's just financial stuff we're going to be talking about, sensitive financial information, that type of stuff, the courts have also been requiring

if you are live streaming on YouTube that social security numbers be redacted in your exhibits, that account number would be redacted because we're screen-sharing during these hearings and these exhibits are popping up on share for all the world to see. I'm amazed how many lawyers do that. They just throw their client's social security number, their bank account numbers up there. Now again, in theory anybody could be watching anywhere in the world.

So you just really need to make sure that you think about all that stuff when representing clients and it's amazing how many people don't do that. That reminds me, going back to rule 76a. When you talk about sealing the pleadings. If you've had a contested trial that's also a good idea because those, if you mark and enter exhibits into a hearing, those are public records.

if I have a final divorce trial that goes for a week and we're marking pictures, and text messages, salacious text messages, and we're marking pictures of kids and pictures of bruises or this, or that, really sensitive stuff. I think a lot of practitioners forget that it's public record. If I know that somebody has had a final contested trial, I can go down there and I want Joe Smith's exhibits from his divorce trial, that's technically public information. And so that's another reason to really, if you have a contested trial, talk to the court about sealing the file at the end.

If the parties agree, particularly if there's an agreement they can agree to withdraw exhibits, Or if you have particularly sensitive exhibits, you can agree to withdraw them. It's just more stuff that I think practitioners just a lot of times they forget, they don't think about it, and they're exposing their clients to risk.

I don't think I've ever seen anything like that happen in my career, but there is a risk that somebody is going to go pull that information, or that at least had the ability to pull the information.

All right. So last thing, I think this is a much broader topic, but Brian, can you talk to us a little bit about moving a case outside the outside of the public courthouse completely and go into a private judge or an arbitrator?

Brian: Sure. For a private judge in particular, that's going to require the agreement of both parties. Arbitration pretty much also requires the agreement of all parties. Although, there are certain situations where arbitrations can be compelled with say a prenup or something like that.

The reason you would go these routes is for privacy, as well as also speed and efficiency, I think. The downside is cost. If you go to see the judge, you want to have as many hearings as you want at the regular courthouse, you don't have to pay the judge.

If you go to arbitration or to a private judge, there is a fee you're going to have to pay the judge or the arbitrator additional funds, but for a lot of reasons that may be a good investment. If you can move your case along more quickly and don't have to wait six months or a year to get a trial date, that's helpful.

If that's what you want to do in your case, some people don't want to move quickly, but some people do. Then the other part of it is privacy. It's not going to be aired on YouTube. Rulings and those types of things can be done much more privately and ineffectively.

That doesn't mean that you're going to have everything in the file hidden or confidential. That's a different process, but this just keeps the actual proceeding, out of the public eye in a public courthouse.

Jake: Yeah, I think so. Like you alluded to, there's a lot of reasons to do a private judge, a special judge. There's a lot of reasons to do a private judge or an arbitrator, to keep you out of the courthouse, keep you out of the public eye.

We do that for quite a few of our cases. There's a ton of other reasons to want to do that as far as efficiency, access to justice, and just moving cases along. I know we have a lot of content on our website about that, but that's just one more option out there as far as keeping things private and keeping things as confidential as you can.

Brian: I think so too.

Jake: All right, we'll see everybody next time. Bye.