

# FAMILY LAWYER

Fall 2019

MAGAZINE

## Technology & the Future of Family Law

**Online Dispute Resolution:  
Good News or Bad News?**

**Obtaining & Presenting  
Electronic Evidence**

**Survey Results: Technology  
& Indispensable Apps**

**Reducing Manual Work  
to Improve Well-Being**



**Lawyers' Addiction & Mental Health Issues**

**Does an Expert Witness' Opinion  
Depend on Who Hired Them?**

**Challenging Retention Bias and  
Adversarial Allegiance in Court**

**Trust Accounts Dos & Don'ts**

**Forensic CPAs in Divorce Cases**

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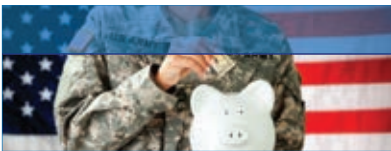
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## MESSAGE FROM THE PUBLISHER



*Dan Couvrette is the CEO of Divorce Marketing Group and Publisher of Family Lawyer Magazine, Divorce Magazine, and DivorcedMoms.com*

### The Intersection of Artificial Intelligence & Human Expertise

**A**s technology advances, legal research and processes can be done faster, more accurately, and/or cheaper. With these advances comes a threat to the careers of those in the legal profession. However, technology could create significant opportunities for those attorneys who take advantage of these advances and evolve their law practices.

In this issue, we offer two articles on online dispute resolution, artificial intelligence, and the future of family law (pp. 6 and 10), which show how technology is being used to help streamline information gathering, negotiations, and cases where couples cannot afford lawyers. At the same time, they also suggest how family lawyers

can use and incorporate online dispute resolution features and the standardized process into their law practice.

Artificial intelligence cannot replace human expertise and experience (yet!). We asked family lawyers and forensic experts to examine how objective expert testimony really is; you'll find their responses in "Does an Expert's Opinion Depend on Who Hired Them?" (p. 18), and "Challenging Retention Bias and Adversarial Allegiance in Expert Testimony" (p. 14),

We surveyed family lawyers and other family law professionals about how they are using technology in their practices; you will find the survey results starting on p. 24. Two family lawyers felt strongly enough about their favorite apps to write articles about them (p. 25 and 39). What's your indispensable app?

If you use eDiscovery, do you know the current best practices – especially when it comes to capturing publicly available data such as social media content? If you are not 100% sure, read "Obtaining and Presenting Electronic Evidence During eDiscovery" (p. 28).

Technology can also help when it comes to your well-being. If you embrace automation, you could reduce the burden of manual processes on you and your staff (p. 40). Speaking of well-being, we highly recommend that you take a look at "Addiction and Mental Health Issues Among Family Lawyers" (p. 34); the strategies and resources there could save someone's career – or life.

Other informative articles include:

- Generating Clients Using Pay-Per-Click Advertising
- Fighting over Custody of Frozen Embryos
- The Economic Reality of Maintenance Post TCJA
- What Family Lawyers Must Know About Trust Accounting
- The Role of the Forensic CPA in Divorce
- Can Pre-Marital Military Years Become Marital in a Pension?

We hope you find this issue both engaging and useful. If you are interested in contributing thought-provoking content to us, please email [Editors@FamilyLawyerMagazine.com](mailto:Editors@FamilyLawyerMagazine.com).

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# Online Dispute Resolution

Technology is disrupting the law – and this disruption may generate significant opportunities for those attorneys willing to embrace change and evolve their practices.

Technology is changing our society, and in doing so, it is changing our relationships. We now use computers to communicate with those we love almost every minute of the day. We use technology within our families (even when we’re together in our houses) in ways that would have seemed incredibly strange in 1993. We have integrated technology into our lives to such a degree that we now use it for many of our most intimate conversations. That means when a dispute arises within our family (maybe over the care of an elderly parent, or over shared custody of a child, or over spousal support payments), our expectation is that we will be able to use technology to resolve it.

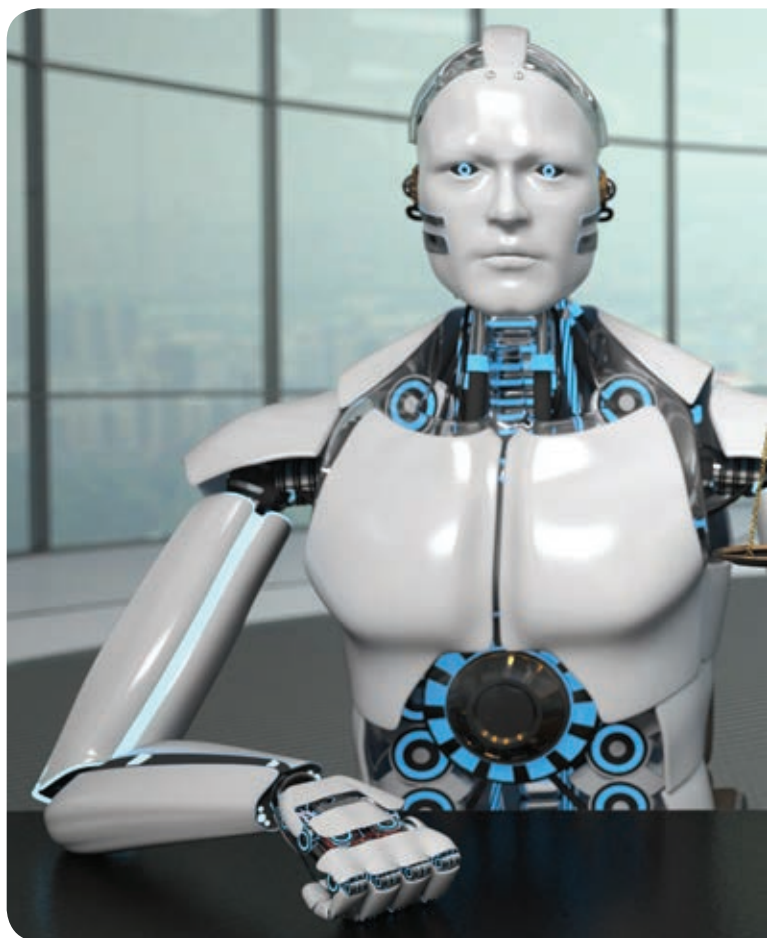
The question of how we can best do that is the focus of Online Dispute Resolution (ODR). ODR is the use of information and communications technology to help parties prevent, manage, and resolve disputes. ODR arose in the 1990s to address disputes that cropped up online, such as buyer and seller disputes in online marketplaces. But as technology has become more widespread and people have become more comfortable communicating through technological channels, online dispute resolution has extended into other kinds of disputes – even emotional face-to-face disputes like those that occur in families.

## Online Dispute Resolution and Courts

In the United States, the fastest-growing area for ODR is the courts. Courts are now deploying online dispute resolution systems to facilitate early resolution in low-value civil cases, like small claims and landlord-tenant disagreements, and these tools are getting traction in the family courts as well. In 2011, I co-founded an ODR system called Modria (now owned by Tyler Technologies) that opens an online resolution room for parties when they e-file a new family case. The software walks the participants through a TurboTax-style diagnosis process (see Figure A) to pre-negotiate issues in advance of a formal hearing or mediation. In some cases, the parties can reach agreement on all of the major issues in their parenting plan without having to work with a mediator or appear in front of a judge.

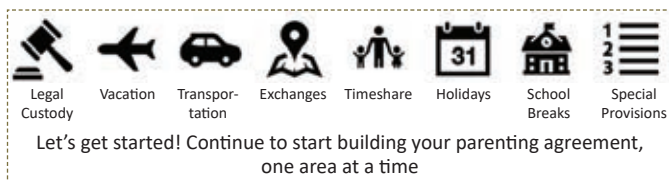
## Modria (Modular Online Dispute Resolution Implementation Assistance) and Family Law

One of the first counties to deploy Modria for family cases was Clark County, Nevada, which is the county containing Las Vegas. Clark County already has a Family Mediation Center with 11 full-time mediators resolving almost 4,000 cases a year. Designed



jointly with Clark County mediators, the Modria platform invites divorcing couples to use this step-by-step negotiation process in advance of their first meeting with the mediator in the Family Mediation Center. If both co-parents pick the same option (say, for legal custody), then Modria informs the mediator that the parties have already reached agreement in that area, which saves time and creates progress the mediator can build from.

Figure A: Overview of the Modria Parenting Plan Agreement Components



# and the Future of Family Law

By Colin Rule, ODR Consultant



Typical resolutions through the face-to-face family mediation process in Clark County take on average four weeks – but the online cases resolve in an average of *six days*, with some cases resolving in as little as two days. Also, 85% of the resolutions achieved through Modria occur at an hour when the court is closed. This makes sense, because after work on a weekday or over the weekend are the times when the parties are most likely to be free to work on their agreement.

## Family ODR Goes Beyond the Courtroom

But family ODR is not confined to the courts. Private family mediators are also using technologies like video and audio conferencing to work with their parties when getting together face-to-face is difficult or impossible. Family mediators can even provide their parties with an online pre-negotiation “workbook” that surfaces

issues that need to be resolved and required information. This helps to inform and prepare parties for the first joint session with the mediator, which can save time and help parties generate reasonable expectations about the process and outcome.

Post-session party satisfaction numbers are still slightly higher for face-to-face mediation, but party preferences are off the charts in favor of online processes. It turns out that the appeal of working out the details of your separation at home and on your own schedule are compelling benefits. As a result, private ODR companies are cropping up to support divorcing couples, including Wevorce.com, HelloDivorce.com, Itsovereasy.com, Commonsensivedivorce.com, and post-separation co-parenting management services like OurFamilyWizard.com and CoParenter.com. More are sure to come in the near future.

There are still questions about the quality of resolutions delivered through ODR. It’s great that parties are satisfied and outcomes are delivered quickly, but if the resolutions don’t prove to be durable, then the parties may end up back in court just a few months later fighting over the same issues.

The Pew Charitable Trusts has announced that they are going to spend millions of dollars on evaluating the effectiveness of court ODR, and they have selected several academic research centers to conduct longitudinal studies on how online dispute resolution compares to traditional litigation and face-to-face mediation. Researchers from UC Davis, the University of Arizona, and Harvard University will examine not only party satisfaction through ODR, but also the durability of agreements achieved through online dispute resolution and any variations in outcomes between ODR agreements and face-to-face agreements.

## Is ODR Good or Bad News for Family Lawyers?

As I sketch out these developments, not all of you may be feeling the urge to applaud. Some of you may regard these new technologies as scary, or even threatening. That is completely understandable. For every new capability technology has introduced there have undoubtedly been downsides and challenges. We often rush ahead with technological innovation without adequate efforts to combat these negative dynamics, which is short-sighted.

Like it or not, the expansion of technology into family law is showing no signs of slowing down. My wife thinks it’s weird that I help people end their marriages online, but my reply is: “How do you think people find their spouses nowadays?” Many

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# Practical Implementation of Online Dispute Resolution

One innovative Canadian company has created an online financial disclosure technology to facilitate family law Online Dispute Resolution (ODR.) Research shows that this technology impacts outcomes by minimizing obstacles, addressing power imbalances, and speeding up processes.

By Darren Gingras, Executive Director, and Josh Morrison, Lawyer

Online Dispute Resolution (ODR) is an innovative branch of alternative dispute resolution (ADR) that utilizes technology to facilitate the resolution of disagreements between parties. Still new to family law, ODR has its roots in financial technologies and has been successfully moving to various areas of law and court processes for the past decade. Notable examples of family law ODR projects include the work of The National Center for

State Courts and Modria in the US, MyLawBC in Canada, and Rechtwijzer in the Netherlands.

## Family Law ODR Growing Pains

Despite notable acceptance and expansion, family law ODR is still not without its own growth challenges. Too often the tech focus of ODR can be placed on the online portion of the process rather than the dispute resolution aspect. For example, tech-focused ODR might be based

on the premise that an entire argument or issue can be neatly and efficiently wrapped up through a fast, inexpensive, and convenient online process. While this is a laudable goal, there are genuine problems with this approach.

When the desire to reach a specific outcome overrides the actual process of resolving the dispute, as is often the case in family law, the participants may only end up dealing with the symptoms of the problem while pushing the root cause

further down the road. Credible ODR work must address the dispute itself in order to have any long-term efficacy.

### **Assisting Professionals and their Clients**

In collaboration with the National Research Council of Canada and various legal governance organizations, SIÉSDE Dispute Resolution Technologies has been tasked to research family law processes, identify process “pain points,” and design/implement technologies that can assist professionals and their clients. Great progress has been made to date in the areas of solution generation, natural language processing (language balancing), parenting solutions, and family law triage processes.

An example of the “online” and “dispute resolution” pillars working successfully together is in the area of family law financial disclosure. Earlier this year, SIÉSDE launched the Financial Disclosure Platform: an online program that allows family law professionals to simplify and automate the disclosure process for their clients.

This platform is a professional-centric, guided path through the financial disclosure process. It streamlines financial disclosure into simplified language, intuitive questionnaires, and bite-sized steps, which allows clients to keep on top of what is required of them without becoming overwhelmed. An automated, artificially intelligent, and client-friendly platform ensures that clients always have a helping hand and can measure progress as they go, allowing them to visualize the finish line.

Research findings conclude that the average length of the traditional disclosure process, per client, is 60-70 days or more. The long, slow, and tedious process of completing financial disclosures often creates confusion and an environment of hostility and distrust, which eventually manifests in unnecessary delays, more adversarial negotiations, and negative impacts on the family. Financial disclosure is a source of serious disputes during the separation process. Acknowledging this reality, and endeavoring to improve it, is at the

forefront of the ODR mandate.

Launched in partnership with the Ontario Association for Family Mediation and the Ontario Centres for Excellence, the platform’s goal is not only to implement a convenient online tool but also to meaningfully minimize the level of dispute inherent in the early stages of a family law case. By standardizing the disclosure and review processes, as well as providing mechanisms to reduce power imbalances, this platform improves the speed of the process by up to 80% compared to traditional methods. This significantly reduces the pre-negotiation period of a separation when spouses often initiate or escalate serious conflicts that hinder the likelihood of a relatively quick and mutually satisfying resolution.

### **Online vs. Offline Financial Disclosure in Divorce**

Traditional methods of completing financial disclosures generally involve a family lawyer providing the client with a generic list of required financial documents, followed by the client completing and then either emailing or physically dropping them off at the lawyer’s office. SIÉSDE’s research highlighted several common problems associated with the traditional disclosure process, including:

- Clients providing some of the documents while missing others.
- Exorbitant and unnecessary delays in gathering/sharing documents.
- Clients “forgetting” bank or investment accounts, assets, or debts.
- Managing client complaints about the necessity of the financial disclosure.
- Complexity and delays for professionals reviewing documents and disclosure information.
- Manually gathering and collating values for legal documents.
- Supporting income valuations.
- Managing client expectations regarding disclosure.

SIÉSDE worked with various legal and professional organizations to implement appropriate protocols, such as best practices and professional standardization, understanding that without

proper protocols, the financial disclosure process can adversely impact the nature of the negotiation process in four ways:

1. First, and most importantly, a failure to complete a financial disclosure remains one of the main reasons that separation agreements are overturned by the court.
2. Second, without full financial disclosure, each spouse is forced to make decisions with incomplete information – which may facilitate injustice, unfairness, or simply engender poor financial decisions.
3. Third, the act of disclosure itself is one of the cornerstones of trust and good faith within the negotiation process.
4. Finally, the length of time it takes a client to complete the financial disclosure process has been shown to be correlated with the level of conflict in the dispute. The longer the disclosure process drags on, the more frustrated the participants become and the more opportunity for hostility.

### **Advantages for Family Law Professionals**

For family lawyers and other family law professionals, automating the financial disclosure process means corporate efficiencies, standardized processes, intrinsic protocols, administrative streamlining, reduced liability risks, and increased productivity for the whole team. The Financial Disclosure platform allows for integration with other legal software, generation of court documents, and the instantaneous secure sharing of documents between clients as well as between lawyers, mediators, and financial professionals. There is no need for couriers, no need to print disclosure files, and no need to experience security concerns regarding email. Financial Disclosure also implemented various negotiation tools that help the professional to visually explain complex financial matters to their clients.

As legal and financial markets are moving towards cloud-based technology

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# 'TRUST' ACCOUNT ISSUES

Virtually every lawyer is required to maintain a trust account, but one mistake could get you disbarred. Family lawyer Claude Ducloux – LawPay’s Director of Education, Ethics, and Compliance – is here to clear up the confusion surrounding trust accounts.

## What goes into a trust account?

There are only two things that go into a trust account: your client’s money that is being placed as a pre-paid fee; and money that is being held by you for some sort of closing or distribution, or an escrow for an event, contract, or costs. What *doesn’t* belong in a trust account is your money – unless you’re in a state that charges you banking fees, which you are allowed to cover by putting in your own money – and non-refundable retainers.

## Should flat fees not yet earned be placed in a trust account?

That depends on your state. Some states want you to place large flat fees in a trust account and “stage it out” with billing when earned. However, you can usually get around that by having an agreement with the client that you don’t have to keep the flat fee in trust.

## What if there are conflicting claims to money held in trust?

The answer depends on the nature of the claim. Is the claim the result of a contract or court order? Has the client assigned a legitimate claim to someone?

For example, lawyer Grace settles Archie’s case and a big settlement comes into her IOLTA. Archie owes a lot of money to creditors: the city hospital has a lien for services provided; his insurance company wants the \$10,000 they

paid for medical bills back under the subrogation rights of his policy; Dr. Smith provided service but does not have a letter of protection; and his former employer wants Archie’s unearned wages returned.

A lawyer must honor a statutory lien, a judgment adjudicating ownership of funds, a court order, a signed written assignment from the client, an insurance company’s right of subrogation, or a letter of protection. In this case, Grace must honor the claims of the hospital and the insurer – nothing else.

## What are some common trust accounting pitfalls?

The common pitfalls are: lawyers take money out of it for personal use, they grant access to an embezzling employee, or they distribute funds to somebody who’s not entitled to it.

In one case, attorney Frank Catania – ex-husband of *Real Wives of New Jersey* star Dolores Catania – was disbarred in 2017 for unauthorized transfers from his IOLTA account. He got caught by a random bar audit for not having the right amount in his account, and failing to deposit the missing money.

In *Florida Bar versus Gilbert*, one of the attorney’s employees turned out to be an ex-felon who embezzled millions of dollars from his trust account, and Gilbert was 100% liable for all the stolen money.

In *In re Madden*, a New Jersey lawyer was disbarred for paying \$14,000 out of his trust account for phone sex. The bar considers money that you’ve withdrawn for personal reasons as theft; in most states, that’s a disbarable offense.

## Is it OK to use credit cards to pay into a trust account?

It is if you use LawPay. Unlike other credit card solutions, the client can’t call the bank to cancel their payment. When my client funds an advance fee payment retainer into my trust account, if there is some need for a refund, it must go through me. ■

*This article has been condensed from the original interview. To listen to the full podcast – which includes Claude Ducloux’s 10 best tips for family lawyers – go to [www.familylawyermagazine.com/articles/what-family-lawyers-must-know-about-trust-accounting](http://www.familylawyermagazine.com/articles/what-family-lawyers-must-know-about-trust-accounting).*



*Claude Ducloux practices family law in Austin, Texas. In 2018, the Supreme Court of Texas appointed him to a three-year term on the Supreme Court on Disciplinary Rules and Referenda. He gives monthly webinars to lawyers via the accredited CLE program he created for LawPay. [www.lawpay.com](http://www.lawpay.com)*

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# Challenging Retention Bias and Adversarial Allegiance in Expert Testimony

You will only call an expert to testify in your case if they are providing positive testimony for your position, so bias on both sides is a given. Read further for some ideas on how to overcome retention bias and adversarial allegiance during cross-examination.

By Stephen Kolodny, Family Lawyer

**B**ased on my experience in over 50 years of intense family law litigation, you can overcome adversarial allegiance and retention bias if you deal with hard facts. When dealing with custody evaluations, however, overcoming bias during cross-examination becomes harder because there is so much subjectivity and so few hard facts.

Since lawyers will only call experts who will provide positive testimony for their case, retention bias is built in to the selection process – and the expert will do all they can to support their opinions. Lawyers must take great care to ensure that their expert’s testimony is supported by hard facts and admissible evidence.

It is the lawyer’s job – their obligation to themselves, the expert, the client, and the court – not to allow retention bias or adversarial allegiance to control the ultimate opinions that are expressed in the courtroom. Lawyers are judged not only by what they do in a courtroom but by the credibility of the testimony they present to the court. You must preserve your reputation for honesty and credibility; that reputation it is hard to earn, but easy to lose.

## Overcoming Retention Bias and Adversarial Allegiance

It is often good fodder for cross-examination to ask an opposing expert if they are biased in favor of the other



party; I have never heard an expert admit to being biased, but the art of cross-examination should allow you to get an expert to deny that which is logically undeniable. The way you phrase your cross-examination question – including tone of voice, inflection, and timing – is critical.

I often ask experts the following: “If I asked you a question to which the truthful answer could be stated in two ways – one of which would be helpful to my client, and the other would be helpful to the other party – which way would you answer the question?” The deafening silence that almost always

occurs while the witness processes that question and their answer is devastating all by itself. Thirty seconds of silence in a courtroom is like a lifetime!

## The “Bias Blind Spot”

Professional articles make it clear that retention bias and adversarial allegiance are difficult – but not impossible – to overcome. Be sure to have the relevant article(s) in the courtroom and either qualify the source as a professionally recognized source through the witness you are cross-examining or through your own expert so the article can be received in evidence.

“Anything You Can Do, I Can Do Better: Bias Awareness in Forensic Evaluators” (*Journal of Forensic Psychology Research and Practice*, Vol. 18, No.1, 2018) notes that: “... research has confirmed the presence of bias in some psychological evaluations. ... Investigations regarding bias awareness reveal that most individuals lack recognition of their own biases in comparison with their perception of bias in others –

Cross-examination is “the greatest legal engine... for the discovery of truth” (Wigmore), and it is also a great “engine” for the casting of doubt and raising issues of credibility. Lawyers are in the persuasion business, *not* the *truth* business. We generally do not know what the truth is: we get information from our clients and others and – as long as we have no reason to believe it is untrue – present it to a court.

resulting from the selection effects, Dr. Murrie notes that: “... our results suggest that even without selection effects, the pull of adversarial proceedings tends to influence opinions by paid forensic experts... the evidence of allegiance effects in the case of structured, ostensibly objective instruments that usually reveal strong interrater agreement leaves us even more concerned about the possibility of allegiance effects in the case of procedures

## Lawyers are in the persuasion business, not the truth business.

an issue known as the Bias Blind Spot... but persist in believing introspection to be an effective technique for reducing bias despite professional research indicating that introspection is ineffective for reducing bias...”

Getting the opposing expert to state that they can control any aspect of bias by self-introspection – which they will almost always say – plays into your hands.

Many years ago I cross-examined a well-respected (by some) child custody evaluator who had written many articles on the critical importance of using the MMPI-II in custody evaluations, going so far as to state that failure to do so would prevent someone from doing a competent job. In our case, that evaluator reached positive conclusions about the mother, who had not completed her MMPI-II. He attempted to justify his ability to reach conclusions without those test results, but a long cross-examination referring to article after article he had written revealed his “bias blind spot.”

The illogic of his attempt to justify his conclusions, which ran contrary to what he had “preached” for so many years, caused the judge to completely disregard his testimony. It also resulted in a substantial diminution of his credibility with the Courts for the remainder of his career, which then became short. If I had represented the mother in the above case, I would have insisted that he test her so that his testimony was consistent with his previous published articles and prior testimony.

Our primary job is to present evidence in the most convincing and persuasive manner possible; the other part is to undermine the credibility of the opposing party and their witnesses. Exposing the weakness of the other party’s case, and raising questions about the competency and veracity of their witnesses, is a critical part of our task as trial lawyers.

### Self-Introspection and Bias

Research in the mental health community has established that contextual bias, which I believe includes retention bias and adversarial allegiance, cannot be overcome by using self-introspection. If you can get the opposing expert to acknowledge that they use self-introspection to control these biases, referring to published studies should seriously undermine their credibility.

“Are Forensic Experts Biased by the Side That Retained Them?” by Daniel C. Murrie, Ph.D., et al (*Sage Journals*, August 22, 2013) confirms retention bias: “The results [of their extensive testing procedures] provide strong evidence of an allegiance effect among some forensic experts in adversarial legal proceedings... Results from this study underscore recent concerns about forensic sciences [cite omitted] and raise concerns specific to forensic psychology – by demonstrating that some experts who score ostensibly objective assessment instruments assign scores that are biased toward the side that retained them.”

After discussing the allegiance bias

that are less structured or less guided by scoring rules...” Family Law cases clearly are the “less structured” ones.

“How Cross-Examination on Subjectivity and Bias Affects Jurors’ Evaluations of Forensic Scientific Evidence” by William C. Thompson J.D., Ph.D., and Nicholas Scirich Ph.D. (*Journal of Forensic Sciences*, 2019), refers to a 2009 National Academy of Sciences study that concluded: “forensic science experts are vulnerable to cognitive and contextual bias” that “renders experts vulnerable to making erroneous identifications.” This article also makes it clear that cross-examination techniques and styles are important in influencing the mind of the trier of fact, and that decision makers “perceived the [expert] to be less credible when admitting that they were exposed to task-irrelevant information.”

We need to be concerned, we need to be cautious, and we need to be strong advocates who challenge these experts, one and all! ■



*Stephen Kolodny is an AAML Fellow, a Certified Family Law Specialist (California Board of Legal Specialization), and a Founding Diplomate of American College of Family Trial Lawyers. Admitted to the United States Supreme Court as well as the California State Bar, he co-authored The Divorce Trial Manual: From Initial Interview to Closing Argument (ABA, 2003). [www.kolodnylawgroup.com](http://www.kolodnylawgroup.com)*

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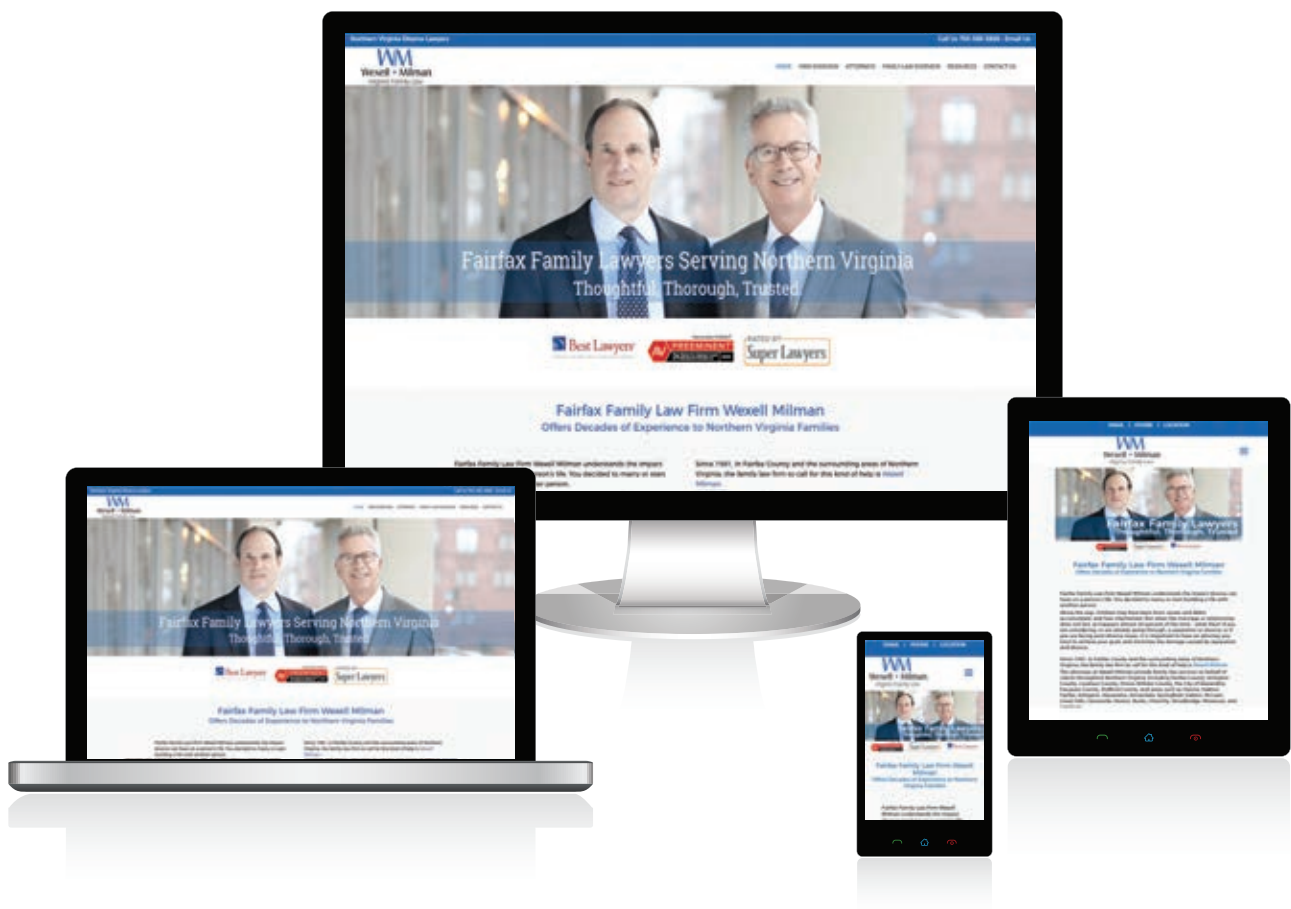
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~ Nissa M. Ricafort and Melanie K. Reichert, Attorneys  
Broyles Kight & Ricafort, P.C., [www.bkrfamilylaw.com](http://www.bkrfamilylaw.com)

“Thank you for sending me the link to your Firm’s website. It is very reassuring to read about your accomplishments and affiliations... in reading through the Family Law page, I really appreciated the Firm’s policy on actually focusing on reducing emotional stress and financial burden. I am terrified, to be honest, because divorce is a major change. But I now have a great deal more confidence in my selection of representation.”

~ M., a California client’s client



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# Does an Expert Witness' Opinion Depend on Who Hired Them?

6 lawyers and 3 forensic experts discuss the Good, the Bad, and the Ugly of expert witness selection.



## Trimming the Evidence to Fit the Facts?

By Justin Whiddon, Family Lawyer

Depending on the case facts, issues, and evidence complexity, expert testimony is vital to prosecute one's case or defend a position. Whether it is clinical or technologically related, litigators and their clients may not have the expertise needed to provide the court with an opinion that can be relied upon by the court to adequately consider the evidence presented. Additionally, certain evidence will not survive objection without the proper expert.

Privately-retained experts have been widely criticized because of the potential bias that may accidentally seep into the opinion. The expert is a retained service, just like any other, and a satisfied customer means repeat business. Obviously, this does not mean that all privately-retained experts are willing to put their license and reputation on the line for an attorney; however, based on certain experiences, some are flirting with misconduct, or, at

the very least, trying extremely hard to provide a favorable opinion – scientifically sound or not. Many times, they are attempting to fit a square peg in a round hole. The facts do not fit, but experts – usually through eloquent persuasion and carefully coached questioning – trim the edges off the square peg to make it fit.

It is hard to say, "an expert's opinion is contingent upon who hired them," but it is easy to say that the exchange of funds influences the size of the gray area. The best way to combat an expert edge-trimmer is to depose the expert prior to trial and determine their position, and, ironically, find an expert that disagrees with the opinion. If you can expose the flaws in the expert's opinion, then you have a great shot at reducing their credibility.

*Justin Whiddon is an Associate Attorney at Balekian Hayes, PLLC in Dallas. He earned his law degree at Texas Wesleyan University School of Law (now Texas A&M University School of Law). [www.bh-llc.com](http://www.bh-llc.com)*



## Impartiality Is Often Compromised in Exchange for Money

By William N. Sosis, Esq., Family Lawyer

This issue depends on the expert. It should be of no surprise that independent judgment and impartiality are too often compromised in exchange for money. Mercenarism, for example, has been an international norm for centuries.

So why should anyone expect expert opinion witnesses to be different, especially in adversarial disputes?

Experts often compromise their field of expertise to the point where their opinions can be construed as client advocacy masquerading as objective analysis. They know that if their opinion can ruin their client's case, no one will hire them. Their reports and opinions, therefore, only provide evidence and arguments that support their client's cause or position.

While courts have expressed concerns about expert venality and partisanship since the late 19th century, expert selection remains largely at the discretion of the parties.

In New Jersey, for example, divorcing parties can use religious experts to testify on the validity of their Islamic marriage contract. These contracts may include a mandatory payment (*mahr*) paid by the husband to the wife in the event of death or divorce. As you might expect, their opinions on whether the *mahr* should be paid in addition to equitable distribution can vary depending on who hired them.

*William N. Sosis is in active general legal practice in Rochelle Park, NJ. He has over 25 years of experience in information technology (IT), working as a consultant, manager, and business analyst for various Fortune 500 companies. [www.sosislaw.com](http://www.sosislaw.com)*



## The Problem with Experts

By James Gray Robinson, Esq., Family Lawyer

In over 25 years of trial practice – including divorces – in North Carolina, one of my biggest peeves was the blatant subjectivity of the experts who were called to testify by one side or the other.

I was primarily engaged in business litigation and high-dollar divorce cases that required valuations of various assets that were not easily valued. These included closely held businesses, retirement funds, real estate, and other intangible assets.

It was fairly obvious in the area I practiced that lawyers had their “go-to” expert: someone they used all of the time for the types of cases they tried. The most blatant were the divorce lawyers who had CPAs (rumored to be on their payroll) that evaluated intangible assets for equitable distribution purposes.

Their opinions often were blatantly skewed for their client’s benefit. I often had cases where the difference between the valuation of a marital asset approached millions of dollars. Several of

these experts were well known by the judges to be subjective and unbelievable. The judges let them qualify as experts and testify anyway.

Many of my clients were “cash poor,” which means that their marital assets may have been worth millions of dollars (closely held family businesses) but they didn’t have the cash to pay retainers and large expert witness fees, much less the attorney’s fees involved. Whoever had the most cash usually got the better ruling. It was frustrating at best.

I believe that family law cases should have mandatory mediation without a trial with a panel of three mediators. Court appointed experts from a panel would establish values and be paid like public defenders. They may not be the best and brightest, but at least they would be objective.

*James Gray Robinson, Esq. was a third generation trial attorney, specializing in family law, for 27 years in his native North Carolina up until 2004, when he became a business consultant. At the age of 64, he passed the Oregon bar exam and is again a licensed attorney. [www.JamesGrayRobinson.com](http://www.JamesGrayRobinson.com)*



## Biases Can Be Difficult to Expose and Hard to Tame

By Joy M. Feinberg, Family Lawyer

The question here is one of “bias” at best or “hired guns” at worst. Books have been written on this topic, including *Whores of the Court: The Fraud of Psychiatric Testimony and the Rape of American Justice* by Margaret A. Hagen (HarperCollins, 1997). The title leaves little doubt about the author’s perspective. Ask any expert and they will regale you about their “fair-mindedness and honesty” in their opinions. But in every case that goes forward to trial, experts who have different – if not diametrically opposing – views will exist. How does this happen?

Certain experts have biases that are difficult to expose. The experienced lawyer knows which parenting experts favor mothers or fathers. The experienced judge also knows this. This is why judges listen to the expert appointed by the court, hoping that the issues of bias will be lessened as it is the “court” hiring the expert – not the party. But biases are not so easily tamed, which is why one must be very careful when selecting the expert.

Outside of the child-related issues, experts are sought and influenced by the lawyer selecting the expert in subtle if not outright blatant

forms of coerced positions. Eventually, those experts who bend too far will be exposed. The greatest concern is an expert playing it closer to the vest – for they are the most dangerous. This is why mediation with truly talented mediators is such an attractive avenue to those who want to resolve cases; the experienced mediator and seasoned lawyer are often capable of exposing an outrageous opinion without the cost of a full-blown trial, but the cost is still far too great for such tactics. The business owner’s valuation will reflect the owner’s concerns and the non-owner spouse will dismiss the business owner’s claims of slow growth or lack of income.

The art of lawyering is to manipulate the facts you have to support your theory of the case. Any litigant who wants to find a “whore” will do so. Anyone who wants to choose integrity will fight for an honest expert: one who can convey their opinion in an intelligible manner with logic and facts that are supportable. Honesty goes a long way – much further than you might think.

*Joy Feinberg has practiced family law in Chicago since 1980. An AAML Fellow, Joy served as president of the AAML Foundation; she also served as president of the USA Chapter of the IAML from 2014- 2016. [www.boylefeinbergfamilylaw.com/joy-m-feinberg](http://www.boylefeinbergfamilylaw.com/joy-m-feinberg)*



## Be an Advocate for the Truth

By Rod Moe, Forensic Accountant

My opinion as an expert witness on a case is not influenced in any way by the attorney or anyone that hires me in a matter.

I am not an advocate for anything but the truth – not the parties or attorney in a matter. My role is to help the court to understand the financial matters regarding a case. I do not subscribe to stretching the truth on any matter.

There may be differences of opinion between the lawyer and the expert, but we should never take any position that is favorable or unfavorable to a client based upon who the attorney is.

We are not the judge in any case; our role is to provide credible, objective, and unbiased financial information to the court to enable them to make a decision in the matter.

The admissibility and the veracity of facts in a case is determined by the judge based upon their experience, knowledge of statutory and case law,

and the way information is presented to the court by the lawyer and the expert.

The role of an attorney is that of an advocate for their client’s most favorable position.

The standard for the selection of a financial expert should be based upon that expert’s ability to present financial facts to the court based upon their knowledge of financial information and the way that information relates to the law.

The attorney is the “Leader of the Orchestra”; as their expert, I can be engaged to present financial information to the court with no other expectation other than as being a credible, objective, straight shooter when it comes to the facts.

*Rod Moe is a Certified Forensic CPA with 45 years of experience in tax and accounting. He provides consulting services related to legal matters, including divorce. Rod is also an accredited Business Valuator and an expert witness who has worked with many divorce and family lawyers in Florida. [www.rodmoecpa.com](http://www.rodmoecpa.com).*



## Hired Guns vs. Objective Experts

By Lynne Strober, Family Lawyer

Many cases in our Matrimonial and Family Law practice involve the use of joint or neutral experts; our attorneys often work closely with forensic accountants, appraisers, psychologists, mental health professionals, and other experts should the need arise.

In my jurisdiction, some experts have earned a reputation for being hired guns who are willing to skew the analysis to the retaining party. Some attorneys use biased experts and others work exclusively with experts who are able to be objective.

We hire the latter because they are capable, thorough, and will produce reliable information that will actually be useful in facilitating a resolution of the case. Most attorneys know which experts are reasonable and reliable and which ones are so biased as not to be helpful. Courts also learn the difference between unbiased and biased experts.

When experts are less than objective or use different methodologies from each other, their results can be miles apart – which tends to polarize the litigants and does not pave the way towards an equitable resolution to the case.

Using a joint expert to value an entity or

entities is not always appropriate, however. For example, in a case where there is a cash business without complete records, or a lifestyle that is not substantiated by the earnings, it can be necessary for each party to have their own expert.

When the two experts are not in agreement, there are various ways to try to resolve the case. The two experts can select a third to address the differences, or you can utilize mediation to reach agreement, or you can narrow the issues of controversy with regard to the reports to limit the unresolved issues.

If the divorcing spouses lack the funds to each hire their own expert, they can agree to use joint expert who is competent and objective.

Experienced, ethical attorneys will use a cost-effective and reasonable approach based upon the complexities of the case and the capacity of the parties to fund the litigation. It is best to set the case on a path to achieve a fair resolution for the client as soon as possible and to steer the case to conclusion.

*Lynne Strober is a Fellow of the American Academy of Matrimonial Lawyers. She has served in numerous leadership positions, including Chair of the NJ State Bar Association Family Law Section where she oversaw the certification of matrimonial attorneys in the state. [www.lawfirm.ms](http://www.lawfirm.ms)*

Cont. on page 22



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## Can an Expert's Opinion Depend on Who Hired Them? Without Question!

By David Carton, Family Lawyer

As a practicing lawyer in New Jersey for over 25 years with a specialization in family law for the last 17, I have seen my share of experts: everything from court-appointed experts to neutral experts to custody and parenting-time forensic experts to reconstruction experts and so on. The list is endless.

Can an expert's opinion differ based on who retained them? Without question. This is not to suggest that a party's expert would write a report with a conclusion exactly the way the party retaining them would ideally like to see.

Experts are hired to provide their opinion based on the facts presented to them on issues where there is no certain answer. If there were a certain answer, a judge could take Judicial Notice of the correct answer under New Jersey Court Evidence Rule 201.

### Two factors play an integral part of every expert's opinion:

1. An expert retained by a party would take as factually accurate what that client tells them and use that as a basis for their opinion.
2. The concept of the expert's judgment.

Whether it is the Cap rate to be used in valuing a business, the reasonable compensation of an employee, what is ultimately in a child's best interests, whether an injury is permanent or not, who was at fault for an accident, what the value of a home is, or almost any other issue, there is leeway in an ultimate conclusion based on that expert's own personal opinion, facts reviewed, or even potential biases.

As part of a lawyer's due diligence, when a client seeks to advance a certain position that needs the

support of expert testimony, that attorney should determine if the expert is able to:

- a. participate based on their credentials and qualify as an expert in that field, and
- b. write a report to offer an opinion supporting that client's position. To fail to vet the client's position in advance may cause the client to pursue a claim that they are unable to prove. If an expert is retained and a report not provided in discovery, it can result in discovery motion practice under New Jersey Rule 4:10-2(d)(3).

Cost is relevant in every case. Experts are professionals and deserve to be paid for their time to review material, conduct independent research, and prepare a report – and potentially for their time during deposition and trial. Certainly, parties without the means to pay them are at a disadvantage, especially if the issues in dispute cannot be adjudicated by a court without expert testimony.

The answer? All family law practitioners and judges wish that there was a clean and simple answer. In some counties a custody neutral assessment is used where there is a custody dispute. More and more frequently, financial experts are being retained to prepare schedules without the need for an expensive and formal report. Another suggestion is that when divorce complaints are filed, any case that may require an expert should be given a Complex Track designation and a Discovery Master should be appointed.

*David Carton is a Certified Matrimonial Law Attorney who has practiced Family Law since 1995; he regularly appears before Family Court Judges throughout New Jersey. He is Co-Chair of Mandelbaum Salsburg's Matrimonial and Family Law practice group. [www.lawfirm.ms](http://www.lawfirm.ms)*



## Do Not Jeopardize Your Reputation over One Case

By Timothy Voit, Financial Analyst

I have testified in both state and federal courts, and I have found that the court frowns upon an expert who alters their opinion based on who retained them. In two separate cases roughly two weeks apart, an opposing expert and I testified in front of the same judge. The opposing expert was discredited, and valuation not allowed in, as he changed his methodology depending upon the spouse that retained him.

It goes to show judges do take note of changing opinions, positions, and methodologies. That is, in effect, the attorney's job to argue their

client's position, and their duty to present the best argument for their client, not the expert.

My recommendation, through the Certified QDRO Specialist course, is to always maintain integrity and fairness to avoid jeopardizing your reputation over one case. It is simply not worth it. Eventually, if an expert testifies enough they will be testifying in front of the same judges and those judges will eventually rely on the expert if they are deemed fair-minded.

*A financial analyst and founder of the American Association of Certified QDRO Professionals, Tim Voit has testified as an expert witness regarding pension valuation and QDRO preparation multiple times. [www.aacqp.org](http://www.aacqp.org)*

# Video Production and Marketing for Family Law Firms



## You Need Videos. Here's Why:

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Videos will account for 82% of all consumer Internet traffic by 2022.<sup>1</sup>
- B. Website Visitors Watch "Explainer Videos"**  
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- C. Short Videos Win over Text**  
68% of people prefer to learn about a new product or service by watching a short video; text-based articles were a distant second at just 15%.<sup>2</sup>
- D. Videos Help You Secure Clients**  
Your potential clients need information and many prefer videos to text. If they do not find videos on your website, they will seek them on your competitors' websites. The right videos could make the difference between losing business and being retained.

<sup>1</sup> Cisco, <sup>2</sup> WyzOwl.com, <sup>3</sup> The Economist

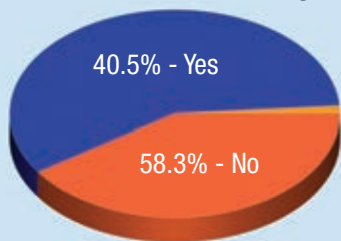
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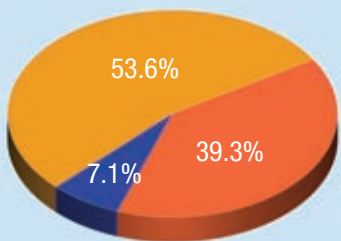


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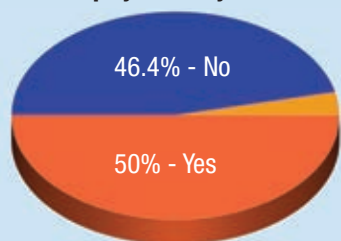


Are you currently using, or do you plan to start using, some form of AI at your firm?

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- No, I'm not using AI, but I plan on using it
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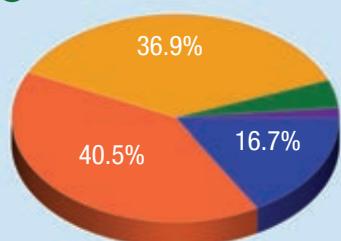


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- I use a dedicated app/software to track my hours
- I track my hours manually using time sheets
- My clients pay me as I am working; I don't track my time
- Not Applicable



# Survey Results: Technology

Family law professionals answer questions about the impact technology has on their practices, and they offer predictions for the future.

We asked, and you answered! We recently surveyed family law professionals on their use of technology and apps. Some of the responses were eye-opening: e.g., only 7.1% are currently using some form of Artificial Intelligence – which is somewhat troubling because experts are urging family law professionals to “Get on board now or get left behind.”

Here is a sampling of the written responses (below). We received too many responses to share in these pages; to read them all, go to [www.familylawyermagazine.com/articles/family-law-technology-survey-results](http://www.familylawyermagazine.com/articles/family-law-technology-survey-results).

## How Do You Use (or Plan to Use) Artificial Intelligence?

“Rather than say I will never use AI in my practice, the better answer for me is that I would consider using it if I knew more about how it would make client communication better and attorney/staff time more productive. I don't have any plans for it now, but I'm open to learning more about it.”  
~ Mary Ann Burmester (Family Lawyer)

“I don't have plans to because I don't know how it would apply to my practice.”  
~ Anonymous (Family Lawyer)

“I have no current information on this subject but hear that it is coming.”  
~ Robert H. German (Family Lawyer)

“Not sure. Haven't seen a use that fits my practice. I have concerns about applying logic (AI) to an illogical and emotion-driven system.”  
~ Bruce Avery (Family Lawyer)

“AI-assisted software can streamline the disclosure process into simplified language simplified language, intuitive questionnaires, and bite-sized steps so that clients can keep on top of what is required of them. This means financial

statements will be completed quicker, with less upset, and all necessary data will be there the *first* time.”  
~ Anonymous (CDFA®)

“I plan to use it for research and office automation.”  
~ Philip Burnham, II, Esq. (Family Lawyer)

“I don't know yet. I need to learn about what added value it will bring.”  
~ Nora Kalb Bushfield (Family Lawyer)

## How Will Technology Impact Your Practice over the Next Decade?

“Expanding market within the state due to e-filing and video conferencing.”  
~ Paul Stenzel (Family Lawyer, Mediator)

“Uneasy about the security of data on the cloud, but looking for some future ease in managing data. It's not coming – it's here. I use more tech than ever, but have no greater security in the functioning of my laptop – with all its apps and info – than I did before.”  
~ Adrienne Grace (CDFA®, CFP®)

“I hope that such insightful technologies will work well, and work in tandem with their human partners.”  
~ Geoffrey Platnick (Family Lawyer)

“I believe technology will continue to make the practice of law more automated, thereby creating economies of efficiency for attorneys that can be passed on to their clients, making legal representation more affordable.”  
~ David Hoffmann (Family Lawyer)

“We are not going to waste money on traditional marketing – like phone book listings – or on square footage. We are designing and building a new office space that uses technology to make our attorneys and staff more efficient and mobile. Many of our younger clients do not want to talk to us on the telephone or meet



# and Indispensable Apps

Compiled by Diana Shepherd, CDFA®  
Editorial Director of *Family Lawyer Magazine*

in our conference room: they want to email us and text us. We are going to make it easy for them to communicate with us in a way that works for them and when it works for them.”

~ Lucinda Glen (Family Lawyer)

“Significantly more automation overall as it relates to administrative work. We're seeing more clients having a preference for online scheduling on their own time. I also foresee more and more lawyers using paperless systems at the courthouse: i.e., losing the paper notebooks in favor of digital files.”

~ MacKenzie Dunham (Family Lawyer)

“Technology has already changed the practice of family law in significant ways. Most evident is the increased expectation of immediate access to attorneys and the increased expectation of a response. The upside is how

efficient email makes the practice. We're far more able to respond to clients faster and to juggle more cases. Additionally, the ability to scan, email, and create esignatures make all parts of the practice faster and easier on both sides. It has also made billing easier and payments easier to handle.”

~ Traci Capistrant (Family Lawyer)

“It will completely automate most mundane tasks and many lawyers will no longer have jobs. Think bank tellers and tax preparers – both dying fields. Creative, out-of-the-box kind of thinking will still be in demand...”

~ Jody Stahancyj (Family Lawyer)

“The majority of my family law cases have some element of technology affecting the outcome. For example, adulterers are being caught by their text messages, emails, and even

memberships to hook-up sites. Also, clients have emergencies on the weekends and need attorney assistance. Being able to securely log on to my firm's documents from anywhere helps me to assist my clients.”

~ Darlene Lesser (Family Lawyer)

“We will have to use more technology as consumers will not work with professionals whose practice is not using up-to-date technology tools.”

~ Eva Sachs (CDFA®, CFP®)

“More cloud will be used. I am concerned with data breaches with secure servers. Banks get hacked; businesses get hacked. Those are high-profile targets, though.”

~ F. Peter James (Family Lawyer)

“[Technology] levels the playing field in many ways for small/solo vs. biglaw.”

~ Steven E. Feder (Family Lawyer) ■



## How Cloud Software Transformed My Family Law Practice

Cloud practice management software may not be right for everyone, but it meets the needs of my family law practice perfectly.

By Shari Rackman, Family Lawyer

As a solo practitioner, I must find technology providers who meet my needs. As an all-in-one cloud practice management software that does that, while ensuring the information I use is available on every device, LEAP fits the bill.

I was concerned about security while using cloud-based software, but LEAP is powered by Amazon Web Services (AWS), so my data has the same protection as governments and Fortune 500 companies – and AWS' 99.99% uptime is important because emergencies do not confine themselves

to business hours.

The software you use should make your life easier. LEAP is uniquely suited to family law: it allows me to access automated forms and pre-configured law matter types; I enter key client details into my system once; and then re-use the information throughout the case for letters, forms, etc. I also have access to a wide range of up-to-date legal court forms, and those I use every day are automatically populated.

I like LEAP because the company is small enough to be personal, but large enough to have the resources to manage my data. Since I started using this all-in-one cloud practice management software, I have saved time and made more money. If you are still on the fence about cloud computing, I urge

you to make the move to a cloud-based system that suits your needs. ■

*This article has been condensed; to read the full article, go to: [www.familylawyermagazine.com/articles/cloud-software](http://www.familylawyermagazine.com/articles/cloud-software).*



*Attorney Shari Rackman has over 20 years' experience helping clients navigate the family court system. She received the NYS Bar Association*

*Merit Award in 2011, and is admitted to practice in New York State and the United States Supreme Court. [www.rackmanlawoffice.com](http://www.rackmanlawoffice.com)*

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# Generating Clients Using Pay-Per-Click Advertising

Pay-Per-Click advertising is a cost-effective way for family lawyers to generate clients when executed properly. The technical sophistication Google Ads has to offer requires knowledge, marketing expertise and time in order to give the best return.

By Martha Chan, Family Lawyer Marketing Expert and Atif Nadeem, Digital Marketing Specialist

## What Is Pay-Per-Click Advertising?

Pay-Per-Click (PPC) advertising allows family law firms to connect, in real time, with prospective clients who are looking for their services. Advertisers only pay when someone clicks on their ad, which can generate a call to the law firm or a visit to their website or landing page that encourages the visitor to set up a consultation.

PPC advertising gives advertisers a lot of control over how much, where, and how they want to spend their advertising budget. In addition to this, PPC ad campaigns can be highly cost-effective, fully targeted, measurable, and customizable. For those who know how to use its features effectively, PPC is likely to provide a good return on investment.

Although there are many different platforms offering PPC advertising, we are going to focus on how to use Google's PPC advertising on their search result pages. Google is the most-used search engine and is also the most dominant advertising platform – and most family law firms do not have a big enough budget to spread effectively across multiple platforms.

## Do Pay-Per-Click Ads Work?

It is increasingly clear that PPC advertising is an important part of a family law firm's marketing plan even if they have search engine optimization (SEO) in place. Even AVVO.com and Justia.com, who rank high on Google, have PPC ads.

From our experience in managing ad campaigns for family law clients, PPC ads have proven to be a cost-effective way for family lawyers to generate leads, drive traffic to their websites, and create brand awareness. Our PPC clients often have prospective clients contact them the same day their Google ads appear. That being said, PPC ad campaigns have to

be executed properly in order to reap the maximum benefits – and where there is competition, the cost will be higher.

## Types of Google Search Ads

There are many different kinds of ad formats available. We use the following three types of ads most often for our clients.

- 1. Text Ads:** These ads appear on desktop computers as well as mobile devices. They typically have a title followed by text. Searchers can either click and land on your web page, or click to call you if they are on a smartphone.

Desktop

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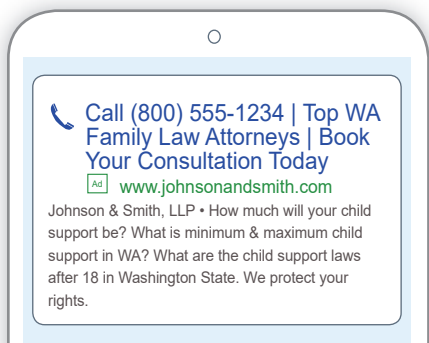
- 2. Dynamic Ads:** Dynamic ads also show up on desktops and mobile devices. The titles on these ads change depending on the search term used. For example, if someone Googles the term “child custody lawyer in Chicago” the ad will include this term as part of the heading, which will read “Child custody lawyer in Chicago.” This encourages the person to click on the ad.

### [Dynamically generated headline]

[Dynamically generated display URL]

Schedule consultation with our Chicago child custody lawyers for negotiation, ... arrangements are available to parents - unmarried, separated, or divorced in IL.

**3. Call-Only Ads:** These ads are for smartphones only. When a prospective client clicks on the ad, they will be given the opportunity to call your law firm. A second click will ring through to your firm.



Our experience shows that more divorcing people call than submit a form online. This is likely because they feel a sense of urgency to speak to a family lawyer, particularly when they have a smartphone in hand. Despite the fact that Call-Only Ads are highly effective, most family law firms are neither aware of nor use this option.

## Where Technology Meets Marketing Expertise

Google has developed a highly sophisticated, targeted, and efficient advertising system that family lawyers can use to help generate the type of business they desire. You can select specific geographic locations (down to cities or counties), language, devices used, and keywords your prospective clients search with. Such sophistication offers both benefits and challenges when setting up a PPC ad campaign properly. For one thing, we need to research the search volume of various keywords to help us determine which keywords we should include – and which to exclude.

All Google ads have limits as to how many words can be used, which requires the skill to write succinct and powerful ads that represent who you are, what you do, showcase the benefits you provide, and offer a great call to action to entice the right prospective clients to contact you.

## Test Your Way to Success: Ongoing Adjustments to Your Ad Campaign

As part of the technological sophistication Google Ads offers, we have access to an abundance of statistics that can help fine-tune your ad campaign. We need to invest considerable time to create, test, and refine a PPC campaign in order to attain your business objectives. We can measure the effectiveness of your PPC campaign in real-time – but first, we need to decide what parameters to turn on and measure. We can measure the following:

- 1. Cost:** How much did you pay Google to run your ads.
- 2. Impressions:** The number of times Google showed your ads.
- 3. Clicks:** How many times a prospect clicked on your ads.
- 4. Clickthrough Rate** The number of clicks divided by impressions.
- 5. Cost Per Click:** How much each click costs you.
- 6. Number of Leads:** The number of phone calls and submission forms you received.
- 7. Cost Per Lead:** How much each phone call and submission form costs you.

We have seen family law firms that only receive reports showing items 1 to 5. If your goal is to generate leads, it is crucial to measure items 6 and 7. The ultimate measure is how much your family law firm is spending compared with how much revenue your firm is generating using these ads. Since only your office knows who became clients and what your billing is, you will have to do that comparison yourself.

One of the keys to success is to set up tests, compare the results, and invest in the winning ads. This allows you to have a more effective ad campaign that produces a higher ROI than if you invested in PPC ads without testing.

## Do-It-Yourself vs. Outsourcing to a Pay-Per-Click Expert

Anyone can attempt to create a PPC ad campaign, but such an endeavor will likely result in the loss of time and

money with no new clients to show for it – particularly if the competition has hired a PPC expert to run their ad campaign.

Google Ads is a sophisticated system that allows those who know how to use it to make informed decisions towards generating desirable leads for less than you would think. But in order to do this, you must have the expertise, the inclination, and the time to make full use of all the available features. It would be a shame to conclude that PPC does not work without giving it a fair chance.

When it comes to PPC, what you don't know *can* hurt you. We strongly recommend that family lawyers hire a marketing firm with expertise in managing successful PPC ad campaigns so you can maximize your ROI and focus on delivering exceptional legal service to your clients. ■



*Martha Chan is a marketing expert for family lawyers. She is the co-owner and VP of Marketing of Divorce Marketing Group – a one-stop marketing agency dedicated to promoting family lawyers and divorce professionals. Atif Nadeem is the Digital Marketing Lead at Divorce Marketing Group. He is a Google Ads and Analytics Certified Specialist who oversees*

*PPC campaigns and SEO for websites the company builds for its clients.*

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# Obtaining & Presenting Electronic Evidence During eDiscovery

Requesting the opposing party’s social media content in the course of discovery has become commonplace. However, the practice of effectively obtaining, reviewing, and presenting this evidence often falls short.

By David R. Hazouri,  
Family Lawyer and  
eDiscovery Consultant

**A**s family law lawyers, we analyze and present the information that tells our clients’ stories to a judge sitting in equity. With the advent and global adoption of 24/7 Internet connectivity and handheld mobile computing, that story is rapidly migrating to the cybersphere. The attraction of immediate, yet highly composed, communication is addictive. Even the commercial sector has seen the favored method of contact move from email to text message – and now towards customizable chatroom-like cyber platforms such as Slack.

For family lawyers, understanding and effectively presenting our clients’ stories requires familiarity with the various computer devices and applications through which these stories are being told. There is certainly the technical side to having such familiarity. But there is also the substantive side, as well. For instance, from a technical perspective, it is very helpful to know that a smiling emoji generated on an iPhone using one platform may appear on the receiver’s end as a grimacing emoji based on the fact that the receiving party is using an Android-based device<sup>1</sup>.

<sup>1</sup>Professor Eric Goldman, in *Emojis and the Law*, 93 *Washington Law Review* 1227 (2018), refers to this phenomena as “cross-platform depiction diversity.” You can navigate to a .pdf of the article from here: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3133412##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133412##)

From a substantive (or pictographic) standpoint, it may also be helpful to know that different people interpret the “praying hands” emoji to mean “high five,” that the “syringe” emoji can mean “blood brothers,” or that the “eggplant” emoji means, well... ask your kids to explain it. In any event, it behooves the competent family law lawyer to engage this technology from both a technological and substantive perspective in order to serve his or her client’s best interests. The remainder of this article will touch on a wide variety of points to help illustrate in a very practical sense how the busy lawyer can go about beginning to acquire and integrate this knowledge into everyday practice.

## How to Request Social Media Content

Requesting the opposing party’s social media content in the course of discovery has become commonplace. However, the practice of effectively obtaining, reviewing, and presenting this potential evidence still often falls short. In requesting production of social media content, it is wise to include a comprehensive list of the most prevalent and au courant social media sites as a non-exclusive list of what is being sought. My standard request for production currently recites well over a hundred social media platforms and applications in the definition section for “social media account.” By being so specific, you are prompting the receiving attorney to be more thorough in investigating the client’s account usage than if the phrase “social media” came with no illustration at all.

You are also avoiding discrepancies (real or manufactured) over whether something is a social media site, a messaging application, a blog, etc. By using the term “account” as opposed to “postings” or “content,” you are also more likely to capture all information that the user may be generating and receiving on the account. This point is an important one because, as social media has matured, the various sites have added more and more functionality in order to keep the user on their site and make their application more conducive to integration with a wider range of other sites. Some of the best examples are the addition of instant messaging functions by sites such as Facebook and Skype or the more lasting chronicling function of “stories” on Instagram.

## Understanding Social Media Content

Of course, obtaining a pre-compiled list of social media accounts for your production request may be of limited use if you are completely unfamiliar with what 80% of the sites offer (not to mention whether they even still exist).<sup>2</sup> Here, in large part, is where the rubber meets the road. I strongly encourage you to visit the websites of the more important social media applications – particularly the “Frequently Asked Questions,” “Privacy,” and/or “Legal” pages. These pages offer a wealth of the very latest information about these sites, which is important for several reasons. First and foremost, you will find a description of all the things the application can and cannot do, including the user’s range of options in customizing his or her account’s functionality, accessibility to others, and rules

for local and cloud-based data storage and retrieval.

Understanding these features and options will inform your decisions in shaping and pursuing your requests to opposing parties for this information, including being able to knowledgeably negotiate with opposing counsel regarding the extent and format of production and, where necessary, to explain to the court the reasonableness of your request when opposing counsel objects.<sup>3</sup>

Here is a hypothetical example. You are seeking the opposing party’s Facebook content for a given period in native format. In this instance, you are aware that the opposing party made, and then deleted, relevant comments/posts on a suspected paramour’s Facebook wall that you have been otherwise unable to get under subpoena.<sup>4</sup> Opposing counsel has offered to produce the archive file for his client’s account created by the resident archiving function that Facebook offers its account users. Assuming agreement on issues of authenticity and opposing attorney’s oversight of his client’s collection, practically speaking, this is generally a reasonable response.

However, because you have read the Facebook FAQ page and/or completed just a modicum of Google research on the Facebook archive function, you know that the archive file will not contain any record of the subject comment/post or its deletion. Although the Facebook archive functions capture a significant amount of data and events, it does not capture these. Assuming from a relevance/proportionality standpoint that the information is discoverable, you now know why you need a forensic capture of the Facebook account, how to explain this is good faith negotiation with opposing counsel, and, if need be, argue to the judge on a motion to compel.

## Best Practices: Engage an eDiscovery Vendor

The foregoing is not to say that party self-collection and/or preservation is normally sufficient to constitute best – or even good – litigation practices. In most situations, it is insufficient, and you should generally only utilize it as an initial stop-gap preservation method if the social media application at issue has a resident archiving function and the archiving protocol can be easily followed with attorney guidance.<sup>5</sup> If there is to be any significant discovery of social media content, you are well-advised to engage an eDiscovery vendor who is capable

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<sup>2</sup> A quick Google search will pull up plenty of helpful sites in addition to Wikipedia that can provide a list of current and popular social media applications, such as: 65+ Social Networking Sites You Need to Know About, <https://makeawebsitehub.com/social-media-sites> (last updated June 5, 2019).

<sup>3</sup> Generally speaking, this information is written in relatively non-technical, consumer-oriented terms, so there is absolutely no excuse for not consulting these sources. Additionally, because of federal and growing state-based personal privacy regulation, as well as more recent pressure from consumer expectations, social media websites are providing account users with more options with respect to the storage and recovery of their own account data.

<sup>4</sup> Forget trying to subpoena Facebook directly for this third-party’s page content or history.

<sup>5</sup> Perhaps the very first step to take is a preservation letter served on the opposing party and an explicit instruction to your own client not to delete any information and to disable any routine, automated deletion features.

# The Role of the Forensic CPA in Divorce

Learn how a forensic CPA can help family lawyers in matrimonial matters.

## What does being a “forensic CPA” mean?

The word “forensic” means that an expert can testify in court and the expert is an advocate for the truth and the facts – not a hired gun. My opinions do not vary from the facts I’ve seen; testimony that isn’t supported by facts demonstrates to the court that you are neither objective nor credible. A forensic CPA understands what the judge needs to make an informed decision, and how to present those facts in a clear, understandable, objective manner.

## How do you help attorneys with their divorce cases?

If one or both of the parties own a business, they may not report the true business income and expenses on their tax returns or financial statements. Determining true income requires a thorough analysis of all accounting transactions. We had a case where the wife owned a dance studio, and she deducted payments to her Amex card as business expenses, which reduced both her business and personal income. We saw a recurring charge on her Amex statement for “privileged assets,”

which was actually an American Express annuity program; she had been charging her credit card to invest in this annuity for many years. The annuity was improperly recorded as a business expense, which not only reduced her income but also represented a significant, undisclosed marital asset. Finding it made the marital pie much bigger, and the husband received a much larger portion of that pie.

## What are some of the issues you look out for when dividing marital assets?

One key issue is the value assigned to assets. We had a case involving a small real estate lot which had not been appraised. The husband claimed he purchased it for \$3,000. The wife was adamant that it was worth \$20,000. We suggested that the judge give the asset to the wife – which significantly increased the balancing payment to the husband and reduced the amount of real assets and cash that she obtained via equitable distribution.

## When it comes to determining income, can’t you just look at someone’s tax returns?

The question of income is really one of cash flow on a monthly basis. There are several tax-deductible expenses that don’t affect income, e.g. depletion allowance on oil well rights.

## Is there a “Rule of Thumb” to determine what a business is worth?

Each business is different. Information reported on tax returns or financial statements may not reflect the actual income and cash flows of the business. You need a detailed review and understanding of the business to avoid under- or over-valuing it.

## When dividing retirement plans, each party gets one-half of the plan balances, right?

Not necessarily, because any contributions made before the date of marriage are non-marital; only contributions made after the date of marriage and before filing for divorce are marital. We had a case where the husband had a substantial premarital retirement account, from which he had made significant borrowings and repayments during his marriage. We prepared a trial exhibit showing that the borrowings were from the premarital amount, but all loan repayments were from marital funds, which converted nonmarital to marital funds. This resulted in the wife receiving several hundred thousand dollars of additional retirement funds.

## What mistakes have you seen regarding commingling of assets in divorce cases?

In many cases, one spouse has a premarital account into which they deposit marital earnings. Money is a fungible commodity: you cannot tell \$1 from another, and by mixing the marital and non-marital funds, the account loses its non-marital characteristics. ■

*This article has been condensed from the original interview. To listen to the full podcast, go to [www.familylawyermagazine.com/articles/podcast-rod-moe-the-role-of-the-forensic-cpa-in-divorce](http://www.familylawyermagazine.com/articles/podcast-rod-moe-the-role-of-the-forensic-cpa-in-divorce)*



*Rod Moe is a Certified Forensic CPA with 45 years of experience in tax and accounting. He provides consulting services related to legal matters, including divorce. Rod is also an accredited Business Valuator and an expert witness who has worked with many divorce and family lawyers in Florida. [www.rodmoecpa.com](http://www.rodmoecpa.com).*

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# Can Pre-Marital Military Years Become Marital in a Pension?

A woman in a U.S. Army uniform is shown from the chest up. She is holding a white piggy bank in her left hand and a one-dollar bill in her right hand. The uniform has "U.S. ARMY" patches on the shoulders and a name tag. The background is a blurred American flag.

In *Martin v. Martin*, Florida's First District Court of Appeal ruled that the Appellant's pre-marital military service should be considered marital when applied to a federal pension benefit calculation. Here's why.

By Timothy C. Voit, Forensic Economist/QDRO Analyst

**M**any family law professionals do not realize that unused military years can be applied to most government pension plans to enhance a monthly pension benefit at retirement. That is, if a military member does not accrue 20 years of military service (a requirement the service member *must* meet to receive military retired pay), the equivalent number of military years can be included to enhance a pension accrued under a different entity – usually government pension



plans. What happens, however, if the military years were pre-marital when the government pension is considered marital? One answer to this question can be found in the recent *Martin v. Martin* decision<sup>1</sup>.

### The Impact Unused Military Years Might Have on a Monthly Pension Benefit

The impact can best be illustrated by an example. First, let us assume a member of the Armed Forces accrued four years of military service, irrespective of marital status. As previously mentioned, the military requires 20 years of service to assign a monthly pension benefit to a military member; known as 20-year cliff vesting, this is retired pay for life. If a member has less than 20 years, they will not receive a pension in most cases. (An exception might be when the military is downsizing and offers incentives to those with 15 to 20 years of service.)

Most municipal state and federal pension plans will imply that military years that are not applied to a military retirement can be used to enhance a monthly pension benefit and not go to waste; however, explanations like this are misleading. Are the years actual military years or simply equivalent years?

A typical defined benefit plan will base a lifetime monthly pension benefit on a formula using:

- years of service,
- average annual income, and
- a retirement factor.

Now let us assume that the same former Armed Forces member is now earning \$60,000 per year and has 20 years of service as a federal employee. If a plan formula uses a 1% factor – some plans might use 2%, 3%, or somewhere in between – the individual's accrued monthly pension benefit is \$1,000 per month: e.g.  $1\% \times \$60,000 \times 20 \text{ years} = \$12,000$  divided by 12 months = \$1,000 per month.

If he makes a deposit of a few thousand dollars with the plan to apply his four years of military service, the additional four years would result in him receiving \$1,200 per month for life, e.g.

$(0.01 \times \$60,000 \times 24 \text{ years}) / 12 \text{ months} = \$1,200/\text{month}$ .

### Martin v. Martin

In *Martin v. Martin*<sup>1</sup> – a case handed down on June 20, 2019 – Florida's First District Court of Appeal opined that Appellant David Martin's eight years of pre-marital military service should be considered marital when applied to his federal pension benefit calculation. The federal pension was accrued during the marriage but the assumed military years occurred prior to the marriage.

The court's reasoning was based on the fact that in order to apply his unused military years to his government pension, David (a federal employee) had to pay to have those years applied, and he used marital funds to purchase the equivalent military years. As Dawn Martin's (the former wife's) expert at the first trial, I explained that her husband would have been required to serve in the military for 20 years to receive military retirement benefits, so those eight years of service had no value for purposes of retirement until he purchased them to apply towards his civil service retirement.

David Martin's attorney argued "but for" the husband being in the military he could not have enhanced the pension. The attorney representing Dawn Martin argued that but for the husband participating in the Federal Employees' Retirement System, he could not have applied the eight years of "equivalent" service – on top of which he used *marital* funds to purchase said years. The trial court found that Dawn was entitled to 50% of David's pension, and the Court of Appeal affirmed that decision.

In this case, purchasing David's eight years, two months, and 25 days cost \$9,866 – which added an additional \$908 per month to the monthly pension for the rest of his life. Not a bad investment, considering only 10 months of payments will make up for the initial cost, and that the pension could potentially pay benefits for the next 20 to 30 years. The Court of Appeal viewed this purchase as a "marital investment", in

which the additional benefit would not have accrued without the marital funds. It is, after all, property acquired during the marriage.

The appellate court in *re Marriage of Zamudio*, 3-16-0537 (Ill.App.Dist.3 02/20/2019) the husband (Frank) used marital funds to add an additional four years of pre-marital military service to his current pension. Here, again, the court reasoned the "enhanced value" of each pension payment flows both from his participation in the plan itself and the fact that the pension statute allows him to enhance the present value of his annuity by the amount calculated based upon his prior military service. The appellate court even recognized that "the enhancement was calculated based on the number equal to the number of months Frank served in the armed forces". This implies that actual years of service are not being used only equivalent years.

### Do Purchases with Marital Funds Always Become Marital Property?

Many other courts across the country have reached the same conclusions in similar cases; however, courts in New York and California have ruled that the application of pre-marital military years should be considered separate property – despite the fact that they were funded with marital funds. In *Valachovic v. Valachovic*<sup>2</sup>, the court in New York did not suggest a remedy for making the spouse whole for their one-half share of the marital monies that were used to apply the military years. The California court, *In re Marriage of Green*<sup>3</sup>, only awarded the spouse one-half of the initial monies that were used to purchase the years, apparently without any interest.

If you have a case where there is the potential for the court to disagree with the concept of marital funds

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<sup>1</sup> *Martin v. Martin*, 1D18-2546 in the advance sheets (Florida Law Weekly)

<sup>2</sup> *Valachovic v. Valachovic*, 9 A.D.3d 659, 660, (NY App. Div. 2004)

<sup>3</sup> *In re Marriage of Green*, 302 P.3d 562 (Cal. 2013)

# Addiction and Mental Health Issues Among Family Lawyers

The legal profession is waking up to the fact that it has a serious problem with substance abuse and mental health disorders; thankfully, several national lawyer organizations have stepped up to offer programs to promote lawyer well-being.

By Bree Buchanan, Lawyer and Lawyer Well-Being Consultant

**D**epression. Anxiety. Drug and alcohol abuse. For family lawyers, these words likely bring to mind the most memorable (for all the wrong reasons) clients. In the past few years, however, the legal profession has started to come to grips with the reality that these words apply to an astonishingly high number of lawyers. For a significant portion of the time I practiced family law, these words applied to me.

## My Personal Story

In law school, I quickly learned that my passion for the law was ignited when representing individuals, as opposed to corporate entities. The flame was kicked up a few notches higher when the individuals had been the subject of violence or abuse. When I landed my first job as a young family lawyer for legal aid, charged with representing victims of domestic violence, I was elated. What I never considered



was how this work could end up burning me.

The family law bar in my city was a tough crowd. Every day as a young lawyer, I lived in fear of the phone ringing, knowing that it could be an opposing counsel ready to make mincemeat of this new lawyer. My clients, many of them having been through years of physical and emotional abuse, were even tougher on me. Sandwiched between the two, I sought out relief from stress and anxiety by resorting to alcohol, the standard “go to” cure-all for many lawyers.

Over the course of the next two decades, I continued working as a family lawyer for legal aid, as a solo practitioner and a director of a family law clinical program. The unrelenting stress – coupled with continuing exposure to some of the worst of human behavior – continued, and so did my drinking. It continued and increased. What had been two glasses of wine at night, ultimately, became two bottles. Whenever I could get them, I added opioids. Days of crushing hangovers blended with days numbed by depression. Anxiety over the tenuous nature of my existence was pervasive. At my worst, I was certainly not the best lawyer but, somehow, I never committed malpractice nor violated any rules of professional conduct.

You can guess where this is headed because you’ve seen it in your clients’ lives. Ultimately, I lost my marriage. Then, a short while later, I lost my job. I’m writing this article today because, at that point, I finally asked for and received help. Today, I am a leader in the national movement to reduce lawyer impairment and promote well-being in the legal profession, a position that would have been absolutely unimaginable ten years ago when I sought help for my substance use and mental health disorders.

### **Addiction and Mental Health Issues Among Family Lawyers: A Dirty Little Secret Comes to Light**

The legal profession is now waking up to the fact that it has a serious problem with substance use and mental health disorders. Two major studies, both published in 2016, served as the

initial sparks for igniting the current lawyer well-being movement. In 2016, the American Bar Association (ABA) Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation published their study of nearly 13,000 currently-practicing lawyers. It found that between 21 and 36% qualify as problem drinkers, and that approximately 28%, 19%, and 23% are struggling with some level of depression, anxiety, and stress, respectively. That year, 15 law schools and over 3,300 law students participated in the Survey of Law Student Well-Being. It found that 17% experienced some level of depression, 14% experienced severe anxiety, 23% had mild or moderate anxiety, and 6% reported serious suicidal thoughts in the past year. One-quarter fell into the category of being at risk for alcoholism for which further screening was recommended.

### **The Lawyer Well-Being Movement**

Armed with this knowledge, leaders of several national lawyer organizations came together and pledged to work towards bringing about a culture change in how the legal profession dealt with not only these behavioral health issues, but also the overwhelming lack of well-being among so many. From this meeting in late 2016, the National Task Force on Lawyer Well-Being was created. In the short amount of time since that meeting took place:

- Members of the National Task Force published a comprehensive report, “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change,” [[www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWell-BeingReportRevFINAL.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWell-BeingReportRevFINAL.pdf)] a charge to all stakeholders in the legal profession to bring about a culture shift.
- Both the ABA and the Conference of Chief Justices passed resolutions that support the Report and urge consideration by all states.
- 28 states have created statewide initiatives to address impairments and promote well-being (go to: [www.lawyerwellbeing.net](http://www.lawyerwellbeing.net) to see what your

state is doing).

- Over 100 legal employers (global firms, law schools, governmental entities, etc.) have signed a pledge to take specific action towards the promotion of well-being and the prevention of impairments. [[www.americanbar.org/groups/lawyer\\_assistance/working-group\\_to\\_advance\\_well-being\\_in\\_legal\\_profession](http://www.americanbar.org/groups/lawyer_assistance/working-group_to_advance_well-being_in_legal_profession)]

In many states, supreme courts are establishing task forces or commissions on lawyer well-being; bar associations are creating well-being committees; law schools are mandating the study of how impairments impact professional responsibility; and funding for lawyer assistance programs is being increased. In others, very little is being done statewide, but efforts are taking hold among local or regional bar associations.

In Canada, the Canadian Bar Association (CBA) is promoting lawyer well-being via confidential Lawyer Assistance Programs designed to help lawyers, paralegals, law students, and judges cope with the mental-health challenges that come with the profession. The CBA has also partnered with the Mood Disorder Society of Canada to create “Mental Health and Wellness in the Legal Profession” – an online program that provides educational tools, support, and resources in areas related to mental illness, mental health, and addictions that are so pervasive in the legal profession. (To learn more, see “Resources for Depression” on page 38.)

### **Recognition is Good, But How Does it Help a Lawyer with Mental Health Issues?**

So, yes, legal associations across North America are working to promote well-being for lawyers (and law students), and to reduce substance use and mental health disorders. But what does this have to do with you, a family lawyer who likely is in a small or solo firm, and has little time or bandwidth to delve into what’s up with the ABA, CBA, Big Law, or the Conference of Chief Justices?

All of these national awareness-raising and policy initiatives, along with the accompanying legal media coverage,

are setting the stage for what I believe is the single most important thing that could help a lawyer suffering as I was just over ten years ago. With each article written, each CLE program delivered, and every speech offered by a bar leader on these topics, we are breaking down the stigma that surrounds behavioral health issues. A conversation is taking place nationally and locally, sometimes from lawyer to lawyer. And, once we know it's ok to talk about these issues in the open, it becomes easier for those suffering from one of them to know that s/he:

- Is not the only lawyer experiencing these issues;
- Can ask for help and receive it;
- Can recover and live a remarkably satisfying and successful life.

These conversations – at every level where they occur – set the stage for saving a life. This article could save the life of someone you know. Here's how.

## Family Lawyers Are Subject to High Levels of Unrelenting Stress

Studies consistently show that high levels of stress, particularly stress that is unrelenting, is a strong and consistent precursor to a whole host of physical and behavioral health disorders. On a simplified level, the process looks like this:

1. Unrelenting stress instills an array of uncomfortable (sometimes seemingly intolerable) feelings, both physical and emotional.
2. We, as humans adverse to pain, reach for whatever will take that pain away.
3. Too often, what is initially a quick and convenient way to alleviate pain brings a whole host of its own problems over the long run.

We know that the practice of law – especially family law – is consistently and, in many ways, unavoidably stressful. Being caught between demanding clients and difficult opposing counsel, then being subject to trial-weary judges, all while trying to operate a business in a world that is changing more quickly than is barely imaginable – this truly is a recipe for unrelenting stress and all that stems from it.

In recent years, I served as director

of a state lawyers' assistance program (LAP). Part of my daily job was to listen to, counsel, and provide referrals to the many overwrought, stressed-out, depressed, anxious, and/or substance-abusing lawyers who called. No small number of those callers were family lawyers. For the lawyers who were in the "yellow light" zone of the stress continuum (not having reached the point of a diagnosable behavioral health disorder), we would often discuss tactics that would fall under preventative measures.

In essence, I encouraged lawyers to make themselves more stress-hardy through a variety of measures rooted in cognitive behavioral therapy, combined with some wisdom derived from my own years in the trenches of trial work. In addition to the ideas below, take a look at the ABA "Toolkit for Lawyers and Legal Employers" [[www.americanbar.org/groups/lawyer\\_assistance/working\\_group\\_to\\_advance\\_well-being\\_in\\_legal\\_profession](http://www.americanbar.org/groups/lawyer_assistance/working_group_to_advance_well-being_in_legal_profession)] for other evidence-based strategies. Perhaps, some of these ideas may spark interest. If so, I encourage you to use the keywords in parentheses in a search engine to learn more.

## Four Strategies to Stop Stress from Escalating

### 1. Check Your Perspective on What It Means to Succeed.

Stress and its debilitating effects skyrocket when we set a standard for ourselves requiring absolute success in each case or (the impossible) satisfaction of all clients. Lawyers, by and large, are a perfectionistic lot, and studies are replete with feedback telling us that perfectionism is a setup for severe stress and dysfunctional responses to it (keyword: "dangers of perfectionism").

Is it possible to be a good lawyer and not require perfection from yourself? I believe the answer is "yes," and a large cohort of lawyers seem to agree with me. As part of my work as a LAP director, I gave hundreds of speeches on well-being and prevention of impairments to thousands of lawyers. During each presentation, I asked audience members about their strategies for finding balance

and reducing stress. A strong and consistent pattern emerged: the older the lawyer, the greater the sense of equanimity. Upon deeper questioning, these lawyers' responses showed they had gained perspective over the passage of time on what success meant. They knew that a loss was not the end of the world and that, because they had done so in the past, they may very well win the next time. They knew that a successful life (and here's the key) was about more than being the best lawyer. It was about enjoying what they had, loving the people in their lives, and – while being proud of their profession – being conscious about not letting this overshadow everything else.

### 2. Adjust Your Attitude Towards One of Gratitude, Even When Everything Simply Stinks.

Intentionally and consistently turning your attention from what is wrong with your life (and the others in it) to what is right, begins to build a habit of looking for the good. Studies show that we are able to – over time – turn ourselves from "glass half empty" to "glass half full" people. We are not stuck in the mode to which we were born and molded by our upbringing.

The internet is ablaze with information, products, and apps for this well-being strategy (keyword: "gratitude practice"). Essentially, it boils down to regularly writing down what you are grateful for in your life and why. I have tried this practice myself and found the benefit to be quick and significant. So that I would have something to put in the daily email to my gratitude practice partner, I began actively looking for what was good in my life. Rather than focusing on horrendous traffic, for example, I spent time thinking about what had happened that morning or what I saw on the way to work that brought a light to my life. Sound simple? It is!

### 3. Build Your Own Support Team.

We humans are intended to live in community with one another and, as such, we are hardwired for it. When

Cont. on page 38

# How Good Is Your Law Firm's Website?

## Is it Time for a Redesign?

**Responsiveness:**  
Does it adjust itself to the device used?  
How does it look on smartphones?

**Search Engine Optimization:**  
How well does it rank on Google?  
Is your sitemap good?

**We Will Review Your Website for Free**

**Performance:**  
How fast is the load time?  
Is it secure and safe from attack?

**Content:**  
Is your branding message clear?  
Does it have content visitors want?

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this is thwarted, stress and its debilitating effects can bring us down. As a LAP director, I often explored with distraught lawyers who could be of support to them and then encouraged connection with those individuals. Studies are replete with results showing the stress-reducing and resilience-boosting benefits of connecting with the positive people in our lives (keyword: “human connection theory”).

The benefits are even stronger when connection is made with others who have experienced a common hardship. Consider bringing together two or three other like-minded family lawyers and start sharing a meal or coffee every week or every month. Share strategies and horror stories. Combine resources, when possible. You could also learn about the healing effects of debriefing with a partner, an essential practice to avoid or diminish the effects of secondary post-traumatic stress disorder. Find a partner and engage in this simple technique whenever you are shaken by particularly disturbing evidence, i.e. acts of physical or sexual violence (keyword: “trauma informed debriefing”).

#### 4. Change up Your Practice.

Get serious about letting go of the clients – or the cases with opposing counsel – who are the worst stress-inducers. Often, it’s a handful of these files that make the entire practice miserable. Withdraw and/or transfer the files to another hungrier, younger, or less-stressed lawyer. Put numbers to paper on how much income you need to live and reduce the number of clients you represent. Do with less so you can live more.

Before you reject this idea, take a moment to calculate how many years of practice you have until retirement. Now, consider: can you endure this degree of stress for that many years without succumbing to the worst that unrelenting stress can dish out? Is inconveniencing or disappointing clients worth that?

#### Seek Professional Help

Finally, if self-help measures are not sufficient and you find yourself slipping from the “yellow light” to the “red light zone,” please be open to asking a professional for help. A good way to start your search is by contacting your state’s confidential lawyers assistance program. You can even call and ask to consult with

them anonymously (keyword: “your state + lawyers assistance program”).

In the sidebar (“Resources for Depression, Anxiety, and Addiction,” below left), you will find links to self-assessments for depression, anxiety disorder, and substance use disorder. As a first step, consider taking a look at the applicable survey tool to learn more about a problem that may (or may not) be developing. If there is cause for concern, it can be helpful to print the results and take them with you to a therapist or even your primary care physician.

I know just how frightening this simple proposition can be. In the midst of my using and abusing of alcohol, I never looked closely at my behavior for fear of finding what I truly knew inside but would not admit. Remember, in 2019, we now know that each of these is a medical condition – not a weakness of character – that is treatable and manageable. If you are suffering, know that life truly can get a whole lot better.

Today, my life can still be stressful. It is, however, also filled with happiness, relative serenity (I’m no saint!), and meaning. I wish the same for each of you. ■

## Resources for Depression, Anxiety, and Addiction

### Directory of State Lawyer Assistance Programs

[www.americanbar.org/groups/lawyer\\_assistance/resources/lap\\_programs\\_by\\_state](http://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state)

### Directory of Provincial Lawyer Assistance Programs

[www.cba.org/CBA-Wellness/Wellness-Programs](http://www.cba.org/CBA-Wellness/Wellness-Programs)

### Depression Assessment

[www.integration.samhsa.gov/images/res/PHQ%20-%20Questions.pdf](http://www.integration.samhsa.gov/images/res/PHQ%20-%20Questions.pdf)

### Anxiety Assessment

[www.integration.samhsa.gov/clinical-practice/gad708.19.08cartwright.pdf](http://www.integration.samhsa.gov/clinical-practice/gad708.19.08cartwright.pdf)

### Alcohol Use Disorder (AUDIT)

[www.integration.samhsa.gov/AUDIT\\_screener\\_for\\_alcohol.pdf](http://www.integration.samhsa.gov/AUDIT_screener_for_alcohol.pdf)

### Mental Health Online Assessment

[www.psychologytoday.com/us/tests/health/mental-health-assessment](http://www.psychologytoday.com/us/tests/health/mental-health-assessment)

### Mental Health and Wellness in the Canadian Legal Profession

[www.mdcme.ca/courseinfo.asp?id=176](http://www.mdcme.ca/courseinfo.asp?id=176)



*Bree Buchanan, JD, MSF, a senior advisor for Krill Strategies LLC., is a frequent speaker and consultant to the legal profession on issues of lawyer impairment and well-being. She is a founding co-chair of the National Task Force on Lawyer Well-Being and chair of the ABA Commission on Lawyers Assistance Programs.*  
[www.prkrill.com](http://www.prkrill.com)

## Related Articles

### Addiction and Dependency Among Family Lawyers

At some point in your career, you will probably encounter another lawyer whose addiction problems impair their ability to practice.

[www.familylawyer magazine.com/articles/addiction-and-dependency](http://www.familylawyer magazine.com/articles/addiction-and-dependency)



### Choose Highly Qualified and Experienced Evaluators to Avoid Bias

By Dr. Gerald Cooke, Forensic Psychologist

We have seen biased expert opinions, but rarely with highly qualified experts. In my experience, most of

the highly qualified and experienced evaluators do not align with who retained them. We avoid this problem by requiring that we be Court Appointed based on agreement of both parties. Also, the contract the parties sign specifically states that the report focuses on the best interest of the child independent of any other considerations, including who paid the fee. Despite the agreement and court appointment status, the Court does sometimes order one party to pay all or most of the fee. We've completed many evaluations where the custody recommendation went against that party. ■

*Gerald Cooke, Ph.D. and Margaret Cooke, Ph.D., both forensic psychologists, have conducted hundreds of custody evaluations since 1979. The practice also conducts evaluations in criminal cases for defense and prosecution and in civil cases for plaintiffs and defendants. Gerald is also a neuropsychologist. [www.CookeForensicPsych.com](http://www.CookeForensicPsych.com)*



## Slack to Increase Your Family Law Team's Productivity

This app boosts efficiency by tapping into a team's cumulative wealth of knowledge while avoiding "death by meetings."

By Christopher Casserly, Family Lawyer

As I work to solve our clients' various family law issues, I will often sit down to tackle my "to-do" list only to have my attention redirected to something else. It's difficult to focus on the firm's growth with such distractions, so our team sought a centralized hub for information, discourse, scheduling – everything that makes a firm run smoothly. Enter the Slack app.

### Slack Lets Your Team Collaborate in Real-Time

Slack is a web-based application that allows our team members to communicate in real-time, keeping them current with the minutiae of running a law firm. There are several custom-made "channels" within Slack; one such channel is "Social Media Content," where we contribute to the firm's online presence. Slack has de-cluttered our inboxes and eliminated inefficient meetings; instead, by collaborating in real-time, we have increased our workflow tremendously.

equals marital property, then the only logical approach would be to either add interest to the former spouse's one-half share of the marital contribution or assume the same investment return on those marital monies used to purchase the years as what would have otherwise have been earned in the former spouse's Thrift Savings Plan or 401(k). It goes without saying that the marital contribution – regardless of what plan it was contributed to – would have increased in value. Over 20 years, that initial marital investment would have likely been worth more than five times as much.

For the majority of cases, making a deposit or contribution toward any enhancement of one spouse's pension with marital monies will make that enhancement marital. Naturally, if non-marital monies were used to purchase the equivalent non-marital or pre-marital years, there would be no question that the enhancement would be then be considered non-marital. ■



*Timothy Voit is a Certified QDRO Specialist with the American Association of Certified QDRO Professionals. He has prepared QDROs for WFA and Voit Econometrics Group for 25 years, and he has testified in both state and federal courts. He is also the author of Retirement Plan Benefits and QDROs in Divorce and Federal Retirement Plans in Divorce. [www.vecon.com](http://www.vecon.com)*

### Slack Pros and Cons

Slack's easy-to-use interface is terrific for intra-office communication. Although it's compatible with several time management apps, the inter-functionality can sometimes be clumsy.

As Slack grows, it has become our centralized hub to move cases forward while we concentrate on growing our practice. Very simply, we accomplish much more by tapping into our team members' experience and knowledge while avoiding the dreaded "death by meetings" than can bring a productive afternoon to a screeching halt. ■

*This article has been condensed; to read the full article, go to [www.familylawyermagazine.com/articles/slack](http://www.familylawyermagazine.com/articles/slack).*



*Christopher Casserly is a partner with the Law Offices of Gregory P. LaMonaca, a family law firm in the greater Philadelphia region. Chris and his team pride themselves on using the latest in technology coupled with a team-based approach to each case. [www.LaMonacaLaw.com](http://www.LaMonacaLaw.com)*

# Reducing Manual Work to Improve Family Lawyer Well-Being

Family lawyers can improve their well-being by implementing processes that automate manual tasks that they handle each day within their practices.

By Scott Clasen, Marketing Director

**W**ellness is an ongoing issue within the legal community. Family lawyers notoriously work too much and rest too little, so it's vitally important to find strategies that lighten your workload without sacrificing client services or law firm profits.

Manual processes keep legal professionals working harder than necessary – yet many attorneys fail to see the value in automation. Systematic changes can make your day more productive and efficient, positively impacting your physical and mental well-being.

Below are some tips for reducing the amount of manual work you take on within your legal practice. Think about implementing some of these approaches to improve your well-being.

## Improving Family Lawyer Well-Being by Embracing Automation

While some attorneys resist automation and the use of artificial intelligence (AI), these technical innovations can actually increase the efficiency and productivity of your legal practice. By automating the least profitable and most tedious tasks, you can free up time for rainmaking, providing quality legal services, and getting some much-needed sleep. You can even increase your firm's profitability with reduced overhead expenses.

Some common family law firm processes that may be automated include:

- Time and expense entries
- Client intake processes





- Billing coding, like UTMBMS (Uniform Task-Based Management System) or LEDES (Legal Electronic Data Exchange Standard)
- Firm budgeting
- Document review
- Invoice submissions
- File format conversions

### Utilizing Cloud-Based Applications

Cloud-based applications provide valuable tools for automation and more free time. Just think about the convenience of accessing client files and data from any place and at any time. This level of mobility opens up a world of greater productivity, immediately impacting the efficiency of your law firm staff, as well as their overall job satisfaction. It centralizes your firm's workload by creating an environment where data flows freely. From firm partners to associates and administrative assistants, cloud-based software promotes wellness throughout the practice.

Let's look at an example. The manual process of converting a file into LEDES format by hand and then walking it to the right location is time-consuming and therefore expensive. With a cloud-based application, these conversions (and the delivery) can be handled quickly and effectively, freeing up time for the tasks that bring more money into the firm.

A cloud-based time-tracking and billing software designed for the legal profession transforms the way you handle key tasks within your firm. As a result, you and your employees spend less time handling tedious administrative tasks.

Saving time within your legal practice is completely doable with the adoption of automation applications. Imagine how many headaches you could avoid with an application that handles expense entries, budgets, or monthly billing! How about automating your client interviews to screen prospects quicker and easier or using an app to guide greater revenue generation?

Now imagine the benefit of having all of these applications integrated with your current practice management or legal billing system. A game-changer, right? By automating those mundane daily processes, you can clearly add value to your law practice while improving family lawyer well-being.

### Lift the Burden of Manual Processes from Your Staff

What if I told that one of your firm's biggest automated value-adds is already sitting right in your office? Law firms frequently overlook the valuable resource they have in their staff members. These employees are often inundated with manual processes that bog them down and stifle their creativity. By inspiring innovative changes and providing training in new technologies, you can encourage staff members to think outside the box and share their ideas.

Inspired employees are happy employees, and happy employees are productive employees. According to Gallup-Sharecare Well-Being Index, happy employees take fewer sick days than their unhappy counterparts – an average of 15 fewer sick days a year! They also tend to have better immune systems, which allows them to cope better with the inevitable office viruses that make the rounds during cold and flu season.

So give your staff the tools they need to automate their everyday tasks. The benefits will be swift and extensive – and they include greater efficiency and talent retention because valued employees are less likely to leave and take their talents elsewhere.

### How to Implement Automation

Virtually everything you and your staff do several times each day or each week can be automated. While large legal projects like document review and trial preparation are commonly identified for automation, you shouldn't overlook smaller tasks.

To start the automation process, start by identifying the tasks you find yourself repeatedly handling. Three areas of legal practice that are almost always ripe for automation include:

- **Emails** – Why are you wasting time writing the same email over and over again? Automated email responders allow you to easily respond to common client inquiries without having to spend time repeatedly drafting responses.
- **Documents** – Whether you draft a contract or a pleading, make sure that you save every written document into a document database. You can either repurpose the entire document or turn it into a fillable form saved in a form library. That way, when someone new walks in the door needing a contract that you have created more times than you can count, you can simply fill in the form and provide them with a customized contract – in a fraction of the time.
- **Scheduling** – How much time have you or your administrative assistant spent trying to coordinate a settlement conference or mediation? There are several applications on the market that can automate this process for you. These products create a poll for all parties to provide their availability and then come up with a winning day and time that is synced with your calendar. Even client scheduling can be automated with a calendar application on your website. Your clients can book an appointment with you without you having to spend a single minute of unnecessary time.

### Automating Repetitive Work Will Improve Family Lawyer Well-Being – and Law Firm ROI

If done correctly, automation provides law firms with a substantial return on investment, financially and in relation to attorney well-being. These innovations allow you to manage time spent on administrative matters while freeing up time to focus on more complex money-making issues – or to simply relax.

By automating the repetitive work in your office, you can accomplish your list of tasks faster, cheaper, and even better. But, even more importantly, you can use these innovations to promote your own health and well-being. ■



*Scott Clasen oversees all aspects of TimeSolv's marketing efforts. With 20+ years of marketing experience, he has seen the full transition to the digital age. To learn more about automating your law firm tasks with TimeSolv, click here for a free trial: [apps.timesolv.com/App/Registration.aspx](https://apps.timesolv.com/App/Registration.aspx)*



# The Economic Reality of Maintenance Post TCJA

The TCJA reduced the amount of after-tax income available to pay maintenance, but other TCJA changes may have positively impacted the marital balance sheet.

By Arik Van Zandt, Business Valuator

**T**he *Tax Cut and Jobs Act* (TCJA) – signed into law on December 22, 2017, with most changes in effect since January 2018 – has resulted in significant tax changes across the board. In terms of the TCJA’s impact on family law, how maintenance payments are treated for tax purposes may be one of the most significant. As you likely already know, maintenance payments related to separation agreements signed on January 1, 2019, or later are no longer tax deductible for the payor and no longer taxable for the recipient. But what does that actually mean for the divorcing parties? Let’s walk through an example together and find out.

In this example, the income-producing spouse generates \$250,000 in pretax (adjusted gross income) annual income, which the parties have agreed to split equally on an after-tax basis for a specified period of time. Additionally, for simplicity purposes, let’s assume that the parties do not qualify for any tax credits.

## Exhibit 1

As you can see from Exhibit 1, pre-TCJA, total available after-tax income to be divided would have been \$15,111 a month – or \$7,555 to each party.

Exhibit 1: Pre-TCJA			
<b>Income Producing Spouse</b>			
Total Income			\$ 250,000
Less: Maintenance			(116,173)
<b>Taxable Income</b>			<b>\$ 133,827</b>
<b>Taxes</b>			
Less: Federal Income Tax	22.8%		\$ (30,453)
Less: Social Security Tax	3.2%		(7,961)
Less: Medicare Tax	1.9%		(4,750)
<b>Total Taxes</b>	<b>32.3%</b>		<b>\$ (43,163)</b>
<b>Income After Maint. &amp; Taxes</b>			<b>\$ 90,664</b>
<b>Monthly Income</b>			<b>\$ 7,555</b>
<b>Non-Income Producing Spouse</b>			
Income from Maintenance			\$ 116,173
Less: Federal Income Tax	22.0%		(25,510)
<b>Income After Taxes</b>			<b>\$ 90,664</b>
<b>Monthly Income</b>			<b>\$ 7,555</b>
<b>Total Available After-Tax Monthly Income</b>			<b>\$ 15,111</b>

## Exhibit 2

Post-TCJA, excluding any changes related to maintenance, the reduction in personal income tax rates that were part of the TCJA would have resulted in more after-tax income: approximately \$615 more (see Exhibit 2, below).

Exhibit 2: Post-TCJA, ex. Maintenance Changes			
<b>Income Producing Spouse</b>			
Total Income		\$	250,000
Less: Maintenance			(116,638)
<b>Taxable Income</b>		<b>\$</b>	<b>133,362</b>
<b>Taxes</b>			
Less: Federal Income Tax	19.7%	\$	(36,396)
Less: Social Security Tax	3.2%		(7,961)
Less: Medicare Tax	1.9%		(4,750)
<b>Total Taxes</b>	<b>39.2%</b>	<b>\$</b>	<b>(39,007)</b>
<b>Income After Maint. &amp; Taxes</b>		<b>\$</b>	<b>94,356</b>
<b>Monthly Income</b>		<b>\$</b>	<b>7,863</b>
<b>Non-Income Producing Spouse</b>			
Income from Maintenance		\$	116,368
Less: Federal Income Tax	19.1%		(22,282)
<b>Income After Taxes</b>		<b>\$</b>	<b>94,356</b>
<b>Monthly Income</b>		<b>\$</b>	<b>7,863</b>
<b>Total Available After-Tax Monthly Income</b>		<b>\$</b>	<b>15,726</b>

However, after considering all the TCJA's applicable changes, the benefit that resulted from changes made to the personal income tax rate tables is more than offset by the changes made to how maintenance is treated for tax purposes, resulting in overall less after-tax income available to pay maintenance; in this example, \$603 (or 4%) less is available, as shown in Exhibit 3 (right, above).

## Exhibit 3

In the case of our example, a 4% reduction in total income available to pay maintenance may not sound significant. However, when considering that the total income is already being split between two households post-divorce, even a 4% reduction in total income available can be significant.

## Exhibit 4

As can be seen in Exhibit 4 (right), if we assume that the non-income producing spouse has an inflexible monthly budget of \$7,555, an amount equivalent to monthly after-tax income that would have been available pre-TCJA as shown in Exhibit 1, \$602 (or 8%) less after-tax income is available to the income-producing spouse. Therefore, in this scenario, the negative impact of the TCJA as it relates to maintenance fully

becomes the burden of the income-producing spouse. That said, the economic reality is, more often than not, that the income-producing spouse's wages will increase over time and any negative inequity on the part of the income-producing

Exhibit 3: Post-TCJA			
<b>Income Producing Spouse</b>			
Total Income		\$	250,000
Less: Maintenance			<i>Not Allowed</i>
<b>Taxable Income</b>		<b>\$</b>	<b>250,000</b>
<b>Taxes</b>			
Less: Federal Income Tax	25.3%	\$	(63,188)
Less: Social Security Tax	3.2%		(7,961)
Less: Medicare Tax	1.9%		(4,750)
<b>Total Taxes</b>	<b>39.2%</b>	<b>\$</b>	<b>(75,889)</b>
<b>Income After Maint. &amp; Taxes</b>		<b>\$</b>	<b>87,050</b>
<b>Monthly Income</b>		<b>\$</b>	<b>7,254</b>
<b>Non-Income Producing Spouse</b>			
Income from Maintenance		\$	87,050
Less: Federal Income Tax	0.0%		<i>Not Taxed</i>
<b>Income After Taxes</b>		<b>\$</b>	<b>87,050</b>
<b>Monthly Income</b>		<b>\$</b>	<b>7,254</b>
<b>Total Available After-Tax Monthly Income</b>		<b>\$</b>	<b>14,508</b>

Exhibit 4: Post-TCJA			
<b>Income Producing Spouse</b>			
Total Income		\$	250,000
Less: Maintenance			<i>Not Allowed</i>
<b>Taxable Income</b>		<b>\$</b>	<b>250,000</b>
<b>Taxes</b>			
Less: Federal Income Tax	25.3%	\$	(63,188)
Less: Social Security Tax	3.2%		(7,961)
Less: Medicare Tax	1.9%		(4,750)
<b>Total Taxes</b>	<b>39.2%</b>	<b>\$</b>	<b>(75,889)</b>
<b>Income After Maint. &amp; Taxes</b>		<b>\$</b>	<b>83,437</b>
<b>Monthly Income</b>		<b>\$</b>	<b>6,953</b>
<b>Non-Income Producing Spouse</b>			
Income from Maintenance		\$	90,664
Less: Federal Income Tax	0.0%		<i>Not Taxed</i>
<b>Income After Taxes</b>		<b>\$</b>	<b>90,664</b>
<b>Monthly Income</b>		<b>\$</b>	<b>7,555</b>
<b>Total Available After-Tax Monthly Income</b>		<b>\$</b>	<b>14,508</b>

spouse's available after-tax income is temporary and will disappear (and even invert) with wage growth.

### The Trend Away from Maintenance and Towards Transfer Payments

While the TCJA did reduce the amount of after-tax income available to pay maintenance, other TCJA changes may have positively impacted the marital balance sheet through an increase in the value of private business interests or public equity interests held due to reduced corporate tax rates, creating an alternative source from which to transfer value from one spouse to another<sup>1</sup>. At Alvarez & Marsal Valuation Services, we've noticed a trend over the last five years away from maintenance payments and towards using transfer payments as a vehicle to transfer cash between the parties, primarily because transfer payments are generally lower risk for the recipient and

result in a cleaner break between the parties. Given that the TCJA eliminated any tax benefits previously associated with maintenance payments, this is a trend we expect to continue with even greater velocity. ■



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<sup>1</sup> *Martin v. Martin*, 1D18-2546 in the advance sheets. For more information related to how the TCJA impacted the value of business interests, please refer to Arik Van Zandt's May 10th, 2018 article, entitled "How the Tax Cuts & Jobs Act Will Impact Corporate Taxes", available at [www.familylawyermagazine.com/articles/how-the-tax-cuts-jobs-act-will-impact-corporate-taxes](http://www.familylawyermagazine.com/articles/how-the-tax-cuts-jobs-act-will-impact-corporate-taxes).

### Implementation / Cont. from page 11

tools supported by dependable partners, the security, reliability, and convenience of these products offer a more efficient process for the professional and a far better user experience for the client. More importantly, by creating a dedicated and standardized process for the firm to follow, family law professionals rest easier knowing that administrators, clerks, consultants, and any other staff involved in the file will follow the exact same procedures from one case to the next. The result is an increase in transparency and a reduction in liability.

Through Beta testing, the Financial Disclosure technology has successfully walked hundreds of clients through their professional's disclosure process. Initial findings conclude that ODR technology can have a major impact on the actual dispute resolution outcomes by removing obstacles, addressing power imbalances, sharing and democratizing information, speeding up processes, and rendering digestible and understandable information.

Financial Disclosure is an example of an ODR tool that combines the online aspect with actual dispute resolution in order to improve aspects of the family law process for professionals and for their clients. ■



*Darren Gingras is the Executive Director of SIÉSDE Dispute Resolution Technologies. He is regularly called upon to speak and train professionals regarding dispute resolution technologies, in Canada and around the world.*



*Josh Morrison (JD, LLM) is the Innovation Director of SIÉSDE. He has managed family law programs within legal incubators and authored multiple reports on family law and access-to-justice. Specializing in process protocols specific to family law, SIÉSDE Dispute Resolution Technologies is based at IBM Canada. [www.FinancialDisclosure.ca](http://www.FinancialDisclosure.ca)*

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# Fighting over Custody of Frozen Embryos

Recent cases show that even when intended parents have signed an agreement stating what will become of stored frozen embryos in the case of divorce, that doesn't necessarily stop them fighting over custody of frozen embryos. Litigants are arguing that the frozen embryos are human organisms that should be protected – and pro-life organizations are trying to help them make their cases.

By Evie Jeang, Surrogacy Lawyer

One topic of discussion that has recently become front-page news in the United States is what couples/intended parents should do with their frozen embryos in case of a divorce. During the beginning of every Assisted Reproductive Technology (ART) journey, all intended parents have to sign a consent and agreement form stating what their fertility clinic should do with the stored frozen embryos in the case of separation.

According to the American Bar Organization (ABA), the state of California saw its first case back on November 18, 2015, in *Findley v. Lee*. In the post, the ABA states that “Judge

Anne-Christine Massullo of the San Francisco Superior Court ruled that a woman could not use frozen embryos after she divorced her ex-husband.” The judge agrees that the consent and agreement form that the intended parents signed remained an enforceable contract under the California laws. The article continues to advocate that Judge Massullo's ruling remains consistent and in line with other “post-divorce embryo custody cases” in New York, New Jersey, and Tennessee.

## Post-Divorce Embryo Custody Cases in the U.S.

The International Fertility Law Group

commented on this precedent-setting case as well back in November 2015. They wrote that this ruling was “the first of its kind in a California court” which had serious implications for the ART industry moving forward. As more couples have turned to in vitro fertilization (IVF) for their fertility needs, the United States has seen exponential growth in cases like *Findley v. Lee*.

In 2018, now-divorced Mandy and Drake Rooks, battle it out before the Colorado Supreme Court over the custody of their frozen embryos. The Rooks were married for over a decade and used IVF to have their three children. They decided to divorce in 2014

and had six viable embryos at the time stored in a Denver clinic. Mandy asserted that she wanted her embryos preserved, “hoping for a large family and believing the embryos were her only chance at a future pregnancy.” However, Drake insisted that he did not want any more children. His attorney states that his client “feels that he should not be forced to have other children by her getting these pre-embryos and implanting them.” The Colorado Supreme Court ruled in Drake’s favor, although in other cases, the courts have ruled in favor of the wife based on the argument that these embryos were these women’s last chance at having a family.

### Frozen Embryos: a Life or Death Issue?

This past April, the Connecticut Supreme Court was presented with another case debating “whether a divorced woman could discard one against her ex-husband’s wishes.” This case involves Jessica Bilbao and Timothy Goodwin, who are a divorced couple who had their daughter through IVF. Before starting IVF, the two had signed a contract stating that in the event they separated, their remaining embryos would be discarded. Ms. Bilbao still wants their last embryo discarded; however, Mr. Goodwin believes it should be saved and adopted by another couple. This case has gathered much media attention due to the oral arguments made by both sides.

During oral arguments, Bilbao’s attorney, Scott Garosshen, told the judges that both parties “voluntarily, willingly and without duress” entered into this agreement and they should “honor the choices they made.” However, Goodwin’s attorney, Joseph Secola, repeatedly told the justices that the embryo “is a human organism who should be protected... We err on the side of life or death – that’s the issue here.” Garosshen refuted this statement, arguing that, “There is an inadequate factual record to be making any kind of determination about when a cellular organism becomes a legal person.”

*Bilbao v. Goodwin* has attracted the attention of several pro-life organizations, who – perhaps galvanized by recent anti-abortion legislation in several states – wrote “friend of the court” briefs for Goodwin.

According to an article written by the *National Catholic Register*, this case has now delved into the realms of abortion law. Secola states that “the law already had many unresolved inconsistencies where unborn children were treated as legal persons in one case, such as recognizing unborn children as potential heirs to an estate, and not others. Recognizing the embryo’s best interests in this case,” he added, “should have no bearing on *Roe v. Wade* and abortion rights.” This case is still currently pending at the Supreme Court level due to the intricacies and new arguments that have been presented. The ruling that is to come from this case will yet again have a national impact on the ART industry here in the United States.

### Disputes over Custody of Frozen Embryos Are Not Restricted to Married/Divorced Couples

Contrary to popular belief, not every embryo custody case involves a married couple. Often all you need are two people who’ve decided to be intended parents by using their own sperm and eggs. One example would be the high-profile case of *Modern Family* star Sofia Vergara and her ex-fiancé Nick Loeb. These two have been repeatedly going to court for five years to battle over the custody of their frozen embryos. According to multiple news articles, Vergara refuses to give Loeb consent to use their embryos.

There are multiple gray and shady areas when it comes to the laws pertaining to and surrounding ART. It’s been difficult for the United States court system to make a ruling on how we’re supposed to balance one individual’s right to be a parent against the other party’s right *not* to have children. Despite recent challenges to agreements made while a couple

was hoping to bring a new life into the world, it’s important that fertility clinics make intended parents sign a consent and agreement form prior to the start of any fertility journey. Often consulting an attorney, one for each party, proves to be beneficial in the long run for couples.

Meanwhile, we will watch and wait to see what happens with cases such as *Bilbao v. Goodwin*, where divorced couples are contesting custody of their frozen embryos. ■

#### Sources:

**International Fertility Law Group**

[www.iflg.net/frozen-embryos-divorce](http://www.iflg.net/frozen-embryos-divorce)

**American Bar Organization**

[www.americanbar.org](http://www.americanbar.org)

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[www.abcnews.go.com](http://www.abcnews.go.com)

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## Future of Family Law / Cont. from page 7

people rely on sites like Match.com or PlentyOfFish.com to find their significant others, so it seems natural to them to utilize technology when those relationships come to an end. Modern clients expect to use technology in every area of their lives – divorce included. Disputants expect to be able to use the same kinds of communication tools they leverage at home and work to handle their separations, and if they're told they have to do it the "old, face-to-face" way, they get annoyed.

### ODR May Generate New Opportunities for Lawyers Who Embrace Change

Many family lawyers are concerned that ODR will put them out of business, but my experience in deploying online dispute resolution systems indicates that this will not necessarily be the case. Currently, ODR systems are usually focused on *pro se*, self-represented litigants who can't afford to hire a lawyer to help them in their divorce, so no family lawyers are being displaced. If parties need and can afford support from a lawyer or mediator, ODR can help to connect parties with capable counsel. Even with ODR, many cases will still require the assistance of a lawyer or a mediator, and the technology will allow them to assist parties outside of their immediate geographic area of practice.

Part of the hesitation about welcoming ODR may be generational. Most young lawyers are very comfortable with technology and are open to integrating new technology into the way they

service their clients. Eventually, all lawyers may come around to appreciate the benefits of ODR, just like their clients. After all, being able to reach agreements from anywhere – including your home office, at the pool, on the golf course, or at the beach – can be pretty great. If resolutions become more efficient, lawyers may be able to take more cases (perhaps even at flat rates) – which will more than compensate for any drop in billable hours.

My grandfather always used to say: "*Don't build your business where the highway is, build your business where the highway is going.*" This is good advice for any lawyers who still plan to be practicing 10, 20, or 30 years from now. Technology is disrupting the law, just like it disrupted medicine and finance – but for those attorneys who embrace the change and are willing to evolve their practices, this disruption may generate significant opportunities. It's not going to be orderly, and we'll probably make many mistakes along the way – but if we do it right, ODR may offer the biggest opportunity we've had to expand access to justice in the last hundred years. ■



*Colin Rule is VP of Online Dispute Resolution for Tyler Technologies. He co-founded ODR service provider Modria in 2011, serving as CEO and COO until Tyler acquired Modria in 2017. From 2003 to 2011, he was Director of Online Dispute Resolution for eBay and PayPal. He has worked in the dispute resolution field for two decades as a mediator, trainer, and consultant. [www.tylertech.com](http://www.tylertech.com)*

## Electronic Evidence / Cont. from page 29

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Thanks to increased competition over the last five years, these services are becoming much more reasonable in terms of pricing/burn rate.

<sup>6</sup>For instance, while X1 Social Discovery is an excellent and very user-friendly tool that costs only around \$2,000 to license annually, it currently can only capture Facebook, Instagram, Tumblr, Twitter, IMAP, Gmail, YahooMail, AOL Mail, YouTube, and webpages/sites. See [www.x1.com/products/x1-social-discovery](http://www.x1.com/products/x1-social-discovery).

Given the easy access the Internet provides to information about the functionality and attributes of not only social media applications but also cell phone platforms (e.g., Apple's iOS), accounting programs (e.g., Intuit's Quickbooks), and even the Internet itself (e.g., Internet Archive's Wayback Machine), it is well within the reach of all family law practitioners to gain the technical knowledge and cyber competence a modern family law practice requires. ■



*David R. Hazouri, a partner at Rafool, LLC, has a deep proficiency in investigative discovery involving computer-based information. In 2006, David established his own eDiscovery consulting firm, and he has taught bar-certified courses on eDiscovery to law students, attorneys, and judges and is currently a Certified X1 Social Media Examiner. [www.rafool.com](http://www.rafool.com)*

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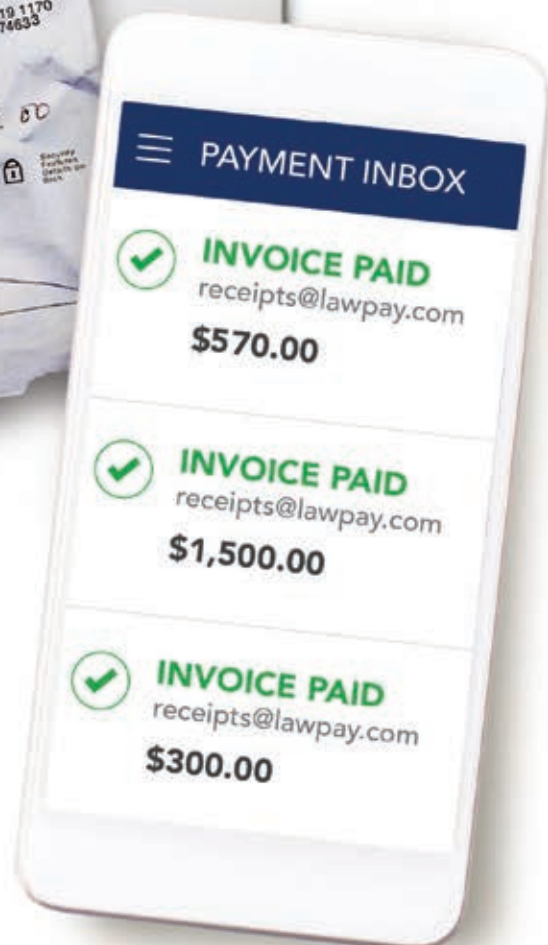
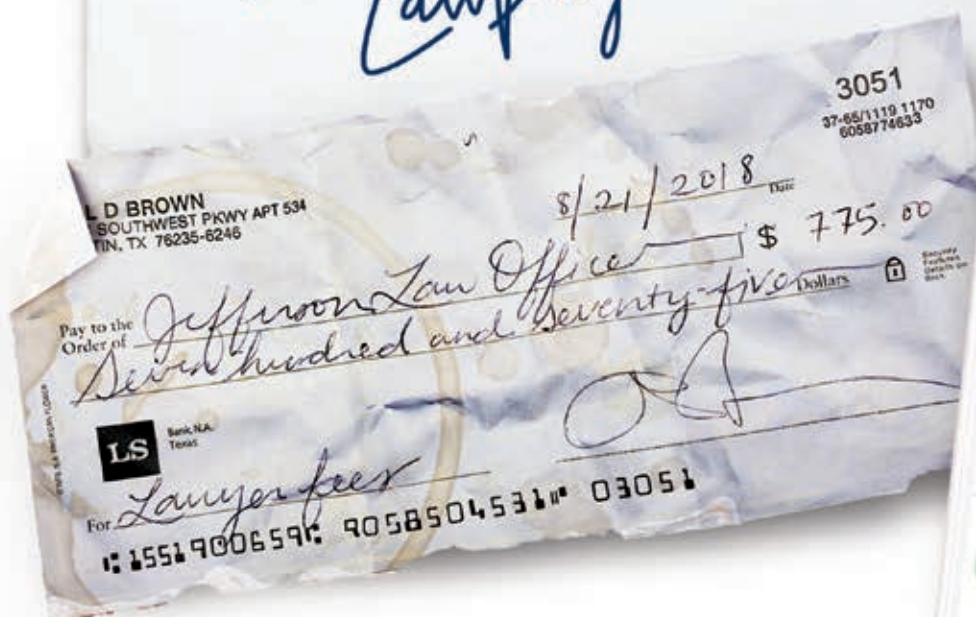
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