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Letter From the Publisher

Helping Family Lawyers Keep Up With the Only Constant: Change

Welcome to our annual 2013 issue of Family Lawyer Magazine!

We’ve been working with family lawyers for the past 17 years and have witnessed the many changes that have occurred, (technology, more pro se divorce, increased competition, reduced court resources, less divorcing people, etc.) in the practice of family law.

We launched our Family Lawyer Magazine media products in 2011 (print magazine, digital magazine, quarterly e-newletter and website) to help you stay current with family law, divorce related financial and mental health issues, and to maintain a profitable practice and attain work/life balance. The positive feedback we’ve received to our Family Lawyer Magazine media products from practicing lawyers across the country has been both gratifying and encouraging.

This issue of Family Lawyer Magazine is jam-packed with an array of articles relevant to your family law practice. It features: top family lawyers offering courtroom strategies; practice advisor Mark Powers laying out the five issues most likely to threaten your law practice; Pauline Tesler explaining how understanding neuro-literacy can change the way you approach conflict resolution; Charles Kindregan discussing cryopreserved embryos in divorce; technology gurus share their knowledge about the apps most likely to make your practice more organized and efficient.

Also featured is the inside scoop on private investigation; family law judges sharing their experiences; a primer on managing a military divorce; advice from top QDRO experts; and a family lawyer shares a heart-wrenching phone call with a former client, a must-read article.

You’ll find many of the most important family law cases reviewed here (plus many more on www.FamilyLawyerMagazine.com); a valuable Professional Directory by state; and in an effort to help family lawyers maintain a better work/life balance we’ve added a new “Travel” section.

My article “Losing Business One Client at a Time”, is intended to serve as a wake-up call, (along with the Mark Powers’ article), that in order for your practice to survive and thrive you’ll need to continue to evolve how you practice and how you market your practice.

If you’re looking to “up your game” you’ll want to read our interview with Carole Gailor who is chairing the “must attend” family law event of 2014 — the AICPA/AAML Annual Divorce Conference.

Family Lawyer Magazine is published by Divorce Marketing Group, which also owns www.DivorceMagazine.com and www.MarriageAndSeparation.com. We invite family lawyers to contribute articles to all of our publications and websites. Send your article suggestions to our editor, John Matias at John@DivorceMarketingGroup.com.

I also invite you to visit our website at www.FamilyLawyerMagazine.com where you will find hundreds of great articles and family law case updates, with new ones being added every day. Please sign up to receive our quarterly Family Lawyer Magazine e-newsletter on www.FamilyLawyerMagazine.com to ensure you stay up to date with the latest family lawyer information.

Family Lawyer Magazine is available because of the generous support of our advertisers without whom these valuable resources would not exist.

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We help attorneys plan for the future and we’re often asked to make predictions about what we believe is “next” so that our clients may have a competitive advantage. Family law attorneys are particularly vulnerable to what we believe are the five most threatening issues facing the legal profession.

80% of Attorneys Will See Their Incomes Drop

80% of the attorneys currently in practice will experience their income either stagnate or decline. In 1968 there were 168,000 licensed practicing attorneys. By 1980 the number had grown to 680,000. As of 2012 there were approximately 1.25 million attorneys in practice.

In the U.S. 44,000 law students graduate per year. Unlike in the medical profession, there’s no cap on the amount of graduates, and in many universities law departments are often the most profitable. Only one out of every two graduates in 2011 have actually found a job, and predictions for 2013 suggest this may be far less than 50%. In the meantime, more and more lawyers are out there looking for their place in the profession and adding to the competition that already exists.

What does this mean to you?

Despite the fact that a family law practice is one of the most challenging practice areas an attorney can take on, it is viewed by many inexperienced attorneys as an easy practice to start. Expect more competition in the coming years as these attorneys try to gain market share with lower fees.

Your Biggest Competition

Your biggest competitors will be the legal service providers on the Internet. This could be a game-changing problem. You see it now on the horizon, but you have not felt the full impact yet.

One of the largest legal service providers that has cropped up outside the jurisdiction of your local bar association is LegalZoom. In 2011 LegalZoom reputedly made $156 million in revenues with a $12 million profit margin. Rocket Lawyer, backed by Internet heavyweight Google Ventures, is also on the rise and expected to be successful. It is only a matter of time before a company like Costco decides to brand its own low-cost legal clinic and exert even more downward pressure on fees for basic, simple services. Keep in mind that Internet legal service providers can hire lawyers very inexpensively. A 2012 New York Bar Association study predicts that by the year 2015, 76,000 attorney jobs in the state of New York will be outsourced to other countries.

What does this mean to you?

Of special interest to Family Law attorneys is Fairway Divorce Solutions, an online service provider that offers a fast and low cost divorce process for its users. Though it’s located in Canada, it’s instructive because it combines three different threats in one package: one, it exposes the increasing commoditization of legal services; two, it features the low-cost delivery of those services by non-attorneys; three, it shows that...
these services can be offered on the internet which extends beyond normal geographic and jurisdictional limits. A triple threat.

**The Bar Can’t Stop It**

State bar associations will become increasingly like enforcement agencies. They will not be the change agents that the profession needs to battle increased commoditization and competition. We believe that most of the change impacting the legal profession will come from the outside — from legal service providers who are not covered by the ethics rules or the jurisdictions of the bar associations. Restricted by their goal to provide governance, bar associations will choke any form of innovation before it gains a foothold in the profession. As they work to maintain the status quo, online legal service providers will be the real market leaders, forcing change from the outside.

**What does this mean to you?**

Understand the well-intended limitations of your local and state bar associations. Look to other state and national organizations for the innovative, leading-edge change that will help you compete in the future.

**Litigators Will Multiply**

A greater percentage of attorneys in the future will make their living as litigators. This means transactional lawyers who were formerly making their living from real estate, estate planning, elder law or probate will find their work absorbed by online legal service providers and other competitors that haven’t hit the marketplace yet. Given the scale of this competition, lawyers will look for an alternate way of making a living and will focus on difficult to commoditize litigation, though won’t necessarily make more money.

**What does this mean to you?**

We anticipate that family law lawyers in particular will suffer fee compression because more lawyers will enter family law, believing it to be an easier practice area to get into.

**Artificial Intelligence**

The greatest threat to your practice has already been invented. The artificial intelligence that already exists in your smartphone can be harnessed to work against you. Bypassing the use of even outsourced legal technicians, artificial intelligence could be programmed to handle many of the more easily commoditized services you are currently providing in your law practice, such as a simple uncontested divorce.

**What does this mean to you?**

When a divorce “app” powered by artificial intelligence is created, make sure you occupy a niche in your family law practice that can’t be reduced to a mechanical questionnaire with branching logic trees.

**The Good News**

Family law services will continue to be in demand. The bad news is that the full-spectrum of services offered by family law attorneys is vulnerable to the threats we’ve identified. At the same time, your higher end services will be subject to increasing competition as transactional attorneys flee their practice areas and enter the increasingly crowded field of litigation.

**You still have time to build a strong defense.**

If you choose to serve lower-end family law clients, understand that this is a short-term strategy, as these clients will become more and more commoditized. You will need to think more like an innovative entrepreneur than a great lawyer to expand this side of your practice.

Act now before you feel the pinch of increasing competition. Preserve and expand the market share you have in your community. Referred clients are generally less price sensitive which will help you maintain your rates when competitors try to undercut you. Work to solidify your referral relationships with the CPAs, marriage counselors, family therapists, business valuators, past clients and other attorneys that have historically sent you good clients. Referrals from these groups can help sustain your practice through the tough times ahead. There is one thing you can count on for the future: referral marketing works and referrals from people who know you and trust you will never go out of style.

**Mark Powers, President of Atticus, and Steve Riley are practice advisors who have co-authored a number of workshops and programs. Visit the Atticus website: www.atticusonline.com or go to www.familylawyer magazine.com/resources for information on where to watch a short video on an innovative approach to creating a competitive advantage in the marketplace.**

**More Related Article**

15 Strategies for Family Lawyers to Nurture and Develop their Referral Network

By Dan Couvrette

Family lawyers need to ensure that they’re proactive and dynamic to achieve the full benefits of referral marketing.


An Interview with family lawyer Steve Mindel: Top 3 Factors that Make a Successful Law Firm

A highly successful partner of the firm Feinberg, Mindel, Brandt & Klein, voted the best family law firm in Southern California in 2010-2012, Mindel explains just what it takes to build up your own firm.

Raising Proper Evidentiary Objections Can Win the Day
Charles Fox Miller

Proper objections can take away the foundations of your opponent’s case, decimate your opponent’s confidence, increase the fact-finder’s estimation of your authority, cement your client’s confidence in your abilities, and give you a basis for appeal.

By contrast, raising improper evidentiary objections, or failing to anticipate or overcome your opponent’s objections can be humiliating and result in a loss. Failing to raise an important objection can also be the basis of a malpractice suit. In short, knowing how and when to raise evidentiary objections is arguably the most important technical skill within trial advocacy. Here are a few quick tips:

• Read the evidence code, thoroughly and often.
• For each important piece of evidence you think the opposition will offer, think of the objections you can raise against it, how your opposition will try to overcome those objections, and what counterargument to use.
• For every important piece of evidence you plan to offer, think of what objections could be raised against it and plan your arguments to overcome them.
• For the most important evidence — on both sides — think about writing pocket briefs and have copies of the authorities upon which you rely.
• Choose when to object carefully, state your objection precisely, and make your record respectfully.

Charles Fox Miller is a partner at Boies, Schiller & Flexner. www.bsfllp.com.

On Handling Trial Exhibits
Stephen Kolodny

I like to use the acronym MIAO, which stands for Mark, Identify, Authenticate and Offer.

Internally number each page of a multi-page exhibit for ease of reference during testimony. As a general proposition, you should offer the exhibit into evidence as soon as the witness authenticates it. Have your exhibits in binders, organized in numeric order by issue, and consider using special binders for each witness. Binders make the process simpler and smoother for the witness, and the judge, and will show that you have really prepared for the trial. The job of the attorney should be to make life easier for the judge. Taking time to present exhibits in a clear, technically proper fashion, not only makes the process go smoothly and leaves a positive impression with the judge, it also shows that you know what you are doing, that you’ve planned out the presentation of your case, and you’re not wasting the court’s time.
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Don’t underestimate the simple act of properly preparing exhibits. The more efficient you are at presenting evidence, the more positive an impression you will make on the judge. In some cases you will find the judge more understanding about the time and effort you have put into the case and will consider that professionalism when it comes to your request for attorney fees or your position in opposing fees when requested by the other side.

The easier you make it for the judge to follow the presentation of your evidence, the easier it is for them to understand your case and theories, and the higher your chance for success.

Follow these steps — they never fail. MIAO:
• MARK your exhibit with its intended number.
• IDENTIFY the exhibit. Number every page of a multi-page exhibit for ease of reference when the witness is testifying. If you’re using a projector ensure that you provide the judge with a copy of the exhibits on a disc or a USB device.
• AUTHORIZE. Have your witness provide the evidentiary foundation for the document.
• OFFER the document into evidence after authentication. Once the witness is gone you may have a problem if a question arises. Having evidence authenticated by a witness in the presence of the judge also adds weight.

Stephen Kolodny is a founding partner of Kolodny & Anteau. www.kolodny-anteau.com

Extract the Most Meaningful Admissions in a Time-Efficient Manner
Roger Dodd

Family lawyers often ask how they can fully develop the facts in a temporary hearing when the judge permits such a short time to present a case. It’s a fair question. Both the world of family lawyers and of judges is imperfect, and a major factor is lack of time.

It is more effective and efficient to cross-examine the opposing party to secure admissions than to direct your own client. It’s also more effective to present fewer but better developed chapters (an organizational form of asking questions), than to hurry through multiple chapters that are not heard by the judge.

When you embrace the dual concepts above, there is one common theme that enhances both: FOCUS. In preparation, you must focus on your cross of the opposing party, not preparing your client for a direct examination. This focus requires a commitment and the courage to do it. Initially lawyers mistakenly think the client wants to testify. Do a good cross, obtain the admissions, and the client will be more satisfied than having had the opportunity to “tell their story.”

Roger Dodd is a founding partner of Dodd & Burnham. www.doddlaw.com

Offers of Proof
Dorene Marcus

One of a trial lawyer’s most important responsibilities is making a record. When a trial court sustains an objection to the relevance or admissibility of any evidence, whether in a line of questioning or in the presentation of physical evidence, the lawyer must make an offer of proof, if not to overcome the objection at the trial level, to preserve the issue for appeal. Because the evidence has been excluded, without the offer of proof the appellate court will have no evidentiary record on which to decide whether the trial court has committed reversible error. Failure of a judge to allow an offer of proof affecting a substantial right of a party is a denial of due process.

Federal Rule 103, on which many states’ rules are now based, governs an offer of proof.

The relevant parts of Rule 103 are as follows:
(a) Preserving a Claim of Error. A party may claim error in a ruling to exclude evidence only if the error affects a substantial right of the party and:

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(c) Court’s Statement about the Ruling: Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question and answer form.

Assuming the court’s approval, an offer of proof may be made by statement of the lawyer of the anticipated content of the excluded testimony, by direct or cross-examination of the witness, or by affidavit of the witness setting forth the excluded testimony. Physical evidence, such as an exhibit, should be marked for identification and included with the record on appeal. An offer of proof can be as elaborate as needed.

Dorene Marcus is a partner with Davis Friedman. www.davisfriedman.com.
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The Theory and Theme of Closing Arguments
Lynne Z. Gold-Bikin

The closing argument is really the starting point in your case. When you know what you want to achieve, it becomes the roadmap to the entire case. It should be brief and to the point. Here is what we want; here is why we want it; here is what we proved for Your Honor to rule in our favor; here is the evidence that we presented to support our case; here are the weaknesses in our case which we overcame by the other evidence we provided. Please give us what we want.

Start with a theme in your case. The theme should be carried throughout the trial beginning with the opening statement, right down to the closing argument. Pick up the theme in the close. It keeps the judge interested.

Always have a theory of why you should win, utilized from opening statement to closing argument. This is why we should win and this is how we proved it. In your closing argument you will argue who the witnesses were that provided evidence. You will argue the evidence that you presented. You will argue why you should win.

In many courts, you cannot make a closing argument. That does not mean you should not prepare one. Remember it is called a closing “argument”. You are arguing your case. You argue first why you should win. You should win because the law on which your case is brought is supported by the evidence you presented, and the witnesses that you called.

Always deal with the weaknesses in your case in closing argument and explain why that testimony or evidence should not change the result that you want.

Closing arguments begin with theory and theme and end with theory and theme. That’s the winning way.


The Houston Family Law Trial Institute has developed a proven method of instruction for family law attorneys seeking to advance their courtroom skills. Using the latest technology and emphasizing small group and individualized instruction, attendees are given the opportunity to learn how to analyze, prepare and conduct the trial of a family law case. Visit their website here: www.familylawtrialinstitute.com.
GRIER RAGGIO is a founding partner of leading Texas family law firm Raggio Family Law. He has been selected to the list of Texas Super Lawyers, and was a Democratic candidate in the 2010 election for the United States House of Representatives seat in Texas’s 32nd congressional district.

How did you get started as a family lawyer?

In the 1960s I decided that environmental issues were going to be the most important thing for me for the remainder of my life, and so I began doing environmental law when I started a firm in New York in 1971. At the time, I was also making a living by doing plaintiff’s personal injury stuff, which was very lucrative. It was in 1980, with the rejection of Jimmy Carter and the solar panels on the White House, that I decided to quit bumping my head against that wall for a while.

What was your motivation to run for office in 2010, and is there a connection between practicing family law and being a politician?

I decided in 2009 that it was time for me to take a shot at trying to do something on the political field. My campaign was based on this concept that we, the federal government, are spending a buck fifty for every buck we take in. Whether Democrat or Republican, the issue right now is that spending and income aren’t in line.

Tell us a little bit about your current thoughts regarding the environment?

We’ve been consuming too much for a long time, particularly through burning hydrocarbons, and this has done bad things to the natural system and to the planet. I tell people that Mother Nature will solve the problem. Mother Nature spans civilizations, and we’re in the spanking phase — but she also kills them. I think we’re in real danger of jeopardizing everyone’s future if we continue with this excess consumption.
Woodward-White as one of the Best Lawyers in America.

Can you tell us about your driving vision as a family lawyer, and about some of your early, seminal experiences in the field?

My early days in private practice were focused on criminal defense, because that’s what was going on. I had been handling a few divorces, calling all my friends and asking them how to do this and that early on in my practice. Then came 1971 and the Attica Prison rebellion. I went up to Buffalo for what I thought was going to be a week to handle the Attica cases, because they needed legal help. I was active in the National Lawyers Guild and volunteers were given the things that were going on at the Attica Prison after the rebellion in September of 1971. And that one week turned into 35 years or so.

Tell us a little bit about your other political activities, or other activities that involve change.

In terms of my activism, there’s a lawsuit in New York that’s called Handschu against Bureau of Special Services. It’s a class action against the New York City Police Department, and it’s the longest running federal case in any District Court. It’s 42 years old, and I have the honor of having five lawyers who have represented me and our class for 42 years, and all of it pro bono.

Is there any chance of a conclusion to this case in the near future?

This case may go on forever and ever. It’s a very important case that has to do with whether or not the police department can single out groups or individuals and conduct surveillance on them. Most recently we filed a motion challenging the surveillance of Muslims. Over the years, what has evolved is something called the Handschu Authority.

Are there any other examples of cases where you pushed for basic human rights?

When I was up in Buffalo, the County of Niagara passed an ordinance that would have required women to look at pictures of dead fetuses before they could have an abortion. I challenged this at the Niagara County legislature, and said to them: “You know, you can’t do this. This is something for the state to regulate. If you try to move ahead with this, I’m going to sue you, and if I win I’m giving my money to causes that help women’s rights, and gay rights.”

Well, they didn’t believe me and I ended up filing a case called Susan B. This was back in the late 1970s, when there had only been one other similar ordinance in Akron, Ohio. The case went up to the US Supreme Court, but it was never argued. We won all the way through. I really felt it made a difference. It protected women in New York State, and it was the right thing to do. Today a woman’s right to control her body continues to be at risk, I am sorry to say.

For more information on Barbara Handschu and her firm visit: www.dobrishlaw.com.

Read or listen to the full version of this interview: Barbara Handschu on A Journey in Helping Others — www.familylawyermagazine.com/articles/a-journey-in-helping-others.

On Work-Life Balance

David Lee is a partner at leading Massachusetts family law firm Lee Rivers & Corr LLP, and is recognized locally and nationally as a preeminent family law practitioner. David is a past president of the Massachusetts Chapter of AAML, and has been consistently recognized by Naifeh and Smith’s The Best Lawyers in America.

How did you resist the acrimonious way of handling divorce? Or did you have to play that game as well when you started?

Well, I had to show two things. First, I had to show that I was thoughtful, and second I had to show that I was capable of playing a bit of that game, if necessary.
A flood of neuroscience research studies is yielding remarkable discoveries about the workings of the human brain, discoveries that challenge core beliefs about human consciousness and rationality embedded in our legal institutions and jurisprudence. This growing body of evidence carries potentially revolutionary implications for our day-to-day work as lawyers by depicting a brain that is driven not by reason, but by emotion — a brain that has changed little in 20,000 years. This burgeoning knowledge can be of great practical value for family lawyers who take the time to develop basic “neuro-literacy.” Indeed, all indications are that these new understandings will have a transformative impact on dispute resolution practice in ways that:

- Enrich the lawyer-client relationship;
- Enhance interactions with clients and colleagues during negotiations;
- Facilitate achieving clients’ goals during negotiations through neoliterate techniques we can weave into every stage of representation.

Replacing “Naïve Realism” with “Neuro-Realism”

Re-tooling for neuro-literacy begins with facing the implications of “naïve realism” a seductively simplistic habit of mind found in abundance among lawyers. Naïve realism, simply put, holds that:

- I see reality as it actually is. My actions and beliefs are based on a sound rational interpretation of reality.
- Other people would share my view and actions and opinions if they had access to the same information that I have, and if they have processed that information in a reasonable way, as I do.

If others do not share my views, it is because:

- They have insufficient or incorrect information, and if they pay attention to my information we can reach an agreement;
- They are lazy or stupid (i.e. not making rational decisions based on the right information); or
- They are biased on ideology, self-interest, or some other distorting influence.

In reality, research confirms that our sensory perceptions and the thinking we base on those perceptions are inherently limited and fallible. Our brains select only a very small sliver of incoming sensory data and make meaning by attempting to match the limited data to similar prior experiences. What our senses do not register is vastly greater than what they do register. Before any thoughts or perceptions even hit our conscious awareness, they have been
become the rainmaker

In today’s competitive business climate, it is more important than ever that attorneys take the time to develop their marketing skills and habits. Now, for the first time ever, you have a guide to help you achieve the marketing goals that put you in control of your practice and your life.

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CONTINUED ON PAGE 94
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Steve Mindel, Managing Partner, Feinberg Mindel Brandt & Klein, California
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Dan Couvrette  DanC@DivorceMarketingGroup
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Dan Couvrette, CEO, Divorce Marketing Group

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We recently interviewed four leading private investigators — Nicholas Himonidis, Rob Kimmons, TJ Ward and Joe Gill — and asked them to share their experiences, insights and tips on their practices and strategies, the latest technology in their field and their work with family law cases.

NICHOLAS HIMOHNIDIS
What types of information-obtaining techniques are legal for those going through a divorce?

Rulings in New York and other states support the right of a spouse to obtain any and all information from family computers, smart phones and other devices. However, this is very different from the real-time interception made possible by spyware. Using spyware that monitors and records the activities of anyone without their knowledge and consent constitutes a Class E Felony in New York, punishable by up to four years in prison. Under the New York Civil Practice Law and Rules, any information obtained in this manner, no matter how relevant, is inadmissible in court.

Is cloning a spouse’s hard drive legal?

Forensic imaging of hard drives and other devices provides preservation of all digital data including emails and other communications, but is not deemed to be an “interception” that falls under eavesdropping statutes. Depending on the device in question, the user’s habits and configuration issues, forensic acquisition and analysis could yield the same or even more evidence than one could obtain with spyware and without the risk of criminal charges or the information being thrown out of court. Forensic acquisition of a computer hard drive or other electronic device for any legal case should be done by experienced and certified computer forensic professionals.

How would one know if spyware has been installed on a computer?

NICHOLAS HIMOHNIDIS is the Vice President of Investigations at T&M Protection Resources, based in New York. He has an extensive background in private investigations, computer forensics and law, and has participated in, conducted and supervised thousands of cases. www.tmprotection.com

ROB KIMMONS formed Kimmons Investigative Services, Inc. in 1982. Licensed throughout Texas, it was established and has its head office in Houston, with offices in Austin and investigators working in Dallas. www.kimmonsinv.com
Spyware may be at work on your computer if it’s slow when saving files or opening programs, certain keys don’t work anymore, error messages or pop-up ads are more common. Your web home page may also differ from usual and the browser could be hi-jacked, bringing you to unwanted websites.

To protect yourself, you can change all your online passwords and other personally identifiable information that may have been collected by software that records your every keystroke. You should also never use the same login ID and password for two different online services or install any new software without first verifying its source. Finally, don’t click on links in pop-up ads or unsolicited emails that advertise software that combats spyware.

ROB KIMMONS
**Can you tell us a little bit about vehicle tracking? Do you just put a device in a vehicle and follow it?**

You do, but it can’t be for just any client. They need to be an owner of the vehicle on the registration and give us written permission to install the device. A couple of years ago those devices were pretty big, but now they’re very small, almost the size of a cigarette pack. You can put them on magnetically, covertly or, if you get possession of the vehicle, install them permanently on the car battery. They’re very effective, as they can locate the vehicle anytime and track speed as well as other things. They’re a great aid to investigators. We often use them in domestic cases. It helps us track someone who might be involved in infidelity. We also often work child custody cases where the individual may be drinking and driving or driving recklessly with children in the car, that kind of thing. Tracking helps us document those activities for the court.

**Can you discuss some investigative techniques used today to collect admissible evidence?**

There are two sides to the investigative business. One would be what I call the gumshoe side, where you’re conducting surveillance, locating witnesses, interviewing them who may have knowledge of whatever it is you’re trying to prove. In surveillance, the best way to have that evidence admissible in court is detailed reports, photographic evidence to prove you were out there and to document what you’ve done. The other side is the technology side, which is the computer forensics work. Texts, e-mails, and voicemails can be the deal-killer or the deal-maker in these cases because it’s very difficult to argue with that kind of evidence. If you get a hold of somebody’s smartphone it can just be a wealth of evidence and really make the difference.

**What advice would you give family lawyers who are considering hiring a private investigator?**

I think that’s extremely important to investigate your investigator and there are things you can do, such as contacting the state board and seeing who regulates the firm, seeing if they’ve had any complaints. Check with the Better Business Bureau, check litigation in the county where they operate, see if they’ve been a defendant in cases, that kind of thing. But one of the things I think is extremely worthwhile to do if you want an ongoing relationship with an investigator is to go visit him. Go to his office. I’m not saying that if you have a fancy office that makes you a good investigator, but you do need to have the tools of the trade and you do need to have some staff to get the work done. See how long they’ve been in business and that kind of thing.

**TJ WARD**

**Can you tell us about your role in the Natalee Holloway case?**

Investigative Consultants and TJ Ward were the lead investigator hired by the family of Natalee Holloway. We utilized our (LVA 6.50) layered voice analysis early on in the investigations and established the lies by Jordan Van Der Sloot, conducted a physical investigation as to the evidence, working hands-on with the local authorities and the FBI. We kept the case alive with the public for over 2 years.

**You’re a supporter of Layered Voice Analysis, can you tell us what kind of technology you’re using and how it works?**

This unique 21st century truth technology is an investigative focus tool used to identify in real time the emotional, psychological and accuracy content of human speech regardless of the language. LVA (6.50) can be used in live interviews, during phone conversations, off pre-recorded materials or wave files. It identifies truthfulness and deception as well as excitement, uncertainty, voice manipulation, stress, tension and false statements, although the results can’t be used in a court proceeding, just like a polygraph.

**JOE GILL** is the President of Gill and Associates, which has been Philadelphia’s premier private investigation firm since it began in 1985. He has worked in many civil and criminal court cases.

www.gillandassociates.com
Like most other professions, lawyers have always evolved with improvements in technology, and it is no secret that computerization and the Internet have transformed how we practice law. In fact, these changes and improvements have continued at such a staggering rate that a year from now this article might be hopelessly outdated. For the time being, however, let’s look at some of the ways technology has and continues to improve the way we work as lawyers.

**The Cloud**

Cloud computing is a way of storing software and data outside of your computer. Companies maintain servers which you can access via the Internet, and for which you pay a usage fee instead of purchasing. This eliminates software maintenance, and means that as long as you are online, you are up to date. Case management and legal software is heading to the cloud, and you can already access Clio, Amicus Attorney, and Fastcase, among others.

**Tablets**

The real revolution lawyers have embraced is the tablet. Their small size makes them completely portable, and they have processing power and storage capacity that exceeds what was available on full-sized computers a decade ago. Everything we can do on our computers, whether it be surfing the web, answering emails, taking notes, or creating documents can now be done on a device you can hold in both hands.

**Apps**

Apps are the future of technology, and the number that are directed at lawyers continues to increase. These apps can...
help with everything from legal research, to picking a jury, to displaying exhibits in trial.

**Smartphones**

Lawyers communicate for a living, and according to the American Bar Association 89% of lawyers are now using smartphones. Essentially mini-tablets, smartphones allow you to run apps, connect to the Internet, and conduct a lot of your business on an even more mobile gadget.

**Remote Computing**

Companies like GoToMyPC and LogMeIn allow you to connect to your main computer from anywhere there is an Internet connection. My office computer is in Northern California, and with remote computing I can connect and run it from any location. I have printed documents, sent and received emails, and drafted letters and pleadings on my office computer all while I was sitting somewhere else in the world.

**Video Conferencing**

Face-to-face communication was for years the only way lawyers spoke to their clients, and thanks to video conferencing technology we can see and hear the people we are talking to from anywhere in the world.

Skype is one free option, and by installing it on your iPad or other mobile device you can video chat with your colleagues, either through Wi-Fi or with your regular data connection. The program also offers text messaging, file sharing, group white boarding, and a complete office intercom system.

**VoIP**

There are dozens of voice over Internet protocol (VoIP) service providers, and every one allows the people in your office to send and receive faxes at their computers, and to record every phone call. The system supports computer chatting and conference calls, and the ability to forward calls to different telephones (even cell phones). The sound quality is perfect and the learning curve modest.

In short, the recent changes in technology have been remarkable and will continue. As lawyers, we’re wise to take advantage of these opportunities to not only help improve our productivity, but to also better serve our clients.

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John E. Harding is the principal of the firm of Harding & Associates. He is a Fellow of the American Academy of Matrimonial Lawyers, the International Academy of Matrimonial Lawyers, and a certified specialist by The State Bar of California Board of Legal Specialization. www.HardingLaw.com

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Best Apps for Family Lawyers

The list of useful apps for family lawyers is constantly expanding. Incorporating apps into your practice not only increases efficiency, it can help you work remotely, communicate with partners and clients, run a paperless office and keep track of documents, clients and finances. We asked three lawyers to recommend their favourite apps.

**MARK UNGER** is a lawyer and mediator in San Antonio, Texas who focuses his practice on Family Law and Technology. unger-law.blogspot.ca

**MINT**
This app and desktop counterpart is a sophisticated and user friendly way to identify monthly expenses when preparing for a divorce case. It allows you to communicate with multiple banks and get information from various accounts, then categorize expenses and evaluate your needs.

**GOOD READER**
Read, highlight, annotate, and bookmark a PDF form of any legal document that is otherwise unalterable, such as a proposed pleading, letter or decree. It’s visually appealing because it allows reading in a page-flipping format (as opposed to scrolling), making it feel more like a binder of documents.

**BEEDOCS TIMELINE 3D**
With both an iPad and desktop component, this app allows you to create a timeline to tell a client’s story in a graphic, interactive and 3D way, then print it out as a PDF paper copy (exhibit) for court. You can also create an iCal category solely for your case and import it directly into this program.

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**NANCY CHAUSOW SHAFER** is a lawyer in Highland Park, Illinois and the President of the American Academy of Matrimonial Lawyers Illinois Chapter. www.chausowshafer.com

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Ask Not What Your Firm Can Do for You

Whether a lawyer has two partners or two hundred, the ability to keep a firm’s best interests in mind and think beyond the individual benefit is crucial to its success.

By Marian Lee, Attorney and Professional Development Director

If you decide you want to go the partner route, you should understand that practicing in a firm means more than sharing administrative resources and splitting profits. Given the degree of autonomy and independence that lawyers cherish and the focus on the practice of law as a business rather than a profession, partners often forget that they must stick together to sustain a successful firm. As an associate, it’s important to prepare yourself for this role and recognize the responsibilities that go with it.

Bring in Business

Perhaps the most obvious contribution that a partner is expected to make is to bring in business. A partner is expected to bring in business that will not only keep the partner busy but will keep associates and potentially paralegals busy as well. As a rule of thumb, many firms expect a partner to bring in enough business to generate revenues equivalent to three times the partner’s salary each year.

Cross-Sell

In firms that have lawyers in a variety of practice areas, partners are typically expected to recommend their partners to their own clients when clients have needs in areas of specialty. Some partners are reluctant to do this, either because they made such a referral in the past and it went badly
or because they are possessive of their clients. This is bad for a firm and breeds an “eat what you kill” mentality.

If you try to serve a client in a practice area outside of your expertise, you may make costly mistakes or run into malpractice issues. Refusing to allow other partners to have contact with your clients will limit the amount of business you can generate to the amount you can directly supervise. You miss out on the opportunity to create a reciprocal relationship that may lead to business for you someday.

Protect the Firm’s Assets

Although not often discussed, partners owe fiduciary duties to each other. These include duties of good faith, care, and loyalty to the firm and fellow partners. One aspect of fiduciary duty is to be conscious when you are using firm assets, and to not waste or squander them. Hundreds of small decisions must be made over the course of the year, and you’ll need to make these in a way that respects the co-ownership rights of your partners.

One asset that partners are sometimes careless about is their billable time. It will be your duty as a partner to record all of the time you spend working on matters for the firm’s clients, to capture it effectively, and to submit it—whether directly into a billing system or to an administrative assistant who will enter it — promptly.

Along the same lines, get the firm’s permission before providing legal services to a nonfirm client. Doing work for nonpaying clients is effectively giving away some of the firm’s inventory of billable time. Although it’s a generally accepted practice in most firms, it should always be done with full disclosure and after a conflicts check.

Promote Compliance with the Model Rules of Professional Conduct

Particularly as firms grow larger and partners divide into specializations, many forget that they are responsible for ensuring ethical conduct throughout the firm. Under Model Rule 5.1(a) of the Model Rules of Professional Conduct, a partner in a law firm “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Your firm may have an ethics committee that administers rules and policies for complying with this obligation. Even so, you are not absolved of personal responsibility for ensuring ethical conduct. Provide input to your ethics committee as you see potential problems, be mindful of the way you run your own practice, and teach the lawyers who work for you to practice ethically.

Enhance the Firm’s Reputation

When you interact with other counsel, courts, the media, or any businessperson outside of your firm, remember that your actions speak not only for yourself but also for your firm.

Support Important Initiatives and Decisions

As a co-owner of the firm, you are expected to support the decisions of the firm’s management. You may not agree with all of them, but it’s important that you present a unified front to the staff and associates when the firm makes a decision. Once the decision is made, everyone needs to stand behind it because disagreement undermines the credibility of the decision and fosters division among the ranks.

Participate in Management

Partners also have a duty to participate in the management of the firm. This can be accomplished through various means and may include everything from following administrative guidelines for submitting expenses, to serving on firm committees, to chairing a practice group. Even firms with large staffs, however, require attorney participation in management to establish policies, make important decisions, and perpetuate the firm’s culture and values.

Take your turn and serve on your firm’s committees for — or as the partner in charge of — activities such as recruiting, professional development, diversity, and pro bono service. Take your role seriously, particularly if you are the chair of a committee. Your reputation may be affected if you neglect to hold meetings, resolve issues, and make decisions. Although it’s easy for the lawyer in this role to de-prioritize the work required because it’s not for a paying client, the fact is that the way you manage your role affects the way that others (partners, associates, and staff) perceive you.

Rather than viewing a committee position as a burden, think of the opportunities that such a position presents. Committee positions can provide an opportunity to build relationships with key players within your firm, particularly those with whom you don’t typically work in your practice group. They also give you the opportunity to use your skills and abilities in a new way.

This article has been adapted with permission from Building Your Ladder: An Associate’s Guide to Success Beyond Partnership © 2013 American Bar Association.

Marian Lee has been immersed in the legal profession for over 26 years, having learned the practice of law, law practice management, and lawyer development from a wide array of vantage points. She is the director of professional development and risk management at Brownstein Hyatt Farber Schreck, in Denver, Colorado. www.bhfs.com

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The call came on a day I was swamped. My secretary said there was somebody holding; an old client who wasn’t calling about business. The name instantly took me back eleven years to the only time I have cried in the courtroom, in front of a jury no less. (I admit this reluctantly as I hate to destroy my tough lawyer image.)

**Misty’s Story is a Long and Painful One**

Misty’s parents were addicted to drugs. She became a mother at 16. By 18, she had started heavily using meth and marijuana. She had two more children before she was 22. She married the father of her two youngest children, a drug user who was horribly abusive. She watched her every action for fear of setting him off, and suffered beatings if he overslept or didn’t like her cooking. Her address held the city police department’s record for most domestic violence calls that year.

Misty was 21 when I met her, coming to me originally because Child Protective Services had opened a case for neglect against her and her husband. She had little money, but I agreed to represent her, and talked her into filing for divorce several weeks later. Misty got her children back a few times, only to test positive for drug use and have them taken again. After the third time, she didn’t get them back and was sent to a drug rehabilitation facility. She had long since run out of money with me, but I couldn’t withdraw from her case — there was something special about her.

In March 2003, the Department filed an action seeking termination of her and the father’s rights to their children. While I had warned Misty this would happen, it took the filing of that Motion to Terminate to really get her attention. Because her rights were being terminated, the judge appointed me to represent her, meaning I would get paid for her trial.

**A Difficult Trial**

When we got to the courthouse, Misty was terrified. In addition to this being a termination action, her divorce would finally be heard. Her husband was there with his lawyer as was the lawyer appointed to represent the children. Numerous witnesses were there, including the psychologist who had conducted evaluations of Misty and her husband. Undoubtedly dreading what was coming, Misty told me she would sign over her rights to her children if her husband would. His lawyer, however, felt he could get the children back. So we proceeded to trial.

It was during the psychologist’s testimony that something clicked inside Misty. He was testifying to her addiction issues and how they impeded her ability to properly care for her children. She leaned toward me with tears in her eyes and said she would give up her children. I immediately asked the judge for a break. During the break I asked Misty if she was sure about this decision. She tearfully said yes. I explained that because her husband was not giving up his rights, she would have to testify against him. Misty signed the
The woman who adopted her children is seeking help from Misty in guiding her teenage son through a difficult time than she planned. She says that I was right, it just took more time for things to fall into place one day. Misty explained on the phone that the trial wasn’t the end of Misty’s problems and she was imprisoned for theft. Prison was a place for her to become drug free but also a terrifying experience where she witnessed many violent acts. She found comfort in the hope she might one day reconcile with her children. Following her release, Misty moved closer to her family in Texas, but struggled with prescription drug abuse, causing her father to close his doors to her. Knowing she couldn’t lose her family again, she sobered up. In 2004, she attended the Academy of Professional Careers and is now working in Amarillo as a phlebotomist. She remains completely drug free.

Misty explained on the phone that there were several things I had told her during my representation that stuck with her. As she was signing away her rights I said: “This is not the end. Make this the beginning of getting your life on track and live your life right, then everything else will fall into place one day.” Misty says that I was right, it just took more time than she planned.

The woman who adopted her children is seeking help from Misty in guiding her teenage son through a difficult adolescence. She is even considering letting him move in with Misty and her new husband. While the idea thrills Misty, she also wonders if she can now be the type of mother her son needs.

Don’t be Afraid to Volunteer

We rarely get to see the turnarounds in our cases, so it’s inspiring and reassuring to know what I do for a living can make a difference. Law as a profession implicitly carries with it the duty of helping our fellow human beings. While lawyers have the right to make money, we must pay our successes and privileges forward.

The next time you have someone who needs help, don’t be afraid to volunteer. Remember that most jurisdictions will waive court costs, filing fees, and even service fees if you are handling a case pro bono for a person with limited means. I am so glad I took that phone call that day. Misty restored my faith in what I do and reminded me how much our work matters.

Cindi Barela Graham is board certified in Family Law and has been named a Texas Super Lawyer every year since 2008. She currently serves as a director to the Texas Academy of Family Law Specialists and is on the Board of the Texas State Bar’s Family Law Section.

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The Benefits and Trends of Pro Se Mediation

By Helen Stein, Family Lawyer

For family lawyers, adding pro se mediation to the menu of services they already provide is a smart business decision that can also be fulfilling and rewarding.

An increasing number of couples today are choosing an uncontested approach to divorce. Even more on the rise are the numbers of pro se contested divorce cases filed each year. The reasons for this are many, including the acrimony sometimes inherent in the divorce court battle, the potentially adverse effect the divorce process has on children, and probably the greatest reason is the financial cost of hiring two attorneys or the costs of a prolonged divorce litigation.

It is particularly noticed in light of the economic challenges we have seen these past years, that couples facing divorce are seeking less expensive options to help them dissolve the marriage. Clearly, as the number of pro se filings increase each year, there is a demonstrated need for affordable and perhaps less stressful divorce services, and therefore a growing market of unrepresented spouses for the family lawyer to serve. Family lawyers may find that offering to these potential clients the option for a pre-suit, pro se mediated divorce, where the two spouses can hire one attorney serving as their mediator, is beneficial not only for the clients, but also will enhance his or her practice.

Increase Client Base

The opportunity to increase the client base a lawyer serves has noticeable financial benefits. In addition, many attorneys find career satisfaction in conducting cooperative process divorces, either as a mediator or collaborative attorney. Unlike the attorney as representative, an attorney as mediator is in a position to help the couple together as they make the difficult transition from married to not married. These attorneys are not constrained by the usual ethical obligation to represent either one or the other of the parties involved.

The benefits of mediation are generally known, and such benefits are more pronounced in divorce where the issues are often personal and private in nature, they involve one family often sharing common goals or interests, and the items (or children) at issue “belong” to both parties and will, at the conclusion be divided and shared. Thus, when you offer your clients the option to hire you as their mediator, pro se, serving both of them as parties to the divorce, you provide the following advantages.

Empowering Clients

The pro se mediation is collaborative; it occurs in a “safe” and private environment where the participants are empowered to discuss their concerns. The attorney mediator provides expertise and guidance on the legal and non-legal issues with which the couple is faced, resulting in a legally sound marital settlement agreement, containing the AGREED terms of the final court order of divorce. The resulting court order is based upon communication between the parties themselves. Research shows that those who have been heard are more likely to feel satisfied having accepted the results, and more likely to adhere later to the terms of agreement.

For many divorcing couples, the option to use pro se attorney/mediation to dissolve their legal relationship is a welcome resource for an affordable and legally wise approach that also promotes a positive transition, rather than the ingredients for a more expensive and potentially prolonged process. For families with children, research shows that how parents go about the process of divorce is the most important factor in predicting success for their children. By offering the option, attorneys have the unique opportunity to assist families as their new foundation is formed for the post-divorce relationship.

Helen Stein is a lawyer licensed in Florida and New York; a Florida state certified mediator in dependency, family and civil law; and a Collaborative Family Law Institute member. She opened a mediation business in 2005, which later became affiliated with Divorce Without War®. Helen is co-owner and President of Divorce Without War USA.
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Tim Voit has been retained in legal malpractice cases to resolve QDRO issues or compute damages, and bears the title of Forensic Economist. Todd Voit teaches investment analysis and advanced investments at both the undergraduate/graduate levels and manages assets for retirement plans and individuals. He also has one of the only Masters’ Theses in the country on the valuation of retirement plans in divorce. These two experts are not only leading the way on QDRO preparation, they’re paving it as well.

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Financial Pitfalls in Divorce Settlements

A look at how a CDFA™ professional can ensure key mistakes aren’t made in a settlement agreement.

In my divorce practice, I have found that the two top services lawyers want a Certified Divorce Financial Analyst™ (CDFA™) professional to perform are:

1. help them and their clients analyze the financial and tax implications of different settlement options, and
2. protect them from liability for financial errors in divorce settlements.

One of the most common mistakes I see with regard to divorce settlements is not taking the effect of taxes into account when dividing marital property. Failing to understand the tax basis of property can lead to settlements that are far from equitable after taxes have been paid by the party receiving the property. When I work with lawyers, I make sure that we review the tax basis of all property, and we ascertain whether the client intends to keep or sell the property post-divorce. One possible solution to this problem is to divide the marital property into tax assets of similar tax basis and then divide these separate classes; this type of division helps to avoid the complexities or omission of tax effecting assets of different basis types. Documenting the discussions with the client about the tax basis of assets and the client’s final decision can be helpful later when taxes are payable; at that time, the client may have forgotten about the discussions and the decision he/she made and may be furious about being hit with a huge tax bill. Being able to demonstrate that the client knew and agreed to this may help to defuse the situation.

Retirement Plans

Many lawyers welcome assistance with retirement plans. A CDFA™ professional can help a lawyer understand the rules and requirements of each type of plan to create a settlement for the client. When negotiating this settlement, it’s crucial to find out what options are available before the settlement is final.

In terms of Defined Contribution Plans, for instance, it is important to know whether the plan will allow distributions — an important consideration if some of the retirement funds will be used to generate liquidity or rolled over to another retirement plan or IRA. Keep in mind that every company you run across is different. Working with an experienced CDFA™ professional can help you avoid the problems that are caused when you and your client think that you roll over the money to an IRA, and then discover that the plan does not allow distributions. Some plans do not allow distributions on certain investment choices while other plans have temporarily frozen funds in certain investment choices because of the downturn in the economy. CDFA™ professionals can help lawyers understand the timing of distributions to make sure the distributions are made at the right time to avoid unanticipated taxes. With more commercial annuities containing living benefits that are divided by contract, a CDFA™ professional can help lawyers and their clients understand whether any or all contractual benefits can be transferred in a divorce.

CDFA™ professionals can help their clients understand Defined Benefit pension plans – particularly whether there is cash that the participant or alternate payee can tap into or when there will be a future stream of income available. We can help determine whether it would be better to value the pension and offset the value with other assets, divide the future income, or combine...
these two approaches. When negotiating the division of a Defined Benefit Plan, a CDFA™ professional can make sure that the property settlement agreement does not require payments that the plan does not allow. A CDFA™ can help both client and lawyer understand the importance of survivor benefits, ensuring that the right to the pension is not lost by the early death of their ex-spouse; a CDFA™ can also explain what would happen to the benefit in the event of the client’s death.

**Underwater Homes**

In the current economy, many homes are worth less than the mortgage balance. Some homeowners are choosing to get out with a short sale. However, you should be aware that a short sale could result in a gain if the short sale value exceeds the homeowner’s basis — which could cause the homeowner to have taxable income if the bank writes off a portion of its mortgage.

**Spousal Support and Taxes**

CDFA™ professionals can help lawyers understand how spousal support can be used as a tax-planning tool and make sure that spousal support is deductible from income by the payor spouse (IRC §215) and includible in income by the receiving spouse (IRS §71). We can help clients structure spousal support to avoid triggering recapture; the two main triggers are front-end loading of spousal support or having support fluctuate or end within six months of a contingency related to one or more children of the marriage (examples include a child attaining a specific age or income level, dying, marrying, leaving school, or gaining employment). If you make a mistake in either of these areas, spousal support could be reclassified as child support, which is neither deductible by the payor nor taxable income to the recipient. Imagine what your client could end up owing in back taxes, penalties, and interest if he/she has been paying (and deducting) spousal support for 18 or 20 years when the IRS discovers the reduction and reclassifies the payments as non-deductible child support! The payor spouse will have to amend all his/her returns, but the recipient spouse can only amend and receive a refund on the last three years of tax returns.

**Capital Loss Carry Forwards**

With the downturn in the economy, we are starting to see more capital loss carry forwards on tax returns. This is a good time to review some of the rules of carry forwards. Carry forwards have a value as a potential tax benefit. Some can be deducted from future income, and others affect the basis of the transferred property. A review of the couples’ tax return is important so that you can include these carry forwards as part of the settlement negotiations. A CDFA™ professional can help you find and negotiate unused capital losses, net operating losses, passive activity losses, charitable contribution carry-forwards, and unused investment interest expenses.

**COBRA Surprise**

Most lawyers are aware that the Consolidated Omnibus Budget Reconciliation Act (COBRA) contains provisions giving certain former spouses the right to temporary continuation of health coverage at 102% of the actual employer’s premium. Although this is expensive, it can allow 36 months of coverage that is not subject to pre-existing condition coverage. Many lawyers, however, are unaware of the requirement that the alternate payee inform the employer of the divorce within a certain time after the divorce. The CDFA™ professional can make sure that the client is informed of this important deadline and help them keep their health insurance coverage.

Andrew Hoffman, FCA, CFP®, CDFA™ is chairman of the Institute for Divorce Financial Analysts’ Editorial Committee and a member of the IDFA Advisory Board. He is a financial trainer on the National Interdisciplinary Collaborative Divorce Training Team. To learn more about how a CDFA™ professional can help you and your client address the financial issues of divorce, go to www.InstituteDFA.com/Lawyer.

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Mark K. Altschuler, Actuary, is president of Pension Analysis Consultants, Inc., serving all 50 states from offices in Pennsylvania & Florida. He has performed over 25,000 pension valuations and QDROs, and is an affiliated member of the American Society of Pension Actuaries and Professionals (ASPPA).

A reasonable compromise would be to prorate the early retirement subsidy so seventeen/twentieiths of the benefit is community or marital property to divide between spouses. Often, it isn’t clear whether the subsidy was earned with marital or post-marital years of service. If the company announces an early retirement subsidy in the year following divorce and the subsidy is awarded without regard to years of service, the employee spouse will argue the benefit didn’t exist at the time of the divorce and the nonemployee spouse shouldn’t receive any of that subsidy. The nonemployee spouse will argue the subsidy isn’t being granted because of any work effort by the employee during or after marriage, but that it’s an across-the-board increase in pension benefits. Since they are receiving a percentage of the pension benefits under the existing QDRO, they should receive the same percentage of the newly enhanced benefit.

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Mark K. Altschuler, Actuary, is president of Pension Analysis Consultants, Inc., serving all 50 states from offices in Pennsylvania & Florida. He has performed over 25,000 pension valuations and QDROs, and is an affiliated member of the American Society of Pension Actuaries and Professionals (ASPPA).

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Avoid a Malpractice Claim with QDROs Gone Wrong

Whether you farm out QDROs or prepare them yourself, shield yourself against liability threats.

By Timothy C. Voit, Financial Analyst

With so many financial professionals and attorneys getting into the QDRO business, there are issues you should be aware of as a family lawyer. Here is a list of problem areas to help you avoid an unintended malpractice claim.

Not Having the QDRO, or like order, prepared and entered at the time of divorce. It is vital to have a QDRO prepared and entered for when the final divorce judgment is entered. In one example, the pension plan participant died one month later in a motorcycle accident, and the former wife lost her share of the monthly pension benefit because the QDRO did not exist.

Failure to provide pre-retirement survivor benefits can be detrimental. If your QDRO preparer fails to mention pre-retirement survivor benefits, be prepared to address the issue in the settlement agreement or divorce judgment. Make it clear the intent of the parties is for the former spouse to receive their awarded share, even if the plan participant spouse predeceases them before or after retirement, through a survivor benefit. Awarding a separate interest (private sector) doesn’t guarantee the benefit to the former spouse if pre-retirement survivor benefits are not included.

Awarding 50% of marital portion of a 401(k) or like plan and placing burden on alternate payee to figure out marital portion. A plan cannot compute a marital portion of a 401(k) because the account fluctuates in value daily and the company may have changed plan administrators or may not have records going back to the date of marriage. Do not put the burden of calculating the marital portion on the alternate payee spouse, but on the plan participant to have the premarital portion excluded.

Disregard for loans, which adversely affects a former spouse’s share. Every attorney should pay careful attention to loans in a 401(k) and whether they were intended for marital use or considered non-marital. State plainly in the settlement agreement whether the former spouse’s share will be reduced by a specific amount or not adversely affected.

Relying on a 401(k) distribution to pay off debt when the plan does not make an immediate lump-sum distribution. This is dangerous, but in today’s economy, a practical approach to take if one party is sitting on a large (illiquid) 401(k) balance. Consult the plan first to determine when a distribution can be made — monthly, quarterly, etc.

Using a model QDRO that’s not consistent with the domestic relations laws of the State you’re in. Attorneys often think QDROs are easy and all they need is a model QDRO. If the company you’re dividing the plan for is located outside of your state, it’s likely the model QDRO is more consistent with the domestic relations law of the state in which the company is located, not the one you’re in.

If you retain anything from this article, understand that:

- The terms and conditions of the plan will always prevail over the intent of the courts or the parties.
- Benefits awarded to an alternate payee spouse are derived through the eligibility of the plan participant spouse.
- Using QDROs to collect attorney fees is not allowed, though there are approaches that can be used.
- Using QDROs to collect child support is a big plus. Remember to shift the tax liability to the plan participant.
- Neglecting to address survivor benefits, in the event the plan participant predeceases the alternate payee spouse, is a claim waiting to happen.

Tim Voit is a recognized expert, financial analyst and founder of Voit Econometrics Group Inc. (www.vecon.com). He has been retained in QDRO malpractice cases by insurance carriers to fix Qdros or computed damages. Mr. Voit is the author of Retirement Benefits & QDROs in Divorce, and Federal Retirement Plans in Divorce — Strategies and Issues.
In an ordinary lifestyle analysis, the divorce financial analyst extracts all transactions from bank, brokerage and credit card statements, categorizes them and calculates totals for each category for the analysis period. This is an important exercise to assess what the parties divorcing have historically spent and determining an appropriate level of support. It’s also used to determine whether a spouse wasted or dissipated marital assets.

More importantly, the lifestyle analysis can be used to uncover hidden income and assets, or help prove that one spouse’s lifestyle exceeds their reported sources of income. The typical lifestyle analysis may only scratch the surface of the financial facts of the case, leaving behind important clues about the parties’ finances. Diving deeper can uncover hidden finances that were overlooked.

**Uncovering Hidden Assets**

A thorough lifestyle analysis can help discover assets that were undisclosed in the divorce. Each transaction from the bank, brokerage and credit card accounts must be traced to determine where the funds went. It’s important to ensure all statements have been received and analyzed, as one missing statement could hold the key to a hidden asset.

The key to discovering hidden income and assets is finding transactions with unidentified or unusual origins or destinations. Large checks made out to cash, significant cash withdrawals, substantial payments to unknown entities, and transfers to previously undisclosed accounts are warning signs of hidden assets. Large cash transactions must be explained, and absent proof of an asset purchase, it’s possible cash was hidden or used for non-marital purposes.

The purpose behind substantial payments to unknown entities must be verified. It’s possible the payment may have been for a house, a vehicle, jewelry, or other valuable assets. Even small payments can yield important clues to hidden income or assets. In one case, a relatively small check was issued to a utility company. On its face, this did not appear unusual, and its small value could have caused it to be overlooked. However, after investigation it was determined the husband secretly purchased a home several years before and didn’t disclose this asset during the divorce.

Payments to unknown entities must also be verified to determine if they’re related to investments in income-producing opportunities, or the transfer of assets intended to deprive the spouse of a share. Even payments to legitimate entities, such as a credit card company should be verified to determine whether a balance was actually due, or whether they were intentional overpayments the spouse hoped wouldn’t be refunded until after the divorce settlement.

The most common kind of discovery in this portion of the lifestyle analysis is an undisclosed bank or brokerage account often opened during marriage. Transfers were occasionally made, and one or both spouses forgot about the existence of the account. Once one account is discovered, it can create a domino effect in which several others are found. The hidden account may have been used to fund other hidden accounts, and carefully tracing all movements of funds will lead to their discovery.

**Finding Sources of Income**

A properly performed lifestyle analysis can also uncover undisclosed income through direct or circumstantial evidence. The forensic accountant’s bank and brokerage statements analysis may find deposits clearly from an undisclosed source of income.
It’s more likely, however, that the discovery of income will require an indirect approach. The lifestyle analysis, also called the “expenditures method” of income analysis, focuses on a spouse’s spending patterns relative to the known sources of income and funds. Is the spouse’s spending in line with known and reported sources of income? Is reported income sufficient to fund this lifestyle? If spending exceeds the disclosed income and assets, and isn’t explained through other cash sources like loan proceeds or inheritance, it’s likely funded through undisclosed sources.

**Examining the Expenditures**

The lifestyle analysis must go beyond a simple summation of expenses. Expenses must be evaluated to determine if anything is missing. Is the monthly mortgage payment accounted for? Have all car payments been included? If some items are missing, it may be due to an error in classification during data entry, or missing account statements.

It’s often necessary to divide expenses between family members to determine which spouse or child benefited from the expenditure. This analysis can get complicated, so an experienced analyst is necessary to ensure completeness and uniformity of the calculations. Expenditures must also be analyzed to determine if any are unusual or non-recurring, or if any need adjustments to normalize expenses.

Assumptions may need to be made when information is missing from the analysis. For example, the spouse may know that $50,000 of improvements were made to the residence during the period being analyzed. If that expenditure isn’t shown in the records, it may signify missing documents. Certain cash expenditures that aren’t reflected in the bank statements must also be considered.

All told, a thorough lifestyle analysis must include an accurate tabulation of transactions in the records, reasonable estimates for items that may be missing, and an overall evaluation of the quality and completeness of the records.

**Using the Lifestyle Analysis**

An often unintended consequence of a lifestyle analysis is damaged credibility of the spouse. As the financial lies begin to unravel and generate momentum, the spouse may quickly lose credibility in the eyes of the court. Even if their income and assets cannot be determined to the penny, there’s often plenty of circumstantial evidence allowing the forensic accountant to draw reasonable conclusions of the truth behind the finances.

Tracy L. Coenen, CPA, CFF is a forensic accountant and fraud investigator with Sequence Inc. She specializes in cases of divorce, embezzlement, financial statement fraud and white collar crime. Her website is: www.divorceinvestigation.com.

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What are Pass-through Entities?

A pass-through entity is a legal entity under state law that generally, with certain limited exceptions applicable to S corporations, does not pay entity-level taxes, but instead reports its taxable income, expenses, gains and losses to its owners, who then directly report such amounts in their personal income tax returns.

Regular and Subchapter S Corporations

Regular corporations are taxed pursuant to IRC Subchapter C; partnerships are taxed pursuant to Subchapter K and S corporations are taxed pursuant to Subchapter S of Chapter 1 of the Code. Regular C corporations are taxed as a separate entity. Therefore, only after-corporate-tax net cash flows are available to distribute to shareholders in the form of dividends (technically, a distribution of accumulated earnings and profits (“AE&P”). The dividend is then subject to tax at the recipient’s tax rate.

Partnerships and Limited Liability Companies

A general partner has unlimited personal liability for the debts of the partnership. A limited partner’s liability for partnership debt is limited to his/her/its capital account, plus whatever amount of partnership debt separately guaranteed by the partner. There is no limitation on the type of entity that can be a partner. A partnership does not pay an entity-level tax.

Outside Basis

Partners pay tax on the entity’s income, expense, gains and losses regardless of cash distributions to the partners. Cash distributions are not taxable to the extent of the partner’s outside adjusted basis in the partnership. Outside adjusted basis cannot go below zero, but a partner’s capital account can become negative as a result of partnership debt that provides additional basis. Partners can increase their adjusted outside basis by the amount of partnership debt for which they are directly liable, their personal guaranty of entity debt, and qualified nonrecourse financing (generally real property indebtedness). Upon a sale of a partner’s interest in a partnership in which their capital account is negative, either as a result of having deducted losses in excess of their adjusted capital contributions (using outside basis from debt to deduct losses), or as a result of the distribution of the partnership debt proceeds, that negative capital account may be “recaptured,” resulting in the recognition of ordinary income.

This is a huge issue in divorce, particularly for folks involved in the real estate industry, because, prior to the most recent financial crisis, many of these people leveraged their properties as values rose, and took out cash for a variety of purposes. Leveraging properties to withdraw cash oftentimes resulted in creating negative capital account balances. Eventually, these negative capital account balances will be recaptured as ordinary income; thus, creating embedded deferred tax liabilities that have to be addressed from a valuation standpoint. If and when such deferred tax liabilities will have to be recognized are points of negotiation between the parties.

Distributions of cash or property to partners in excess of outside adjusted basis are taxable to the transferee partner. See §731(a)(1). When an ownership interest in the partnership is purchased by a contribution of appreciated property, the adjusted basis of that property carries over to the partnership and oftentimes results in a difference between the fair market value of the property contributed to the partnership in excess of the adjusted basis of that contributed property (“Excess”). A partnership can elect pursuant to IRC §754 to adjust the inside basis of partnership property to the extent of that
Excess. That Excess might be goodwill in a business valuation context. The amortization/depreciation of the Excess is then specially allocated to the contributing partner. This is a very valuable advantage that partnerships have over other business entity forms such as S corporations. In fact, only partnerships, whether general or limited, and inclusive of limited liability companies that are taxed as partnerships, have the ability to make special allocations of income, expenses, gains and losses.

**S Corporations**

S corporations offer shareholders pass-through taxation somewhat similar to partnerships, as well as limited personal liability with respect to entity-level debt. Shareholders get outside basis for direct loans that they make to the S corporation; however, unlike partnerships, an S corporation shareholder cannot get an increase in outside adjusted basis for entity-level debt. Partners do get an outside adjusted basis “step-up” for entity-level debt that the partner guarantees. The sale of stock in an S corporation is generally subject to capital gains tax rates. A sale of assets of the S corporation may generate ordinary income as well as capital gains.

**IRC §338(h)(10) Election**

The law provides that the shareholders of an S corporation can unanimously elect pursuant to Code §338(h)(1) to create a tax fiction in which they sell their stock in the corporation, but the transaction is re-characterized as a sale of assets followed by a complete redemption by the corporation of all the stock of the selling shareholders. This creates a greater tax burden for the selling shareholder. Since the buyer is gaining the “step-up” in depreciable outside basis, all other things being equal, the buyer should be willing to increase his/her/its purchase price. The amount of that increase is generally negotiated and bargained for by both buyers and the sellers. While the availability of an IRC §338(h)(10) election somewhat “levels the playing field” as between partnerships and S corporations, that election is not as powerful as a §754 election.

**Valuation Controversy**

Notwithstanding that there a lot of other technical differences between regular C corporations, S corporations and partnerships, what is the valuation controversy associated with these differences? The academic literature strongly suggests that shareholder-level taxes are manifested in the Equity Risk Premium that valuation analysts employ (either in their build-up models or capital asset pricing models) in determining value using an Income Approach. Valuation analysts and academics have been unable to develop a truly comprehensive financial model to quantify the impact. Accordingly, there are a handful of models being employed in practice, and the valuation impact can be enormous.

**Effect on Equity Risk Premium**

To the extent that the ERP increases as shareholder-level taxes increase, reducing the expected net cash flow stream by some imputed entity-level tax rate benefit for the presumed advantage of partnership tax status may result in an overstatement of value. That is because the valuation analyst cannot determine with certainty whether the increase in expected net cash flow that s/he calculates by decreasing the expected net cash flow stream by the imputed tax amount is offset, in whole or in part, by an increase in the discount rate. All of this controversy is superimposed upon sometimes conflicting U.S. Tax Court decisions that have dealt with this issue.

**Standard of Value**

In a divorce context, if the standard of value is pure fair market value, the issues enumerated herein above have to be carefully considered. What if the standard of value is fair value or some iteration of investment value or value to the holder or divorce value, does the above analysis really matter? If the valuation analyst does not assume the hypothetical disposition of the business, then the issue of differences in business entity may not make a difference. If the business has a history of making tax distributions to owners, it may be appropriate to impute an entity-level tax at the expected combined federal and state effective rate of tax when valuing a controlling interest. If valuing a minority ownership interest, the valuation analyst has to review the company’s historical cash distribution policy relative to the control and minority owners, as well as any specific provisions in the company’s shareholder, partnership or operating agreement related to any required tax distributions.

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1 All references to IRC and Code refer to the Internal Revenue Code of 1986, as amended.
2 Excluding liquidating distributions.
3 However, if the partner/LLC member dies, there will be a “step-up” to fair market value of the decedent’s partnership/membership interest; thus, avoiding the recapture. See IRC §2031 and Treas. Reg. §20.2031-1(b).

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This article has been abridged. To read the full article visit: www.familylawyermagazine.com/articles/pass-through-entity-earnings

Barry Sziklay is the partner-in-charge of the Forensic Accounting, Litigation Support and Valuation Services practice of Friedman, LLP, a certified public accounting and advisory firm, with offices located throughout New Jersey, New York City, Long Island and Beijing, PRC. www.FriedmanLLP.com
In family law cases where hidden income from a business is at issue, a simple, coherent presentation must be made to the court. The analysis must be easy to understand and clearly prove the presence and extent of hidden income.

**Reality Check**

Many family law practitioners are told by their client that the other spouse has hidden income. This income is alleged to be from unreported business revenue or exaggerated business expenses.

Reducing income from a business prior to divorce allows a lower valuation amount for the business and diminished support. This can yield the spouse controlling the business (the in-spouse) an unfair advantage in negotiations. It is imperative for the attorney to judge the reality of hidden income quickly in the case, or they risk taking an indefensible position that will harm their credibility with the judge.

**Judges**

In a contested divorce, many “out-spouses” will claim the “in-spouse” is hiding income. Sometimes this comes from actual knowledge, but often may simply be a retaliation effort. Many judges are predisposed to side with the in-spouse and declare no hidden income. This is because many claims for hidden income are alleged and not clearly proven. Even when it is clear there may be hidden income, if an amount cannot be determined with some certainty, it is difficult for the judge to rule effectively.

**Tanking a Business**

Pre-divorce planning may lead a business owner to reduce income prior to the filing date — the date of separation — or due to a “leading event”, such as the initiation of an extra-marital affair. For the forensic accountant or valuation analyst, it is important to determine a date where the need for divorce would be apparent to the “in-spouse”, as income may be driven down well prior to the agreed date of separation.

If it can be proven a business was “tanked” at a date prior to the dissolution date, it may be possible to assess the value of the business and the income generated by the business using data from prior years. There must be some testimony or clear evidence the forensic accountant can rely on, or the argument becomes qualitative and can generally be argued by each side.

**Investigation — A Basis Business Document Request**

If the attorney and the forensic accountant agree that an investigation into hidden income from a business is necessary, the following documents should be assembled:

1. Last 3 years business tax returns
2. Last 3 years financial statements, balance sheet and income statements
3. Detailed general ledger for last two years
4. QuickBooks electronic backup file (If QB is not used, obtain a copy of the accounting data file)
5. Accounts receivable aging schedule at Date of Separation
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14. List of all debts
15. Payroll reports for last two years
16. List of suppliers with names and addresses
17. List of customers with names and addresses

Investigation — Analysis

Once the document requests have been fulfilled, the forensic accountant can perform “analytical procedures” on the data. These analytical procedures are comparisons and analysis of various tax returns, schedules and business documents, with client representations and various expectations. When these documents are examined and compared, they can often contradict one another. Contradictions are evidence to support the theory of hidden income. These contradictions need to be modeled into dollar amounts for explanation in court.

The Presentation

The presentation to the judge needs to be clear and concise. The fewer exhibits, the better. If the issues are complex, they must be simplified by the forensic accountant. You should be able to summarize your findings in a single diagram, spreadsheet and a bar or line chart.

I have found Visio (a Microsoft Office Product) an excellent tool for creating diagrams that assist in clarifying complex financial issues. Present your findings with Visio in an audit diagram, a color pie chart or a cause and effect diagram. A single excel spreadsheet showing the estimated actual income against the income reported is essential to show the court. This spreadsheet will be a summary of the various findings of the forensic accountant. Attempt to make this document as clear as possible by limiting the number of columns and rows that are filled with data.

The spreadsheet should be turned into a colored bar or line chart. This colored chart can be easily created to illustrate financial findings in excel.

The impact of a short, simple, illustrated presentation will allow the court an understanding of the issues, clarify the forensic work and lead to a positive result for your client.

Kim Joseph Onisko performs accounting and tax work for corporate, governmental and non-profit clients. Mr. Onisko also performs forensic accountings and asset tracings in business and divorce litigation. His firm Onisko & Scholz, LLP is a tax, accounting and business consulting firm located in Long Beach, California. www.OniskoScholz.com
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Section 1041 of the Internal Revenue Code (§ 1041) contains mandatory rules that apply to all transfers of property between spouses or former spouses that are “incident to divorce.” Under § 1041, no gain or loss on the property transfer is recognized by either spouse, and the basis of the property transferred carries over to the transferee spouse.

A property transfer is “incident to divorce” if it: (i) occurs within one year of the cessation of the marriage; or (ii) is “related to the cessation of the marriage.” The latter is true of a transfer of property if it: (i) is made pursuant to a divorce or separation instrument; and (ii) occurs within six years of the date of divorce. § 1041 applies even if the transferred property is acquired by the transferor spouse after the divorce is final. As long as the transfer occurs within one year of the divorce, the same rules will apply even if the transfer is not required by the divorce or separation instrument.

The Principal Residence

As a general rule, single taxpayers can exclude from gross income $250,000 of gain realized on a qualified sale of their principal residence (joint filers can exclude $500,000). If the home is owned jointly but separate returns are filed, each person can exclude $250,000. The exclusion can only be utilized once every two years. Remember, however, that a § 1041 transfer would not trigger gain recognition (i.e., not treated as a sale).

To qualify for the exclusion, the taxpayer (or the taxpayer’s spouse) must have owned and used the home as the principal residence for two of the five years prior to the sale. It need not be 24 consecutive months, and the ownership and use tests can be met over different periods of time. For married taxpayers filing a joint return, understanding the ownership and use tests is pretty straightforward. For separated and divorced couples, it may be more difficult.

Special tax rules offer divorcing couples an option that can provide real tax savings. With respect to the ownership test, the transferee spouse is considered to have owned the home during any period of time in which the transferor spouse owned it. With respect to the use test, the transferee spouse and transferor spouse are considered to have used the principal residence during any period of time in which (i) the ownership test is met; and (ii) the transferee spouse was allowed to live there under a divorce or separation instrument and it is used as the main home.

Conclusion

Division of the marital estate can sometimes be tricky, and understanding the financial aspects of a settlement can be challenging. Property division can end up being inequitable if one party inherits a significantly better or worse tax situation. This article only provides an overview of the tax rules related to selling a principal residence in the context of a divorce, and a detailed analysis of the possible fact patterns is beyond its scope. Family lawyers and divorcing parties should consult a CPA for tax advice on specific situations.
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A member of the armed forces has just called your office for an appointment next Monday. He says he wants to file for divorce. How should you prepare?

By Mark E. Sullivan, Family Lawyer

What Is Domicile?

The first essential element of divorce is domicile of at least one or both the parties. You cannot obtain a valid divorce if neither party is domiciled in your state. The U.S. Supreme Court has stated that jurisdiction over the power to grant a divorce is premised on domicile. The domicile of one of the spouses within the state gives that state power to dissolve a marriage, regardless of where it took place.

A domicile is the place where a person has a settled connection for legal purposes — where they presently live or intend to return to after an absence. It is their fixed, permanent home and principal establishment. One cannot acquire a new domicile without abandoning an old one. Their stay in the domicile must be indefinite, not for temporary or special purposes, or until it is to their advantage to take up residence elsewhere.

Domicile for Service Members

Due to their involuntary mobility, federal law provides service members (SMs) with unique protections; otherwise, they might be considered domiciliaries of each state in which they are assigned. Specifically, the service members Civil Relief Act allows SMs to retain their domiciles for tax purposes and voting. A service member can prove their domicile in many ways, such as moving their family to a state, registering to vote in it, or obtaining a driver’s license.

Don’t Be Fooled

Some people confuse the military phrase “home of record” (HOR) with domicile, which are two different things. The HOR is a military administrative term that refers to the place to which the government will transport them and their household goods upon separation from the service. It’s based on where the SM entered military service and isn’t intended to carry legal implications.

Don’t be deceived by faux residence statutes. Some states have statutes granting an SM the right to apply for a divorce when they
have been stationed in the state for six months. Such a law would appear to allow an SM who has been stationed in the state for half a year — but is domiciled elsewhere — to file in that state for divorce, even though their spouse is likewise not domiciled there. Such states include North Carolina, Georgia, Texas and Virginia.

Be careful when such a statute is present. Residence alone, even when pursuant to military orders, is not domicile. Mere assignment to a military base in a state does not come close to being considered domicile. When there is no bona fide domicile, the divorce will be in serious jeopardy. One party must be domiciled in the forum state that grants the dissolution or divorce.

When taking on a divorce case, pay particular attention to the state claimed by your client (or the opposing party) for state tax withholding. Quite a few SMs claim Florida or Texas as their legal residences upon entry into the military due to state income taxes. Seven states do not have any personal income tax, and a number of others have rules that limit personal income taxes to passive income or to those other than service members. Thus, many SMs consider themselves Florida residents or “Tax Texans” so they can avoid state income taxation. Often they have done nothing of substance to change their domicile, but simply filed an “affidavit of domicile” in Florida and opened a post office box there.

Residence

Distinct from domicile is the concept of residence. Residence usually means the physical location of an individual, detached from however long they intend to remain there. The terms “domicile” and “residence” are sometimes confused and may be used synonymously by courts or statutes.

The state residence requirement for divorce can pose a problem for your client, who will not be a physical resident of their domicile state unless they are stationed there. While a nonmilitary spouse of an SM may be a domiciliary of the state of military assignment, the SM rarely is. Many states have explicit residency statutes requiring the petitioner or plaintiff to reside in the forum state for at least six months preceding the filing of the lawsuit, in addition to implicit domicile requirements.

Be sure to check your state statute closely to determine whether it requires the SM to be physically present in your jurisdiction for the period of residency. Some states require a physical presence, while others give “constructive credit” to SMs who are absent involuntarily due to military orders.

Divorce Procedures and the Service Member

Can you obtain the dissolution without a hearing? Does the SM have to testify? It is sometimes difficult for SMs to obtain leave, and travel can be unreliable and expensive. Sometimes you can get your client a valid divorce where they are stationed, but it will be necessary to check the jurisdiction laws to see if your client qualifies for divorce because of domicile (that of both parties should be checked).

Next, see if the SM or spouse is eligible for divorce back home in their state of legal residence. Sometimes the process is faster, simpler, or less fault-oriented than in the jurisdiction where your client is presently stationed.

Finally, be careful to find out if there are ways of avoiding unnecessary travel and expense for your client. See if you can use depositions or summary judgment to cut down on expenses for personal appearances in divorce hearings.

Peremptory Settings

Counsel for the SM should address obtaining a priority or peremptory setting for the divorce. In fact, the SM’s attorney should consider this for any hearing in which the SM’s live testimony is required. This is usually a matter of reading the state’s rules of civil procedure, general practice, or the local rules to see what elements are necessary for a peremptory setting. Be sure to keep knowledgeable about any rules, priority setting and otherwise, that may be put in place by the court.

Share the Load

Why should you carry the whole case when you can get help in handling a military divorce? If you don’t do this type of case often, you should consider associating co-counsel or a consultant.

You can find a Guard or Reserve judge advocate for your partner, or perhaps an attorney who is a retired JAG officer. Wherever you go, remember the duty to obtain competent co-counsel is an ethical requirement.

Mark E. Sullivan, a retired Army Reserve colonel, practices family law in Raleigh, NC and is the author of The Military Divorce Handbook (ABA, 2nd Ed. 2011), from which portions of this article are adapted. He is a Fellow of the AAML and a board-certified specialist in family law. He works with attorneys nationwide as a consultant on military divorce issues. www.ncfamilylaw.com

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By Mark E. Sullivan

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What is different about this conference than any other family law conference?

What makes the AICPA/AAML National Divorce Conference unique is it is geared to lawyers and CPAs, business valuators and other financial professionals who work in divorce related fields. Divorce lawyers work closely with these professionals in their divorce cases on a routine basis. This conference provides useful, cutting-edge information on multiple advanced topics. Many of the speakers are nationally recognized, expert divorce lawyers and accounting, financial or business valuation professionals who have been paired to provide a comprehensive, dual perspective on the issues. This conference also uniquely provides a national venue for networking between legal and accounting professionals who share common interests in divorce-related fields.

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This is an opportunity for accounting and financial professionals to make contact with the divorce lawyers who make the decisions in their firms regarding hiring of these professionals, and conversely, the place for divorce lawyers to connect with the best financial and business valuation professionals. The quality, experience and expertise of the accounting and business valuation professionals is of major importance to divorce lawyers. The National Divorce Conference is the best place to meet the practitioners in the field.

The 2014 National Divorce Conference will be held April 23-25, 2014 at the Bellagio Hotel in Las Vegas, Nevada.
Client Relations

By Carrie Hagan, Clinical Associate Professor of Law

Keys to Effective Client Interviews

Some tips on better time management and building rapport during client meetings.

Many of us in law school didn’t take classes on interviewing and counseling. This meant that somehow we had to learn on our own, and the most direct route for that was to learn by doing, for better or worse. Whether you have never interviewed a client, or have been interviewing them for years, this article will give you a few pointers/reminders to organize your thoughts in an interview and maintain some helpful direction.

It Isn’t About You

The first thing to remember about interviewing is that it isn’t about you. Your role in this setting is to learn about the client. This can be tricky, because in order to build rapport we feel the need to connect through personal information. It’s fine to volunteer personal information to a client, but after doing so you may want to redirect them to the real purpose for your meeting: to learn about them.

We also need to be mindful that interviewing takes on a few additional challenges when in the realm of family law. As we know, family law cases can be highly emotional, and can deal with issues such as domestic violence, child abuse, anger, and sadness. Regardless of how we feel about emotions erupting in an interview or meeting scenario, the key is not to ignore them. Rather, you should acknowledge the feelings or emotional response and then move on. This means acknowledging a client’s feelings before moving on. For example, you can say: “Do you need a minute?” or “I can see that this makes you really upset.”

Remember that each interview has several goals:
1. To get to know the client.
2. To learn about their facts.
3. To reduce any anxiety and to clarify what they are looking to get out of the situation.

Below is an approach you should employ so that you can leave interviews and client meetings with a surer sense of where you stand and where you’re headed, for both you and your client.

Begin On the Same Page

Start the interview with a brief meet and greet, as well as a clear statement of why you are there and what you hope to accomplish. A suggestion might be: “Thanks for coming in today. During our meeting I’d like to get some more information about you and your needs, then I’d like us to fill out some paperwork, and make sure we get any questions you may have answered. We have about an hour scheduled, so if you are ready, let’s get started.” This brief summary of your session not only initially puts clients at ease, but it also gives clear direction about why you’re there, how long you have, and what you want to get done.

Once you are ready, ask one or two open-ended questions to get the conversation rolling. This allows you to set a direction for your session while at the same time giving the client a chance to open up. You may want to take notes while the client is talking at this point, and check with or alert the client that you will be doing so. While the client is talking, be sure to engage them using “active listening,” which really means listening without interjection while using signals (such as nodding) that show you are interested and paying attention. You should not typically ask questions of the client at this point. Let them give you as much information as they can, as you will next be clarifying what they have just presented you with. Should clients ask questions of you during this session you may want to let them know that you will note each question and save it for later, as you really just want to get an idea of what the situation. This allows you to keep the client on track, note what questions they have, and then answer them when you are ready to do so.

Take Control Again

When you feel like you have the whole story, or the client has reached a stopping point, take control again by using your notes to clarify the client’s goals
and details. Often in an open-ended monologue clients will list events out of order and with lots of confusing details. This clarification allows you to make sure you have the pieces you need, get some of your questions answered, and obtain additional information from the client. This is also a good point to answer any questions that the client may have brought up and to fill out any needed paperwork. Once you feel as though you have accomplished as much as you need at this stage, you may want to move on. How you move on depends on whether you will be accepting this case or not. Should you be accepting the case you may want to discuss preliminary strategy or your initial thoughts about any action that can be taken, and then move to the next step. Do this even if you aren’t sure whether you will take this case.

Close out the interview (or meeting) and list what your next steps will be. Your last step may be the most important. This is your opportunity to give a heads-up about what your process will be from here on out. Review what needs to happen before you can take further action, and wish them well with an idea of how you will next get in contact. Clients are especially anxious at the close of interviews or meetings, as they aren’t sure what comes next. You can use this last session to clarify what might follow and also to inform them of your timeframe. Be careful about giving clients specific days or times that you will contact them unless you are 100% sure that you will contact them then, as you will hear about it if you don’t. To avoid this, you may want to give them a generally specific timeline for future contact, with instructions about what to do if they have questions before they talk to you again.

Interviewing, especially without practice, can at times be time-consuming and unproductive. Even with practice, the subject matter of family law cases can make interviewing challenging due to the emotions involved. To help you corral information and make your time useful for both you and the client, the framework above should help you to stay focused and on track. Each step should be tailored to your own individual style, but in general the key to effective client meetings is gentle control, clarity of process, and general transparency about what comes next.

The first thing to remember about interviewing is that it isn’t about you. Your role in this setting is to learn about the client.

Carrie Hagan is a Clinical Associate Professor at the Indiana University Robert H. McKinney School of Law in Indianapolis where she directs the Civil Practice Clinic, specializing in family and civil issues. In addition to teaching full time at the clinic and consulting, she has presented and been published on her interdisciplinary work with law and social work locally, nationally and internationally.

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When the Supreme Court of Tennessee decided the divorce case of Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), it opened the door to using divorce proceedings to address issues arising from the prior storage of unused cryopreserved embryos. Since then, courts around the country have struggled with the resolution of spousal disagreements over what to do with these embryos produced by in vitro fertilization.

Broad Legal Issues

In some cases, one or both of the divorcing spouses have contributed their gametes to the production of the embryos, while in others, donor sperm or eggs have been used. Also, in some cases the parties have executed a contract determining what disposition should be made in case of a separation or divorce, but not in others. Some courts have enforced such contracts, others have not. Sometimes one of the divorcing spouses wishes to use the embryos, and other times a spouse wishes to donate the embryos to others or research. There are also cases where one party wants the embryos destroyed, but the other party objects on religious or moral grounds. The variety of legal issues arising in these divorce cases is broad, and each one has its own factual and procedural complications. Courts are not in agreement on many of these issues, and this article is intended to provide an overview of this subject.

Embryos, as that term has been used in the divorce decisions, refers to the early stage product of in vitro fertilization. Some courts have called them “pre-embryos” to reflect their lack of development. However, they have all the genetic components, which can evolve into a human fetus when transferred to a female womb.

The legal status of an embryo is relevant to the determination of whether divorcing couples have the legal authority to donate their embryos to another couple for implantation. Disputes over disposition of cryopreserved embryos have been addressed in the context of divorce in a number of states, but not always in a consistent manner. Although the issue mostly arises in divorce, it is possible that a separating non-marital couple may also encounter it. In such a case, it is likely a court will look to the principles used in the divorce cases, especially on contract and reproductive choice issues.

The “Interim Category”

Several courts have been compelled to address the status of embryos when divorcing spouses disagree
over the use of surplus cryopreserved embryos. There is general recognition in the reported decisions that embryos fall into an “interim category” between personhood and property that “entitles them to special respect because of their potential for human life.” See Davis v. Davis, 842 S.W.2d 588 at 597 (Tenn. 1992). The Massachusetts court agreed embryos are not just a species of property to be divided between the divorcing spouses; see A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000).

Generally, embryos are not subject to property division as a species of property in the context of divorce, although a few courts have ruled that the contractual right to dispose of cryopreserved embryos produced during the marriage is a form of personal property which can be subjected to disposition as property in a divorce. See Marriage of Dahl, 194 P.3d 834 (Ore. App. 2008) (under Oregon law a contractual right to possess or dispose of embryos constitutes personal property subject to division as per the contract in a divorce case). See also, Reber v. Reiss 38 FLR 1279 (2012) (embryos treated as personal property, although apparently not argued).

The abortion cases make clear that United States constitutional law does not consider an embryo a legal person. See Roe v. Wade, 410 U.S. 113 (1973) (finding that a fetus does not constitute a “person” for purposes of the due process clause of the Fourteenth Amendment). But see a report by Sherry Colb on CNN.com, Judge Rules Frozen Embryos Are People, (reporting that a fertility clinic which allegedly discarded nine of the plaintiff’s embryos could be sued for wrongful death based on the proposition that an embryo is a human being). While the weight of overwhelming legal opinion seems to be that an embryo cannot be considered a legal person, to treat an embryo as merely a kind of property would belittle its potential to develop into human life.

The “interim category” in which some courts place embryos entitles the progenitors of the embryo to an ownership or control interest, allowing them to dictate the ultimate disposition of their embryos while avoiding the intense national debate over abortion. However, courts and commentators have noted that while couples have the right to control the disposition of their embryos, that right is not unfettered. While the progenitors may have certain rights as to use, control, and disposition of embryos, the “property” classification does not completely fit. In divorce cases, courts have refused to treat embryos as simply property. Some states also restrict or even prohibit the use of embryos for research. It is also probable that a state could restrict the sale of embryos or limit such sales under the state’s power to regulate health.

**Court Interpretations**

Currently the law as interpreted by divorce courts has recognized four options regarding the enforcement of contracts providing for disposition of embryos. These options are: (1) enforcing a dispositional agreement and, in the absence of a contract, giving preference to the party wishing to avoid parenthood; (2) refusing on public policy grounds to enforce a preexisting agreement and enforcing the right of one of the divorcing parties to refuse parenthood; (3) recognizing agreements to dispose of embryos made prior to divorce, but permitting a party to change his or her mind up to the point of use or destruction of the embryos; and (4) enforcing an agreement to dispose of the embryos for non-reproductive use.

A sample of court decisions involving these policies include the following: In re Litowitz, 48 P.3d 261 (Wash. 2002) (enforcing agreement of the parties regarding disposition of the cryopreserved embryos after five years); Marriage of Nash, 2009 WL 1514842 (Wash. App., 2009) (not reported in P.3d) (arguably the fact that the wife had no genetic connection to the embryos made the award to the husband easier to justify); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (court upheld divorcing husband’s wish to avoid conception of child by ordering destruction of the cryopreserved embryos) ; J.B. v. M.B. and C.C., 783 A.2d 707 (N.J. 2001) (New Jersey court ordered the embryos to be destroyed as requested by the wife notwithstanding husband’s religious objections); Marriage of Witten, 672 N.W.2d 768 (Iowa, 2003) (as to embryos produced using gametes of husband and wife if they cannot reach a mutual decision regarding disposition then no transfer, release, disposition or use of the embryos can occur without the signed authorization of both parties).

It is not uncommon for an agreement between the couple and a clinic (sometimes called a cryopreservation agreement) to include a provision regarding disposition of unused embryos following IVF. However, the parties may decide to make a different disposition as part of their divorce proceeding. This latter agreement should then control over agreement provided by the clinic. For example, in a Washington case, the cryopreservation agreement with the clinic gave the wife the right to determine disposition of embryos which had been produced for the married couple using the husband’s sperm and donor eggs. As a result of subsequent

**Many states have not yet evolved criteria to resolve disputes over the disposition of embryos when couples divorce.**

CONTINUED ON PAGE 106
On Becoming a Judge, and Preparation in the Courtroom

We recently interviewed Dianna Gould-Saltman, a former family lawyer turned judge. She reflected on her career path, becoming a judge and how family lawyers can better their own practices. What follows is an excerpt:

What do you think it takes to make a good judge? What do you believe are the qualities you bring to the job and ones you still need to work on to become a better one?

Well, I came to the family law bench with 25 years of experience in practicing family law, so that’s helpful, but probably not very common of those who sit in family law. Certainly having knowledge of the law is helpful, but it’s neither sufficient nor exclusive. Being a good listener and time manager is critical when we have — as we do in California — substantial budget cuts for the courts. Our dockets are getting longer, so we have less of an opportunity to allow people to tell their stories in court as they might if I had half as many cases before me in a day.

Being able to strike that fine balance between allowing people the opportunity to tell their story fully so they feel that they have been heard, and not being in a position where the last ten cases have to be continued on another day is always a fine-tuning balancing act.

Can you tell us a little bit about the mental and actual process of becoming a judge in California?

I think that you have to be in a position where you’re ready to make a considerable change in the way you look at the law, because being a judge and a lawyer are very different jobs, and you don’t recognize that until you’re sitting here in a black robe. I will say that in terms of how it occurs — at least in California — 90% of us are initially appointed and that appointment comes from the Governor, generally through a vetting process through an appointment secretary. And in this case, the California State Bar also has a commission that does a vetting process.

So you have a lot of applications to fill out and interviews with people. They send out many questionnaires to hundreds of people in the community about their opinion of you as an attorney, and then you get more interviews about that sort of thing.

So even for the 90% of us who are appointed, it’s a six-year term, and you’re appointed to replace either a new judge opening, which is more rare, or somebody who’s either retired, been elevated or changed positions. As an example, I took over from somebody who retired, and she still had two and a half years left on her term. I had to complete that term before needing to run for election.

And at that point, if you’re a sitting judge and nobody contests you, then you don’t even appear on the ballot and you instantly have another six years. If somebody does pull out papers to contest you, then you’re in a fully contested election. About 10% of judges run for election as a first instance. They were not appointed by the Governor, but chose to run in a contested election in the first place.

Is there anything that you’ve observed family lawyers doing that could be improved, in terms of moving things through the court, making it easier for judges to assess cases and make better decisions?
I would say preparation is key, to know your case backwards and forwards. Better yet, know the other side’s case backwards and forwards too, and the best way to do that is probably by meeting and conferring with the other side before you ever approach the counsel table.

If I felt that people had really met and conferred and resolved all of the things that they could have, and what I had left was what really required a judicial determination, then it would be very easy for me to make that call. When I feel that the only reason they’re in front of me is because they haven’t spoken with each other in the first place, I sort of feel like I’m there as a referee, not a decision-maker, and that is not so helpful.

For the full version of this interview with Judge Dianna Gould-Saltman please go to: www.familylawyermagazine.com/articles/saltman-interview

Judge Gould-Saltman was appointed by California governor Arnold Schwarzenegger to the Los Angeles Superior Court bench in 2010. Prior to her appointment Judge Gould-Saltman practiced family law for 25 years, 18 as a Certified Family Law Specialist. She is a Fellow of the American and International Academies of Matrimonial Lawyers.

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Judge Lowrance was a domestic relations lawyer for twenty years prior to becoming a domestic relations judge in the circuit court of Cook County, Illinois. She is the author of the book The Good Karma Divorce and has been a guest on Good Morning America, the CBS Morning Show, CNN, ABC and other networks.

Bullying Between Family Lawyers is Not a Rite of Passage

By Judge Michele Lowrance

I recently had an opportunity to talk with quite a few young family law attorneys. Among their experiences was one I knew only too well while a new attorney: bullying. This can be a pervasive problem. Although often not personal and used as a power strategy, mastering certain skills and learning to handle the bully can advance your own power. What follows is a list of defensive tactics to use against bullies:

• Don’t mirror their behavior. If you do, they have pulled you into their territory, causing you to be off balance. If you choose to confront them, do so when you’re feeling in control and centered.

• When feeling overwhelmed ask, “Could you say more about that?” Keep asking for clarification.

• Watch your body language. Crossing your arms may suggest that you’re intimidated.

• Keep eye contact.

• Assert the topic you want to discuss. Insist on staying on one issue at a time.

• Ask open-ended questions that can’t be answered with a yes or no.

• Practice what you want to say ahead of time.

• Remember this is not about you. A bully tries to treat everyone in a dominating way.

• Don’t threaten or try to manipulate the person, proceed to the next legal step. You will gain their respect and maintain your own.

• If you want someone to stop screaming, stop interacting with screaming as if it were a legitimate mode of communication.

• Stay calm, collected, and focused when dealing with a person that would otherwise mislead, unnerve, or distract you.

• Make a list that sets your bottom line. One list of what you will tolerate and one list of what you will not.

• Don’t focus on trying to change the behavior of a bully, put your energy on your own reactions.

Above all, remember that it’s not a bad thing to be intimidated by a bully — courage is only developed when you’re first afraid.
To view Part 2 (pages 58 to 108) of the 2013 of this Family Lawyer Magazine, please click here.