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2014

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Managing your Online Reputation

"It takes 20 years to build a reputation and five minutes to ruin it," said Warren Buffet. In today's online world, a poor rating or negative comments by an anonymous person can do a world of harm to your reputation in seconds.

Negative comments, valid or not, can be posted by anyone — including your client's ex who is angry about the favorable result you obtained for your client. Less-than-perfect lawyer ratings can also be caused by a lack of publicly-available information about what you or your firm have accomplished for your clients and the legal community.

Many family lawyers do not realize that managing their online reputation properly can have a positive impact on their firm's bottom line. The reverse is also true: no online reputation management equals a hit to your bottom line, whether you realize it or not. Some lawyers I have spoken with don't think they need to pay attention to what's on the Internet because their clients come from word-of-mouth referrals and not Google searches. Although that might be true, you should never underestimate the power of a defamatory blog post to stop a potential client from even making an initial call to you. In other words, you don't know how much business you could be losing to a competitor with a better online reputation. This issue offers two articles that will help you better understand, manage, or even rebuild your online reputation: "Lawyer Reputation Management" and "Dealing with Digital Detractors".

At *Family Lawyer Magazine,* our goal is to offer information and advice that will help you achieve excellence — both professionally and personally. In this issue, our editorial team and contributors have done an outstanding job of providing vital, cutting-edge articles, including:

- Priming your family law practice for success in an increasingly competitive market.
- Avoiding mistakes that can kill your firm's corporate culture.
- What family lawyers need to know — expert advice to help serve your clients and grow your practice.
- Specialty issues — from military divorce to same-sex marriage to assisted reproductive technology and citizenship.
- Avoiding potentially irreparable harm to a client's rights, both on appeal and in the trial court.
- Tips on how to overcome some top billing challenges.
- How the selection of the right forensic expert can assist in the settlement of your case.
- A look at double dipping, one of the most prevalent problems in family law cases involving a business.
- Advancing technology — from cloud computing, to finding hidden assets using digital evidence, to ensuring that your client's confidential information stays confidential.
- Handling work-related stress and building your brain-power through nutrition.

Be sure to check our family law case updates on page 44, and our Professional Directory on page 70 for resources and referrals. I also invite you to visit our website at www.FamilyLawyerMagazine.com, where you'll find hundreds of articles, and where you can sign up to receive our quarterly e-newsletter.

Dan Couvrette
Publisher, Family Lawyer Magazine
CEO, Divorce Marketing Group
866.803.6667 x124
DanC@DivorceMarketingGroup.com

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Avoiding Appellate Landmines in the Post-Judgment World

Attorneys should be familiar with the post-judgment landscape prior to trial in order to avoid potentially irreparable harm to a client's rights – both on appeal and in the trial court.

By Andrea Seliski and David Sarif, Family Lawyers

Family law appeals can sometimes appear confusing. For example, a Motion for New Trial, which is a good avenue for post-judgment relief, can also serve to extend the time to file an appeal. However, what happens when a Motion for New Trial and an Appeal are pending at the same time? Does it matter which one was filed first? (Yes). Do all post-trial motions have the same effects and interactions with appeals? (No). Does it matter which party is filing a post-trial motion and which party is filing an appeal? (Yes). Can a party unwittingly eliminate his or her chance to appeal by actions relating to a post-trial Motion? (Yes). Are there safeguards an attorney can take to protect his or her client in the areas of law that are unclear? (Yes). All of these questions matter, and the answers can significantly impact a party's rights in both the trial and appellate courts.

A practitioner searching for law on this topic can quickly come across an authority stating that the filing of a Notice of Appeal divests the trial court of jurisdiction. Generally, this rule is in place so that a trial court cannot modify an order while it is being examined by an appellate court. However, this simple tenant may be incomplete if the transfer of jurisdiction is not warranted in light of certain post-trial motions. In other words, it is not always true that the filing of an appeal will supersede the jurisdiction of the trial court with regard to a pending motion. It is important to understand this landscape before stepping out into the often unknown territory of post-trial motions and appeals.

While a Notice of Appeal generally divests the trial court of jurisdiction, certain timely-filed post-trial motions (such as a Motion for New Trial) can "delay" the divestiture of

Above all, read and then re-read the appellate court rules where your case resides.

jurisdiction "until the motion for new trial is ruled upon and a notice of appeal to the ruling has been filed or the period for appealing the ruling has expired." See for example, *Cooper v. Spotts*, 309 Ga. App. 361, 362. In other words, if a Motion for New Trial is timely filed, even while a timely Notice of Appeal is pending, the trial court retains jurisdiction to decide the Motion for New Trial. Furthermore, a trial court, by its own motion, may be able to correct its own errors within a certain window following judgment, even if a Notice of Appeal has been filed.

Phrases such as "delays of divestiture" should be treated with caution and investigated thoroughly. The idea that the transfer of jurisdiction from the trial court to the appellate court is merely "delayed" by the filing of a post-judgment motion implies that no further action is required by a party to ensure the transfer of that jurisdiction occurs. However, depending on the interests of the party involved, such transfer may not be automatic and there may be additional actions required to preserve the right to appeal. It is possible that case law and statute contradict on this point, and if this is the case, the prudent practitioner would follow the more stringent requirements. It is better to be overly cautious and make a timely filing that may turn out to be unnecessary than to refrain from filing and destroy an appellate opportunity for your client. Quite simply, it pays to be paranoid.

A "Ruling" on the Motion

It may take more than merely *filing* a post-trial motion for a party to obtain certain rights on appeal. A "ruling" on the motion may be key to extending the time to file an appeal and/or the jurisdiction of the appeal itself. Accordingly, a practitioner should thoroughly research whether the withdrawal of a post-trial motion might have unintended effects on a client's right to appeal. For example, in the case of *Cooper v. Spotts*, Cooper timely filed both a Motion for New Trial and Notice of Appeal. Since jurisdiction to decide the Motion for New Trial still rested with the trial court, the appellate court dismissed the appeal. Cooper then withdrew her Motion for New Trial, on the erroneous belief that the withdrawal would give the appellate court jurisdiction. The motion was Cooper's only avenue to file an appeal beyond the 30 days normally allowed, but the court would have to rule on the motion in order to extend the time to file an appeal. Because her voluntary withdrawal was not considered a "ruling" on the motion, re-filing her appeal 61 days after the original judgment was untimely, and Cooper had eliminated both her opportunity for a new trial and for an appeal.

Appellate courts may give trial courts an opportunity to rule on certain post-trial motions by delaying divestiture of jurisdiction, but obviously, this mechanism cannot be utilized solely for the purpose of delay by the same party filing an appeal. A party who files a post-trial motion and a Notice of Appeal should not attempt to argue that the motion delays the appellate court's jurisdiction, which appellate jurisdiction was invoked by the same party. Do not be surprised if a party is deemed to have waived whatever right he or she may have had to delay the resolution of the appeal.

Which document is filed first — the post-judgment motion or the Notice of Appeal — can make a difference. Depending on the type of post-trial motion, if a Notice of Appeal is filed while certain motions are already pending, the appeal may be subject to dismissal, or the trial court could be immediately divested of jurisdiction to decide the motion. Some post-judgment motions can effectively turn the final judgment into an interlocutory order when viewed in terms of a subsequently filed appeal. The effect of such a motion could change the procedure required to file an appeal. Finally, a non-moving party should not depend on the filing of the movant's motion as a guarantee of an extension of time to file an appeal.

Appellate law can be extremely technical and complex. The guidelines in this article are of a general nature, and it is only prudent that you check your applicable jurisdiction's rules as different rules may apply. When in doubt, consult with or bring on an attorney well-versed in appellate law to assist. Regardless — and above all — read and then re-read the appellate court rules where your case resides. ■

Andrea Seliski specializes in pursuing and defending appeals of all domestic and family law cases in the State of Georgia. www.domesticappeals.com.

David Sarif is a partner at Naggiar & Sarif in Atlanta, GA. He devotes his practice to divorce and family law. www.nsfamilylawfirm.com.

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By Marshal Willick
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Is your Family Law Practice Primed for Success?

Failing to plan is planning to fail; do you have a plan to secure the future of your family law practice? Answering these seven questions will let you know whether you are on the road to a successful future; if not, here are seven ways to help you get on track.

By Dan Couvrette, Family Lawyer Marketing Consultant

Whether your practice is doing well or if business is down, there are a number of actions you could be taking today to secure the future of your business. In this article, I'll highlight seven items that are critical to the future success of your practice. (These tips do not include your skills as a lawyer – I assume that you will continue to update your legal knowledge and skills.) Answer "yes" or "no" for each item; if you answer "yes" fewer than four times, you need to get into action now or the future of your practice could be in jeopardy.

1. Do you embrace technology? Yes __ No __

If your firm isn't using the latest technology, software, and devices, it could be perceived as passé or obsolete. Changing this perception will be more difficult and expensive the longer you delay, so embrace the best and most innovative technology and client-management tools *now*. They can improve your effectiveness and efficiency when it comes to serving your clients as well as marketing and managing your law practice.

2. Is your website mobile-friendly? Yes __ No __

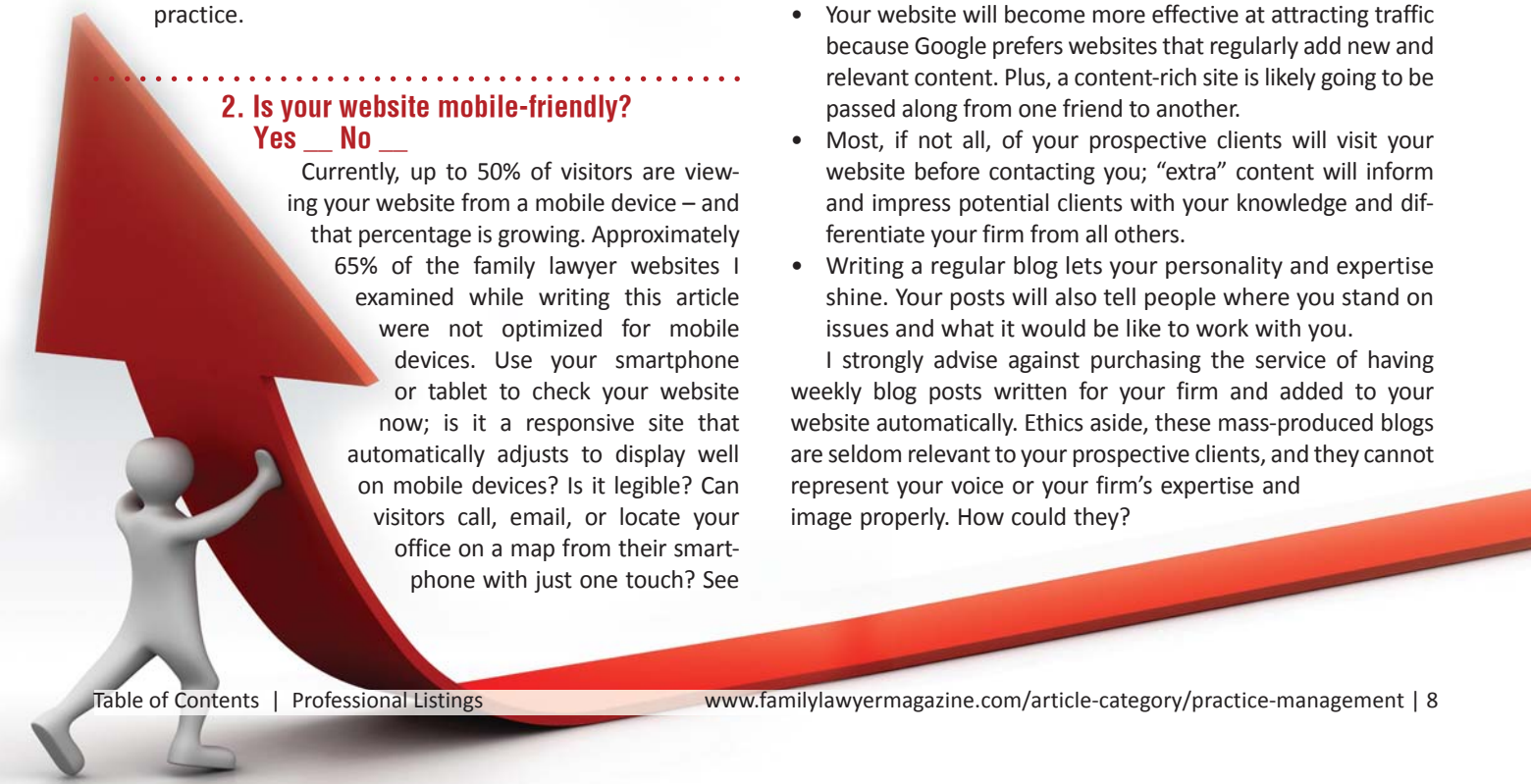
Currently, up to 50% of visitors are viewing your website from a mobile device – and that percentage is growing. Approximately 65% of the family lawyer websites I examined while writing this article were not optimized for mobile devices. Use your smartphone or tablet to check your website now; is it a responsive site that automatically adjusts to display well on mobile devices? Is it legible? Can visitors call, email, or locate your office on a map from their smartphone with just one touch? See how some well-designed smartphone friendly websites look like here: www.DivorceMarketingGroup.com/our-portfolio/mobile-websites-portfolio/. Compare these to your own website; how does your website stack up? Data shows that 10–15% of visitors to these smartphone friendly websites ended up calling or emailing the firm. These statistics speak volumes.

3. Are you adding content and resources to your website on a regular basis? Yes __ No __

Most family law firm websites provide very little in the way of information or resources that would be helpful to prospective and current clients: they provide basic information about the firm and the lawyers and that's about it. If you question the need to add "extra" information, here's why you should do it:

- If potential clients don't find the information and answers they're looking for on your website, they'll go elsewhere – and possibly hire the firm that did address their burning questions on their website instead of hiring you.
- Your website will become more effective at attracting traffic because Google prefers websites that regularly add new and relevant content. Plus, a content-rich site is likely going to be passed along from one friend to another.
- Most, if not all, of your prospective clients will visit your website before contacting you; "extra" content will inform and impress potential clients with your knowledge and differentiate your firm from all others.
- Writing a regular blog lets your personality and expertise shine. Your posts will also tell people where you stand on issues and what it would be like to work with you.

I strongly advise against purchasing the service of having weekly blog posts written for your firm and added to your website automatically. Ethics aside, these mass-produced blogs are seldom relevant to your prospective clients, and they cannot represent your voice or your firm's expertise and image properly. How could they?



The writers know nothing about you or your firm: they take a generic topic and "spin" multiple versions of the same post and add them to their customers' websites.

4. Do you nurture your referral sources on a regular basis? Yes __ No __

Many family lawyers get a significant amount of their new business from referrals – yet very few are in regular contact with their referral sources. If you are doing nothing to keep your firm "top of mind" with your referral sources, and you're relying solely on people remembering you when it comes time to recommend a family lawyer, you are jeopardizing the future of your business. You need to have a strategy in place to keep yourself top of mind with those who refer business to you. Here are a few easy and effective ways to nurture your referral sources:

- Produce, purchase, or lease a custom eNewsletter with relevant content and send it your referral sources every month.
- Take potential referrers to lunch or dinner, or host a networking session in your office, restaurant, golf club, or other facility.
- Participate in associations and join networking groups that could bring you closer to quality referral sources. For instance, one family lawyer joined a Rolls Royce Club. Groups can be in-person or online through LinkedIn, Meetup, etc.
- Thank your referral source three times: once when you first receive the referral, once after the referral becomes your client, and again when the client's case has reached a satisfactory conclusion.
- List germane professionals on your website – and let them know you've listed them.
- Ask current referrers for recommendations for other professionals to add to your network.
- Network with attorneys who don't practice family law; they won't consider you competition.
- Network with financial professionals, therapists, and mediators with a mental-health background.
- Be a referrer! It goes both ways.

5. Are you constantly expanding your skills? Yes __ No __

In the future, the number of attorneys making their living as litigators will increase while the number of transactional lawyers will decrease; this shift is already happening because technology is making it easier for people to use online legal services for their divorce. You should consider developing your litigation skills as well as your non-legal skills (financial, conflict management, mediation, collaborative, etc.) to prepare you for a changing divorce landscape.

6. Are you visible through social media? Yes __ No __

Professionals who recognize the importance of social media – and use it effectively – have a huge advantage over those who fear or disdain it. The three most important networking websites for professionals are LinkedIn, Facebook, and Google+.

- **LinkedIn:** This is *the* social network for professionals. Every family lawyer should have a complete, up-to-date LinkedIn profile, and should make and accept link requests from all appropriate professionals in a timely fashion. You can take advantage of the terrific marketing opportunity LinkedIn offers by starting your own group and establishing yourself as *the* authority in family law. At the same time, you'll be creating deeper relationships with group members who could refer business to you. Being strategically active on LinkedIn will help convert prospective clients into clients and increase referrals from other professionals.
- **Facebook:** Every family lawyer should have a complete company Facebook page. Many lawyers dislike Facebook because of clients posting pictures and comments that have jeopardized their cases. Advising clients to stay away from websites like Facebook and Twitter makes sense – but some attorneys have concluded that they, too, should stay away from all social media. This bias can blind you to the great marketing opportunity that Facebook offers. There are 1.2 billion Facebook users – you don't want to be notable by your absence.
- **Google+:** Google maybe a latecomer in social media, but it has made significant strides because of its leverage through YouTube and the Google search engine. Just like LinkedIn and Facebook, you can create extensive profiles and pages and showcase your expertise through photos, videos, articles, and blogs. In fact if you have a Gmail account, Google has already created a profile for you; you should take a look at your page right away and make it better. This profile will show up when someone Googles your name. If you do not have a Google+ profile, create one now!

If you lack the time, interest, or skills to create and maintain this kind of social-media presence, consider outsourcing it to a trusted marketing company to create excellent and complete profiles for you and your firm.

7. Are you working at heightening your profile online and offline? Yes __ No __

Some attorneys have worked hard to establish themselves as experts in the field of family law by becoming Board Certified or a Specialist. Increasing your legal skill-set will pay dividends for your clients, but you also need other strategies to demonstrate your expertise, manage your reputation online and offline, and stand out from your competitors in order to secure new business. Here are a few actions to take:

- Google your name and see what the search results say. You are your search results. Are there any pages with bad comments, poor ratings, or inaccurate information about you? Do you show up on the first page of Google

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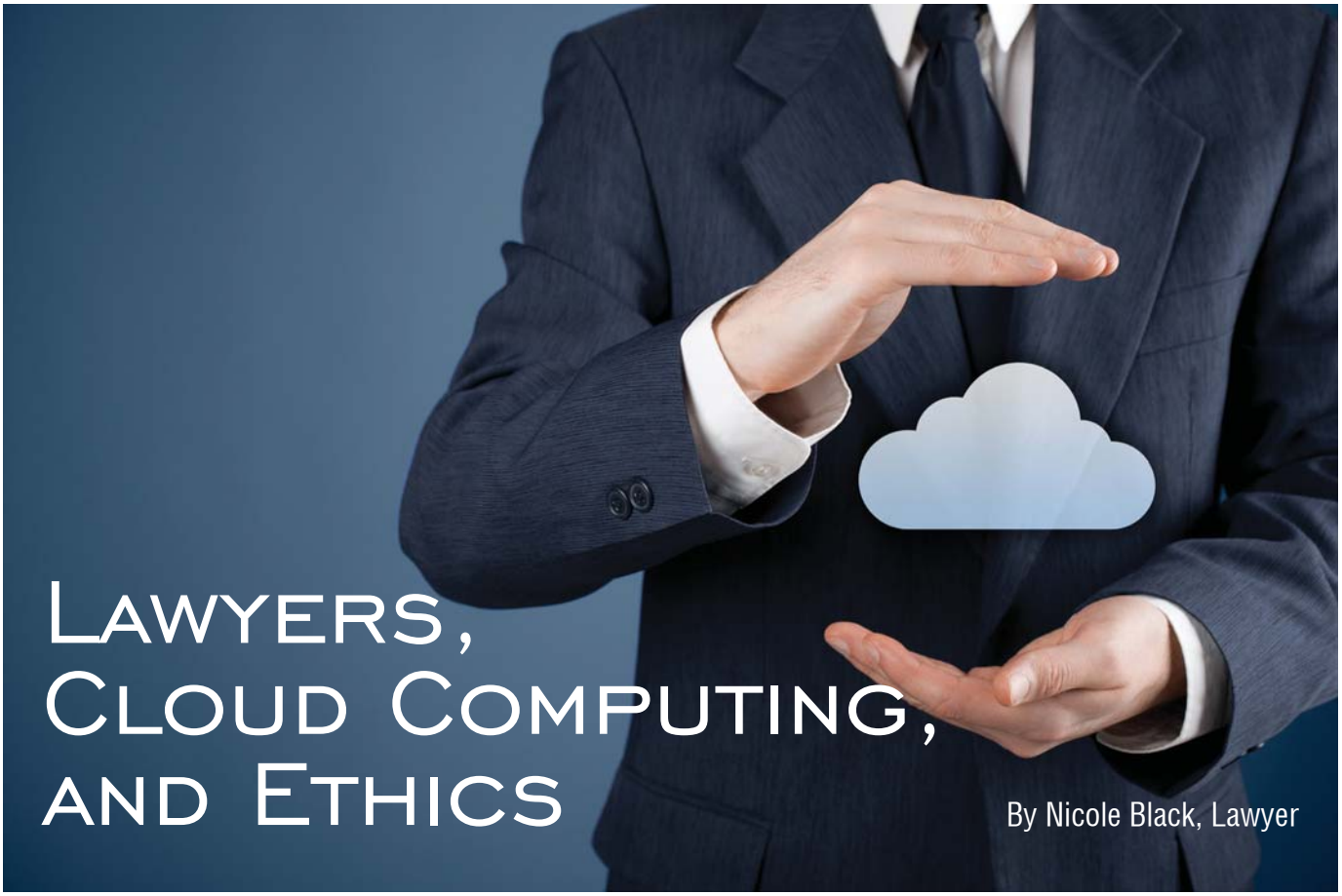

Lawyers, Cloud Computing, and Ethics

By Nicole Black, Lawyer

Ensure that your client's confidential information stays confidential.

Many believe that cloud computing is the future of computing. That's why so many businesses, including law firms, are moving to the cloud more quickly than ever before. In fact, according to the results of the American Bar Association's 2013 Legal Technology Survey, lawyers' use of cloud computing software to manage their law firms increased by more than 30% in 2013, with nearly one-third of all lawyers surveyed reporting that they used cloud computing software in their law practices.

So, why are so many lawyers using cloud computing? According to the survey results, 74% of the lawyers surveyed cited convenient access as one of the best selling points of cloud computing. The next most popular feature was 24/7 access, with 63% citing that feature, and affordability came in third at 56%. The bottom line: lawyers use cloud-based law practice management systems because they increase both productivity and profits.

Of course, like any type of computing system, cloud computing isn't perfect, but no type of data storage system is risk-free. This applies equally to any type of third-party outsourcing, whether it is the outsourcing of administrative tasks, or the outsourcing of the management of your law firm's physical or digital data.

Lawyers have always entrusted confidential data to third parties, including process servers, court employees, cleaning crews, summer interns, document processing companies, external copy centers, and legal document delivery services. Absolute security has never been required in these situations. Rather, lawyers are required to exercise due diligence by taking reasonable steps to ensure that confidential client data remains safe and secure.

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Cloud Ethics / Cont. from page 10

And, as all of the ethics boards that have addressed this issue have concluded, the standards applied to cloud computing are no different. See, for example, Alabama (Formal Opinion No. 2012-184), Arizona (Opinion 09-04), California (Opinion 2010-179), Florida (Proposed Advisory Opinion 12-3), Iowa (Opinion 11-01), Maine (Opinion 194), Massachusetts (Opinion 12-03), New Hampshire (Opinion 2012-13/4), New Jersey (Opinion 701), New York (Opinion 842 and Opinion 940), Nevada (Opinion 33), North Carolina (2011 Formal Ethics Opinion 6), Oregon (Opinion 2011-188), Pennsylvania (Opinion 2011-200), Vermont (Opinion 2010-6), and Virginia (Legal Ethics Opinion 1872).[1]

A good example of the opinions that have been issued regarding lawyers' use of cloud computing is Committee Advisory Opinion #2012-13/4, handed down by the New Hampshire Bar Association Board of Governors.

In this case, the Committee gave the green light to lawyers seeking to use cloud computing, noting that lawyers routinely outsource the handling of confidential data to third parties: "As noted in NH Bar Ethics Op. 2011-12/5, 'Lawyers regularly engage companies to provide support services. Banks hold client funds; telephone companies carry privileged communications; credit card companies facilitate the payment of bills; computer consultants maintain necessary technology.' When engaging a cloud computing provider or an intermediary who engages such a provider, the responsibility rests with the lawyer to ensure that the work is performed in a manner consistent with the lawyer's professional duties."

When it comes to the use of cloud computing, the Rules of Professional Conduct do not impose a strict liability standard.

The Committee then concluded that lawyers are not required to ensure absolute security when it comes to confidential client data and that lawyers may use cloud computing if they exercise reasonable care when doing so: "It bears repeating that a lawyer's duty is to take reasonable steps to protect confidential client information, not to become an expert in information technology. When it comes to the use of cloud computing, the Rules of Professional Conduct do not impose a strict liability standard. As one ethics committee observed, 'Such a guarantee is impossible, and a lawyer can no more guarantee against unauthorized access to electronic information than he can guarantee that a burglar will not break into his file room, or that someone will not illegally intercept his mail or steal a fax.'"

In other words, it is your duty to ensure that the third parties to whom you entrust your data and who have access to the computer servers that house your data meet the same security obligations as any other third party to whom you entrust confidential client files. Regardless of who has access to your data or what format the data takes, the steps you take are always the same: ensure that your client's confidential information stays confidential. The standards applicable to computer-generated are no different than those applied to digital data, even when that data resides in the cloud. ■

[1] For a complete list of the ethics decisions issued about cloud computing, see the American Bar Association's handy comparative chart, which can be found online: www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.

Nicole Black is a Rochester, NY attorney and Director of Business Development and Community Relations at MyCase.com*, an intuitive law practice management system for the modern law firm. She is the author of the* ABA book Cloud Computing for Lawyers*, co-author of the A*BA book Social Media for Lawyers: the Next Frontier*, and co-author of* Criminal Law in New York, a West-Thomson treatise. www.mycase.com

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FAMILY LAWYER MAGAZINE
FAMILYLAWYERMAGAZINE.COM

CEO/Publisher
Dan Couvrette, 866.803.6667 Ext. 124
danc@divorcemarketinggroup.com

Editorial
Diana Shepherd, Ext. 131
diana@divorcemarketinggroup.com
John Matias, Ext. 129
john@divorcemarketinggroup.com

Advertising Sales
Family Lawyer Magazine &
FamilyLawyerMagazine.com
Dan Couvrette, Ext. 124
Barbara Corrigan, Ext. 128
barbarac@divorcemarketinggroup.com

Art Director/Production/Webmaster
Gina Tan, Ext. 130
gina@divorcemarketinggroup.com

Marketing/Client Services
Martha Chan, Ext. 136
marthac@divorcemarketinggroup.com
Manos Filippou, Ext. 141
manos@divorcemarketinggroup.com
David Bareno, Ext. 123
david@divorcemarketinggroup.com
Christiam Bareno, Ext. 137
christian@divorcemarketinggroup.com
Tanoya Greaves, Ext. 125
tanoya@divorcemarketinggroup.com

Accounting
Bruce Cowen, Ext. 122
bruce@divorcemarketinggroup.com

Circulation Manager
Sophie Yussuf, Ext. 121
sophie@divorcemarketinggroup.com

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What Family Lawyers Need to Know

Expert advice to help you serve your clients and grow your practice.

1 Advise your clients to protect their alimony and/or child support income in case the ex-spouse becomes disabled.

As a family lawyer, you probably insure your income in case of a disability. Were you aware that there are plans that allow your clients to insure their spousal and/or child support income in the event the ex-spouse becomes totally disabled and is unable to continue making support payments? Support payments need to be protected given that the probability of disability occurring during one's working years is two to three times greater than the risk of death. Most divorce agreements protect support payments against death, but do not include disability protection. If the payor of support becomes disabled, the payments may be reduced or terminated. Include Disability Insurance against support payments in your client's Settlement Agreement to make sure that an unexpected disability won't leave your client in financial jeopardy.

— Kenneth A. Bloch (CLU), President, Family ValueGuard, www.FamilyValueGuard.com

2 Avoid having the Plan Administrator reject your QDRO.

The plan administrator has the final say about a QDRO. Many attorneys think that if the judge orders it, then the plan must comply. However, the plan cannot provide any benefit that is not available under the terms of the plan. There are many reasons why proposed QDROs are rejected; here are some of the more common ones.

- Referencing the wrong plan name.
- Submitting the wrong type of QDRO for the Plan.
- Failing to address increases or decreases in a defined contribution plan.
- Incorporating an invalid valuation date.
- Failing to include beneficiary language for defined contribution plan.
- Improperly combining a percentage and a dollar amount.
- Selecting a disallowed form of benefit designation for defined benefit plan.
- Failing to indicate when payments will be made.
- Designating a form of payment that is inconsistent with plan guidelines.

— Theodore K. Long (MComm), President, QdroDesk, www.qdrodesk.com

3 Learn how modern drug and alcohol testing could affect your clients.

Reliable forensic testing results can make-or-break a child-custody case in divorce; you owe it to your clients to know what state-of-the-art technology can expose. Did you know that fingernails are a reliable specimen to determine use of substances with a history that goes back three months for alcohol and up to six months for certain drugs? Unlike hair, biomarkers locked in fingernails are not affected by chemical processing. Even if a spouse comes in with no fingernails, you can simply wait two weeks for the nails to grow out a sufficient quantity to test. What is positive in a nail today will still be positive in two weeks. Today's scientific instruments are much more sensitive, and there's new research in biomarker testing. A modern drug-testing lab can get accurate results from fingernails, hair, and even dried blood spots. PEth is another cutting-edge test for direct alcohol biomarker: five dried blood spots can show binge alcohol consumption in the last three weeks.

— Nancy J. Parra (MA), Marketing Communications Manager, United States Drug Testing Laboratories, www.USDTL.com

4 Protect your client's credit during and after divorce.

Credit harm indemnification and recovery is best achieved when the mutual indemnification agreement clearly specifies credit reputation damage, rather than expecting it to be part of a general indemnification clause. Credit harm resulting from one spouse's (mis)behavior can have an

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Marketing Experts for Family Lawyers

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– Dan Couvrette, CEO, Divorce Marketing Group

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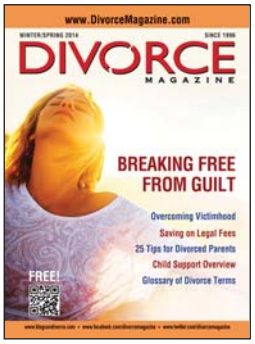

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Family Lawyers/ Cont. from page 15

economic impact on the innocent spouse for at least seven years — and possibly for ten years per the *Fair Credit Reporting Act*. Credit harm will impact the couple's individual as well as joint accounts. Violations include failure to notify the spouse that agreed-upon payment(s) will not be made, failure to make the payment in a timely manner or at all. In a recent case, the spouse who remained in the family home missed three mortgage payments and the property was sold as a short sale. Both spouses were on title, so this damaged the other spouse's credit score, causing credit-card cancellation and withdrawal of a mortgage refinance offer. After the damage was monetized in an expert report, the case was settled with financial recovery to the credit-injured spouse. In another case, the husband flagrantly used joint account funds in a fiduciary breach and TRO violation; because of the report, the bench awarded $35,000 to the credit-injured wife.

— Georg Finder (ICE), Credit Damage Evaluator, www.CreditDamageExpert.com

5 Get a smartphone-friendly website and get more business for your law firm.

Designed for viewing on a laptop or computer monitor, regular websites are mostly illegible and frustrating to visitors viewing them on smartphones. This makes it difficult for visitors to find what they want — including your contact information. If you make it easy for potential clients to call or email you while they have their phones in their hands, they will. Not all smartphone-friendly websites are created equal. Make sure your smartphone-friendly website keeps your branding and design, and allows visitors to call, email, or find you on a map with just one touch. There are generic versions that do not feature "Call Us", "Email Us", or "Find Us" buttons, and they strip all your attorney pictures, logo, and the customized website design that you have already paid for. Google research shows that smartphones are used everywhere: 96% at home, 83% on the go, and 69% at work. According to the Pew Internet Project, 58% of American adults now have a smartphone. Just think of the business you are leaving behind if your website is not smartphone-friendly!

— Martha Chan (MBA), V.P. Marketing, Divorce Marketing Group, www.DivorceMarketingGroup.com

6 Bring in financial experts at the beginning of the case.

When working with financial professionals – such as a Certified Divorce Financial Analyst (CDFA), forensic accountant, or business valuator – consider hiring them at the onset of the divorce process. Your case will run much more smoothly because the financial expert can explain the financial options and consequences to your clients — which should enable them to make an informed decision about a settlement offer much sooner. Also, if you give your client the opportunity to make a decision about whether to use a financial professional or not, they will gain a sense of control during a process that often leaves them feeling out of control. Your clients will appreciate your effort to introduce them to a service they might need instead of having them find out about it after the divorce is final – and you will appreciate having an expert to "hold their hand" through the financial process. Many financial professionals will not charge (or offer reduced fees) for an initial consultation.

— Tim C. Satre (CFP®, CDFA™), EDS, www.DivorceAndMoneyHelp.com

7 In child-custody cases, a thorough background check on the other parent and his/her new partners can help demonstrate what is in the child's best interests.

A thorough background search should ensure your client's children will be safe with the other parent and any live-in boyfriends/girlfriends. A good report will reassure your client that his/her children are not being cared for by an irresponsible new partner, or one with a criminal past and/or addiction issues. When spousal or child support is involved, the ex-spouse may try to claim unemployment, or that they have no assets; a background search can verify if he/she is telling the truth or simply does not want to pay. Finally, if the parent has skipped out or is elusive, a private investigation agency should be able to find him/her.

— Ron Ciancioso, President, Confidential Resources, www.ConfidentialResources.com

8 Get technology on your side to organize client files and billing.

Software designed for family lawyers and clients can organize your client files and communication between you and your client as well as between your client and their ex. You can use them to track parenting schedules, co-parenting communications, email and financial documents from professionals both inside and outside your firm, as well as hours for billing and invoicing. To maximize both function and efficiency, choose a product that integrates directly with consumer co-parenting software designed to help separated and divorced parents communicate better and reduce conflict. These types of products create opportunities to improve your client relationships and to responsibly increase billable hours.

— Stephen Rosenfield, CEO, www.my2families.com and www.ComeToAgreement.com ■

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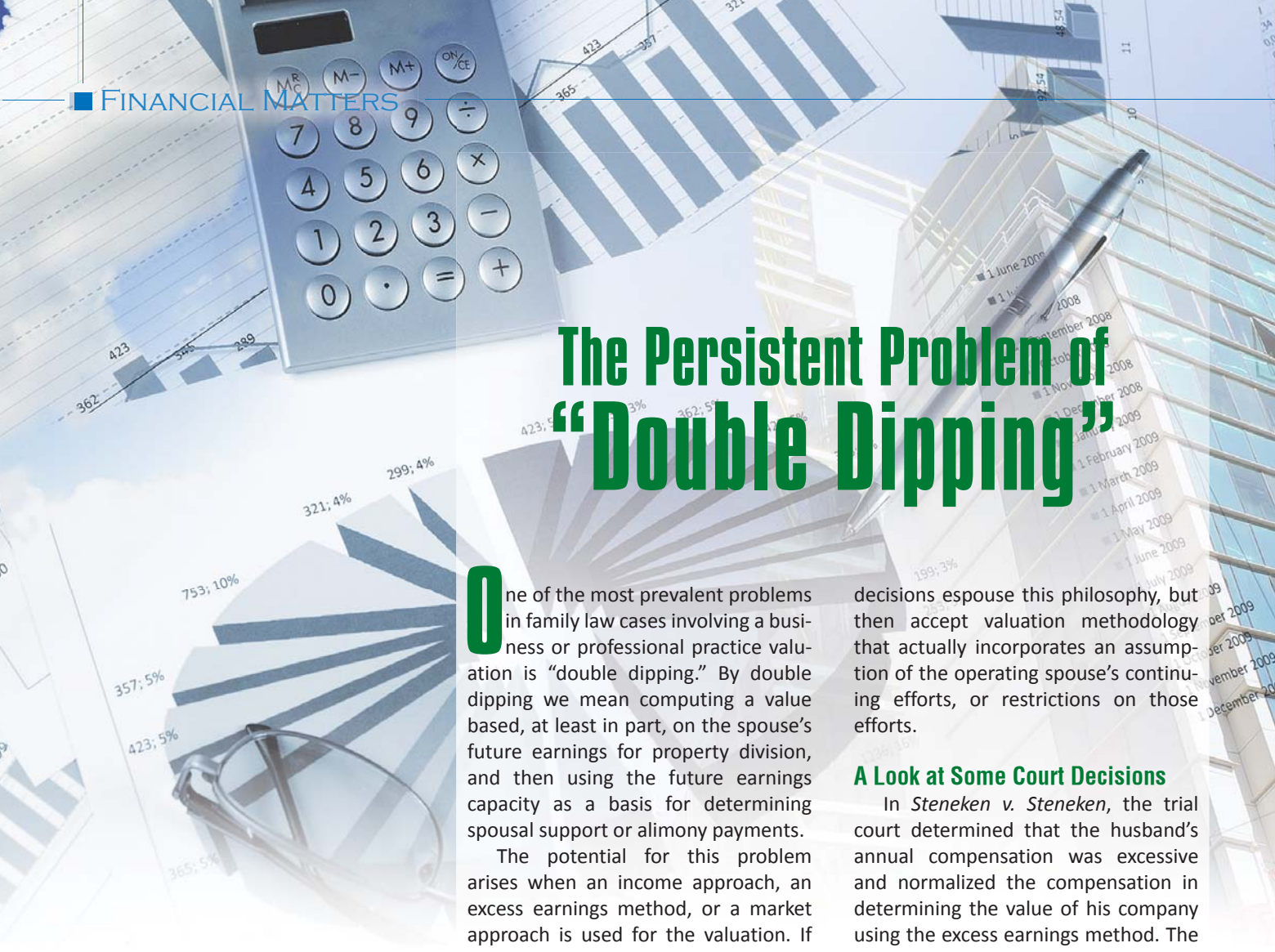

The Persistent Problem of "Double Dipping"

By Shannon Pratt and
Alina Niculita, Valuators

Double dipping occurs when the same asset is considered both a marital asset (for property division) and a source of income (to determine alimony payments).

One of the most prevalent problems in family law cases involving a business or professional practice valuation is "double dipping." By double dipping we mean computing a value based, at least in part, on the spouse's future earnings for property division, and then using the future earnings capacity as a basis for determining spousal support or alimony payments.

The potential for this problem arises when an income approach, an excess earnings method, or a market approach is used for the valuation. If these methods reflect an implication that the operating spouse will continue to operate, the value of that spouse's future efforts is impounded, at least to some extent, in the distributive value. If payments are then ordered out of the earnings from that spouse's efforts, double counting is the potential result.

This problem is exacerbated in those jurisdictions that consider personal goodwill to be a marital asset. Personal goodwill is a function of future earning power resulting from persistence of patronage of the individual. If this value is fully reflected in the distributive asset, then this earning power is being used twice if it is the basis for future payments to the nonoperating spouse.

This problem can be avoided if the valuation methodology truly follows the philosophy of not being dependent on future efforts (or restrictions on efforts) of the operating spouse. However, as noted earlier, many court decisions espouse this philosophy, but then accept valuation methodology that actually incorporates an assumption of the operating spouse's continuing efforts, or restrictions on those efforts.

A Look at Some Court Decisions

In *Steneken v. Steneken*, the trial court determined that the husband's annual compensation was excessive and normalized the compensation in determining the value of his company using the excess earnings method. The court then determined alimony using the husband's actual annual compensation — which was $50,000 more. The husband argued that distributing his excess earnings as the goodwill portion of the value of his business, and also considering it for alimony purposes, was impermissible double counting.

The New Jersey intermediate appellate court ruled that the value of the business was as of the date of dissolution and was based on past excess earnings, whereas the alimony determination was based on future income. The court also noted that even if this was double counting, it was not banned by New Jersey law, which bans only the double counting of pensions.

The New Jersey Supreme Court expressly rejected the premise that because alimony and equitable distribution are interrelated, a credit on one

Cont. on page 22

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Double Dipping / Cont. from page 20

side of the ledger mandates a debit on the other side. Instead, the court focused on the "bedrock proposition" that all alimony awards and equitable distribution determinations must satisfy basic concepts of fairness, and that – although clearly interrelated — the structural purposes of alimony and equitable distribution are different.

Accordingly, the court rejected the husband's assertions of double counting, saying that the husband "mistakenly equates the statutory and decisional methodology applied in the calculation of alimony with a valuation methodology applied for equitable distribution purposes that requires that revenues and expenses, including salaries, be normalized so as to present a fair valuation of a going concern." The court concluded that it is not inequitable to use a valuation method that normalizes salary in an ongoing closely held corporation for equitable distribution purposes, and to use actual salary received in calculating alimony — the valuation methodology chosen for equitable distribution purposes should not alter the alimony award. According to the court the "interplay of those two calculations does not constitute 'double counting.'" The ultimate judicial inquiry must be whether the ultimate result, both in toto as well as in its constituent parts, is fair under the circumstances and congruent with the standards set forth in the alimony and equitable distribution statutes. The court also rejected the distinction made by the appellate court between the fact that "valuation of the corporate asset was based on [the husband's] past earnings, not his future earnings," whereas "[the husband's] actual current and future compensation may be treated as income for alimony purposes."

Justice Long, in a dissenting opinion, agreed with the husband that the majority's holding would allow the impermissible double counting of income (albeit not dollar-for-dollar). Justice Long's position was that the majority converted a certain amount of the husband's projected future income stream into an asset and then calculated the amount of alimony based on that asset. According to Justice Long, this was improper, as "[o]nce a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout." Instead, Justice Long's solution would have used the appellate court's approach, which neither allows the unfettered dual use of a single income stream, nor requires the use of the same figure for both calculations. "Rather, judges should be able to use the 'real' income for alimony and the 'normalized' income for the corporate valuation so long as the ultimate outcome recognizes that a single income source (the difference between the real and normalized income) played a part in both."

It is arguable that, to the extent the court used excess compensation as the

Cont. on page 59

Tipping the Scales

A Judge's perspective on how including a Certified Divorce Financial Analyst on your team can lead to success.

By Jessica Pierce, Certified Divorce Financial Analyst®

The Honorable Kathleen McCarthy has served in the Family Division of the Wayne County Circuit Court since her election to the bench in 2000. Prior to taking the bench, she was a partner in her own law firm specializing in family law and personal injury litigation. Judge McCarthy is an active member and a past-president of the Wayne County Family Bar Association and a past-president of the Dearborn Bar Association. She is the 2006 recipient of the "Judge of the Year Award," presented by DADS of Michigan and MOMS for DADS for her commitment to ensuring that children have frequent access to both parents, and recipient of the 5th Annual "Guardian of Justice Award," presented by ADC of Michigan. In addition, Judge McCarthy is an adjunct professor at the University of Detroit Mercy School of Law and has taught advanced courses for the Institute for Divorce Financial Analysts (IDFA) since 2002.

Jessica Pierce, IDFA general manager, recently spoke with Judge McCarthy about how attorneys can achieve the best results in court by utilizing all available resources. Judge McCarthy offered her thoughts on the use of Certified Divorce Financial Analyst (CDFA) professionals, and the unique perspective they bring to each case.

JP: When and how did you first become aware of Certified Divorce Financial Analysts?

KM: I first became aware of Certified Divorce Financial Analysts early in my legal career — approximately 20 years ago — when one of the first CDFA professionals in Michigan marketed his services to me. It was perfect timing because I was a new, young divorce lawyer and was dealing with a complicated Social Security case. I needed the CDFA professional's expertise to resolve the case.

JP: In your opinion, what value do you think CDFA professionals bring to the divorce process?

KM: A CDFA professional brings a detailed financial expertise to the case that divorce lawyers frequently lack. This includes knowledge of tax implications of various property distributions that all too often are not presented to a judge. Without that thorough financial information, inaccurate property and spousal support distributions are likely being made and being incorporated into final judgments, which then are nearly impossible to alter at a later date.

JP: Has the evidence provided by a CDFA professional in court, mediation, or arbitration helped you to understand the parties' financial situations more clearly? Is it possible that having a CDFA on the team could affect the eventual outcome of a divorce?

KM: Evidence provided by a CDFA professional has absolutely assisted me many times in understanding the parties' financial situations. Testimony from a CDFA professional can help a judge make more equitable final judgments. More often than not, cases with CDFA professionals involved settle without the necessity of a trial, because CDFA professionals make the numbers clear to the divorcing parties and their attorneys. Therefore, once the emotional aspect of the divorce subsides for the client, the attorneys are able to show their clients from an equitable standpoint where and how the case should be settled as a clear financial picture is present. The CDFA professional can show the attorneys the financial ramifications of various settlement proposals — which can reduce the parties' anxiety and increase the chances of reaching a truly equitable agreement.

JP: In the past, traditional financial experts used in divorce setting were usually CPAs. Can you tell

us something about how the CDFA professional's expertise differs from that of a CPA — not only in settlement negotiations, but also as a testifying expert in court?

KM: For the past 20 years, the CDFA designation attracts and educates a variety of professionals, and each learns the best practices from the others, including lawyers, CPAs, CDFA professionals, judges, etc. This designation offers a CPA the opportunity to understand the legal side of divorce practice and apply that to their financial expertise. Many CPAs have never testified in court or worked in the legal area of family law. Being a CDFA professional exposes a CPA to this practical application, enhancing their financial background and servicing a much-needed area of legal practice.

JP: Based upon your experience with a Certified Divorce Financial Analyst as a qualified financial expert, is it fair to say that it's time for qualified CDFA professionals to be more widely used in the divorce process?

KM: I absolutely believe that qualified CDFA professionals should be more widely used in mediation, arbitration, and litigation. Bringing in a CDFA professional as early as possible in the case is essential for proper discovery requests, document gathering, and document interpretation. It may be too late if the CDFA professional is brought into the case at the mediation stage in order to help to the full extent possible, especially if the discovery period is closed. Most cases settle at mediation, thus it is essential to have the financial expert on hand early to insure that a settlement can be reached at mediation and executed, that tax implications have been fully considered, and that the parties truly understand what they are agreeing to in the financial settlement. ■

To learn more about how a Certified Divorce Financial Analyst® can help you and your client address the financial issues of divorce, go to www.InstituteDFA.com/Lawyer.

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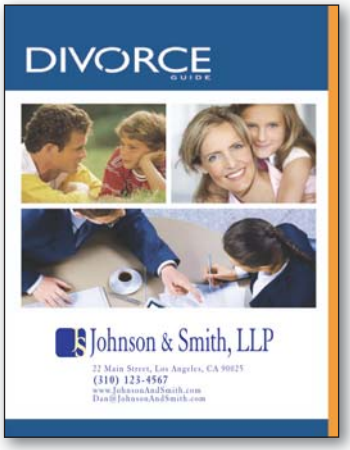

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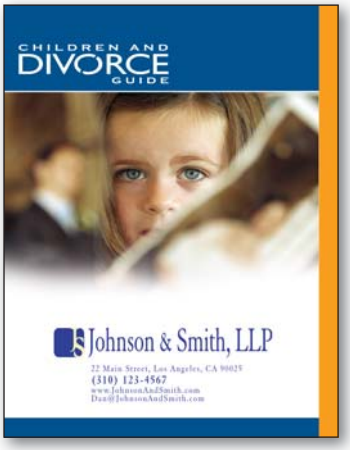

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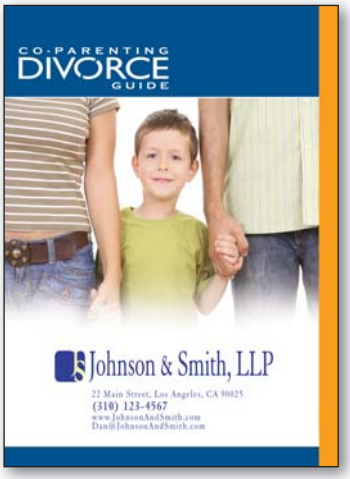

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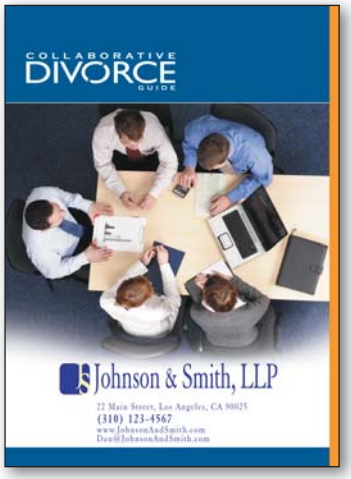

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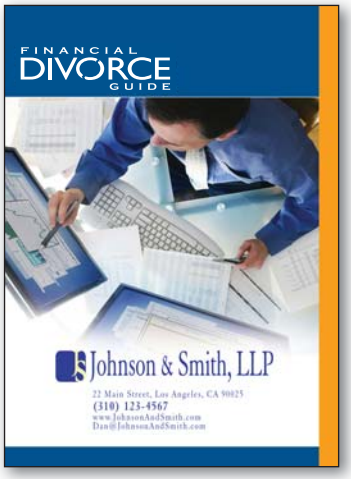

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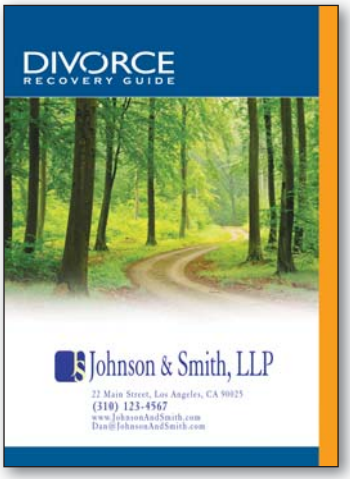

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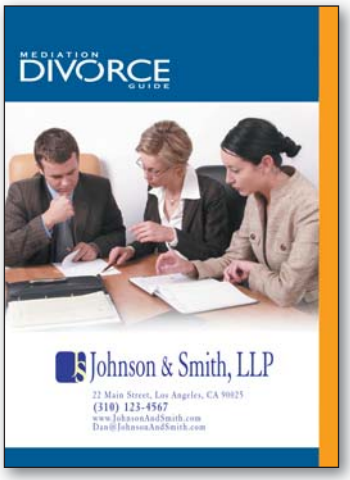

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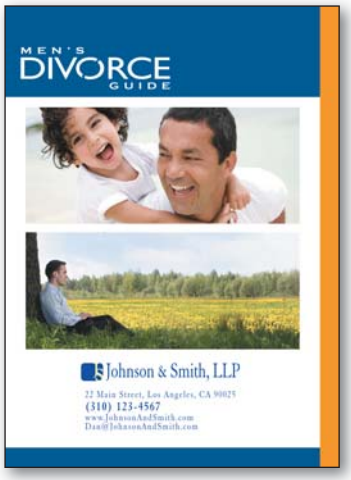

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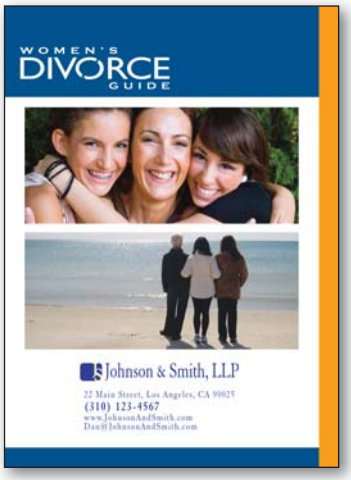

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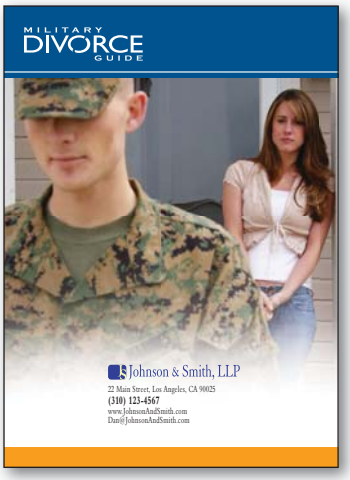

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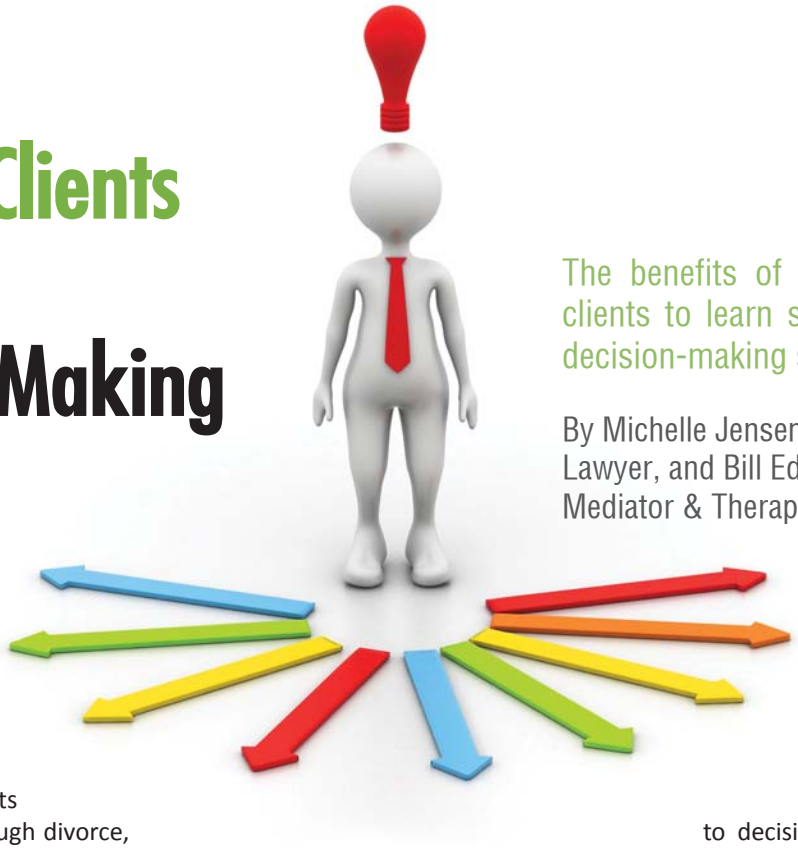
Can Difficult Clients Learn Decision-Making Skills?



The benefits of encouraging difficult clients to learn self-management and decision-making skills.

By Michelle Jensen, Social Worker & Lawyer, and Bill Eddy, Family Lawyer, Mediator & Therapist

When dealing with high-conflict clients who are going through divorce, the legal issues often become overshadowed by their negative behavior, which is harmful to everyone involved and detrimental to the case. Trapped in a cycle of defensive thinking, intense emotions, and extreme behaviors, difficult clients often lack the skills necessary to break free from their dysfunctional thinking and behavior. Additionally, high-conflict clients lack rational decision-making skills – especially under the stress of divorce.

Teaching Upset People Self-Management Skills

One approach that legal professionals can consider is teaching clients – especially parents – skills for self-management that will help them remain calm, communicate more effectively, and make better decisions. The concept of teaching self-management skills is based on Dialectical Behavior Therapy, a well-researched treatment method proven to work well with individuals diagnosed with borderline personality disorder (a mental-health disorder that reflects all the high-conflict behaviors listed above). Key aspects of this treatment method include teaching skills for reducing one's sense of distress, managing relationships, and keeping one's moods in a more normal range. Parents who practice self-management skills can also protect their children from absorbing their negative emotions.

Paradigm Shifts

Teaching skills before asking clients to make decisions requires several paradigm shifts for family law professionals – but does not necessitate new laws, as the basis for such counseling and classes is already established in family code. Teaching these skills also requires an interdisciplinary approach, with the collaboration of all professionals involved with the family.

Here are four key skills for your high-conflict clients to learn.

1. **Timely Preparation.** Practicing self-management skills from the start of the case allows parents to be less involving of their children throughout the process and more effective at making small decisions without court involvement. Engaging clients in a positive activity related to decision-making prevents them from becoming "stuck" in the adversarial process. Such an approach should also include advising your client to seek counseling from the start of the case – especially in contentious divorces.
2. **Developing Skills for Both Parents.** Ordering both parents to learn decision-making skills will eliminate the parenting contest, thereby allowing your clients to focus on the future rather than maintaining a defensive role towards the past. Both parents should be encouraged to learn self-management skills that will help them during the divorce case as well as in the future.
3. **Shifting Focus.** Changing the focus from teaching parenting skills to teaching specific decision-making and self-management skills can empower your clients to make their own decisions regarding divorce, custody, and co-parenting. Clients who are taught positive engagement in the decision-making process are more likely to act in accordance with these decisions and successfully make the smaller

choices required to implement a co-parenting plan.

4. **Realizing Insight Is Not Effective.** Clouded by their defensive thinking, high-conflict clients lack insight into their own behavior. However, trying to argue with their flawed logic only serves to make them more defensive. Rather than attempting to provide them with insight, a high-conflict parent should be encouraged to develop self-management skills. Difficult clients should focus on the future as much as possible, and learning applicable new skills is one effective way to do so.

Conclusion

Parents experiencing stress related to divorce often exhibit defensive behavior that can negatively influence their case. As divorce professionals, we can bring out the best in our clients by assisting them to learn the necessary skills to make reasonable proposals and decisions. Requesting that your client attend counseling early on in a difficult divorce case, learn to practice self-management, and develop stronger decision-making skills will not only allow for a better attorney-client relationship, but will also benefit their family throughout the divorce process. ■

Michelle Jensen (MSW, JD) is the Program Director for New Ways for Families™, a project of High Conflict Institute. She assists legal and mental health professionals in implementing the New Ways method. Bill Eddy (LCSW, Esq.) is a lawyer, therapist, mediator, and the president of High Conflict Institute. An international expert on managing disputes involving high-conflict personalities, Bill developed the New Ways for Families™ method for application in and out of family court. www.newways4families.com

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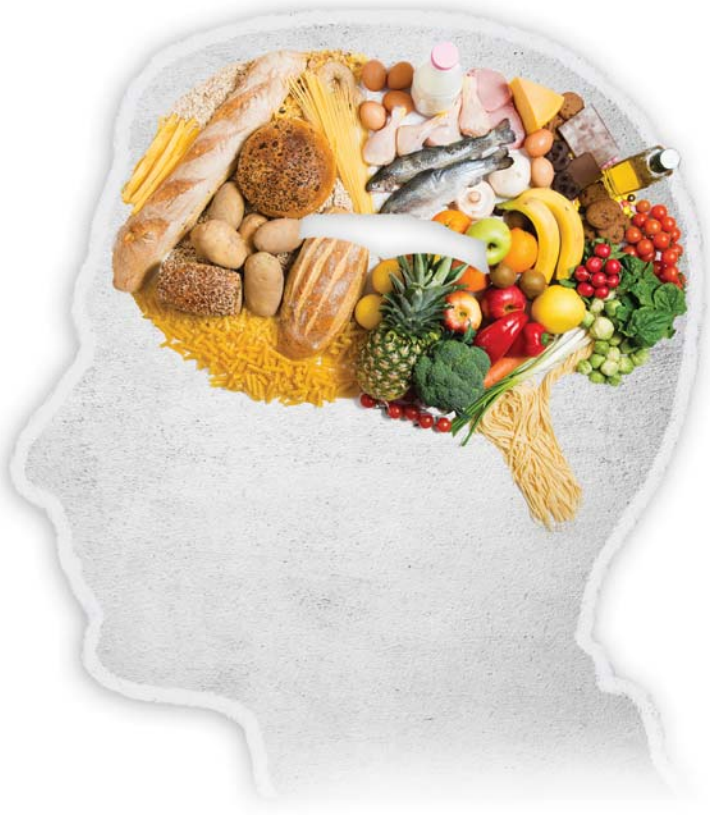

By Trish Krause, Certified Holistic Nutritionist

Nutritional strategies to boost your brainpower for peak performance both in and out of court.

We all know that choosing the best foods will deliver the best results when we're trying to sculpt our bodies and make them stronger, faster, and more productive. But what about our minds? We function in a knowledge economy, and count on our intellectual prowess to deliver the goods to clients as well as run our own lives successfully. Given the demands of practicing family law, are you feeding your brain for peak or sub-par performance?

First, a little brain anatomy: your brain, which weighs about three pounds, is nearly 60% fat. Despite the fact that you may feel like you're losing ground as you age, your brain can actually continue to grow neurons throughout your life in response to the right stimulation – including what you feed it. Your brain's favorite food? Glucose, followed closely by healthy fats.

Here are some key nutritional strategies to boost your brainpower and keep your gray matter healthy and functioning at peak performance levels.

Glucose? Isn't that Sugar?

Your brain is a sugar hog and demands a steady stream of carbohydrates in order to keep it running smoothly. But that does not mean that gobbling candy bars on the run between meetings or while chauffeuring kids to soccer practice will give you what you need to stay sharp. When levels of sugar in the blood fluctuate, the brain doesn't get its steady fuel supply, and behavior and learning become more erratic. Your brain performs best without the highs and lows, and that means choosing the right carbohydrates to avoid those spikes and crashes.

To ensure sustained release, never skip a meal. Eating something small every three hours is critical. Choose carbs from whole foods: vegetables, fruits, nuts, beans and legumes, or fiber-rich grains found in oats or quinoa. Whole-wheat products can be a good choice, but read the labels carefully to ensure that it's 100% whole wheat and not a product that's mostly made of refined wheat flour. The more refined a grain is, the less fiber it will have in it, and the faster it will spike your blood sugar – something you want to avoid to keep your brain healthy.

Tip: an apple dipped in some nut butter is a portable on-the-go snack that will help level your blood sugar. So is a handful of almonds, a cup of yogurt, or some raw veggies with hummus.

Is Fish Really Brain Food?

Mom was right: eating fish can make you smarter! Feeding your brain with the right fats can strengthen the synapses related to memory as well as nourish the membranes of the brain cells, keeping them supple and strong so they can keep out toxins.

Fatty cold-water fish such as salmon, mackerel, herring, cod, or halibut are excellent sources of omega-3 fatty acids. Studies have shown that people with high levels of omega-3s reduce their risk of dementia and slow mental decline, so plan to eat fish at least three times a week for optimal brain health.

You can also find omega-3s in walnuts and flax seeds; use the oils as salad dressing or stir-ins to yogurt or smoothies, or grind the flax seeds and include them in baked goods, meatloaf,

or oatmeal. Both cauliflower and Brussels sprouts also contain very good levels of omega-3s.

TIP: just a quarter cup of raw walnuts a day will give you your daily requirement of omega-3s.

The Building Blocks of Calm

Proteins in your diet can affect brainpower because they're made up of amino acids from which neurotransmitters are made. These neurotransmitters are biochemical messengers that carry signals from one part of the brain to another – for cognition, reasoning, creativity, problem solving, etc. The more you nourish these neurotransmitters, the more clearly they'll be able to deliver the messages, and the better you'll be able to perform thinking tasks.

One particular amino acid – tryptophan – is especially critical. Tryptophan is a precursor to serotonin, the hormone that helps keep us calm, balanced, and happy. Given the fast pace and multiple demands of practicing family law, staying calm under pressure is imperative. Serotonin also contributes to memory and learning capacity.

Turkey, chicken, salmon, yogurt, eggs, and cacao are all good sources of tryptophan. For those who prefer to eat a plant-strong diet, dark leafy greens such as kale, spinach, and chard, as well as mushrooms, pumpkin or sunflower seeds will also feed your neurotransmitters.

TIP: Chocolate can indeed help to calm a stressed-out brain. In addition to the serotonin in raw cacao, it contains a compound called theobromine, which increases blood flow – exactly what a hard-working brain needs. So enjoy your daily bite of dark chocolate as long as it's made from raw cacao and is at least 70-85% cacao. ■

Trish Krause (CNP, NNCP) is a certified holistic nutritionist. A former corporate executive herself, she specializes in teaching busy professionals how to navigate their nutrition journey while juggling stress, clients, travel, families and life. At Bite Out of Life Nutrition & Lifestyle Coaching, Trish works both face-to-face and remotely with her clients. www.bite-out-of-life.com

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Stress Management Tips
to Keep Ahead in a Competitive Market

Chronic unmanaged stress can make you unfocused, cranky, and burned out. These simple stress management tips can help improve your bottom line as well as your physical and emotional health.

By Carolyn Ellis
Life Coach and Author

Stress is an inevitable part of life as a family law attorney. Growing online legal services and a burgeoning supply of newly-minted lawyers means there is more competition for securing that next client.

Learning how to manage your stress isn't just about making healthy choices for your body, it's about making healthy and effective choices that can impact your bottom line in business. Chronic unmanaged stress can make you unfocused, tired, cranky, and burned out — qualities that will not help you attract new business or opportunities. Here are some simple tips to help you manage stress and can keep your edge in a competitive marketplace.

Dial Down The Adrenalin

Studies show that even just one minute of deep, diaphragmatic breathing can help tame the adrenalin rush that's triggered when your body gets into "flight or fight" mode. When you're feeling stressed, or about to be in a pressure-filled situation, take a moment or two to get grounded by taking some slow deep breaths. It helps diffuse some of the body's stress response so you can think more clearly and keep your focus.

Prioritize Your Physical Health

If you become ill, your ability to hit your billable-hour targets can drop suddenly and drastically because it isn't easy to delegate or duplicate what you bring to your clients. Prioritizing your physical health means getting back to the basics — such as getting enough sleep and exercise, and eating right.

Keep it simple and take one proactive step towards making improvements in your physical health this week. For example, you could commit to taking a 15-minute walk outside each day. Cut back your coffee intake by one cup a day or forgo the morning bagel on odd numbered-days. Invest in a trainer at the gym to create a personalized workout plan so you maximize the effectiveness of your time at the gym.

Use Your Powers of Observation

We don't always have control over events in our lives, but we do have control over our response to those events. As a family lawyer, you already have excellent observation skills that you bring to your clients. All you need to do is transfer those same powers of observation to where stress shows up in your life so you can better manage it — or sidestep it completely.

Start by making a list of the top five to ten areas of your life — professional and personal — that are creating stress. Using a scale of 1-10, with 10 being "most stressful", give yourself a quick self-assessment and identify your highest area of stress. Brainstorm possible solutions to reduce stress in that one area; pick one simple step and implement it right away. Repeat this simple process as often as needed until you have better control over your peak stress zones.

Recharge Your Batteries

Productivity experts know that high performance and optimal productivity can't be achieved unless energy output is balanced with downtime and energy renewal. In the bestseller *The Power of Full Engagement* (Free Press, 2005), authors Jim Loehr and Tony Schwartz argue that "full engagement" and sustainable success comes through managing energy — not time.

Break up focused work with short breaks every 90 minutes if possible to stretch your legs or do some jumping jacks. Give yourself some downtime to relax with family or dedicate time to a fun hobby. Even unplugging from electronics for a day on the weekend can feel quite relaxing. Make booking your vacation a priority.

Talk it Out

Lawyers are masters at reasoning and constructing arguments. When it comes to managing stress, seeking help or just a sympathetic ear can remove the pressure of having to figure it all out yourself like you do with your clients. Whether you talk it out with a trusted friend or a trained counselor, giving yourself space to express your feelings can in itself provide a lot of relief. ■

Carolyn Ellis is the Founder of ThriveAfterDivorce.com and BrillianceMastery.com. She is an award-winning coach, transformational expert, and author of the award-winning The Divorce Resource Kit *and* The 7 Pitfalls of Single Parenting: What to Avoid to Help Your Children Thrive After Divorce. www.thriveafterdivorce.com

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KEY Considerations when Retaining a Forensic Expert

The selection of the right forensic expert can assist in the settlement of the case.

By Michael Saccomanno, Business Valuator

Having an independent third-party prepare a business valuation report or forensic analysis does not guarantee success and/or an amicable settlement. If each party handles the process properly, however, having a joint forensic expert increases the odds of a satisfactory settlement — a settlement that will save the clients the expense of a costly trial and allow attorneys and experts to close cases in a more timely fashion.

Who to Retain?

The selection of the right forensic expert can assist in the settlement of the case. First and foremost, the character and integrity of the expert is a must. Most forensic experts have a degree, are experienced, and often accredited by one of the major designators. But all this may not help your case if the expert is not objective and unbiased. A joint expert must objectively listen to each party to determine an unbiased, defendable position regardless of what the clients believe. This requires the expert to be able to see the "big picture" — which most experts can do when they represent only one party, but a perspective that is much harder to maintain when jointly retained.

Joint experts should be cautioned not to attempt to render an opinion "in the middle" of what the clients originally believed was reasonable. Joint experts incorrectly view the "middle" outcome as a success. In reality, these experts did not perform the service of a qualified expert, but merely a service that engineered an outcome. This is a direct contradiction to the principles on which the accounting and/or valuation profession was founded: educated, informed, defendable conclusions. Furthermore, the concluded "middle" outcome (either high or low) was at the expense of one or both of the clients. Fortunately, such an approach is the exception than the norm.

Whether jointly or independently retained, the job of a forensic expert is to determine an outcome within a reasonable degree of certainty — not to be a psychologist, or worse, a hired gun.

Unfortunately, in all of our practices we have witnessed certain experts who are notoriously perceived as "husband friendly" or "wife friendly"; these experts manufacture artificially high or low values depending on who they represent. These professionals will not succeed in the jointly retained arena because, in the end, the attorneys and the clients are left with unsupportable or unrealistic conclusions — which may be worse than having no conclusion at all.

Key Elements to Successful Joint Retention

At the start of joint engagements, each attorney should provide the expert a timeline of reported deadlines. This is preferably done by conference call with both attorneys and followed up in writing to avoid any confusion.

Along with being independent, joint experts must be *perceived* as being independent. Is there a difference? Yes. One way to resolve any potential independence questions is to copy each attorney on all correspondence, memos, and

draft schedules/reports. Joint experts must remember that they have been retained by both clients, and need to treat the engagement as such.

Another key element to a successful joint retention is the handling of the interview process. In a joint retention, the expert should independently interview both spouses regarding their respective perception and knowledge of the marriage, business, etc. Why interview the non-moneyed spouse? The non-moneyed spouse should be an essential part of the process, and the answers they provide during the interview are not as important as the comfort level one can obtain by including them in the process.

After concluding preliminary findings, the joint expert should contact each attorney for a three-way conference call or meeting to discuss the findings and address any questions that may arise. Once each party has an opportunity to ask questions, the expert should finalize their findings.

I am not suggesting that attorneys should attempt to retain a joint expert in every matrimonial case. Joint retention typically does not work when the clients are being unruly. Sometimes, the case at hand has so many complex issues that you, the attorney, believe that your client is best served with their own expert. ■

Michael A. Saccomanno (CPA, ABV, CFF, CVA, CDFA) is a FLVS Partner at Friedman, LLP. Since 2001, approximately 50% of his matrimonial cases have been jointly retained.
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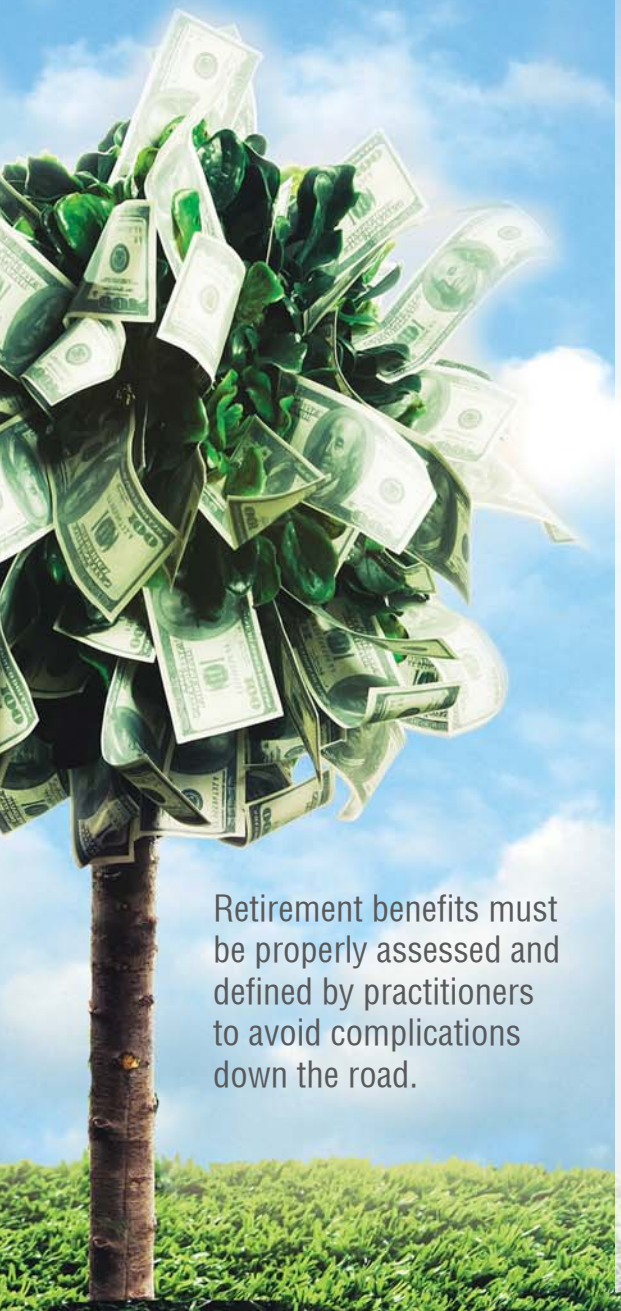
Discovery into the Largest Financial Asset: Retirement Benefits

By Tim Voit, Financial Analyst



Retirement benefits must be properly assessed and defined by practitioners to avoid complications down the road.

In order to better serve their clients in cases of divorce and the division of retirement plans, attorneys should pursue each and every type of retirement plan accrued during the marriage.

The importance of discovery in both the valuation of retirement plan benefits and QDRO-related issues cannot be overemphasized. Drafting a marital settlement agreement or equitable distribution agreement that simply states that the petitioner/plaintiff is awarded 50% of the respondent's/defendant's retirement benefits, or vice versa, will lead to future complications. In fact, many of the problems in malpractice cases could be avoided if the retirement plans had been properly identified and defined in the first place.

In long-term marriages, 401(k)s can be rolled over, transferred, or liquidated. However, this is not true of pension plans, which remain with the company until retirement. Like 401(k)s, defined contribution plans have account statements that are mailed regularly to the home or are easily accessible online; pension benefit statements, on the other hand, generally are neither mailed nor easily available online. Therefore, the other spouse may or may not know if benefits are accruing in a pension plan.

The Necessity of Due Diligence

More often than not, a spouse will want to minimize his/her assets in a divorce, so due diligence is required on your part. You should never blindly accept what the spouse who holds the majority of the retirement accounts says he/she has in terms of retirement benefits, or what he/she puts on a financial affidavit.

For discovery purposes, if an individual has worked for a company for many years, a diligent practitioner must ask if any terminated or frozen plans exist. Although a retirement plan may be terminated, it still has to be administered and eventually paid out. If a frozen or terminated plan goes undiscovered, the alternate payees lose out on benefits accrued during the marriage, which will then become your problem as well.

An example of a case where a pension plan went unnoticed involves a company that terminated one plan in the mid '90s and created a new defined benefit plan as part of a merger. The second pension plan was the only one mentioned or referenced in the parties' settlement agreement. Upon reviewing the documents after the divorce, it was brought to their attention and discovered that the wife was entitled to approximately $50,000 more in benefits.

Obtaining Information From the Plan Administrator

One solution is to send each employer a questionnaire/authorization upon the onset of the divorce process. This allows enough time for the plan administrator to respond before the settlement is finalized. In long-term

Cont. on page 79

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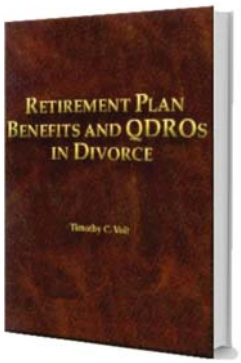

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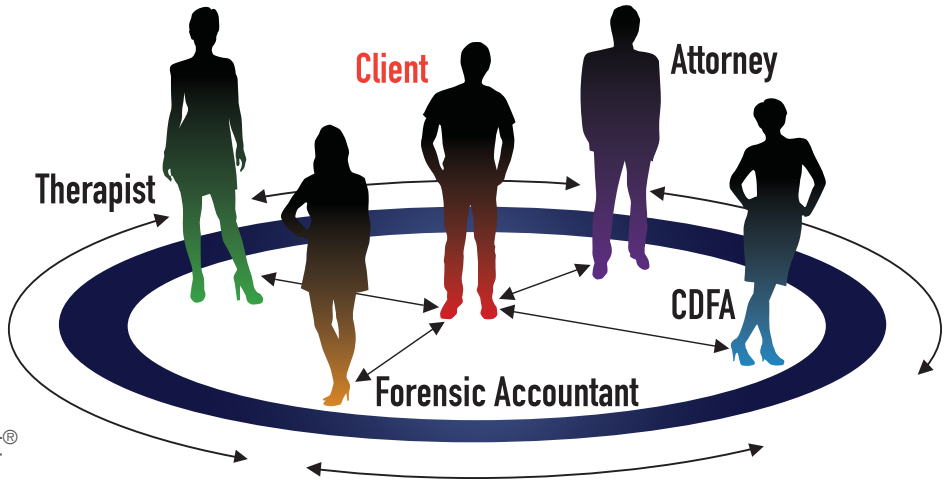
The Circle of Support



A new team approach to traditional, litigated divorce.

By Barbara Shapiro, Certified Divorce Financial Analyst®

As a Certified Divorce Financial Analyst, I work with many types of attorneys — from mediators to aggressive litigators, from sole practitioners to lawyers in mid-size firms. Regardless of the model the attorney and their respective teams use, they all want the best for their clients.

In the mediation and collaborative models, neutrality is paramount both during and after the divorce. The traditional approach, on the other hand, takes an advocacy position. As such, the client is the central figure and the professional team — attorneys, paralegals, CDFA professionals, and any other recommended specialists — interact with each other on a professional level and with the client on the client's level of understanding. This model is particularly successful with the financially unsophisticated spouse.

The model I call "The Circle of Support™" allows the client to hear the same information several times from various sources; hopefully, this repetition will enable them to process the information correctly, which will allow them to make rational decisions based on fact. Often times clients — particularly unsophisticated clients — hear bits and pieces of information that they string together to reach incorrect conclusions. In addition to stalling the case, the client is most likely repeating the wrong information to both friends and relatives. Obviously, being incorrectly quoted can be disastrous to that particular professional's reputation.

In my experience, the traditional "team" is loosely established and not very well organized. The attorney speaks to the CPA or CDFA individually, but we seldom (if ever) speak to each other or meet as a group to speak with the client. The lines of communication with the client are linear instead of being circular between the professionals and interactive with the client.

In the Circle of Support process, the attorney at all times is the team leader, and each subsequent professional is a specialized team-member. This approach accomplishes several goals:

1. If the client does not understand a concept, it is explained early in the process
2. If two heads are better than one, then four or five heads are better than two.
   a. By collaborating, the team might come up with a creative solution that could settle the case equitably.
   b. By collaborating with other professionals, the attorney could reduce potential oversight and subsequent liability.
3. The client is well-informed and feels more in control of his/her destiny.
4. The professionals may have met new referral sources.
5. A satisfied client is a good source of referrals.

The concept obviously can be tailored to meet both the attorney's and client's specific needs and requirements, but it can make the divorcing process run more smoothly for everyone. Similar to the Collaborative process, the Circle of Support has one key difference: the professionals are able to work with the clients post-divorce. This is important because in some cases, there is a subsequent divorce issue that needs to be resolved. Also, most people — especially financially-unsophisticated spouses — who find someone they trust and feel comfortable with want to continue that relationship post-divorce; in the Collaborative model, they are prohibited from doing so.

To create the Circle of Support team, the attorney could make a practice of asking a client at the beginning of the case: "Do you have a financial professional you're working with and intend to continue using post-divorce?" If the answer is "yes", then the client has someone they know and trust on his/her team and the attorney has effectively networked and met a new professional he/she might want to work with in the future. If the answer is "no", then the attorney can choose a financial professional that he/she thinks would mesh well with that client. Adding this professional to the Circle of Support would accomplish two objectives:

1. There would now be a team-member who can make financial projections for the attorney to use.
2. There would now be someone who could work with that client post-divorce.

This process could be repeated for other professionals required for a particular client/case. Asking the question creates a win/win for everyone and helps to make the case run more smoothly. ■

The president of HMS Financial Group, Barbara Shapiro, EDM², MSF, CFP CFS, CMC, and CDFA, has 20 years' experience providing clients with comprehensive financial planning during and after divorce. She holds three Masters Degrees: in finance, counseling, and special needs. She is the Chair of the Institute for Divorce Financial Analysts' Ethics Committee, and the former Treasurer of the Divorce Center. www.hms-financial.com

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3 MISTAKES THAT CAN KILL YOUR FIRM'S CULTURE

By Tea Hoffmann, Strategy Consultant

Culture is a key differentiator for most firms, and it is especially important for a family law practice wanting to attract new clients.

For today's law firm, culture matters and should not be seen as a "buzz word" used only by the Gen X and Y crowd. In 2012, *Inc.* magazine reported that 18% of college graduates considered the culture of an organization to be the number-one factor in making an employment decision. Unfortunately, many lawyers and law firms don't believe that these statistics apply to them, but in today's competitive family-law practice, establishing and retaining the right culture for your firm can be a key differentiator when it comes to attracting clients.

What do your clients think about your firm's culture when they visit for their initial divorce consultation? Are they compelled to tell their friends about the experience? Can they tell from just one visit which values are important to your firm? If you are not sure, then it could be time to assess or establish the type of culture that will encourage your clients to make referrals and share their positive experiences.

Culture is atmospheric. Culture is a feeling. We all know a good culture when we experience it. When I enter my doctor's office, for example, the receptionist smiles and says hello to me by name. When I sit down, they have magazines that are current and relevant to their patients (most of who are over 50), and when I am called back to see the doctor, the nurse (who also calls me by name) asks about my children and my work before she asks me to raise my sleeve to take my blood pressure. I know that customer service is important to this office.

Culture is a shared set of values that is communicated and demonstrated throughout the organization. The leader sets the standard of what is important and what actions will and will not be tolerated. A leader makes few exceptions, if any, and exemplifies the purpose of the firm.

Culture flows downward. If an organization's leader does not adhere to the core values and stated purpose of the firm, then the other lawyers and staff won't buy into it and the culture will become a joke. I have heard horror stories from staff who bought into the firm culture outlined in their initial interview, only to find a few months in that the talk was just, well, talk.

So, which mistakes can kill your firm's culture?

1. Lack of Stated Purpose or Values

At my current firm, client value is one of our four stated standards. Actions that reinforce this value include: completing in-person client interviews and actively responding to the feedback; completing after-action interviews and online surveys to determine in real-time what worked well and what we could be doing better, as well as staff training on client service; and constant reminders of why our clients are important.

Our client commitment is prominently displayed in our lobby; it is also on our coffee cups and is the basis of a new website our firm is launching. These simple steps effectively keep our client commitment top-of-mind.

Family law practitioners may choose

to provide customer service training to lawyers and staff; prominently display the firm's client commitment in the lobby and in all client materials; provide clients with a resource, outside of their primary attorney, to call and ask questions; establish a standard response time policy; or complete a simple after-the-case interview to determine what went well, and what could have been done better or differently.

2. Lack of Leadership

Leadership at all levels must subscribe to and embody the firm's stated values. Otherwise, your attempted culture revival is destined for failure. Obtaining staff buy-in at a small family-law firm is much easier than doing so at a larger firm, but it still requires effort from those in leadership positions. Every leader has certain core values, but establishing or re-establishing a unique firm culture should involve a group discussion on current perceived core values as well as the aspired values. The gap between where you are in relation to your purpose versus where you want to be must also be discussed involving small, targeted actions that move your firm closer to exhibiting your unique culture.

3. Inefficiencies

Some studies estimate that inefficiencies cost organizations 20-30% of their revenue. Despite this, many firms are running so fast that they never slow down enough to be efficient, or they don't want to spend the money to create efficiencies. But you can't afford to ignore this topic, as inefficiency is an underlying source of frustration – and frustration is toxic to your firm's culture.

If your computer is outdated and takes minutes to load, if your copiers are constantly jammed and your files are disorganized, and if your workspace does not allow you to do your job well, there is a problem that must be addressed. The cost of such inefficiencies, in addition to the frustration they cause, include lower-quality work, wasted time, damaged morale, and a higher staff turnover rate.

So, to the leaders reading this, I would ask: what are your firm's core values and purpose? Do you most strongly value client attraction, client retention, productivity, profitability, community service, or something else? How are you communicating those values to your team? How are you embodying and demonstrating these values? Can your team describe the firm's purpose, and are you open to suggestions from all team members on how that purpose can be accomplished? Are you willing to spend the time, money, and energy necessary to turn your firm into a place that clients will want to go and will refer to others? A firm where lawyers enjoy working, and where staff members choose to stay because they feel like part of a team?

Whether you're actively working to shape it or not, your firm has a culture. It's up to you to choose how to define your firm's culture and avoid making the toxic mistakes that can kill culture completely. ■

Tea Hoffmann is the Chief Strategy Officer for Parker Poe Adams & Bernstein in Charlotte, NC. She received her JD from Cumberland School of Law. In her current role, she provides guidance in the formation, development, and implementation of revenue generating strategies and policies. Ms.Hoffmann is a frequent public speaker across the United States on a wide variety of business development-related topics.
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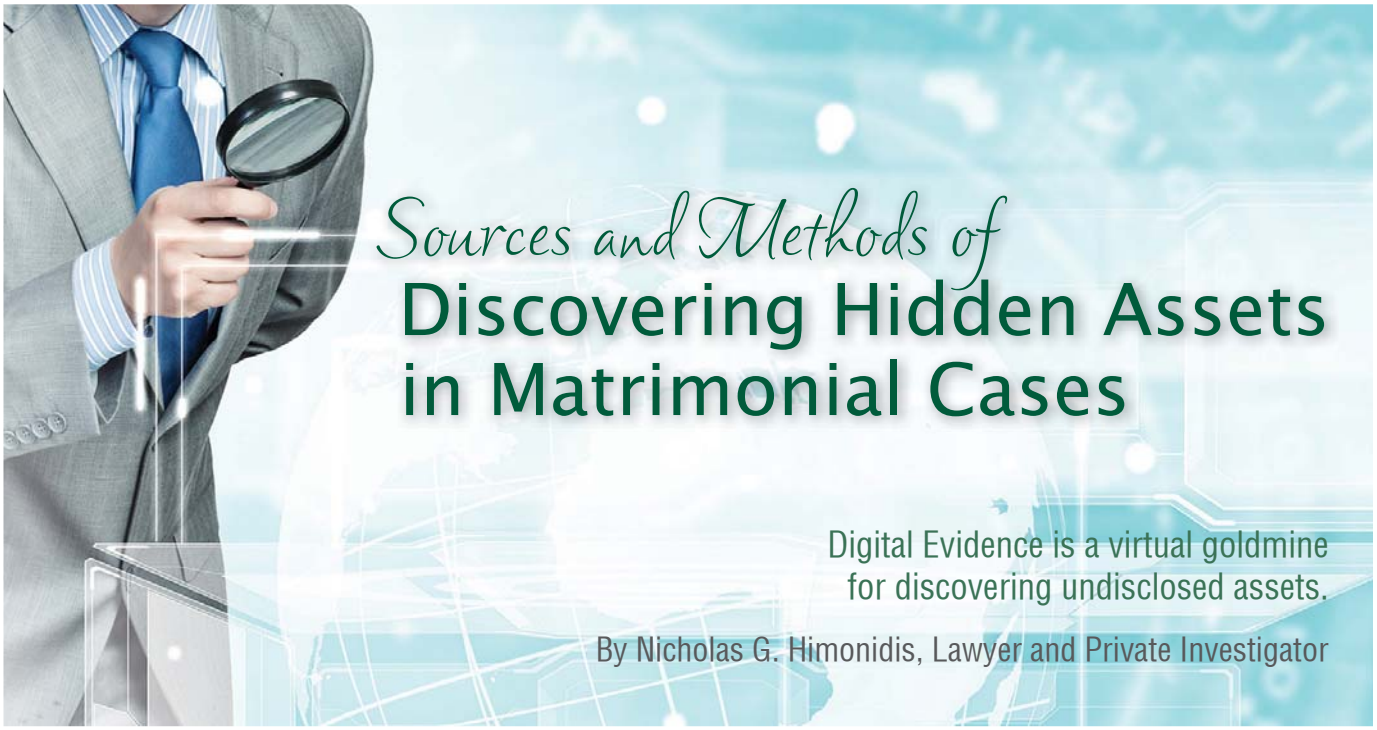

Sources and Methods of Discovering Hidden Assets in Matrimonial Cases

Digital Evidence is a virtual goldmine for discovering undisclosed assets.

By Nicholas G. Himonidis, Lawyer and Private Investigator

Digital evidence is everywhere. Electronically stored information and electronic communications are pervasive and, contrary to the assertions of many, extraordinarily difficult to completely eliminate or obfuscate. The devices that so many of us use every day are pulling email from servers, synchronizing with our computing environments, and creating multiple redundant backups of our accounts and data — locally or "in the cloud". Countless other facilities, mechanisms, and factors contribute to the almost endless creation and duplication of data, which may evidence undisclosed assets or lead to their discovery.

Almost everyone does some portion of their banking online. Automatic notifications via email and text messaging are commonplace for bank accounts, credit cards, and other electronic transactions. In general, there is no correlation or verification by the financial institution(s) between the name on the account and the email address(es) provided for notifications.

A spouse hiding assets may have bank accounts in someone else's name, but they may still receive email or text notifications regarding account activity — and may still access those accounts online to conduct transactions. Wire transfers may be initiated via email. Payments may be made from one party to another via PayPal and other online exchanges. All of this creates evidence of potentially undisclosed assets.

Digital forensic examiners can extract data, including deleted data, from all manner of electronic devices and digital storage media.

Digital forensic examiners can extract data, including deleted data, from all manner of electronic devices and digital storage media. All that is required is for the aggrieved spouse to legally gain access to those devices. There are several avenues to accomplish this: obtaining access to the device through formal discovery mechanisms, and "self-help" or what is often referred to as Clandestine Imaging. Both of these distinctions involve practical as well as legal issues.

Let us take the example of emails that may evidence undisclosed assets or accounts. (The same concepts apply to text messages and other forms of Electronically Stored Information or ESI.) Emails sent or received by an opposing party may be demanded through a document request; attorneys should routinely include requests such as: "*any and all emails, text messages, or other electronic communications sent or received, to or from any financial institution.*"

The opposing parties may not be trusted to fully and adequately produce the requested emails, or may legitimately be unable to do so because the email(s) in question have been deleted and they lack the expertise to recover them. Therefore, counsel may consider demanding production of the electronic devices themselves — smartphone(s), laptops, tablets, etc. — for examination by a forensic expert, as well as production of relevant, non-privileged material, pursuant to a stipulated or court-ordered protocol.

Some will suggest that it is easier to simply subpoena the emails from their host (e.g., Gmail, Hotmail, Yahoo). However, these email account hosts, as well as the wireless carriers who provide text message service and all other online service providers, will routinely refuse to comply, citing Title II of the *Electronic Communications Privacy Act* (18 USC Sec. 2701 et. seq.). Absent a court order or consent of the account holder, these hosts are prohibited from releasing the substantive content of stored electronic communications.

It may be possible to obtain a court order or an authorization from the account holder, by demand or direction of the court or discovery referee, if the account holder is a party to the divorce action. Yet even that remedy may be a dead end if the communication in question no longer exists on the host's server. Because storage space is valuable, retention policies of online service providers, wireless carriers, and email hosts for user-deleted content are generally very short: 30 to 90 days on average.

Such realities lead us to conclude that a forensic examination and extraction of ESI from the party's device is most often the best method for obtaining the evidence sought in most circumstances.

Formal Legal Discovery vs. Clandestine Imaging

Most jurisdictions recognize some form of discovery mechanism (e.g., Demand for Discovery and Inspection under NY CPLR 3120) whereby a party may demand that physical items, including computers and electronic devices, be made available for examination, copying, etc.

However, in certain circumstances, Clandestine Imaging offers a viable and potentially preferable alternative. This option entails making a forensic duplicate or extracting data in a forensically sound manner from electronic device(s) in which the client has a legal and/or equitable interest, and data they have a right to access *outside the scope of formal discovery* (ideally before the case is commenced). The client may, under the laws of the jurisdiction and the factual circumstances, have a right to access these devices and data contained on them, independent of any formal legal directive.[1]

Bank Account Searches

Not so many years ago, investigators in matrimonial and other cases would contact banks, posing as the customer, and a through a variety of very clever, well-established "social engineering" techniques, would routinely determine if any account(s) existed at the institution, and if so, obtain the party's private account information.

While the discovery of undisclosed financial accounts remains as important as ever in matrimonial cases, there are several major problems with the above strategy.

Cont. on page 62

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Significant Family Law Case Updates

CALIFORNIA

In re Marriage of Boblitt

By Amy Kapner and Robert Brandt of Feinberg, Mindel, Brandt & Klein, LLP

The Civil Discovery Act applies in Family Law. Most of our fellow family law practitioners will probably not argue with this notion, despite the fact that ours is an area of law in which "some informality and flexibility have been accepted." However, the court in Boblitt clarified the implications of this fact as it applies to post-judgment hearings in family law matters.

As a fundamental and crucial rule of the Civil Discovery Act, the Code of Civil Procedure section 2024.010 et seq. provides that discovery must be completed "on or before the 30th day before the date initially set for the trial of the action" and absent a court order or an agreement of the parties, "continuance or postponement of the trial date does not operate to reopen discovery proceedings." Because post-judgment motions do not constitute new cases, discovery is not automatically re-opened upon the filing of a post-judgment motion and the initial discovery deadlines apply.

In Boblitt, the Wife contended that she was deprived of her due process right when the court granted the Husband's motion to add a reimbursement claim less than 30 days before a post-judgment hearing. The court stated, "Wife's due process argument is based on the assumption that she had the "right" to conduct discovery prior to the evidentiary hearing on Husband's post-judgment motion [on the reimbursement claims]. That assumption, in turn, appears to be based on the belief of wife's attorney that "in family law, [but] not in civil law,... post-judgment motions act as a separate and individual case" for purposes of discovery. That belief is incorrect."

Although discovery does not reopen automatically upon the filing of a post-judgment motion, the Boblitt court clearly stated that discovery on post-judgment matters is indeed available via motion to reopen discovery after judgment, or via an agreement between the parties.

So although the area of family law may give off the air of informality and flexibility, the rules apply; it is imperative that we understand them and prepare accordingly. *C072685-CA: 2014* ■

CONNECTICUT

Mekrut v. Suits

By Nicole DiGiose and David Griffin of Rutkin, Oldham & Griffin

Husband and Wife entered into a marital separation agreement, which was incorporated into their judgment of divorce. Based on the agreement, the Husband was required to pay $550 per week in alimony until August 13, 2014, and thereafter $450 per week until August 13, 2019. Two years after the marriage was dissolved, the Husband was terminated from his employment and received $106,528.32 in a severance package. Five months after his termination, the Husband ceased making alimony payments. However, during that time he used more than $30,000 of his severance money on repaying various debts.

The Wife filed a first motion for contempt which was granted by the court. The court found that the Husband owed $8,415 in alimony and his failure to pay was wilful. The Husband filed a first motion to modify his alimony payment, which was denied because he failed to meet his burden of proving that a substantial change in circumstances had occurred. One

month later, the Wife filed a second motion for contempt and the Husband filed a second motion for modification. The Husband requested an evidentiary hearing but the judge denied his request and decided the second motions without a hearing. The court granted the Wife's second motion for contempt and ordered the Husband to pay his arrears within ten days or face incarceration. The Husband failed to make the required payment and was incarcerated with a purge amount set for $16,460, the total amount of alimony owed. The Husband's second motion for modification was denied.

"[A] court may not find a person in contempt without considering the circumstances surrounding the violation to determine whether such violation was wilful.... [T]he fact that the defendant had other financial obligations did not excuse him from complying with a clear court order." The Appellate Court affirmed the trial court's decision that

the Husband's failure to continue making alimony payments was wilful. While he was not required to allocate his entire severance package to alimony, he was obliged to budget the funds in a way that allowed him to comply with the court's order.

Under Olson v. Mohammadu, 310 Conn. 665 (2013), a party seeking a modification of a support order bears the burden to show a substantial change in circumstances has occurred. Furthermore, "the alleged inability to pay must be excusable and not brought about by the defendant's own fault. [I]f a party's culpable conduct causes the inability to pay an alimony award… then the threshold question of whether a substantial change in circumstances exists is not met." In Mekrut, the Appellate Court held that the Husband's conduct of prematurely spending his severance package was culpable and he therefore could not meet his burden of showing that a substantial change in circumstances existed.

Lastly, the Appellate Court held that the trial court erred in denying the Husband's repeated requests for an evidentiary hearing. "Due process of law requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation…and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.... [the party] has the right to demonstrate that his failure to comply with the order of the trial court was excusable." Instead, the trial court decided the matter on the papers and determined that the Husband must pay the alimony owed within ten days or face incarnation. In doing so, the trial court violated the Husband's due process rights. *147 Conn. App. 794, 84 A.3D 466 (2014)* ■

FLORIDA

Hahamovitch v. Hahamovitch

By Richard West and Susan Savard of West, Green & Associates

Hahamovitch addresses two important issues relating to the interpretation of prenuptial agreements. The first issue was whether the provisions of the prenuptial agreement were broad enough to waive the Wife's claims to assets titled solely in the name of the Husband, when those assets were acquired by the Husband during the marriage as the result of marital efforts and assets in his name had appreciated in value during the marriage due to marital efforts.

The agreement provided in part that the Husband shall be the sole owner of all property he purchased, acquired, or otherwise obtained in his own name. The court reasoned that this title provision, when read in conjunction with the other provisions of the agreement, was a waiver by the Wife of her claims. To hold otherwise would ignore the title presumption provision of the agreement. In so holding, the court certified conflict with opinions of the Second and Third Districts that have construed prenuptial agreements with substantially similar title provisions as being insufficient to waive a spouse's claim to the enhanced value of the other spouse's non-marital property that resulted from marital earnings. [Irwin v. Irwin, 857 So.2d 247 (Fla. 2nd DCA 2003) and Valdes v. Valdes, 894 So.2d 264 (Fla. 3rd DCA 2004).] The court certified the following question as one of great public importance: "Where a prenuptial agreement provides that neither spouse will ever claim any interest in the other's property, states that each spouse shall be the sole owner of property purchased or acquired in his or her name, and contains language purporting to waive and release all rights and claims that a

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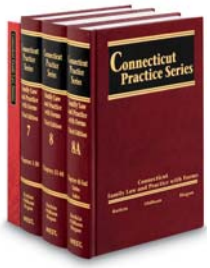

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spouse may be entitled to as a result of the marriage, do such provisions serve to waive a spouse's right to any share of assets titled in the other spouse's name, even if those assets were acquired during the marriage due to the parties' marital efforts or appreciated in value during the marriage due to the parties' marital efforts?"

The court rejected the Husband's argument that because the agreement was signed prior to enactment of the equitable distribution statute in 1988, application of F.S. 61.075 to the agreement would constitute an unconstitutional impairment of a preexisting contract. The Supreme Court in Robertson v. Robertson, 593 So.2d 491 (Fla. 1991) has described F.S. 61.075 as largely a codification of existing case law.

The second issue of interpretation of the prenuptial agreement was whether the Wife had waived her right to seek modification of alimony. The agreement contained a provision for the termination of payments to her upon death or remarriage. The agreement was not solely a property settlement agreement: it was a "blend" of property distribution and alimony. The agreement was silent as to modification of alimony. A waiver of the right to modification of alimony in an agreement must be clear and unambiguous or the interpretation of the agreement as a whole can lead to no other conclusion. The integration clause of the agreement was insufficient to waive modification of the alimony obligation when a substantial change of circumstances existed under F.S. 61.14.

The opinion includes an excellent analysis of the two methods of challenge to the validity of prenuptial agreements. It also provides the history of case law relating to the enhancement and appreciation issues of prenuptial agreements. *133 So.3d 1008 Fla. 4th DCA 2014* ■

GEORGIA

By Sarah McCormack of Kessler & Solominay

Sullivan v. Sullivan

"[A] spouse's interest in a closely-held corporation may be a marital asset subject to equitable division in a divorce; this is so even when the business interest was started as the result of separate pre-marital funds."

The spouse claiming the marital interest in the appreciation of a separate property asset during a marriage "has the burden to establish the interest's true market value at the time of marriage and at the time of divorce."

Where a Husband receives certain shares in a closely held business, for example, the burden was on Wife to demonstrate:

1. the value of such shares at the time of the marriage;
2. the value of such shares at the time of the divorce; and
3. "that any such gain [was] . . . due to spousal effort, either separately or in conjunction with the other spouse."

In this case, the trial court rejected the Wife's attempt to value the closely-held shares at the time of the parties' marriage based upon Husband's basis in said shares, or his sale of said shares under certain circumstances and at certain times. The appellate court held that the trial court had the authority to reject such valuation techniques, and noted that buy-sell agreements with respect to closely-held shares did not necessarily represent the shares' true market value. *2014 WL 1266263 (Ga.)* ■

Sahibzada v. Sahibzada

A trial court has the discretion to prohibit travel by minor children outside of the United States prior to the age of 16 and absent their other parent's consent.

A trial court could not, however, prohibit children from being removed from the State of Georgia.

This case involved a Father with no immediate family in the United States who had family in Canada, Australia, and Pakistan. He had not only sent significant amounts of money to family members in those countries, but he had also traveled unpredictably without informing anyone where he was. *2014 WL 998639 (Ga.)* ■

Friday v. Friday

Where a party seeks downward modification of a child support obligation due to an involuntary loss of income, and the other side files for contempt, the trial court alone determines what "portion of child support attributable to lost income shall not accrue from the date of the service of the petition for modification."

The payor's determination of what new amount of child support is appropriate

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is not binding upon the court, and his or her payment of a lesser amount after the modification is filed and prior to any court approval is undertaken at his or her jeopardy. *2014 WL 819450 (Ga.)* ■

ILLINOIS

In Re Parentage of J.W.

By Gunnar J. Gitlin of the Gitlin Law Firm

In Illinois, there had been an open question of whether visitation in paternity (parentage cases) was a right or a privilege. In In Re Parentage of J.W., 2013 IL 114817, Illinois Supreme Court, addressed this issue: if the standards that apply to divorce law under the Illinois Marriage and Dissolution of Marriage Act applied, then visitation was more of a right than a privilege. If the divorce law applied, then there was a presumption in favor of the biological parent for visitation that did not require that parent to demonstrate that visitation was in the child's best interests.

The father urged that the appellate court correctly ruled that the Illinois Parentage Act incorporates the visitation provisions of section divorce law and so there was a rebuttable presumption entitling the non-residential parent to reasonable visitation – unless the serious endangerment standard were proven by the custodial parent.

The divorce law in Illinois provides that: "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health." 750 ILCS 5/607(a) (West 2008).

In contrast, Illinois parentage law provides that: "the judgment may contain provisions concerning *** visitation privileges with the child." (Emphasis supplied by appellate court.).

The Illinois Supreme Court stated:

> As a result, the presumptive right to visitation in section 607(a) of the Marriage Act, drafted over 30 years ago, is in keeping with the traditional model of a family paradigm, where each parent has presumably exercised custody over the child and one parent will now be granted custody and the other reasonable visitation. Such a presumption reflects a legislative recognition of the need to protect the preexisting parent-child bond that presumably developed prior to the divorce or separation of two parents. Thus, to overcome the presumption that visitation is in the best interests of the child in custody proceedings filed by a parent under the Marriage Act, the General Assembly sought a higher, more stringent burden on the custodial parent than merely the traditional best-interests factors.
>
> In contrast, in actions under the Parentage Act, paternity is at issue and must first be proved. At the time visitation is sought, a relationship with the child may not have ever been forged, especially where paternity is established long after birth. *** Additionally, the paradigm of preserving or continuing the parent-child relationship of a traditional intact family unit does not accurately reflect many family situations. *** Thus, in parentage actions, issues of visitation may arise under situations where the court may be asked to balance several competing interests related to the child.

Accordingly, in Illinois parentage cases, visitation is a privilege, is not subject to presumptive rights (compared to divorce cases where visitation is a right), and is not automatic. The court should make findings regarding visitation being either in the best interests of the child or not in the best interests of the child. A proposed comprehensive re-write to the Illinois paternity law has been proposed and is in the legislative hopper. ■

NORTH CAROLINA

Quackenbush v. Steelman

By Carrie Tortora of Gailor, Hunt, Jenkins, Davis & Taylor

The North Carolina Court of Appeals affirmed the trial court's dismissal of the plaintiff's claims for alienation of affection and criminal conversation for lack of personal jurisdiction.

The facts alleged in Plaintiff's complaint are as follows: Plaintiff and Defendant are citizens and residents of New Jersey. In April 2008, Plaintiff and her husband, Robert T. Quackenbush, attended the funeral of the Defendant's husband, where they met Defendant for the first time. At the time of the funeral, Defendant

invited Mr. Quackenbush to stop by her home to pick up some of her husband's belongings that might have "sentimental value" to him. In October 2009, Defendant learned that Mr. Quackenbush was planning to attend Bike Week in Florida, and she convinced him to allow her to accompany him. Mr. Quackenbush drove to Florida, while Defendant took a plane flight. While in Florida, Defendant pretended to be Mr. Quackenbush's wife and seduced him into having sex with her. Defendant urged Mr. Quackenbush to stay an extra week with her in Florida, and although he declined, he allowed her to drive back to New Jersey with him. On the return trip, Defendant and Mr. Quackenbush stopped for dinner in North Carolina, where they stayed overnight in a hotel and engaged in sexual intercourse that night and the following morning. During their time in North Carolina, Defendant continually implored Plaintiff's husband to leave his wife and move in with her when they returned to New Jersey. Upon

their return to New Jersey, Defendant and Mr. Quackenbush moved in together, and Mr. Quackenbush bought Defendant gifts. Ultimately, Defendant convinced Mr. Quackenbush to file a complaint for divorce from Plaintiff; however, Mr. Quackenbush eventually dismissed his complaint for divorce and has reconciled with Plaintiff.

The Court of Appeals agreed with the trial court's conclusion that the Defendant lacked sufficient minimum contacts with North Carolina to confer jurisdiction on due process grounds. The court cited several factors from prior appellate decisions in determining whether minimum contacts exist, including "(1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties."

While no single factor controlled, the Court emphasized that the "quantity of the contacts" factor "militates against a finding of jurisdiction over Defendant." In addition, as to the second and third factors, the court noted that the parties had been interacting for six months, which detracted from the importance of their brief 18 hour visit to North Carolina. Additionally, the court noted that Mr. Quackenbush's affections had already been alienated – or at least were in the process of being alienated – before Defendant and he arrived in North Carolina. With respect to criminal conversation, although the Court acknowledged that the parties had sex in North Carolina, the court noted that "this factor alone is not dispositive [of the jurisdictional issue]." Finally, the court noted that, aside from the 18-hour stay in North Carolina, none of the three individuals involved had any connection to North Carolina, and that accordingly there was no evidence that North Carolina was a more convenient forum.

In light of the fact that North Carolina is one of the few states that maintains claims for alienation of affection and criminal conversation, this case suggests the courts will scrutinize jurisdictional issues in these cases so as to discourage potential forum shopping. ___ *N.C. App.* ___, *753 S.E.2d 399 (2013)*

NEW JERSEY

By David Wildstein of Wilentz, Goldman & Spitzer

Gnall v. Gnall

Before Judges Messano, Lihotz, and Kennedy. Opinion by Judge Lihotz, J.A.D.

ISSUE 1: Did the trial court err in awarding limited duration alimony of 11 years under the circumstances where the parties had been married almost 15 years, had three children (ages 14, 13 and 11) and were 42 years old at the time of trial?

HOLDING 1: Yes. A 15-year marriage is not short-term, and thus, the trial court on remand must evaluate whether permanent alimony is appropriate taking into account the wife's inability to achieve something close to the marital standard of $18,000 per month. The court declared that there are no specific lines delineating short-term marriages versus long-term marriages and that duration does not dictate the applicability or inapplicability of permanent alimony. A dependent spouse's age alone cannot obviate permanent alimony as age is only one factor weighed in the determination of alimony. Only after the court determines that permanent alimony is unwarranted can the court consider limited duration alimony.

ISSUE 2: Did the trial court err in averaging the parties' expenses over several years when computing the marital lifestyle and the wife's needs?

HOLDING 2: Maybe. The Appellate Division remanded to the trial court for specific findings of fact and legal conclusions regarding the savings component of the wife's budget.

ISSUE 3: Did the trial court err in imputing income to the wife of $65,000 per year?

HOLDING 3: No, but the Appellate Division remanded for the trial court to determine an appropriate effective date of imputation taking into consideration the time and cost necessary for plaintiff's retraining. The trial court's conclusion that the wife ignored her responsibility to obtain work pendente lite was not supported by the evidence. There is no court order or directive that the wife return to work.

ISSUE 4: Did the trial court award an appropriate amount of child support in this high income case?

HOLDING 4: Maybe. The Appellate Division remanded for the trial court to set forth its factual findings supporting a supplemental support award above the child support guidelines amount in light of the parties' high income.

ISSUE 5: Did the trial court err in not addressing the division of bonus income and the wife's use of that bonus to pay living expenses while the husband failed to support her from his income?

HOLDING 5: Yes. On remand, the Appellate Division directed the trial court to consider the treatment and allocation of the bonus income, which was used by the wife to pay her expenses pendente lite while the husband did not support her from his income.

ISSUE 6: Did the trial court correctly calculate the amount of life insurance to secure the husband's alimony and child support obligation?

HOLDING 6: No. On remand, the Appellate Division directed the trial court to consider the husband's

request to reduce the life insurance annually and to allocate the total amount of life insurance between the wife and children. *Gnall v. Gnall, 432 N.J. Super. 129 (App. Div. 2013).* ■

Minknowitz v. Israeli

Before Judges Messano, Lihotz and Ostrer. Opinion by Judge Lihotz, J.A.D.

ISSUE 1: Can an arbitrator resume the role as arbitrator after mediating disputes between the parties?

HOLDING 1: No. Under the Uniform Mediation Act, N.J.S.A. 2A:23C-1 to -13, an arbitrator may not assume the role of mediator and thereafter resume the role of arbitrator absent an agreement of the parties.

ISSUE 2: Can parties who contract to proceed in binding arbitration change the process to mediation resulting in an enforceable settlement agreement?

HOLDING 2: Yes. The change of the process to mediation will not invalidate the settlement agreements previously executed.

ISSUE 3: Did the arbitrator and Family Part err in denying the wife's request for documents following the initial partial settlement agreement?

HOLDING 3: Yes. Although the arbitrator was correct in determining that discovery would not be reopened, the arbitrator improperly precluded the wife from obtaining documents to which she was entitled under the arbitration agreement. *433 N.J. Super. 111 (App. Div. 2013).* ■

Willingboro Mall, Ltd. v. 240/242 Franklin Avenue, LLC

Opinion by Justice Albin.

ISSUE 1: Must a settlement agreement reached at mediation be reduced to writing and signed at the time of mediation?

HOLDING 1: Yes. A settlement that is reached at mediation but not reduced to a signed writing will not be enforceable on a going-forward basis. An audio- or video-recorded agreement would also satisfy this requirement. If an agreement is reached at mediation, it must be reduced to writing and signed before the mediation comes to a close. If the settlement is complex, the mediation should be continued for a brief but reasonable time in order to sign an agreement. Under the facts and circumstances of this case, the oral settlement agreement is enforceable.

ISSUE 2: Did plaintiff waive the privilege that protects the parties from disclosing any communication made during the course of mediation?

HOLDING 2: Yes. A party that expressly waives the privilege and discloses privileged communications that occurred during the mediation cannot later invoke the privilege. *215 N.J. 242 (2013).* ■

J.B. v. W.B.

Opinion by Judge Cuff, P.J.A.D. (temporarily assigned).

ISSUE 1: Under what circumstances can a party seek a modification of a Property Settlement Agreement to create a special-needs trust for the benefit of an unemancipated adult disabled child of the marriage?

HOLDING 1: A parent seeking to modify a Property Settlement Agreement to create a special-needs trust for the support of a disabled child must present a specific plan outlining its purpose and demonstrate how the proposed trust will benefit the disabled child.

The court noted that at a minimum, the trial judge should be provided with a thorough explanation of the trust and its intent so that the judge has a complete understanding of the current physical, psychological, educational, and recreational needs of the dependent disabled child; the costs to support those needs; and the resources available. The court further explained that if the plan relies upon government benefits, the party must explain how the trust will use those benefits. Plaintiff stated that his request for a special-needs trust at this time was so that his money would be in trust for the child while the child received governmental benefits that he qualifies for and needs. The Father asserted that the child is truly being benefitted by the trust because the child would have the benefit of the child support paid into the trust and the receipt of means-tested benefits. The court found this argument disingenuous and self-serving.

ISSUE 2: Did the Court err in not appointing a guardian ad litem for the dependent and unemancipated adult child of the marriage?

HOLDING 2: No. There is no rule or statute that addresses whether a guardian ad litem for the adult unemancipated disabled child should be appointed. The court noted that the basic role of a guardian ad litem is to address the best interest of a minor child. The decision to appoint a guardian ad litem for a child is within the discretion of the judge. Here, because the Father failed to present a comprehensive plan, the trial judge did not mistakenly exercise discretion. However, should the parents submit a detailed plan proposing the trust, the trial court should consider appointment of a guardian ad litem or other resource person.

ISSUE 3: What are the requirements of a special-needs trust?

HOLDING 3: A. The state must receive all amounts remaining in the trust upon the death of the beneficiary up to the total medical assistance paid on behalf of an individual. B. The trust must specifically state that the trust is for the sole benefit of the trust beneficiary. C. The trust must be irrevocable. D. The trust must state that its purpose is to permit the use of trust assets to supplement and not supplant, impair, or diminish any benefits or assistance from the Federal, State, or other governmental agency for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving. *215 N.J. 305 (2013).* ■

NEW MEXICO

Clark v. Clark

By Thomas C. Montoya of Atkinson & Kelsey

Spousal Support Amount and Duration; Income from a Subchapter S Corporation.

1. Husband and Wife were married 13 years. There were no children.
2. Husband had a separate property business, a Subchapter-S corporation and Husband was the sole owner and operator of the business. Husband earned a 3 year average annual W-2 income of $423,413, and average annual

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M. Eileen Echols, the Managing Attorney and Senior Litigator, innovated a team approach to provide exemplary service. Each case is assigned a minimum of two attorneys, who work together with the firm's other attorneys, to provide quality legal services. Eileen is a former Family Law Judge, twice named Outstanding Family Law Judge for the State of Oklahoma, by the Family Law Section of the Oklahoma Bar Association.

David W. Echols is a Fellow in the American Academy of Matrimonial Lawyers, and he has been an AV rated attorney by Martindale Hubbell for over twenty (20) years. Both David and Eileen have been selected as SuperLawyers, by review of their peers; both are former Chairs of the Oklahoma Bar Association's Family Law Section, former Adjunct Law Professors, and both are frequent teachers and lecturers on the topic of Family Law to Oklahoma lawyers.

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non-W-2 income distributed from his business of $212,020, for total income of $635,433.

3. Based on Husband's W-2 income alone, it calculated Husband's gross pre-tax income for spousal support purposes as $35,284 per month.
4. At the time of the final decree of divorce, Husband was 66 years of age, and Wife was 60. Husband's job was physically demanding and, due to his age and health, he wanted to retire.
5. The parties did not introduce any evidence of Wife's earning capacity and did not anticipate Wife's return to work as a viable reality under the circumstances presented to the district court.
6. The district court awarded Wife transitional spousal support for an eighteen-month period, in the amount of $6,500 per month, without any findings regarding how she would be supporting herself thereafter. Wife appealed.
7. The Court of Appeals held that
   a. Subject to certain exceptions, income received from a Subchapter-S corporation owned by a spouse is included when calculating spousal support;
   b. The duration of spousal support is controlled by the recipient spouse's ability to become self-sufficient.
8. Spousal support represents a substitute for or a continuation of the right to support that the spouse had during marriage.
9. The non-W-2 income that is actually distributed by a Subchapter S business is available to be consumed by the parties and can also be used to pay the increased tax obligations incurred as a result of the K-1 allocations issued by the business. Important to this analysis, the non-W-2 income distributions from a Subchapter S business that exceed the amount necessary to pay corporate business expenses or the shareholder-spouse's tax obligations are considered income for purposes of calculating family support obligations.
10. The owner of a closely-held corporation cannot avoid a support obligation by sheltering income that should be available for support by manipulating salary, perquisites, corporate expenditures, and/or corporate distribution amounts. However, we cannot attribute as income funds not actually available to or received by the party.
11. A shareholder-spouse who is able to control the retention or disbursement of corporation funds is required to prove that such actions were necessary to maintain or preserve the business.
12. It was an abuse of discretion for the district court to exclude all of Husband's non-W-2 income received from his separate business when calculating spousal support.
13. The case was remanded the matter to the district court for a factually definitive and legally reviewable calculation of Husband's business income. Upon recalculation, Husband's support obligation to Wife should then be adjusted as necessary.
14. A district court should not terminate jurisdiction to extend a future support order after a lengthy marriage, unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction. As a result, rehabilitation awards that provide spousal support for a limited duration have generally involved younger recipients with substantial job skills and relatively short marriages.
15. When a district court finds that a spouse is currently entitled to periodic spousal support but may later become self-sufficient, the proper course is to order such support for an indefinite time, with the payor spouse bearing the burden to move for reduction or elimination of support when it appears that the recipient spouse has in fact become more self-sufficient.
16. Automatic termination of Wife's spousal support after eighteen months could only be justified in this case if, after eighteen months, Wife's income was sufficient to establish that spousal support would no longer be necessary to help support her reasonable needs, which evidence was lacking. The case was remanded for further consideration by the district court regarding the duration of the spousal support to Wife.

Certiorari Denied, December 11, 2013, No. 34,414. 2014-NMCA-030, _ P.3d _;

NEW YORK

R.P. v. L.P.

By Leigh B. Kahn, of Mayerson Abramowitz & Kahn, LLP

The parties in R.P. v. L.P. had an interest in a residence in Pennsylvania, among other assets. They owned the residence with the Wife's mother as joint tenants with rights of survivorship; the parties had a two-thirds interest in the residence, and the Wife's mother a one-third interest. During the pendency of the New York matrimonial action, the Husband retained a lawyer in Pennsylvania and filed an action seeking a partition of the Pennsylvania property.

Before the Husband could effectuate service of the complaint in the Pennsylvania partition action, however, the Wife obtained a temporary restraining order enjoining the Husband from commencing such an action in Pennsylvania. Upon full determination of the motion, the Wife was granted an order "enjoining and restraining the Husband, pendente lite, from commencing or prosecuting, or directing anyone to commence or prosecute on his behalf, a partition action with respect to, or placing or directing another at his request to place on the market for sale, the

property located in Pennsylvania, without the Wife's consent or an order of this court".

In granting the Wife's application, the court first noted that the parties owned their interest in the Pennsylvania residence as tenants by the entirety, a form of ownership which, it is well-established under New York law, may not be altered prior to the issuance of a judgment of divorce (unless both parties consent). In rejecting the Husband's argument that a partition action that seeks only to sever the parties' joint tenancy with the Wife's mother would not affect the Wife's interest in the Pennsylvania residence, the court noted that "the Wife's interest in the property includes her interest in the parties' joint tenancy with her mother."

In addition, the court in R.P. noted the prohibitions of the automatic orders set forth in Domestic Relations Law § 236(B)(2)(b) and 22 New York Court Rules and Regulations § 202.16-a, which preclude either party to a matrimonial action from "selling, transferring, encumbering, concealing, assigning, removing or in any way disposing of, without the consent of the other party in writing, or by order of the court [before which the matrimonial action is pending], any property pendente lite, whether individually or jointly held by the parties, except in the ordinary course of business." The court held that the Husband's partition action "would effectively result in one or several of the prohibited actions" and that, therefore, "it would constitute a violation of the automatic orders, for which the Husband could be subject to contempt penalties."

The R.P. decision can be read as implicitly holding that the automatic orders themselves should preclude the very step that the Husband took in filing a partition action in Pennsylvania, since that action would result in one of the transactions prohibited by the automatic orders with respect to the

Pennsylvania property. However, in granting the Wife's application for an interim restraining order precluding the Husband from pursuing the partition action he had filed in Pennsylvania, the court acknowledged that the automatic orders do not expressly prohibit a party from taking steps that might lead to the occurrence of one of the enumerated transactions; rather, they merely prohibit the transactions themselves. Consequently, the decision in R.P. highlights a "gap" in the automatic orders, one that – in the absence of an application for injunctive relief – could permit a party to accomplish indirectly (through legal maneuvering in another court) that which the orders would prohibit him or her from accomplishing directly. *NYLJ 1202644228019 (Sup. NY 2014)*

PENNSYLVANIA

M.O. v. J.T.R.

By Michael E. Bertin of Obermayer, Rebmann, Maxwell & Hippel

M.O. v. JTR., 2014 Pa. Super. 15 (February 4, 2014), addressed the issue of whether the court has to analyze the 16 statutory custody factors under 23 Pa.C.S. §5328(a) and delineate its reasoning in its decision when deciding a "subsidiary" issue that does not affect the determination of which party will have primary custody.

The issue before the court was whether Father was to be required to be off from work during his five-week vacation time with the children. The trial court held that he did not.

The Pennsylvania Superior Court agreed with the trial court, which held that "because the hearing was limited to a single, discrete and narrow issue, it was not required to address each of the 16 factors." The trial court also held that most of the factors contained in Section 5328(a) were not relevant to the single issue before the court.

The Superior Court held that: "The plain language of Section 5328(a) requires that the 16 enumerated factors be considered when the court is determining a child's best interest for the purpose of making an award of custody." The Superior Court indicated that a subsidiary issue is not an "award of custody" as defined under Section 5323(a). The Superior Court stated: "While the court must consider the child's best interest when modifying a custody order, the modification provision [in the custody statute] does not refer to the 16 factors of Section 5328….The cases in which we [the Superior Court] have applied Section 5328(a) have involved an award of custody as defined by Section 5323(a) or have involved modification that also entailed a change to an award of custody."

The trial court's ruling in the M.O. case modified the prior order by lifting the requirement that Father had to be off from work during his five weeks of summer custody, but did not change the underlying award of custody. Therefore, based on the specific facts of the M.O. case, the Superior Court found that Section 5328(a) was not implicated directly. The Superior Court further provided a reminder that the trial court was not exempt from determining that the modification that it made was in the best interest of the children, and stated that the trial court's decision was in the children's best interest.

Therefore, the Superior Court found that the trial court was not required to analyze all 16 custody factors and was not required to delineate the reasoning for its decision on the record since the issue before the court was a subsidiary issue. *85 A.3d 1058 (Pa. Super. 2014)*

TEXAS

Tucker v. Thomas

By Brad LaMorgese of McCurley, Orsinger, McCurley, Nelson & Downing

In an issue of first impression, the Texas Supreme Court held that a trial court may not award attorney's fees incurred in a non-enforcement modification suit affecting the parent-child relationship as additional child support or necessaries. Husband and Wife sought modification of their final decree. At trial, the court characterized the attorneys' fees as necessaries and ordered payment of the amicus attorney's fees and Wife's attorney's fees as additional child support, subject to contempt and jail time if not paid. The Court of Appeals affirmed the court's ruling.

The Texas Supreme Court reviewed whether the Wife's attorney's fees could be awarded as additional child support. The Supreme Court reasoned that because the Legislature expressly authorized the assessment of attorney's fees as additional child support in enforcement suits, but not in modification suits or under Title 5's general attorney's fees provision, the Legislature did not intend to grant the trial court authority to characterize Wife's attorney's fees as part of Husband's child support obligation. Further, Section 151.001 of the Family Code does not authorize trial courts in non-enforcement modification suits to characterize attorney's fees as necessaries, enforceable by contempt. Thus, though the trial court could award fees, it did not have discretion to award them as necessaries or as additional child support in a non-enforcement modification suit. The Supreme Court noted that it expressed no opinion as to whether the amicus attorney's fees could be awarded as additional child support. *419 S.W.3d 292 (Tex. 2013)* ■

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Double Dipping / Cont. from page 22

basis for alimony, the court used that money twice: once to value the distributed value of the business, and again to determine the amount of alimony — a classic case of double dipping.

In Sampson v. Sampson, the value of the wife's insurance agency was offset in the husband's property distribution and then was counted as credit towards his alimony support obligations. The wife argued that this was double counting. Because there were inconsistencies in the experts' reports concerning owner salary, the court was unable to determine whether double counting had occurred, and it remanded the case for further factual determinations on this issue.

The court in *Champion v. Champion*, noting that there is a split among jurisdictions on the issues of what constitutes double dipping and whether it ought to be prohibited as a matter of law, rejected a claim of double dipping and found the business to be both a marital asset and a source of income.

In *Keane v. Keane*, New York's highest court held that the prohibition against double counting applies only to intangible assets, such as professional licenses or goodwill, or the value of a service business — not income-producing tangible assets such as a rental property.

In *Sander v. Sander,* the court ruled that it is not double counting to assign a value to a business, as well as to attribute gross income from that business to the spouse, without adjusting either. Where the trial court, in its discretion, valued the company at a value it would have to a buyer who would pay a manager's salary, the court's decision was upheld as both logical and supported by the record. ■

Shannon P. Pratt, CFA, ARM, ABAR, FASA, MCBA, CM&AA, is the founder and Alina V. Niculita, CFA, ASA, MBA, is the president of Shannon Pratt Valuations, Inc., a national business valuation firm located in Portland, OR. Dr. Pratt has more than ten books in print on various business valuation topics including valuations for marital dissolution purposes and he has testified on hundreds of occasions in various types of litigated matters including divorce cases. Ms. Niculita manages valuation engagements at Shannon Pratt Valuations, and has contributed to several business valuation books.
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Lawyer Reputation Management: What's in an Avvo Rating?

Whether you like it or not, your Avvo rating is available for all to see. You cannot ignore it; your rating is part of your online reputation, which could impact your practice.

By Martha Chan, Marketing Consultant for Family Lawyers

By now, almost all lawyers know about Martindale Hubbell's lawyer ratings, but not everyone is aware of Avvo's ratings. Do you know that there might be a profile about you on www.Avvo.com, which might display peer and client reviews as well as rating you as a lawyer? If you know about it, are you happy with your rating? Not all attorneys think their rating is accurate, so I interviewed Mark Britton, Avvo's founder and CEO, to gain some insights on his company and its lawyer rating system.

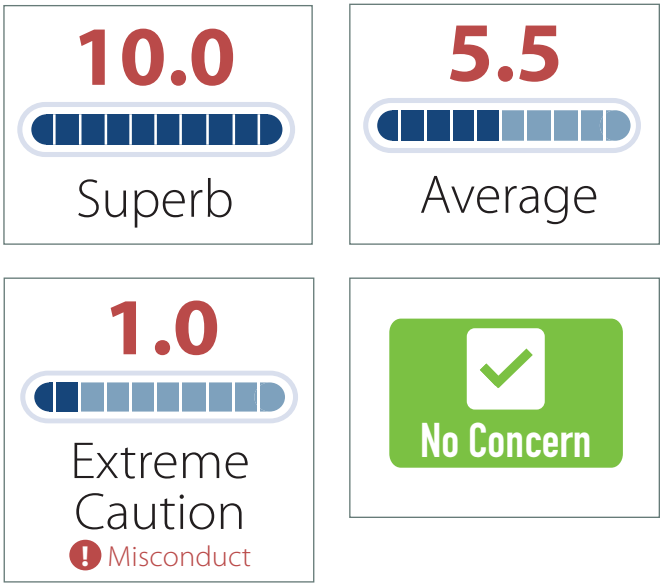
Although Avvo is a relatively new player in the online lawyer directory/ratings game, it has gained momentum with online users, lawyers, and investors since its launch in 2007. Monthly visits to Avvo currently stand at 5 million+; the company has rated more than 97% of U.S. lawyers, and 160,000 of those actively participate in the website by providing 3 million searchable answers.

Whether you like it or not, your Avvo rating is available for all to see — including potential clients, your competition, and opposing counsel. You cannot ignore it; your rating is part of your online reputation, which could impact the future of your practice.

Most people know they can't trust everything they read online ("Consider the source!"). However, the debate about whether you are a good family lawyer worthy of being hired is now online for all to see — whether you like it or not, and whether you are aware of it or not.

Avvo's Data Collection Process

The company starts by obtaining information from the State Bar Association. Then it uses a network of trained crawlers to collect publicly-available information about a lawyer from multiple sources – including court records, the law firm's website, and mentions on other web pages. Avvo tracks the rest of an attorney's information through the web on an ongoing basis. As a lawyer switches firms or experiences career growth, Avvo reassesses that lawyer and adjusts his/her rating periodically.



Rating System and Attorney Profiles

When they have collected sufficient data on a lawyer, Avvo creates a profile and numerical rating from 1 to 10 using a mathematical model developed with input from many lawyers. This system is meant to create an unbiased ranking for consumers to use along with the lawyer's profile as two of the factors when deciding which lawyer to hire. Any work experience, industry recognition, achievements, and disciplinary history will be listed in the profile. A lawyer can add new and correct wrong information on their profile after "claiming" his/her Avvo profile.

This rating system uses multiple top-level elements, and there are many variables within each element. For example, Industry Recognition is a top-level element; in that category, Avvo's big data team assesses which awards a lawyer has received are significant/relevant (e.g., an award from the ABA is more important then one for coaching Little League Baseball), considers whether the lawyer is a

thought leader, and discovers whether the top publications or organizations look to the lawyer as a timely or academic commentator. When it comes to work experience, the system will consider many factors, including years of practice and whether the lawyer has held the most prestigious jobs in the given state.

If Avvo is not able to garner enough data about a lawyer to provide a numerical rating, it will display a rating of either "Attention" or "No Concern". The former is used if there is information in the licensing records, such as a disciplinary action against a lawyer, without positive information to offset it. The latter is used when there is no negative information in the records. In both cases, consumers are advised to perform more research before deciding for or against hiring a lawyer.

Well-Guarded Algorithms

Each lawyer's Avvo rating is derived from a multifaceted mathematical algorithm that weighs many factors. Avvo is constantly adapting its system to be as current and impartial as possible, and the algorithm itself is both carefully guarded and regularly updated to prevent attorneys from "gaming" the system.

Understandably, Britton won't discuss the secrets behind Avvo's ratings in great details; both the threat of copycats and unfair manipulation prevent him from disclosing details about the algorithm. The challenge is to balance helping attorneys understand how to achieve a rating that genuinely reflects their skills and experience without allowing anyone to undermine the integrity of the system by gaming it.

What Factors Influence Ratings?

An attorney's educational background, relevant work experience, and professional achievements will impact his/her Avvo rating. There are about two-dozen top-level variables measured by their algorithms, but there are hundreds of second-level variables and new information that will impact the overall picture.

Because your rating is based on publicly-available information, it pays to ensure that you have a great online reputation by having complete information about your work experience, achievements, and industry recognition on your own website as well as other relevant websites.

Britton says that claiming your Avvo profile does not impact your rating; in fact, many lawyers who are unaware of Avvo's existence have received top ratings. However, a complete profile with relevant information will help to provide more information to the Avvo data team and the general public — which help a prospective client choose you over another lawyer.

The Impact of Client Reviews

Britton notes that client reviews do not contribute to an attorney's rating on Avvo. Although clients can be very passionate about their lawyers, they often have difficulty understanding what constitutes a legal "win". Positive client reviews do, however, help lawyers appear higher in Avvo's sort order.

Having a good online profile and reputation is crucial — not just on Avvo, but on as many relevant websites as possible.

Optimizing your Online Reputation

In one sense, your rating is a reflection of your qualifications as a lawyer: practices and actions that make you a good lawyer will help you obtain a good rating. However, lawyers who are marketing-savvy and understand the importance of making their qualifications and success known will get more visibility than those who do not. This is especially true in the online world, where the circle of influence reaches far beyond those who actually know you.

Having a good online profile and reputation is crucial — not just on Avvo, but on as many relevant websites as possible. With the power of the Internet at every prospective client's fingertips, you are your Google results.

Providing detailed information on an online profile can transform a consumer's perception of you from a collection of impersonal data to a living, breathing person who could actually help them. As much as possible, you should reinforce and keep updating your profile with information about your experience, knowledge, and skills. This will maximize your visibility — which helps to convert consumers into clients.

At the very least, you should correct inaccurate information, including contact information and place of employment.

You may not be able to make an unhappy client understand that you achieved the best possible result given their circumstances, but you can let others know who you are, your experience and skills, and your contribution to the legal community by ensuring your online profiles are in tip-top shape. ■

Martha Chan is a marketing expert for family lawyers and divorce professionals. She is a co-owner and vice president of marketing for Family Lawyer Magazine, Divorce Magazine, *and Divorce Marketing Group, a marketing agency dedicated to promoting family lawyers and divorce professionals.*
www.divorcemarketinggroup.com

Hidden Assets / Cont. from page 41

For starters, the conduct described above was expressly outlawed in 1999 by the *Gramm-Leach-Bliley Act* (GLB), also known as the *Financial Modernization Act* of 1999. Section 521 of GLB makes it a federal criminal offense to "obtain or attempt to obtain, or cause to be disclosed or attempt to cause to be disclosed to any person, customer information of a financial institution relating to another person. ... (1) by making a false, fictitious, or fraudulent statement or representation to an officer, employee, or agent of a financial institution; ... (2) by making a false, fictitious, or fraudulent statement or representation to a customer of a financial institution; or ... (3) by providing any document to an officer, employee, or agent of a financial institution, knowing that the document is forged, counterfeit, lost, or stolen, was fraudulently obtained, or contains a false, fictitious, or fraudulent statement or representation."

This change has led many attorneys to cease engaging in these types of investigations altogether.

There are, however, methodologies that are still effective in this modern banking environment — and more importantly, do not run afoul of *GLB*. While the task has certainly become more difficult, and the information available is more limited, it is still feasible to determine what institutions a party has accounts with — and in some instances, how much they have on deposit — without running afoul of the law.

Surveillance

No-fault divorce statutes have removed the need for surveillance in matrimonial cases to gather evidence of grounds (e.g., adultery). But surveillance can still be a valuable investigative tool. Often through direct observation or "reverse engineering," surveillance leads to the discovery of undisclosed assets such as real estate, business interests, vehicles, boats, planes, banking relationships, etc.

For example, investigators conducting surveillance note the license plate of the Mercedes driven by the client's estranged spouse. A check of that license plate reveals that it is registered to an out-of-state company that leased the Mercedes six months prior – almost a year before the divorce action began. A check of the Vehicle Identification Number reveals the Mercedes was leased through a local dealership. A visit to the dealership by investigators confirms that the subject spouse leased this vehicle (and another Mercedes, apparently for his paramour) through the out-of-state corporation. The dealership provides copies of the certificate of incorporation and corporate resolution authorizing the leases. The subject spouse's name does not appear on the certificate of incorporation, thus no amount of public records searching would have likely turned up his connection to the company. However, crucially, the corporate resolution states that the subject spouse, as an owner and officer of xyz corporation, is hereby authorized to execute lease(s) etc. The kicker: the certificate of incorporation shows that the company was formed *almost two years prior to the commencement of the case*. The subject spouse's interest in this company is marital property, subject to equitable distribution – but it was never disclosed and turns out to be of substantial value.

A subject spouse is observed during surveillance visiting a townhouse apartment outside New York City. A check of the address reveals that an LLC owns the property. (Extensive public records and database searches on the subject spouse did not uncover this address or link the subject spouse to it). Research on the LLC reveals that it was formed more than a year before the commencement of the case. Investigators also find the name of the corporate service that filed the LLC along with the LLC's address, which is a Post Office box in the LLC's name.

Searches of this P.O. Box through every available public records database yield no affiliation with the subject spouse. However, a bank account

locate search for the LLC reveals that a particular bank had run a check on the LLC through a third-party verification service. A subpoena to that bank finds that the LLC did have an account there and that the subject spouse was a signatory on the account. Subsequent discovery efforts prove that the subject spouse had formed the LLC with a relative and had purchased the townhouse in question, as well as two others, several years before filing for divorce, but had failed to disclose these acquisitions during the case. If not for the surveillance, all this property would likely have gone undetected. ■

[1] The laws governing when a party (in this case, a spouse) has a right to access data on a device in the marital home vary from state to state, and the decision to employ this strategy should involve careful analysis of all the facts on a case-by-case basis.

Nicholas G. Himonidis is an attorney, licensed private investigator, certified fraud examiner, and certified computer forensic specialist. He is vice president of Investigations at T&M Protection Resources in New York City. www.tmprotection.com

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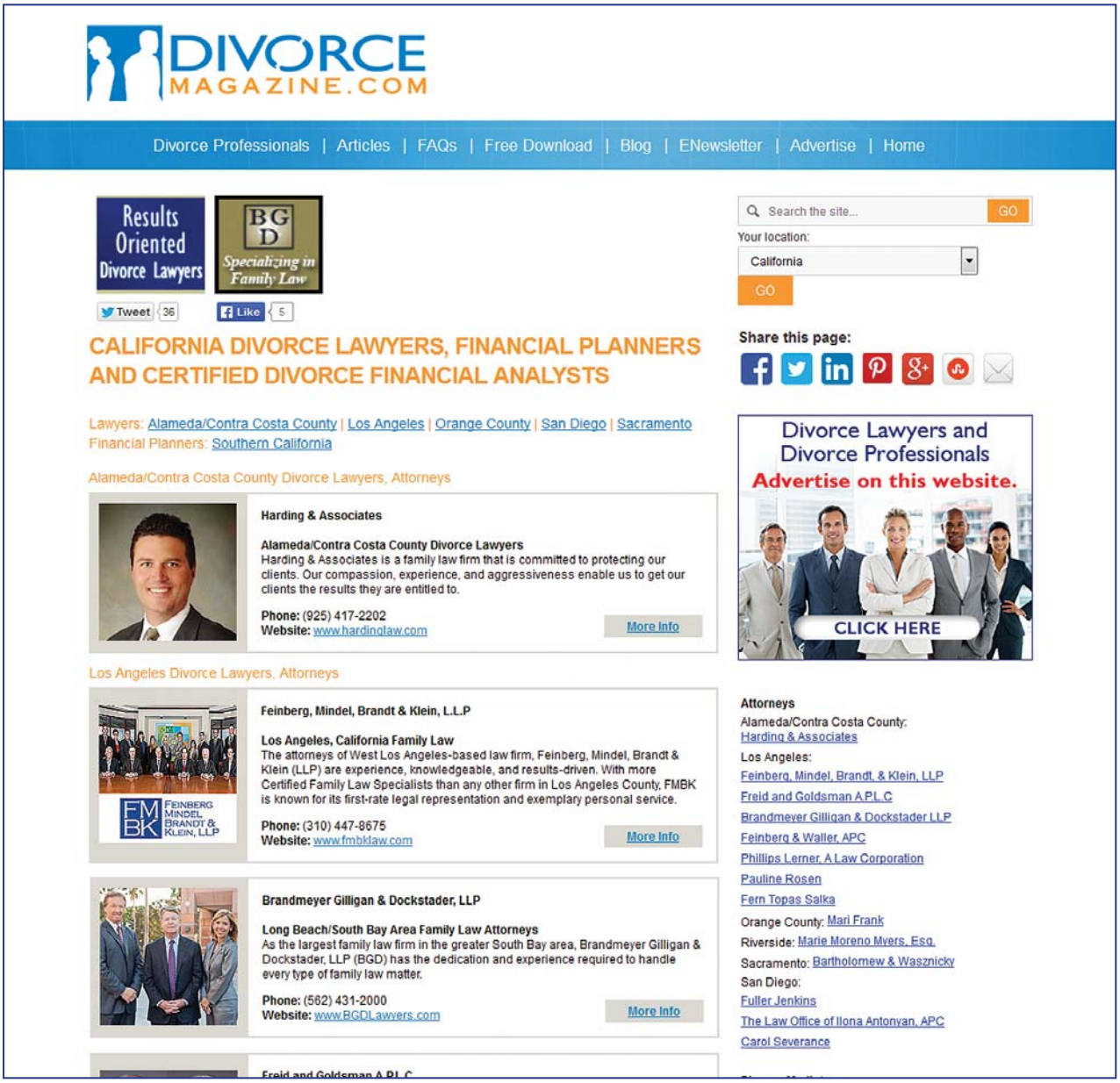

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TEN COMMANDMENTS
FOR HANDLING MILITARY RETIREMENT BENEFITS

By Amy Privette, Paralegal, and Mark Sullivan, Family Lawyer

Military retirement benefits are not handled in the same manner as private pension plans, which are governed by ERISA (Employee Retirement Income Security Act). Allocating and dividing military retirement benefits as part of a divorce case is not easy. The best advice is to find someone "in the know" who can help you and your client navigate the minefield of military pension division, Survivor Benefit Plan (SBP) coverage, medical care before and after divorce, and other retirement benefits. Still, for those bold enough to take on the challenge, here are some tips to help you get started:

1 **Get the docs.** There are numerous documents that you need to request from the servicemember (SM) to evaluate what retirement benefits are available. This could include a Leave and Earnings Statement (for active duty members), Retirement Points Statement (for Reserve and Guard members), Retiree Account Statement (for retirees), SBP election forms, retirement orders and discharge papers, as well as Officer or Enlisted Record Briefs.

2 **Know the rules.** The division of military retired pay is authorized by the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408. It is an enabling act which allows states to divide military retired pay, but leaves the specifics of how to do it up to each state. The Survivor Benefit Plan (SBP) is the survivor annuity program which allows the former spouse to continue receiving a stream of payments after the servicemember/retiree dies. SBP is provided for under 10 U.S.C. § 1447 et seq. Volume 7B of the Department of Defense Financial Management Regulation, DoD 7000.14-R (DoDFMR) expands upon the federal statutes to provide more detailed guidance as to the division of military retirement benefits. See also 10 U.S.C. § 1408 (c)(4) for specific rules regarding which courts have jurisdiction to divide military retirements.

3 **Identify the system.** Active duty retirement occurs under one of 3 systems: a) Final retired pay b) High-3 c) CSB/Redux [1]. Reserve/National Guard retirements are based on retirement points, NOT time, and the servicemember must have at least 20 "good years" of service (50 points are required to have a good year) to be retirement-eligible. Active duty retirements pay out immediately upon retirement whereas Reserve or Guard retirements generally do not pay out until the retiree reaches age 60. The cost of providing SBP coverage to a former spouse can also differ, depending on whether it is an active-duty or reserve retirement.

4 **Use the right lingo.** SCRA – When the SM has not yet retired, the pension division order must state that the SM's rights under the Servicemembers Civil Relief Act, 50 U.S.C. Appx. 501 et seq., have been honored. DFAS is the retired pay center for Army, Navy, Air Force, Marine Corps (as well as Reserve units and Air and Army National Guard). There are separate pay centers for retirees of the Coast Guard, Public Health Service, and National Oceanographic and Atmospheric Administration. Disposable Retired Pay (DRP) is gross retired pay less any VA disability waiver, the premium

for SBP (if coverage is for former spouse of this divorce), and any other money owed to Uncle Sam. DRP is what the pay center divides, regardless of what the court order says. COLAs (cost-of-living adjustments) are usually applied to retired pay in January, and are automatically included in the share received by the former spouse unless the court order awards the spouse a flat dollar amount. The pension is not a "fund," so you cannot refer to the account balance or the part of the fund acquired during the marriage or vested at the date of divorce. Use an MPDO (Military Pension Division Order) to divide the retirement benefits, not a QDRO, since this is not a "qualified plan" under federal law; it is a statutory retirement program.

5 **Choose wisely.** When the pension is based on retirement from active duty, there are four acceptable methods for dividing it: a) fixed dollar amount; b) percentage; c) formula clause; and d) hypothetical award. There are pro's and cons for each method, so make sure you evaluate which would be best for your case. A full explanation of the four methods can be found in the Attorney Instruction Guide available at the DFAS website [2].

6 **Don't forget the SBP.** SBP is a unitary benefit and cannot be divided between a present and former spouse. Without SBP, the stream of pension payments to the former spouse ceases upon the death of the servicemember/retiree. The benefit paid out is 55% of the selected base amount. The maximum base amount is the full retired paycheck; the minimum base amount is $300. The cost for coverage is generally 6.5% of the selected base amount, paid upon retirement by deduction from the pension check. If the former spouse predeceases the retiree, then the spouse's share of the retired pay automatically reverts back to the retiree – at NO cost. If the former spouse gets remarried before age 55, then her coverage under SBP is halted.

7 **Watch the clock.** There must be ten years of marriage overlapping ten years of military service for the former spouse to get pension payments directly from the pay center. Even with an overlap of less than ten years, the former spouse is still eligible to claim a share of the retired pay, but the retiree will have to make the payments. There are two deadlines for setting up SBP coverage for the former spouse. When the SM makes the election, it must be done within one year of divorce; when the former spouse sends in a "deemed election," it must be done within one year of the order requiring the other party to elect SBP coverage.

8 **Beware of disabilities.** Certain types of disability compensation can reduce the retired pay that is divisible with a former spouse. The primary types of disability payments are military disability retired pay, VA disability compensation, and Combat-Related Special Compensation (CRSC). The court cannot divide VA disability compensation (see 1989 Mansell decision by the U.S. Supreme Court), and only a small part of military disability retired pay is subject to pension division (although disability benefits ARE subject to consideration in support cases, in general). When the military retiree has a VA disability rating of less than 50%, election of VA payments means a dollar-for-dollar reduction of retired pay; thus, the retired pay share for the former spouse gets reduced due to the unilateral action of retiree. Courts and agreements often employ indemnification language to guard against this and to protect the property share awarded to a former spouse.

9 **Don't Get a Life.** When representing the former spouse, don't rely on Servicemembers Group Life Insurance to secure benefits; a 1981 Supreme Court decision says courts cannot enforce orders or agreements that require SGLI. *Ridgway v. Ridgway, 454 U.S. 46 (1981).*

10 **"Medic!"** If there have been 20 years of marriage overlapping 20 years of military service, then an un-remarried former spouse may qualify for full medical benefits as a 20/20/20 spouse. For shorter term marriages, look in to CHCBP (Continued Health Care Benefit Program) as a means of providing health insurance coverage.

[1] militarypay.defense.gov/retirement/ad/01_whichsystem.html

[2] www.dfas.mil/garnishment/usfspa/attorneyinstructions.html

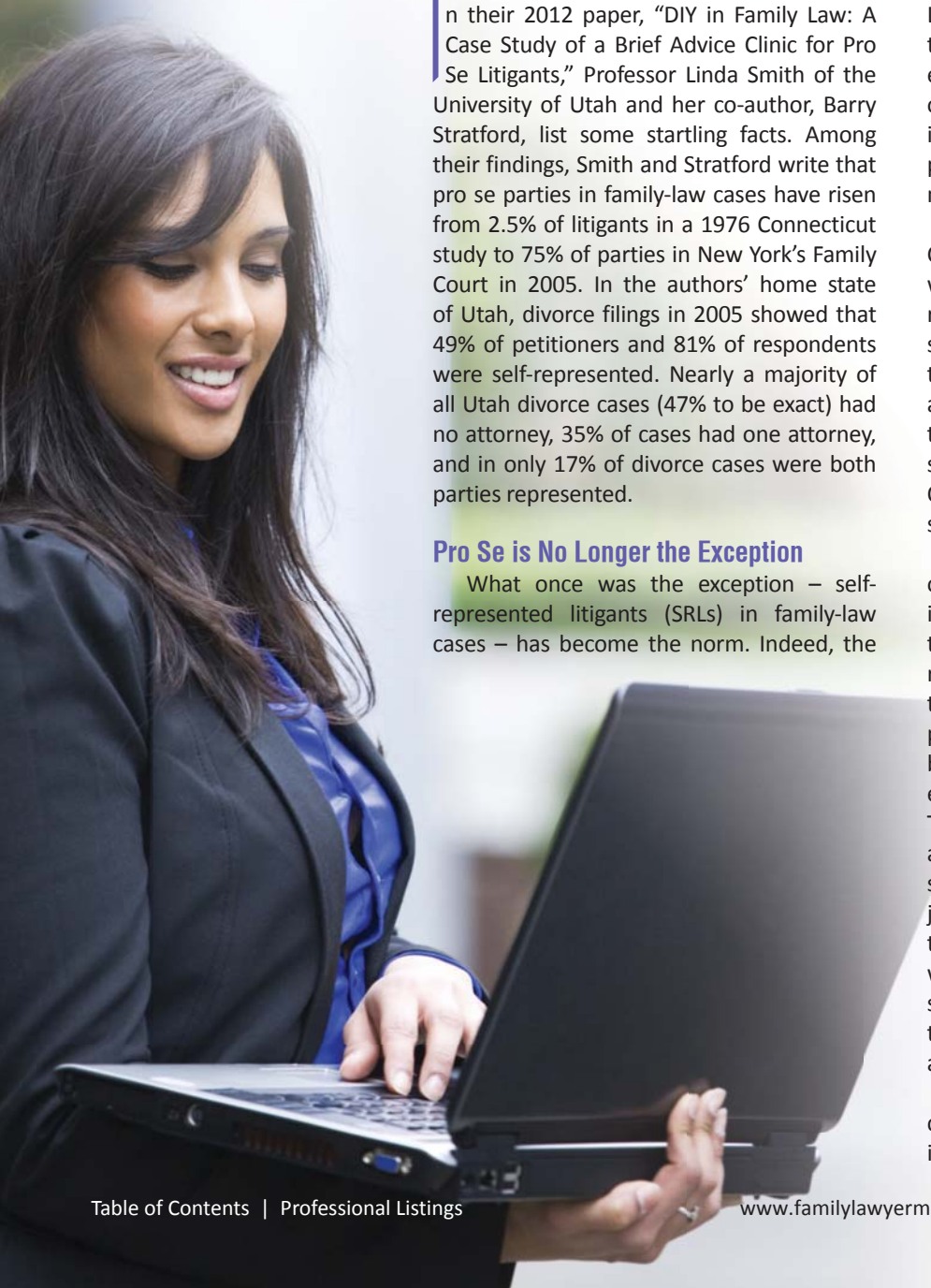
Mark Sullivan is a retired Army Reserve JAG colonel, practicing family law in Raleigh, NC. He is the author of THE MILITARY DIVORCE HANDBOOK *(Am. Bar Assn., 2nd Ed. 2011). A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as a consultant and an expert witness on military divorce issues in drafting military pension division orders.* www.ncfamilylaw.com

Amy Privette, a NC State Bar Certified Paralegal, contributed to this article when employed by the Law Offices of Mark E. Sullivan, P.A., where her primary responsibility was family law, with a special focus in the area of military divorce and federal pension division issues. Ms. Privette is now in law school at Regent University.

Using Technology
When the Other Side is Pro Se

When the opposing party is a pro se litigant, family law attorneys can minimize disruption to court proceedings through the use of technology that fosters open information and communication for both sides.

By Joshua Lenon, Technology and Ethics Lawyer



In their 2012 paper, "DIY in Family Law: A Case Study of a Brief Advice Clinic for Pro Se Litigants," Professor Linda Smith of the University of Utah and her co-author, Barry Stratford, list some startling facts. Among their findings, Smith and Stratford write that pro se parties in family-law cases have risen from 2.5% of litigants in a 1976 Connecticut study to 75% of parties in New York's Family Court in 2005. In the authors' home state of Utah, divorce filings in 2005 showed that 49% of petitioners and 81% of respondents were self-represented. Nearly a majority of all Utah divorce cases (47% to be exact) had no attorney, 35% of cases had one attorney, and in only 17% of divorce cases were both parties represented.

Pro Se is No Longer the Exception

What once was the exception – self-represented litigants (SRLs) in family-law cases – has become the norm. Indeed, the Legal Services Corporation now estimates that the programs and resources devoted to ensuring access to justice address only 20% of the civil legal needs of low-income people in the United States. Therefore, family-law practitioners should expect to be facing non-represented parties on a regular basis.

When it comes to SRLs, judges' Model Code Rule 2.2 encourages courts (some would argue, out of necessity) to make reasonable accommodations to ensure pro se litigants have the opportunity to have their matters fairly heard. This means that attorneys in family-law cases should expect the court to waive certain requirements and standards that would be imposed on lawyers. Often, the normal rules do not apply to pro se litigants.

Unfortunately, this means that SRLs often disrupt the court process, lengthening already drawn-out proceedings. In 2013, the Arkansas Access to Justice Commission released a report on pro se litigants. Within the three counties studied, 22% to 27% of petitioners represented themselves, and between 90% and 95% of respondents had either represented themselves or defaulted. The study also surveyed circuit court judges about their experiences with self-represented litigants, and 91% of responding judges reported differences in how efficiently those cases are handled compared with when both parties are represented by counsel. The study findings reinforce the view that a lack of legal representation negatively affects court operations.

However, the rules of court still apply to counsel representing clients against SRLs – including abiding by court rules and orders

that provide aid to pro se parties. For example, the Washington State Supreme Court, in their Access to Justice Technology Principles, imposes a duty on "all persons and entities who may represent, assist, or provide information to persons who come before the court" to use technology to promote equal access to justice and equal opportunity for participation in the justice system.

Role of Technology in Pro Se Cases

While Washington's technology principles do not mandate that lawyers limit their use of technology to accommodate self-represented parties, they do impose a duty to employ technology that advances those principles for both sides of a legal matter. Indeed, the principles state that the justice system shall reject, minimize, or modify any technology use that reduces the likelihood of achieving the objective of a just process. The technological tools you use when facing an SRL should effectively aid the process of justice.

Family law counsel can work with the court to minimize the disruption pro se litigants cause to proceedings by choosing tools that support speedy resolutions. This means using technology that is not only convenient for the lawyer, but also creates efficiencies for the opposing side.

Why would you help the opposing side, even if it is represented by a pro se litigant? As officers of the court, family lawyers should adopt tools that are convenient to SRLs in order to minimize disruption and to aid in reaching speedy resolutions for their clients.

There are several key technologies that are helpful to family lawyers that can also be used to smooth out disruption when the opposing party is self-represented.

Family lawyers should use cloud-based document management tools that can also serve as repositories for SRLs. Openly sharing necessary documents ensures the proceedings go as smoothly as possible by providing the SRL with easy access to important information. It is entirely possible that a pro se litigant might not be as organized as opposing counsel. The loss of documents and a lack of organization can be minimized if family lawyers choose to utilize a technology that can serve representation on both sides of the legal matter.

Improving Communication

Communication between lawyers and SRLs is another area where technology can help minimize disruption. You should choose a messaging service that can act as a hub for messages and document transfers. However, there is a fine line in this matter: family lawyers should not have control over SRLs' communications, but they should be open to providing a messaging portal (similar to those used to communicate with clients) to allow for the secure, speedy delivery of information to and from pro se parties.

Lastly, some advanced solutions allow lawyers to manage the schedule by using calendaring software and task assignments to inform SRLs of meetings and deadlines. Family lawyers should make the extra effort to invite pro se litigants to meetings. Normally, a party's counsel would keep track of hearing conferences and scheduled events, but SRLs may need extra help keeping track of deadlines and upcoming events. Family lawyers should take advantage of their system's task assignment functions and calendar invites to help keep both parties on schedule for agreed deadlines.

By using technology that minimizes disruptions caused by SRLs, family lawyers can continue to represent the best interests of their clients while also doing their part to aid court operations. Family attorneys should be open to utilizing technology that furthers equal access to justice. ■

Joshua Lenon is an attorney admitted to the New York Bar Association. He studied law at St. Louis University School of Law, obtaining a JD and a Certificate in International and Comparative Law. Joshua currently serves as Lawyer-in-Residence for Clio, providing legal scholarship and research skills to the leading cloud-based practice management platform. www.goclio.com

Dealing with Digital Detractors — A New Ethics Trap for Divorce Lawyers?

Gone are the days of inconspicuous client relations. Today's consumer can publicly critique every company or professional — including attorneys — online. How you respond to digital detractors can either land you in trouble, or help restore your reputation.

By John Browning, Trial Lawyer

Ah, the good old days; when dealing with an irate client meant fielding a few angry phone calls or responding to a curt letter informing you that your services were no longer needed. You moved on, presumably the client moved on, and that was usually the end of it. But in today's digital age, where everyone is just keystrokes away from airing their grievances with the world, comments posted to lawyer ratings sites like Avvo.com — or even consumer complaint sites like Yelp.com, or RipoffReport.com — can live online forever and pop up in response to Internet searches for your name. As with any criticism, there's a right way and a wrong way to respond — and the wrong way can land you in front of the disciplinary board.

Digital Defensiveness Can Lead To Trouble

One Chicago employment attorney learned this lesson the hard way in January 2014, when she received a reprimand from the Illinois Attorney Registration and Disciplinary Commission for revealing a client's confidential information in a public forum. The Chicago attorney had represented a former American Airlines flight attendant during late 2012 and early 2013 in an unsuccessful quest for unemployment benefits (the client had been terminated for allegedly assaulting a fellow flight attendant during a flight). After firing his attorney, the disgruntled client posted a review of the lawyer on the attorney review site Avvo.com. In the post, the client expressed his dissatisfaction bluntly, claiming that his former attorney "only wants your money," that her assurances of being on a client's side were "a huge lie," and that she took his money despite "knowing full well a certain law in Illinois would not let me collect unemployment." Within two days of the negative comments, the attorney contacted her former client by email, requesting that he remove the post; the client refused to do so unless he received a copy of his file, and a full refund of the $1,500 fee he had paid.

Sometime in the next two months, Avvo removed the Chicago man's posting from its online reviews of the attorney. But on April 10, 2013, the former client posted a second negative review of her on Avvo.com. This time, the attorney responded by posting a reply the next day on the site. In the reply, she called the allegations "simply false," said that he didn't "reveal all the facts of his situation" during their client meetings, and stated: "I feel badly for him but his own actions in beating up a female coworker are what caused the consequences he is now so upset about." According to the Illinois disciplinary authorities, it was this online revelation of information obtained from her client that violated the Rules of

Professional Conduct, as well as the fact that her posting was "designed to intimidate and harass the former client and keep him from posting additional information about her on the Avvo website," which constituted another violation of professional conduct rules, as well as conduct that tends to "bring the courts or the legal profession into disrepute."

In a similar situation, a Georgia attorney's petition for lesser sanction of voluntary discipline was rejected by the state's disciplinary authorities. According to *In re: Skinner*, after being fired and replaced by new counsel, the lawyer responded to negative reviews "on consumer websites" written by the former client by posting "personal and confidential information about the client that the attorney had gained in her professional relationship with the client." The court didn't go into detail about the exact comments posted, however, and specifically noted that the record didn't reflect "the actual or potential harm to the client as a result of the disclosures." And in an unpublished 2013 California opinion, *Gwire v Bloomberg*, a disgruntled former client anonymously posted comments about a California lawyer on ComplaintsBoard.com, accusing the attorney of committing "a horrific fraud" and including a "partial summary of the attorney's incredibly unethical history." The attorney responded with a post calling his former client "unreliable," "a proven liar," "mentally unbalanced," and made references to his divorce file and previous business failures. When the California attorney sued his former client for defamation and trade libel, the client tried to have the lawsuit dismissed under California's Anti-SLAPP statute. While the trial court allowed the defamation claims to go forward (and was affirmed by the appellate court), the appropriateness of the California attorney's response to the online remarks wasn't raised as an issue on appeal.

An All-Time Low: Planting Fake Reviews

Of course, there is an even more disturbing way for an attorney to get into trouble over reviews on websites: not by revealing confidential client information, but by posting fake or fabricated content, both negative and positive (false testimonials). In 2013, an attorney was publicly reprimanded by the Minnesota Supreme Court for "falsely posing as a former client of opposing counsel and posting a negative review on a website." In Dallas, Texas, a pending lawsuit brought by one law firm accuses a rival firm of a campaign of false postings while posing as unhappy ex-clients. And in August 2013, Yelp took the extreme step of suing a San Diego bankruptcy firm for allegedly "gaming the system" through the "planting of fake reviews intended to sway potential clients with false testimonials."

Responding Positively To Negative Reviews

So what *can* you do when faced with negative online reviews? Sure, suing for defamation is an option, as one Nevada family lawyer did when the ex-husband of a woman he had represented published nasty comments about him on Facebook. But most of what's said in an online review is likely to be non-defamatory because it is opinion and/or protected free speech. Moreover, as the cautionary tales discussed here illustrate, posting a rebuttal that gets too specific and breaches attorney-client confidentiality can result in a trip to the disciplinary board. The best approach may be that advocated by Josh King, general counsel of Avvo, who calls negative commentary "a golden marketing opportunity." He says, "By posting a professional, meaningful response to negative commentary, an attorney sends a powerful message to any readers of that review. Done correctly, such a message communicates responsiveness, attention to feedback, and strength of character. The trick is to not get defensive, petty, or feel the need to directly refute what you perceive is wrong with the review." ■

John G. Browning is the founding partner of the Dallas, TX office of Lewis Brisbois Bisgaard & Smith, where he handles civil litigation in state and federal courts. He is the author of The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law *(Aspatore Books, 2010), and is considered a leading authority on the topic.* www.lbbslaw.com

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Lisa Schmidt stays current with the information about her clients' cases and the laws surrounding them, and she's not afraid to push for changes in the law when needed.

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Family Lawyers

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Mary Dagenhart
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mdagenhart@yjkfamilylawfirm.com
www.yjkfamilylawfirm.com
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Patricia M. Barbarito is a Certified Matrimonial Attorney. She is the former chair of the New Jersey Bar Association (Family Law Section) and a fellow of the American Academy of Matrimonial Lawyers.

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www.kzellaw.com
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270-10711 Cambie Road
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Overcoming the Top Five Billing Challenges

Billing software can resolve issues you have with mobility, fee disputes, handling retainer fees, collections, and multiple billing models.

By Dr. Rick Kabra, Technology Specialist

As a family law attorney, you likely already have your hands full with emotional clients, children in need, and complicated, ever-evolving divorce laws. You also face a unique set of practice-management issues that use up time that could be better spent in court or consulting with new clients, which affects your firm's profitability. Here's a look at five of the most common challenges found in family law practices, and solutions that can simplify attorneys' lives.

Technology: Boon Or Bane?

"Technology is supposed to make our lives easier, allowing us to do things more quickly and efficiently," wrote James Surowiecki in an article in The New Yorker. "But too often it seems to make things harder, leaving us with fifty-button remote controls, digital cameras with hundreds of mysterious features and book-length manuals, and cars with dashboard systems worthy of the space shuttle."

This is just as true with improper implementation of law practice management software as it is with television remotes. Wrong solutions may simply complicate things, requiring you to take an hour to accomplish something that you could do in ten minutes with pen and paper. How is that smart?

On the other hand, just because some technology is over-designed doesn't mean that all technology is bad. Many senior attorneys remember a day before cell phones, easy Internet access, and digital files, but they can't actually recall how they managed to run a practice without these tools.

The best option is to give serious thought to the challenges you face, and then find a technology that addresses those needs. The software that's right for the attorney across the street practicing estate planning isn't necessarily the right solution for you. Even if you already have a working solution, it is worth your time to evaluate the new cloud-based offerings because they offer solutions that yesterday's desktop software couldn't.

The Five Big Problems

Here are five of the most common problems that interfere with the function and growth of a family law firm.

1. **Mobility.** Family law is one of the most mobile specializations in the legal field. You spend a lot of your time in courtrooms, settlement conferences, and mediation sessions. You need case details at your fingertips, and you need to be able to record your hours and expenses right away rather than trying to remember your charges at the end of the day.

2. **Fee Disputes.** Some clients love to nickel and dime their attorneys – especially in lengthy cases decided in ways they consider unfair. An angry client could file a frivolous billing dispute months or years down the road that at best wastes your time and money, and at worst draws the attention of your state bar.
3. **Retainer Handling.** The best way to get paid is to get paid up-front. Many family law practices ask for advance retainers so they can be sure to get paid. Even after you deposit those funds in your trust account or business account, it is illegal to spend that money until you have earned it through your documented fees. Tracking every penny of retainer funds across dozens of cases is a challenge for many family law firms.
4. **Collections.** Few attorneys want to deal with dunning clients for payments, but unless you stay on top of your invoicing, you will find too many matters simply never get paid. The chance of collection drops rapidly as accounts age, so it is important to be vigilant.
5. **Billing Models.** Although family law invoices traditionally use the billable hour, a recent study shows 62% of law practices surveyed are moving away from hourly billing in an effort to keep clients happy (see www.bna.com/using-alternative-fee-arrangements-to-increase-new-business). However, tracking your actual expenses so you can be sure your fees aren't too high or too low requires stacks of paperwork and is very difficult to do by hand.

The Five Big Solutions

Specialized billing software for attorneys can address each of these problems. Most modern law firm billing software offer some or all of these features:

1. **Mobility.** Cloud-based law office management software gives you secure access to your legal billing system from anywhere with an Internet connection – which these days is pretty much everywhere. Rather than depending on hastily scribbled notes or your own memory, you enter your billable hours and expenses as they are incurred so you can bill accurately.
2. **Fee Disputes.** The best defense against fee disputes is a comprehensive audit trail, which is easy to create with legal time and billing software. Nothing stops a fee dispute faster than an itemized and chronological log of all your activities. Audit trails need to be scrupulously protected, since "my hard drive crashed" carries about as much weight with your state bar as "my dog ate my homework". A good cloud-based solution stores data on remote, professionally-managed servers so you know your data is safe if you need to defend against a fee dispute.
3. **Retainer Handling.** Family law attorneys normally deposit retainers in attorney trust accounts. That makes sense when you consider the duration of most family law cases, the large amounts involved, and the rules of your state bar association. However, attorneys often forget that trust accounting is even more critical to a family law office than their billing needs. Unless your trust and billing systems work together, you are eventually going to make a costly mistake in your record keeping. You really need a legal billing program with integrated trust management functions so you can track advance retainers easily. You also need to be able to issue low-retainer reminders easily so you can notify clients when they need to replenish their accounts.
4. **Collections.** Your collection efforts start with your invoices. In the article "Attorney Fees: Five Keys to Ethical Compliance", author David Cameron Carr calls accurate invoices "an essential part of a lawyer's ethical duty to communicate with the client." Invoices should be clear and uncluttered so clients aren't confused about how much they owe. However, even the best clients sometimes forget to pay on time. You can't collect money if you don't know what is owed. Legal billing software should give you a 360-degree view of your practice's finances so you can tell at a glance what hasn't been billed and what hasn't been paid. In summary, two best practices to keep your collections manageable are consistent invoicing and timely overdue account notices. If your billing software allows one-click generation and emailing of invoices and payment reminders, then you are miles ahead.
5. **Billing Models.** You don't want to be locked into the billable hour if you are looking into alternative billing, but you also want to retain the option for hourly rates to supplement flat-fees with added charges for unusual work. Even for flat-fee matters, you need to be able to track unbilled hours and expenses so you can evaluate your fee structure and ensure it is fair. Look for software that offers all these billing model options.

Technology does not always make things better, but that doesn't mean you should continue to practice in the Stone Age. Sit down and make a list of the top five billing problems in your family law practice – they might not be the same as the ones above – and look for a software solution that addresses your specific concerns. With the help of the right technology, you will have more time to give your clients the personal attention they deserve. ■

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International Assisted Reproductive Technology and U.S. Citizenship

The question of whether U.S. citizenship will transmit to children born outside of the U.S. remains an important issue for your clients when they choose to make assisted reproductive technology arrangements abroad.

By Leslie Schreiber, Lawyer and Counselor

The United States fosters a positive environment for Assisted Reproductive Technology arrangements (or ART). Nevertheless, there may be situations that motivate intended parents to consider traveling abroad to engage in ART to create their family. This article will examine the issue of transmission of U.S. citizenship to a child born abroad through assisted reproductive technology. When counseling clients who are considering traveling outside U.S. borders to create a family, an examination of the citizenship issues must be an integral part of the conversation because the risk of unwittingly creating a climate for a "stateless" child is a valid one. A stateless child is one who has no recognized national state in which he/she is entitled to live, or he/she is not recognized as a citizen of the state where the intended parents live.[1]

Taking all Factors into Consideration

Whether considering egg donation, embryo donation, or utilizing a gestational surrogate, there are many factors that enter into the decision-making process. Firstly, the climate for assisted reproductive technologies varies amongst each state within the U.S. A majority of the states statutorily enable egg donation and surrogacy, and enforce the contracts between intended parents and their collaborative partners. There are a few exceptions, however. Michigan is the only state that outlaws surrogacy arrangements.[2] Additionally, several states rendered surrogacy contracts unenforceable, namely: Arizona, Indiana, Kentucky, Louisiana, and New York. Due to these exceptions, it is essential to advise your client about your choice of law and any potential risks involved.

The Major Financial Motivator

Another factor that may motivate intended parents to look abroad is cost. The main barrier faced by an American intended parent in choosing surrogacy here is the prohibitive cost. A typical surrogacy arrangement made through an independent surrogacy agency averages around $100,000 in the U.S. This cost includes the agency fee; surrogate compensation; professional fees such as legal, medical, and psychological evaluations; incidental costs for the surrogate; and insurance, if necessary. There are often unanticipated costs, so expecting a finite number is unadvisable. Egg donation fees vary depending on whether the process involves services of a third-party agency, an in-house fertility clinic's egg bank, or a private individual, as well as how many IVF cycles one utilizes. Regardless of the method used, the fees are often upward of $20,000.

The sheer sticker-shock forces many intended parents to seek alternatives — the main option being to search beyond the U.S. borders to find ART-friendly and financially-feasible jurisdictions.

Countries like India and Ukraine have developed billion-dollar industries by creating favorable surrogacy environments. Other countries, such as Italy and Canada, have imposed strict barriers to the practice.[3] Such disparity in this new "fertility tourism" industry can wreak havoc on the uninformed client.

Will U.S. Citizenship be Transmitted to Your Client's Child?

So, if your clients do decide to travel abroad for ART, an integral part of the discussion must include whether U.S. citizenship will be transmitted to any child or children born. Recent policy changes at the Department of State impact the rules governing the transmission of U.S. citizenship to children born abroad through the use of ART. Determining whether U.S. citizenship will be conferred upon children born abroad to an American parent utilizing surrogacy falls under the Department of State, and is governed by U.S. law. More specifically, transmission of U.S. citizenship at birth to a child born abroad is governed by the Immigration and Nationality Act (INA) Sections 301 and/or 309. Section 309 governs children born out of wedlock. The Department of State broadly interprets the INA rules to: "require a U.S. citizen parent to have a biological connection to a child in order to transmit U.S. citizenship to the child at birth."[4]

Previously, the rules required that a mother have a genetic connection to a child in order to qualify as a parent for the purpose of obtaining immigration benefits. Recognizing the increase in ART procedures around the world, the Department of State amended its rules in an attempt to keep up with the medical advances. Under the newly revised policy, birth mothers (gestational mothers) who are also the legal parent of the child will be treated the same as genetic mothers for the purposes of immigration benefits. What this means is that if a gestational mother (as interpreted by the DOS) utilizes the services of an egg donor, even though there is no genetic connection, citizenship will be bestowed as long as all other conditions per the rules are met. ■

[1] Charles P. Kindregan, Jr. and Danielle White, "International Fertility Tourism: The Potential for Stateless Children in Cross Border Commercial Surrogacy Arrangements." Social Science Research Network, 2013.

[2] MICH. COMP. LAWS ANN. § 722.857 (West 2013)

[3] Legge 19 febbraio 2004, n. 40 (It.) and Assisted Human Reproduction Act, S.C. 2004, c. 2 § 6 (Can.), respectively.

[4] "Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad." Travel.State.Gov.

Please utilize the online version of this article for helpful links and further information: www.familylawyermagazine.com/articles/art-citizenship.

Leslie Schreiber has been practicing law for over twenty years. She began her career in the appellate arena as a judicial clerk before transitioning to the appellate division for Florida's Attorney General's office. Enamored with reproductive law, she changed the course of her career. Leslie is an active member of the ABA's Family Law Section of Assisted Reproductive Technology. www.leslieschreiber.com

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Retirement Benefits/Cont. from page 34

marriages, you may want to forward a copy to the employers during the marriage. Make your list of questions concise to ensure the plan administrator will take the time to answer them; otherwise, the administrator may place it at the bottom of his or her stack of inquiries.

You should also ask the administrator or employer to provide the exact start date of the participant's employment, and the date he/she began participating in each of the plans. Participation in a defined contribution plan — e.g., 401(k) or similar plan — doesn't always coincide with the date of employment, and this information may be necessary when examining premarital versus marital benefit accruals.

If the spouse with the majority of the retirement benefits is unwilling to sign the authorization, the information will have to be subpoenaed with the questionnaire portion attached.

Cases of Multiple Benefit Plans

Practitioners may also encounter participants in multiple pension plans. If the divorce involves a union employee, benefits may have accrued under two or three different pension plans: one funded through employer contributions, one funded through union dues, and possibly a national pension plan. The practitioner must ask if the participant is involved in one or more plans associated with his or her union or job classification, past or present. ■

Tim Voit is a nationally recognized expert in QDROs and pension valuations, a financial analyst, and founder of Voit Econometrics Group Inc. He is the author of Retirement Benefits & QDROs in Divorce *(CCH, 2004) and Federal Retirement Plans in Divorce – Strategies and Issues (Voit Econometrics Group, 2011). A sample questionnaire/authorization is available by visiting:* www.vecon.com/downloads.

Same-Sex Marriage in the New American South

Southern jurisprudence is at the forefront of protecting the rights of same-sex couples.

By Robert Miller, Lawyer

On September 26, 1996, President Bill Clinton signed into law the Defense of Marriage Act (DOMA). Section 3 of DOMA defined the institution of marriage for federal purposes as between "*one man and one woman*", and allowed states not to recognize same-sex marriages from states that did recognize same-sex marriage. Following the passage of DOMA, many states amended their constitutions to prohibit same-sex marriage.

Despite these state prohibitions remaining in place today, national opinion has significantly shifted since 1996. For example, one Gallup poll found that in 1996, approximately 68% of Americans believed that same-sex marriage should not be recognized as valid. By contrast, in 2011, that same Gallup poll found that 53% now approve of same-sex marriage. Hence, in just 15 years, American popular opinion has shifted from vastly disapproving of same-sex marriage to a slight majority approving of it. And while it is true that support still lags in the south, approval ratings are up 14% in the last decade (21% in 2003 to 35% in 2012).

It was in this rapidly-changing landscape that the United States Supreme Court heard the case of *United States v. Windsor*, 570 U.S. 12 (2013), which marks the beginning of the end of state and federal prohibitions on same-sex marriage. Surprisingly, in the wake of *Windsor*, four southern courts have held their bans on same-sex marriage unconstitutional. The inevitable question thus becomes: "Why would four historically conservative southern courts all find state bans on same sex marriage unconstitutional?" In search of an answer, it is best to start at the beginning.

Windsor: The Beginning of the End

Edith Windsor and Thea Spyer were a same-sex couple from New York who married in Canada in 2007. Spyer passed away leaving her entire estate to Windsor, who attempted to claim the federal estate tax exemption for surviving spouses. Pursuant to Section 3 of DOMA, Windsor was barred from doing so by the Internal Revenue Service, who found that the exemption did not apply. Windsor was required to pay $363,053 in estate taxes.

Windsor was successful in the lower courts where Section 3 of DOMA was held to be an unconstitutional violation of her equal protection rights. Following another win on appeal, the United States petitioned the United States Supreme Court and in a 5–4 decision, issued on June 26, 2013, the court held Section 3 of DOMA to be an unconstitutional violation of equal protection because the "avowed purpose and practical effect of the law was to impose … a separate status… upon all who enter into same-sex marriages…" In its holding, however, the court made it clear that Windsor should not be applied to state specific prohibitions on same-sex marriage.

Four Southern Courts Hold Bans on Same-Sex Marriage Unconstitutional

In the ten months following the *Windsor* decision, at least seven courts have used the opinion to invalidate state bans on same-sex marriage. Despite the court's statement that *Windsor* should not be used to strike down state bans, it should come as no surprise that it has been used in this manner. Justice Antonin Scalia even predicted this result in his *Windsor* dissent, stating, "[The majority holds that] DOMA is motivated by "'bare… desire to harm couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws…" In Justice Scalia's opinion, the issue of same-sex marriage should be left to the individual states to decide.

Unfortunately, Justice Scalia's dissent fails to acknowledge that state laws often disenfranchise minorities. This is especially true with regard to southern jurisprudence where, for example, anti-miscegenation laws prohibiting interracial marriage were still on the books as recently as 1967. The Supreme Court has long been the final arbiter with regard to the constitutionality of state and federal laws. Likewise, Justice Scalia's argument neglects the substantially similar justifications used by the United States (regarding DOMA) and the individual states (regarding their own bans). In short, the justifications have been *exactly* the same: (1) protect traditional marriage, (2) responsible procreation, and (3) optimal child rearing. Each of these justifications were addressed and summarily dismissed in *Windsor*, and therefore it should come as no surprise that *Windsor's* language would be used to invalidate substantially similar state laws and justifications.

What follows is a summary of two of the four southern opinions that used *Windsor* to invalidate same-sex bans in Oklahoma and Virginia.

Bishop v. United States (Oklahoma)

Plaintiffs Mary Bishop and Sharon Baldwin challenged a 2004 voter-approved amendment to the Oklahoma Constitution that defined marriage as between one man and one woman, following their denial of a marriage license. Bishop has the distinction of being the first southern court, post-*Windsor*, to invalidate a state prohibition of same-sex marriage.

In his well-articulated opinion, Judge Terence C. Kern thoroughly explains why Oklahoma's constitutional amendment violates the equal protection clause of the Fourteenth Amendment by precluding same-sex couples from receiving an Oklahoma marriage license. The Court explained that a "class-based equal-protection challenge… generally requires a two-step analysis… the Court asks '[1] *whether the challenged state action intentionally discriminates between groups*… [and, if so, 2] *whether the state's intentional decision to discriminate can be justified by reference to some upright government purpose*." In answering part one, the Court quotes verbatim an Oklahoma Senate press release and selected quotes from Oklahoma senators, which reference judicial efforts to block the redefining of marriage. The Court concluded that the "exclusion of the defined class was not hidden… it was consistently communicated to Oklahoma citizens as a justification." Finding that the law intentionally discriminated against same-sex couples, the Court shifted its focus to determine whether the law was justified.

A recent Gallup poll found that 53% of Americans now approve of same-sex marriage. And while it is true that support still lags in the south, approval ratings are up 14% in the last decade.

Prior to determining whether the law was justified, the court had to establish the appropriate level of scrutiny. The Court determined that the type of discrimination at play was "sexual-orientation discrimination," which required only rational basis review (most deferential to the government), not gender-based discrimination, which would have required heightened scrutiny. The Court determined that rational basis review was required; however, the level of scrutiny was ultimately of little consequence because the state was unable to pass even basic rational basis muster. As in *Windsor*, the state argued four justifications: (1) promoting morality, (2) encouraging responsible procreation, (3) promoting optimal child rearing/ideal family, and (4) protecting traditional marriage. The Court addressed each in turn, ultimately holding that all four justifications were impermissible and that the fourth was simply based on the "majority's disapproval of the defined class." In short, all of the justifications that were addressed and dismissed in *Windsor* were similarly dismissed in *Bishop*.

Bostic v. Rainey (Virginia)

The plaintiffs in *Bostic* were same-sex partners who were unable to obtain a marriage license as a result of Article I, Section 15-A of the Virginia Constitution, which defined marriage as between "one man and one woman." *Bostic* sought injunctive relief and a declaration that Section 15-A was an unconstitutional violation of equal protection provided by the Fourteenth Amendment. *Bostic* was granted both requests.

The Bostic opinion is unique in that after determining that (same-sex) marriage was a "fundamental right," the court applied "strict scrutiny" review. This is a radical departure from the majority of post-*Windsor* cases (and indeed *Windsor* itself), which applied rational basis review or, at most, heightened scrutiny. Applying strict scrutiny, the Court noted that Virginia's prohibition must be justified by a "compelling

state interest" and be "narrowly drawn to express only those interests." As the reader can probably infer, the *Windsor* justifications (e.g., tradition, federalism, responsible procreation), which have not passed rational basis review, were summarily dismissed by the court when strict scrutiny was applied.

The *Bostic* opinion is also important as it eloquently explains the interplay between the judicial branch and changing popular opinion with regard to same-sex marriage. Judge Arenda L. Wright Allen poignantly noted that "the protections created for us by the drafters of our constitution were designed to evolve and adapt to the progress of our citizenry… Tradition is revered in [Virginia]… However, tradition alone cannot justify denying same-sex couples the right to marry any more than it could justify Virginia's ban on interracial marriage." This observation is, perhaps, the quintessential example of the American judicial system reflecting the popular opinion of the people and the reason why state bans on same-sex marriage are falling in rapid succession.

Conclusion

It is tempting to argue that the outcomes above are simply a product of political party lines and activist judges. However, this argument is flawed in that it fails to account for the significant shift in public opinion over the last decade with regard to same-sex marriage. Indeed, at the time when most of the United States' same-sex marriage laws were implemented, national support of same-sex marriage hovered near 30% according to most polls. However, national public opinion has shifted and now has a 50% or higher approval rating. Hence, it is not surprising that American jurisprudence is also moving towards acceptance. What is surprising is that of the seven post-*Windsor* opinions, four have come from what has historically been the conservative southern United States, a region that Justice Scalia noted was a "familiar object of the Court's scorn."

Similar to jurisprudence regarding miscegenation laws and "separate but equal" facilities for African-Americans, which were struck down as public opinion began to shift, so too has jurisprudence with regard to same-sex marriage found its tipping point. This tipping point has only been made easier given the similar/disproven justifications being levied by the United States in *Windsor* and subsequent state cases. And while southern popular opinion still lags behind national opinion, proponents of same-sex marriage can take comfort knowing that southern jurisprudence, which is historically slow to address similar civil rights issues, is at the forefront of protecting the rights of same-sex couples, perhaps more so than ever before. ■

Robert Miller is an attorney at Kessler & Solomiany, LLC, located in Atlanta, Georgia. The firm's practice is limited to family law matters such as divorce, child custody/support and modifications of previous court orders. Mr. Miller is extremely active in the Atlanta legal community and he is a member of the Young Lawyers Division, Child Protection & Advocacy and Family Law sections of the State Bar of Georgia. www.ksfamilylaw.com

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Dan Couvrette is CEO of Divorce Marketing Group, the only one-stop marketing agency dedicated to helping family lawyers and other professionals who work with divorcing people grow their practices. He was the only marketing professional asked to present at the 2014 AICPA/AAML National Conference on Divorce. www.divorcemarketinggroup.com

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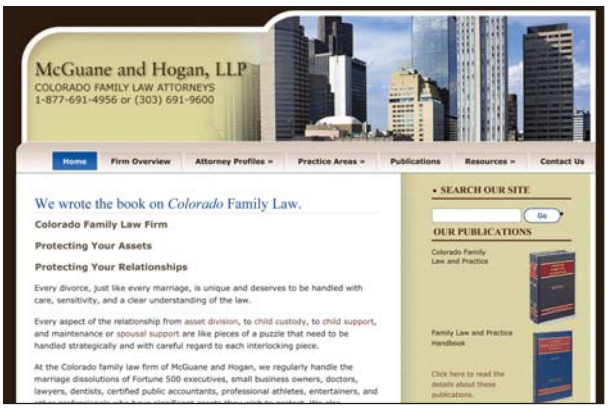

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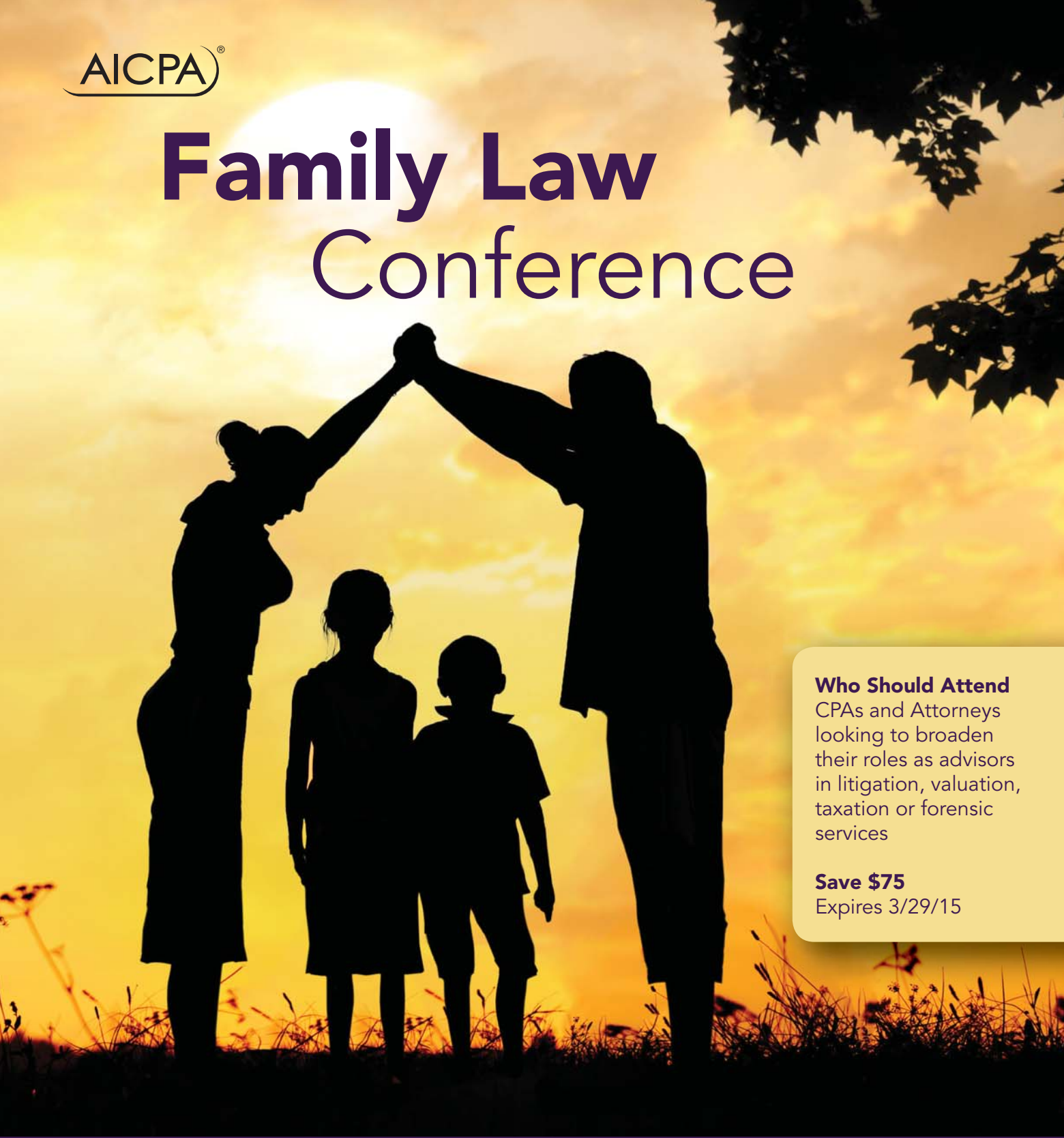

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