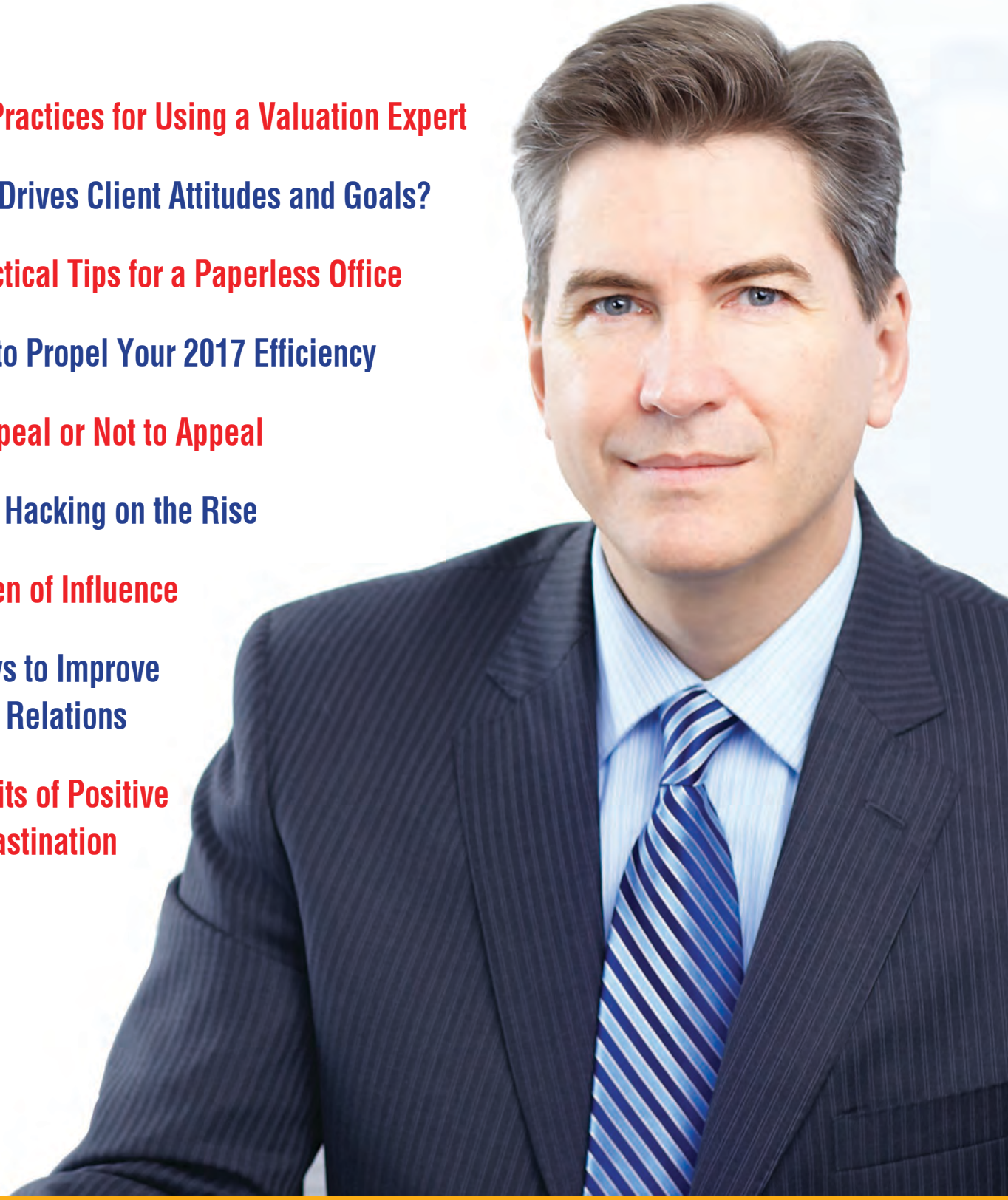
FAMILY LAWYER MAGAZINE

Spring 2017



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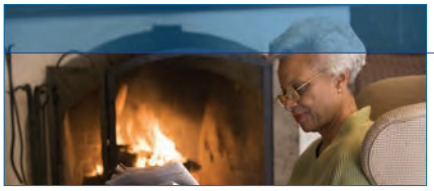

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CEO/Publisher
Dan Couvrette, 866.803.6667 Ext. 124
danc@divorcemarketinggroup.com

Editorial
Diana Shepherd, Ext. 131
diana@divorcemarketinggroup.com

John Matias, Ext. 129
john@divorcemarketinggroup.com

Avital Borisovsky, Ext. 135
avital@divorcemarketinggroup.com

Advertising Sales
Aleks Krawczyk, Ext. 126
aleks@divorcemarketinggroup.com

Peter Smith, Ext. 128
peter@divorcemarketinggroup.com

Marketing/Client Services
Martha Chan, Ext. 136
marthac@divorcemarketinggroup.com

Navarre Bailey, Ext. 125
navarre@divorcemarketinggroup.com

Rachel Cass, Ext. 127
rachel@divorcemarketinggroup.com

Shaganaa Sivaloganathan, Ext. 133
shaganaa@divorcemarketinggroup.com

Atif Nadeem, Ext. 137
atif@divorcemarketinggroup.com

Webmaster
Gina Tan, Ext. 130
gina@divorcemarketinggroup.com

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

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Letter from the Publisher

You went to law school to become a lawyer, but now you may find yourself spending more time managing staff, dealing with new technology, trying to attract new clients, or billing existing clients than actually practicing law. Especially for small firms and solo practitioners, you need to be able to think like a successful business owner to build or maintain a thriving law firm.

This issue has a special focus on practice management, client relations, and marketing – all of which are absolutely vital to a prosperous practice. How can you reduce errors in files and time spent on daily tasks? What can you delegate, outsource, or automate – without negatively impacting your clients' experience? To help answer some of these questions, take a look at:

- Saving time and money by going paperless: see **"5 Practical Tips for a Paperless Family Law Office"** to learn how to switch (page 8).
- **"6 Ways to Improve Client Relations"**, which offers strategies for maintaining office productivity, increasing your firm's success, and improving client relations (page 14).
- **"What Drives a Client's Financial Attitudes and Goals?"**, which will help you to figure out your client's true motivations and goals (page 10).
- The third edition of our **Marketing Guide for Family Lawyers** (after page 24). This special supplement provides six bonus articles to help improve your marketing results, get back on track, or get started.

For resources and referrals, check our **"Professional Directory"** (page 43) or visit our website, which offers hundreds of useful and relevant articles.

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To Appeal or Not to Appeal:

That is the Question

You have fought the good fight – but despite your best efforts, the trial court did not award all that your client desired. After the dust settles, what – if any – next steps should be taken?

By Michele M. Jochner, Appellate Lawyer

Many clients – and some attorneys – automatically jump to the conclusion that an appeal will readily "fix" whatever problems are perceived with the trial court's judgment, and all will ultimately be as it should. However, taking an appeal is a time-consuming and often expensive endeavor, and both counsel and client should carefully and realistically consider all of the pros and cons prior to embarking on this new journey.

From the start, the attorney should make it crystal clear to the client that an appeal is neither simply a second bite at the same legal apple nor a "do over." An appeal is not a new trial; instead, it is a paper review of what occurred at trial. To this end, the task of the appellate court is to examine the trial court record to determine whether the lower court committed any errors of fact or law. The client must understand that he or she is bound by what is in the record, and that the appellate court takes no evidence and hears no witnesses.

Managing Client Expectations

When considering an appeal, you must manage your client's expectations effectively. Have a frank discussion about the outcome: that despite investing additional tens of thousands of dollars to appeal the trial court's ruling, after all is said and done the result may remain exactly the same – or become even worse. After the roller-coaster of a trial, emotions are running high and a client may want to do whatever it takes to get an unfavorable result reversed – even if the chances of doing so are low and the costs are high. This is fine, as long as the client fully understands the steps in the process, the expenses that will be incurred, and the risks involved.

An appeal is another full round of litigation that often takes years to conclude and is undeniably costly. It requires the attorney handling it to have a deep understanding of all aspects of the trial court record, as success in briefing and oral argument hinges upon counsel's mastery of the facts and the application of the law to those facts. If the attorney handling the appeal is not the same one who tried the case, the client must be prepared to accept additional expense for the time the new attorney needs to get up-to-speed with all that occurred prior to judgment. This cost alone can be significant where the record is voluminous.

The briefs, which are often lengthy and complex, tell the client's story. Page limits vary by jurisdiction; in Illinois, for example, opening briefs are capped at 50 pages – or 80 pages if cross-relief is also requested. Needless to say, researching and crafting these documents is not inexpensive. Finally, if oral argument is granted, preparation for that all-important give-and-take with the appellate panel is likewise a very time-consuming and expensive process.

Appeals: Different Standards of Review

The decision of whether to pursue an appeal often depends on the types of issues that will be raised. Different issues often have different standards of review. The standard of review is important because it is the lens through which the appellate court considers your case. The spectrum ranges from nearly complete deference to the trial court where decisions based upon discretion are involved, to no deference being given to issues purely legal in nature; claims of erroneous factual or evidentiary rulings fall somewhere in between the two.

Not every loss is worth appealing… Perform a detailed and objective cost-benefit analysis before your client decides to move forward.

An appellant stands in the strongest position if a pure issue of law can be raised, as it is subject to *de novo* review. On the other hand, an appellant is in the weakest position if the claim of error is one of abuse of discretion, where the most deference is afforded to the trial court's ruling. The client must understand the effect of the standard of review – especially where it means that the appeal does not start out on a level playing field due to the deference accorded to the trial court's judgment.

You should also make your client aware that taking an appeal of a portion of the judgment could be the catalyst the opposing party needs to file their own request for cross-relief on other parts of the judgment that were decided in your client's favor. By putting the trial decision in play, the other side could ultimately have the favorable aspects of the decision overturned, and your client could be in an even worse position than prior to the appeal. Make a risk assessment as to what potential issues could also be raised by the other side, and the probability of success if that occurs.

Is the Loss Worth Appealing?

The client could also be on the hook for the other side's fees in defending the appeal. Because attorney fee-shifting often occurs in dissolution cases, that concept may also be carried over into the appellate process. Advise your client as to whether they may also be obligated to pay the other party's legal fees as well as their own for the appeal.

The bottom line is that not every loss is worth appealing, and you should perform a detailed and objective cost-benefit analysis before your client decides to move forward. Outlined above are some of the major issues to discuss with your client when considering taking an appeal of the trial court's judgment. Of course, additional considerations will likely arise in each case based upon the specific facts. Suffice it to say that both the costs and the benefits of appealing a trial ruling can be significant. However, the key is to prepare the client for what is to come so that they can make a fully informed decision. ■

Michele M. Jochner is a partner with Chicago's Schiller DuCanto & Fleck, LLP, where she handles the firm's appellate matters. She has authored more than 200 legal articles and has served in leadership positions with a number of bar associations and community organizations. www.sdflaw.com.

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A Tale of Two Appeals

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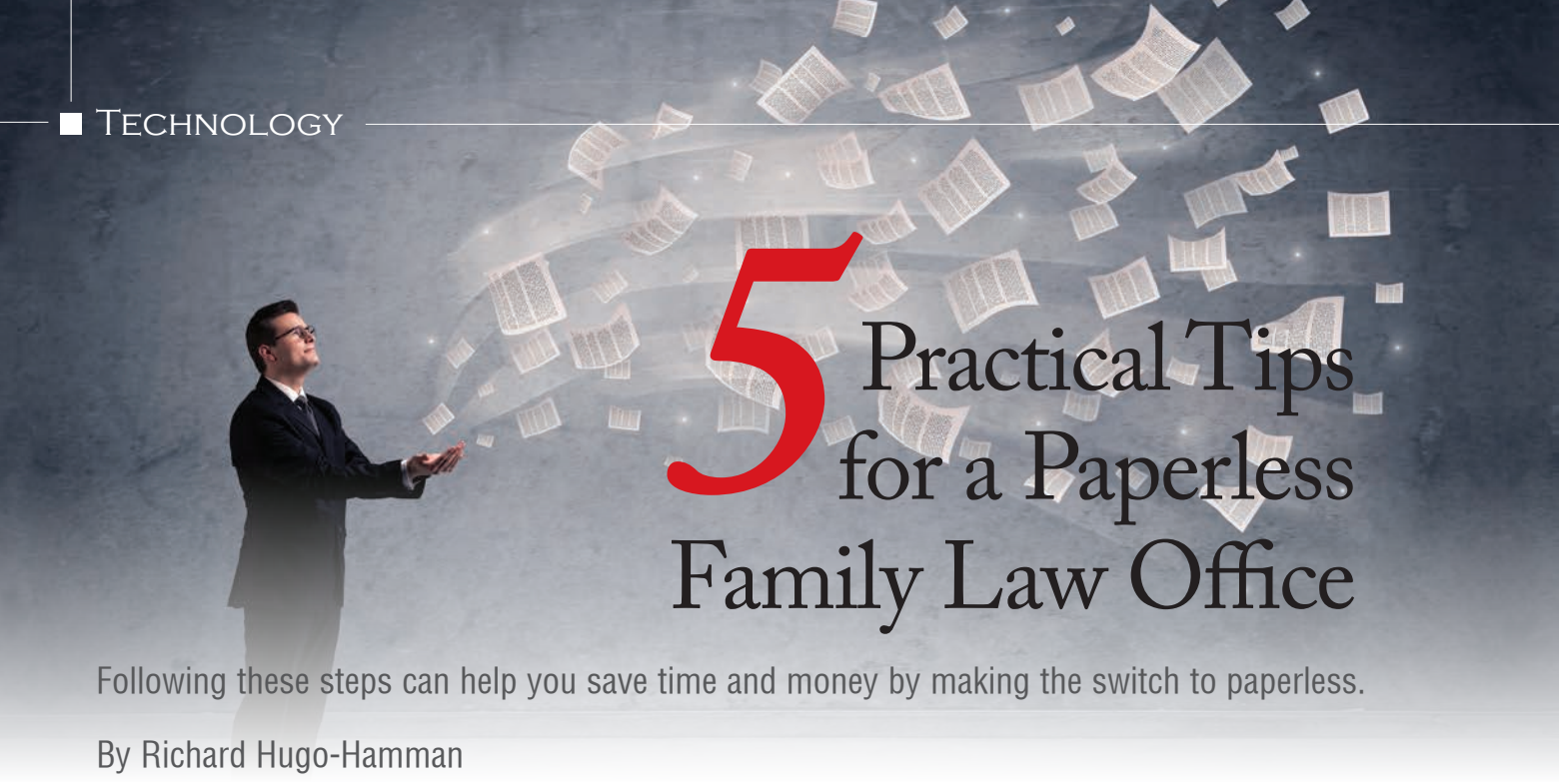

5 Practical Tips for a Paperless Family Law Office

Following these steps can help you save time and money by making the switch to paperless.

By Richard Hugo-Hamman

Today, smartphones and tablets put the world at our fingertips. Information can be retrieved with the touch of a finger. As a family lawyer, you must keep up with technological advancements in order to best serve clients. You need all client information – including all matter documents – with you, wherever you are. It is what the 21st century client expects.

Unless you want to carry around stacks of manila folders, the only way to achieve this is to go paperless. Although it may seem daunting, going paperless will make your firm more organized and help you serve your clients better.

How can you bring your family law firm into the 21st century and go paperless? Here are five practical tips to help you make the transition.

1. Convert paper documents to electronic format

Most correspondence today arrives electronically, and it is easy to associate with a certain matter. But what about incoming paper documents? A good scanning system is a must; scan all incoming paper documents so electronic copies can be stored. Depending on the importance of the original documents, they should either be destroyed or sent back to the person who provided them.

2. File electronic documents by matter

All documents – including emails and attachments – should have an original version stored in the matter. A good system will automatically associate all new correspondence and documents with the matter you are working on. It should also be easy to add it to a different matter.

3. Use templates and forms

Whether you are crafting a simple letter or a complex family law form, you should have these documents readily available when you need them. A good system provides you with templates, documents, and functionality that allows you to incorporate your own templates into one system. Associating documents and templates to a specific matter type within the system can be useful and help save your colleagues' time as well.

4. Use electronic bills, invoices, and reports

There's no need to search for paper invoices. Use a system where legal costs and disbursements are always automatically up-to-date. A good system may not even require the use of a bookkeeper. Reports can be re-created and updated at any time, making paper copies obsolete.

5. Record time electronically

Record all billable time on your smartphone or desktop. This will prevent errors when information is rekeyed or edited; and those types of errors could cost you money. You should also link any notes with the corresponding electronic matter.

Why Go Paperless?

A paperless office saves time: no more searching through stacks of manila folders. It also saves money: you can focus on performing billable tasks, not filing and version control.

The right technology, a willingness to make the change, and application of these steps can help you make the switch. The benefits? Impress your clients, enjoy practicing law more, and lower your operating costs.

To learn more about going paperless, you can download this whitepaper here: www.leap.us/whitepapers/the-paperless-office/. ■

Richard Hugo-Hamman is the Executive Chairman of LEAP Legal Software. He has thought about the challenges facing small law firms for more than 25 years and has visited thousands of law firms on three continents. www.leap.us

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What Drives a Client's Financial Attitudes and Goals?

Ask most divorcing clients about their financial goals and the response can range from a blank stare to an angry diatribe. If you hope to get an informed answer, you need to identify their core beliefs and competencies about finances.

By Karen D. Sparks, Financial Analyst

Trying to discern client priorities in the financial area of divorce is never an easy task. The question, "What do you want?" is often met by a confused or blank stare, a rambling vent, or an aggressive answer that has undertones of anger and/or resentment. So, how do you figure out what your client's goals actually are?

First, you need to invest in a process to work through the modalities of knowledge, global vision, and framework. Whether you handle this in-house or ask a divorce finance professional to help the client with this task, it will be time well spent as this will go a long way towards getting to, through, and over the obstacles that can crop up when discussing finances with a divorcing client.

Now, let's take a look at what it means to work on this issue from the inside-out by turning the lens inward towards the client.

Financial Knowledge

Divorce professionals have a tendency to use "divorce speak" or technical terms for allocating assets. Clients may appear to be understanding the information, but really, they zoned out after the first few sentences.

The first objective is to take the client's "financial pulse": what is their attitude towards money, and how comprehensive is their knowledge of how the marital finances were handled?

- **Attitude towards money.** How we think and feel about money has a direct correlation to how our role models interacted with it while we were growing up. Some of us experienced money used as power and control; used frugally because there was never enough; used with abandon and without budget; used to extract certain behavior results; used to placate, reward, or punish. Taking a few minutes to zero in on your client's attitude will help you discern the right approach to take.
- **Marital financial knowledge.** To establish a baseline for a client's financial knowledge, ask about key financial issues in the flow of the marriage regarding investments, tax returns, credit-card debt, asset investment, living and family expenses, and other key points. This exercise often highlights areas where the client had no real knowledge or only a vague idea of what was going on – or worse, was not aware of the dissipation or transfer of valuable marital assets. Once the client understands the true marital finances, you can identify and clarify the framework for areas of emphasis or concern that need to be addressed in the allocation process.

Cultural Factors

Divorce in the United States is gradually becoming a more widespread phenomenon in cultures where historically marriage was a permanent relationship that was never legally severed.

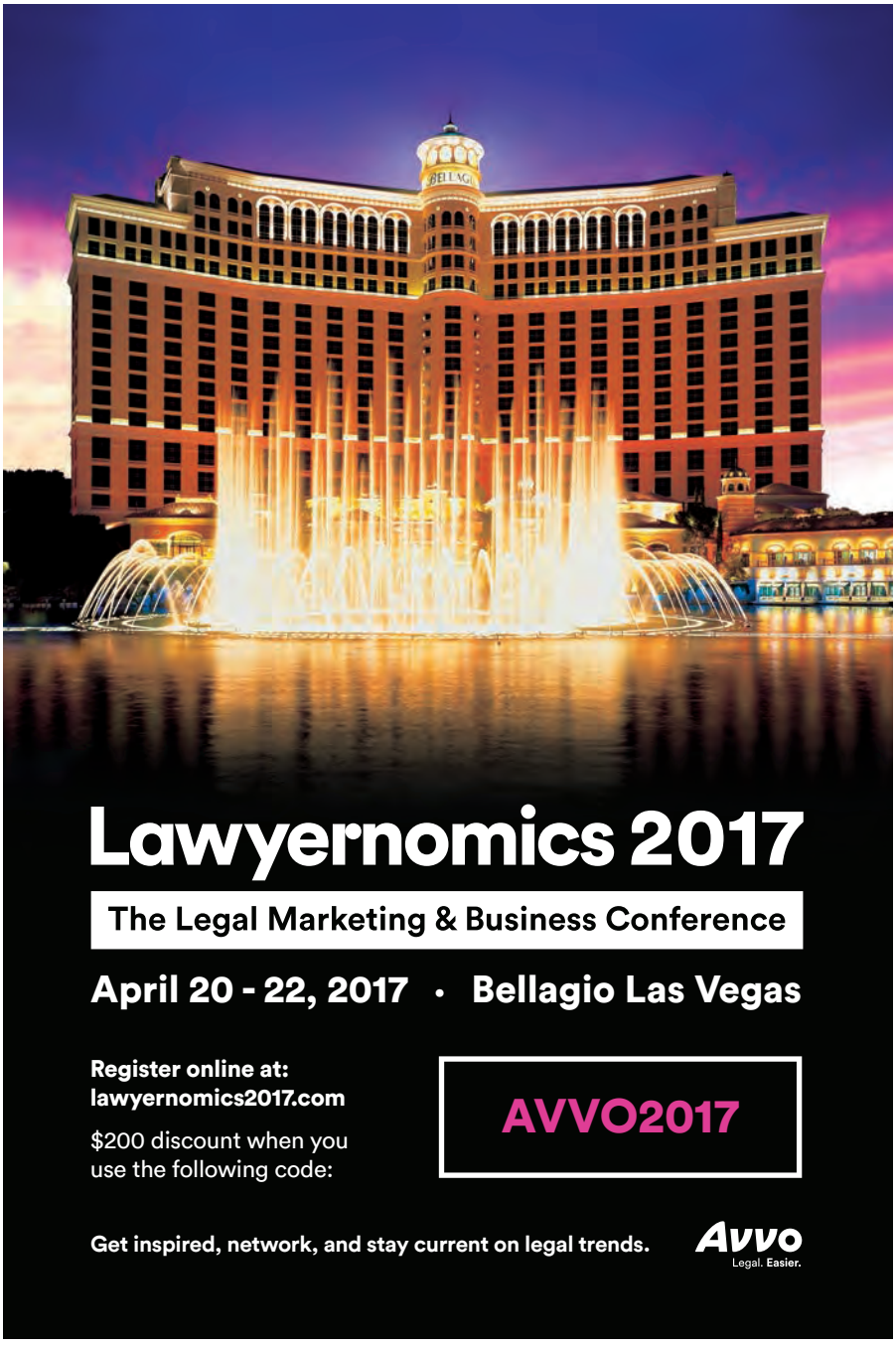
As individuals struggle to bridge the gap between what they feel needs to happen with their marriage and how they will be viewed by their family, religion, or culture, their viewpoints can be very rigid, emotional, and power-based.

As professionals, we need to be aware of and sensitive to these cultural norms – which includes understanding how these norms

might impact the financial discussion.

Stay attentive for indications of circumstances that include but are not limited to:

- **Managing family influence.** Sometimes, a couple's family members may insist on being involved in their divorce in some way. Here, the objective is to clearly set forth the guidelines and boundaries for your business practice so that everyone is on the same page. Make sure you have a good grasp on what is important (and why it is important) to the family in the financial resolution. This will establish an atmosphere of trust and understanding, and then you can gradually move towards narrowing the focus of your discussions to the actual individual or the couple considering divorce.
- **The art of discussion.** Some clients will be hesitant to express themselves openly on financial matters because of their cultural or family background. Creating an atmosphere where they can feel that their concerns and questions about the divorce allocations are being heard and incorporated into the analysis will reduce their anxiety and help to keep lines of communication open and effective.
- **Offshore assets.** There may be concerns about real and personal property acquired during the marriage and located in another country. You should know what those assets are (and, ideally, what they are worth), but unless you are an expert in this area, the only financial analysis you can do in most cases is on property acquired in the United States. You should note to the client that the pursuit of these foreign assets is a separate matter outside the scope of current proceedings.



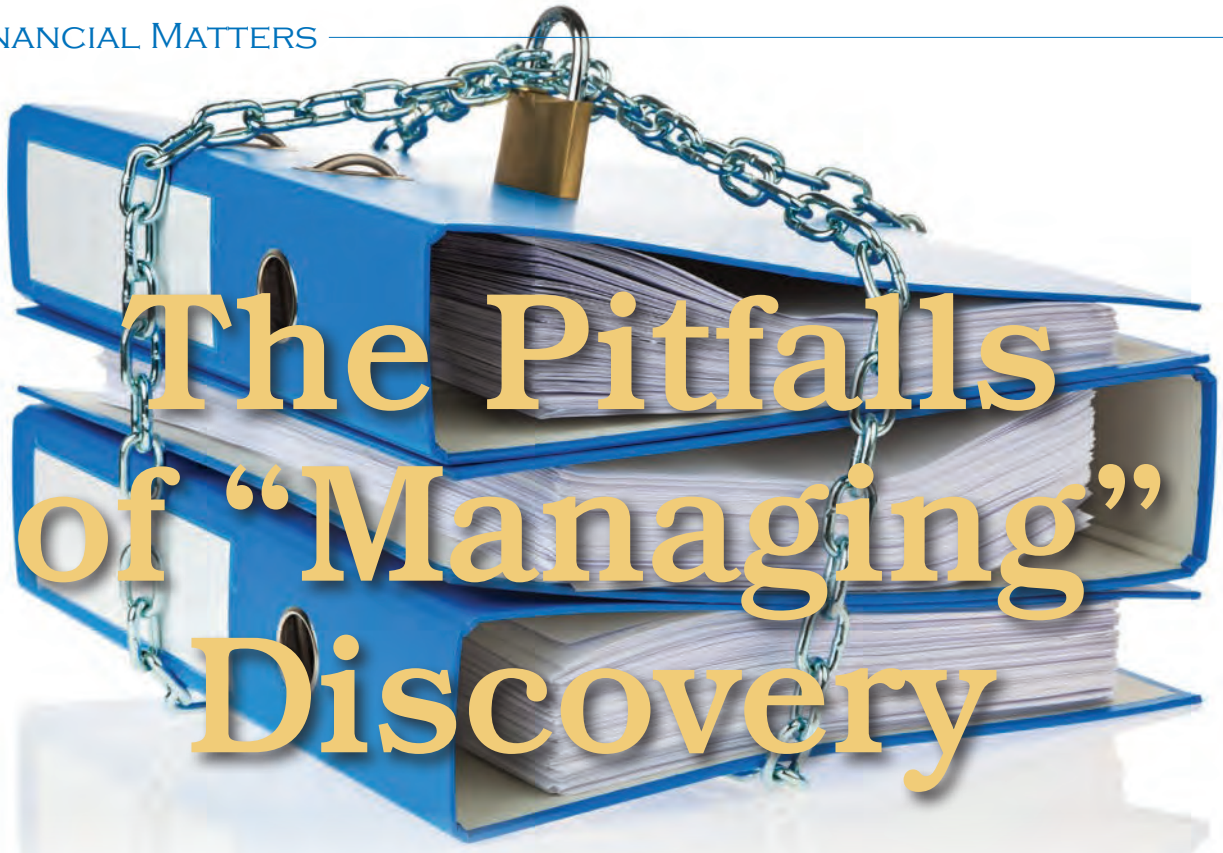
Framework

Once you have assessed the client's knowledge and grasped any attendant cultural issues, you will have the opportunity to focus on items that are vital to the client's wish-list and to develop a realistic plan for allocating the marital assets.

Conclusion

Before asking clients what they want, you need to identify the core competencies and beliefs behind their approach towards divorce finances. Only then will you be ready to guide your clients towards the financial result that they are seeking. ■

Karen D. Sparks, CDFA®, J.D., is the principal and owner of Divorce Financial Strategists™. In her capacity as a Certified Divorce Financial Analyst®, she provides client services locally and nationwide for divorce and separation financial analysis and post-divorce implications. www.divorcefinancial-strategists.com



The Pitfalls of "Managing" Discovery

When attorneys try to control the flow of discovery to the retained financial expert, they may create more problems than solutions.

By Joseph L. Leauanae and Jennifer A. Allen, Financial Consultants

When we work with an attorney, we need to reach a consensus on the type and quantity of information that we need for our financial analyses. Occasionally, the attorney will attempt to manage the flow of documentation to our office by either not providing us with pertinent discovery in a timely fashion or by only providing partial discovery.

Attorneys who try to manage the flow of discovery to the retained financial expert usually rationalize their actions as follows:

1. I want to control costs and/or due diligence.
2. I want to influence the expert's conclusions.
3. I am embarrassed that the expert will identify deficiencies in my requests for production.

Cutting Corners

We are not advocating for an open checkbook when it comes to the retained financial expert's review of discovery; however, tightening the purse strings by limiting due diligence can cause substantial issues in a case.

Attempting to control costs by waiting until the last minute to retain an expert can be counterproductive: a rushed timeline could mean charges for additional (or more expensive) professionals than would have been necessary without the expedited time frame.

Attempting to control costs by selecting which document production to provide or withhold could also backfire: the attorney may not know which documents are crucial to the retained expert's analysis, and there is potential for significant damage if opposing counsel provides information at deposition or in trial that causes the expert to change their opinion.

Loading the Gun

Most attorneys are not actively seeking to control the retained financial expert's testimony. However, even subtle attempts by counsel to direct the scope of the expert's analysis through "management" of the discovery they provide can leave the expert unnecessarily exposed to criticisms regarding their objectivity, competence, and the integrity of their opinions. Financial experts play a crucial role in the success of certain litigated matters, and the preclusion of their testimony can severely hamper counsel's effectiveness.

An attorney may avoid providing the retained expert with documents that do not support their client's position. However, the expert might have reached a favorable conclusion even if the attorney had provided all pertinent discovery. As such, by "directing" discovery, the attorney may have poisoned the appearance of the retained expert's opinion. Unfavorable information seldom remains buried, and one of the worst experiences for an expert is to first see such information when opposing

counsel provides it at deposition or trial.

If an opposing expert receives more information than the retained expert, the opposing expert's analysis and opinion may be perceived as more credible, supported, and informed.

Covering the Oopsie

Being human, attorneys sometimes make mistakes. When mistakes occur in requests for production, counsel may attempt to divert attention from those mistakes by not giving the retained financial expert the opportunity to either assist with additional discovery requests or to identify deficiencies in documents already produced through discovery (since such deficiencies may have resulted from counsel's actions rather than the responses provided by opposing counsel).

If the expert is not made aware of discovery deficiencies in a timely fashion, they may not be able to adequately address such deficiencies in their report. The trier of fact may also preclude the expert from rectifying deficiencies in counsel's requests for production if not done in a timely fashion.

On occasion, counsel has sought to cure unrectifiable discovery deficiencies at trial by seeking our responses to hypothetical scenarios wherein such deficiencies did not exist. In our experience, these presentations are never as effective as being able to directly correlate testimony to documents that have actually been produced through discovery.

Protecting Your Expert

As financial experts, our currency is competency and credibility. By attempting to manage the flow of discovery, counsel runs the risk of either short-changing our effectiveness or, at worst, debasing our worth. Therefore, we propose that open dialogue regarding discovery should be maintained between counsel and the retained financial expert in order to avoid the many pitfalls that may otherwise arise. ■

Joseph L. Leauanae (CPA, CITP, CFF, CFE, ABV, ASA) and Jennifer A. Allen (CPA, CFE) are with Anthem Forensics, LLC, a Las Vegas-based firm specializing in forensic accounting, business valuation, and economic damage calculation services. Most of Anthem's work is oriented towards providing expert witness testimony; the firm also assists clients in non-litigious matters. www.anthemforensics.com

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646 375 3843
jean.han@bakertilly.com

Stacy A. Statkus, Director
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646 375 3834
stacy.statkus@bakertilly.com

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6 Ways to Improve Client Relations

These tips should help ensure that clients are happy with the representation they receive during their divorce – and a happy client is the best referral source for future clients!

By Caitlin DeGuilo Toker and Rosanne S. DeTorres, Family Lawyers

To be successful, the attorneys at a family law firm must have a firm handle on all aspects of the law. Equally important to a firm's overall success, however, is its policies and standards as they relate to client relations; if you know the law but can't maintain a solid client base, your firm will inevitably fail. Here are six strategies that can help you maintain office productivity, improve client relations, and increase your firm's success.

1 Structure the Initial Consultation to Maximize Productivity

Potential clients often wish to explain what is happening in their lives and the reasons for the divorce to the attorney. This background information may be invaluable to determine strategy moving forward, but it can prevent the attorney from gathering the necessary details to identify urgent issues, determine what special circumstances might exist, and review the divorce process with the potential client. Ask your support staff to give the potential clients a list of important information to bring with them to the meeting – such as financial documents, or any prior orders if it is a post-judgment matter.

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The attorney must also know how to strike a balance between allowing the client to share his or her story and directing the consultation to obtain necessary information and provide appropriate feedback.

2 Follow Up with Prospective Clients

If a potential client is not prepared to move forward immediately at the time of the initial consultation, then follow up within a week of the initial meeting. Ask if they have any questions that could help them decide whether or not to move forward at this time, and remind them to contact the office when they are ready to move forward. As they are leaving the consultation, consider handing each potential client a card or brochure encouraging them to call or email with any questions they may think of later on. Following up is crucial to client relations: it reinforces the client's feeling that they are special and that the attorney cares about what is going on in their life.

3 Respond to Phone Calls and Emails Promptly

One of the best compliments a client can give a family law practitioner is that they always felt as if they were the attorney's only or most important client. Inform your clients that it is your firm's policy to return phone calls the same day or within 24 hours whenever possible. When a client calls and the attorney is unavailable, have support staff take a message and schedule a specific time that the attorney will return the call. If the attorney is in court or is otherwise unable to return phone calls on the same day, support staff should contact the client to schedule a telephone conference for the following day or later in the week so that the client is not left in limbo. This manages the client's expectations, and lets the client know that their matter is important to the firm.

4 Email Is Not Right for Every Communication

While email simplifies communication with clients, it may not be good business practice to simply give your support staff carte blanche permission to email all orders and correspondence to the client. You should always review everything aside from a standard scheduling notice and advise when it is appropriate to send to the client. For example, an order from the court requiring your client to pay the other party's counsel fees may be an upsetting surprise. Instead, you could call the client prior to emailing the order to reassure them and answer their questions. Ensure that clients are comfortable with the way you plan to provide information to them, and that they have access to their attorney upon receipt of potentially upsetting news.

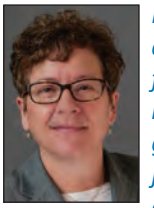
A client who feels that they are not a top priority when they are meeting with their attorney is unlikely to refer additional work to the firm.

5 Make Face Time with Clients Count

One of the best ways to demonstrate your commitment to a client is to be attentive and "in the moment" during meetings. For example, when you are in a client meeting, you should be engaged in talking to or listening to that client – not multi-tasking and reviewing other emails or taking calls. A client who feels that they are not a top priority when they are meeting with their attorney is unlikely to refer additional work to the firm.

6 Follow Up with Clients at the Conclusion of a Case

When a family law case concludes, follow up with the client to ensure that they are aware of what steps need to be taken to address potential post-judgment issues. This may be done in writing, by itemizing the additional steps and providing a deadline for each one: for instance, that the marital residence must be refinanced within 60 days, or the retirement accounts divided by X date. This is also a prime opportunity to refer the client to other professionals that could help with post-divorce matters – such as an estate attorney to rewrite the client's will or an accountant to prepare tax returns or create a budget for the newly single individual. The post-divorce reality may be overwhelming and scary for clients, and having a clear outline for what needs to be done by when may go a long way to reducing their fears about the future. ■



Rosanne S. DeTorres concentrates her practice in family law cases, including divorce, custody, grandparent's rights, juvenile delinquency, domestic violence, and DYFS cases. An accomplished appellate attorney, she is also a trained family mediator and a Collaborative Law attorney.

Caitlin DeGuilo Toker handles all aspects of family law, including divorce, custody, parenting time, equitable distribution, alimony, child support, and post-judgment matters. She has significant experience in motion practice and negotiating property settlement agreements.
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10 Things I Wish I Knew Starting Out in Family Law
Knowing what to do and what not to do will help you build a client base and a solid reputation that will carry you for years.

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Recent and Recommended

Visit www.FamilyLawyerMagazine.com for interesting and informative articles written by industry professionals and experts. Here's a sneak peek at some of the articles we have recently published on our website.

Preparing Clients for Emotional Milestones of Divorce

By Mary Ann Burmester

As attorneys, we see the stages of divorce from a litigation timeline perspective: petition filed, discovery, possible interim hearings, settlement negotiations, possible trial, and final decree. This is a familiar pattern to us, and we know it takes months or years to complete the process.

Clients, however, view the stages differently. We, as counselors-at-law, not just attorneys-at-law, need to be aware of the emotional milestones from the clients' perspectives and prepare them for getting through the stages. Based on almost 30 years of practicing law and the personal experience of being twice divorced, here are some frequent emotional milestones clients face when ending a marriage – from their initial consultation to the moment they take off their wedding rings. ■

– Mary Ann Burmester is a family lawyer and founder of NM Divorce & Custody Law, LLC.
www.nmdivorcecustody.com
www.familylawyermagazine.com/articles/emotional-milestones

Divorce Liens: An Alternative to Selling the Family Home

By Lorelei Stevens

A divorce lien can avoid some of the turmoil of selling the family home – which is often a divorcing couple's largest single asset. With a divorce lien, one party keeps the house, and the other gets a note and deed of trust (or mortgage) secured by the property. One gets real estate, and the other gets paper.

In this arrangement, the spouse who keeps the home – often the wife – has the same familiar environment for herself and the children. The children don't have to change schools, and there are no divorce relocation costs. She retains a fair share of the equity, and she has the obligation to pay the departing spouse according to an agreed-upon schedule. ■

– Lorelei Stevens is president of Wall Street Brokers, Inc.
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David W. Echols is a fellow in the American Academy of Matrimonial Lawyers. Jonathan Echols, named for the third year as a Rising Star by SuperLawyers; Amy Howe, recognized for the third year by the National Trial Lawyers Top 40 Under 40, National Academy of Family Law Attorneys Top 10 Under 40 for 2015 and 2016, and American Institute 10 Best Under 40 for 2015 and 2016; Ashley Rahill, Recipient of Oklahoma Bar Association President's Award, 2012 and Leadership Academy 2014; and Kyle Endicott, who is the newest member of the firm, continue to provide our clients with knowledgeable and compassionate representation.

In Memoriam, Judge M. Eileen Echols (March 16, 1951 – June 30, 2016)

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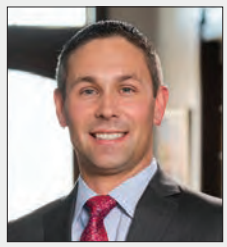

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Advanced Financial Analyses: Road Testing Proposals

By J. Anthony Licciardello

Divorce settlements are an exercise in financial planning. But many divorces move through the courts with nothing more than financial affidavits and a spreadsheet of assets to assist clients and the court in assessing whether a particular settlement is fair and equitable.

With the availability of advanced financial software, and with divorce financial analysts as consulting partners, it is now possible to create compelling and accurate financial projections that tell a powerful story to clients, opposing attorneys, and the court.

This article discusses some ways advanced financial analyses may be used to build a case and then support that case in court, giving you an advantage in obtaining the best possible settlement for your client. ■

– J.A. Licciardello is a CDFA® and the president of Wentworth Divorce Financial Advisors.
www.divorcefinancialally.com
www.familylawyermagazine.com/articles/road-testing-financial-proposals

Managing Virtual Employees

By Ursula Furi-Perry

As virtual offices become a reality, and as technology helps employees work from anywhere at any time, an increasing number of employees are working remotely or telecommuting at least some of the time. In fact, according to a 2014 *New York Times* article, the annual survey of the Society for Human Resource Management "found a greater increase in the number of companies planning to offer telecommuting in 2014 than those offering just about any other new benefit." The same article reports some promising news: employees who work at home tend to put in more hours and are more productive.

While law practice tends to be bit slower to catch onto trends than other industries, it is by no means immune to this trend. But what are some important considerations for managing associates or other employees remotely? ■

– Ursula Furi-Perry is an attorney at Turco Legal, PC.
www.turcolegal.com
www.familylawyermagazine.com/articles/managing-virtual-employees

Top 10 Keys to Getting Paid

By Ann Guinn

For many years, family law attorneys got paid when the divorcing couple sold the family home, so they didn't worry if they didn't receive regular payments along the way. Then came the economic crisis of 2008, when attorneys saw clients go into foreclosure, short sale, or simply walk away from an underwater mortgage. Many attorneys were left holding the bag (an empty bag) after providing legal services to clients who had no way to pay.

Family law is, arguably, one of the hardest practice areas in which to get paid. When one household becomes two, your client may be struggling to cover living expenses. You're sympathetic, but you still need to get paid. So, what can you do to help yourself? ■

– Principal of G&P Associates, Ann Guinn is a law practice management consultant.
www.familylawyermagazine.com/articles/10-keys-to-getting-paid

QDRO Drafting: Don't Forget About Early Retirement Benefits

By Mark E. Hills

Corporations, municipalities, and school systems (typical employers offering defined benefit or "pension" plans) are well into an age of downsizing. They often utilize early retirement as a "friendly" means of incentivizing employees to voluntarily join in such downsizing. The possibility of early retirement and its impacts on the division of pension benefits in a divorce must be carefully evaluated and planned for in preparation of QDROs/EDROs. You must consider early retirement benefits when dividing a pension; careful planning, preparation, and explanation of QDRO provisions to the client are necessary to avoid problems for clients and attorneys alike. ■

– Mark E. Hills, Esq. is a partner and chair of Varnum LLP's family law practice group.
www.varnumlaw.com
www.familylawyermagazine.com/articles/qdro-drafting-early- retirement-benefits

Business Valuation and the Double Dip Problem

By Rob Metcalf

In my 21 years as a business valuator in family law cases, an issue frequently arises related to the interplay between the business valuation methodologies applied and the business owner's salary resulting in associated support obligations.

Lovingly termed the "double dip," the short definition of this issue is counting the same income stream twice: once for division of property and the other for determination of support. Any seasoned family law attorney will take one of two positions to advocate for his or her client. This article will discuss the options related to double-dipping, and provide a clarifying understanding of the underlying issues. ■

– A partner at MarksNelson, Rob Metcalf specializes in business valuations and litigation support services.
www.marksnelsoncpa.com
www.familylawyermagazine.com/articles/double-dip-problem

Advice to Newly Minted Family Lawyers

By Gerald Tomassion

Practicing family law is a rewarding and challenging career choice. Family law is so complex that even the most experienced of family law attorneys are continually learning and growing in the field. There are a few common mistakes

that most family law attorneys make when starting out. Knowing what to do – and what not to do – will help you build a client base and a solid reputation that will carry you for years. Putting in the essential work will allow you to have the practice of your dreams. ■

– Gerald Tomassian is a family law attorney at Tomassian, Pimentel, & Shapazian.
www.tpslawfirm.com
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Gaining Traction

By Katie Lammers, Amanda Crain, Blaine Balow, and Jenna Eisenmenger

As equity partners, we were running into the same questions: How do we make more money? How do we better manage our staff? How do we grow our practice areas? How do we better forecast our firm finances? We found ourselves spinning our wheels, trying to gain momentum. This caused frustration and rifts within the business. We displaced blame and pointed fingers at others for not getting to where we need to be. We hid behind our practices and claimed to be too busy to focus on the business.

Our firm had reached a point where staff was frustrated, we were losing good talent to our competitors, and partners were spending countless hours discussing problems without any resolution in sight. Employees did not know where to go with problems, and, if they did, there was no guarantee that their issue would be resolved. While our legal practice areas were thriving, we still felt stagnated dealing with the same ongoing interfirm issues. ■

– Katie Lammers and Amanda Crain, partners, and Blaine Balow and Jenna Eisenmenger, associates, are family lawyers at Heimerl & Lammers, LLC in Minneapolis, Minnesota.
www.hllawfirm.com
www.familylawyermagazine.com/articles/gaining-traction

Making a Mess a Bigger Mess

Most attorneys have the tendency to match their opponent's aggressive or "hardball" tactics. But is it possible to use fairness, integrity, and civility to deflect and de-escalate antagonistic behavior of opposing counsel?

By Wendy Williamson, Attorney and Mediator

I played tennis in high school and learned quickly that I tended to play to the level of my opponent. Attorneys have the same tendency with predictable results. I often marvel at the different persona an attorney can bring to the mediation table based upon whom her opponent is. As an attorney and family mediator, I genuinely enjoy working with attorneys and respect their hard work. From my neutral perspective and from working with the same attorneys in different cases, I have seen the effects that both good and bad combinations of personalities can have on cases.

I struggle with the destructive impact that toxic relationships between attorneys can have on mediation, their clients' outcome, the children involved, our profession, and the legal system. Commentary [1] of Ethics Rule 1.3 states: "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." Ralph C. Losey observed: "Naturally, lawyers frequently engage in overzealous representation, and clients normally react favorably to this behavior." *Mercer Law Review (2009).*

Case Study: A Toxic History

The attorneys have a high-conflict relationship based upon actual and perceived hardball tactics in prior cases. Each would passionately explain that a strong offense is the only effective defense against their aggressive opponent. Discovery disputes, contempt motions, and ex parte hearings are more likely. By the time the parties arrive at mediation, lines have been drawn and the heavy artillery is in hand. Offers start in the realm of ridiculous and often cause a quick and ugly end to negotiations.

It is not unusual for their clients to have a look of shock or desperation when they realize mediation is ending without closure. The possible outcomes of this toxic relationship can be:

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- a client incurs higher legal fees due to offensive tactics or responses
- their case takes longer to resolve due to high emotions and extreme demands
- clients are left with more legal fee debt than assets at the end of litigation
- a client's relationship with their co-parent or their children deteriorates as a result of litigation tactics
- opportunities to negotiate an earlier, less costly settlement are wasted.

Do these possible outcomes present ethical issues or professionalism issues or neither? The easier answer is that combative lawyering is not an ethical issue because the lawyers are diligently advocating for their clients. It is much more difficult to address the complex and entrenched professionalism problems inherent in legal warfare.

The Supreme Court of Georgia "believes there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good" (Aspirational Statement of Professionalism). Combative lawyering is the most visible demonstration of this current trend. What does professionalism require of us?

1 It Is Possible to Take the Higher Road. If we don't believe this, our profession is no better than the worst among us. During mediation, I have witnessed attorneys maintain their focus, efficiency, and dignity in the face of abusive tactics by an opposing attorney. I have watched attorneys effectively counsel their clients to consider compromise, focus on facts and figures, and ignore poor behavior. I have observed attorneys using fairness, integrity, and civility to deflect and de-escalate antagonistic behavior of opposing counsel.

Professionalism, in a legal sense, is to a great extent practicing the golden rule: "Do unto your fellow attorneys, the judges, and society as you would have them do unto you."

"Competence has also played an important role in tempering excessive zeal in diligence. By tradition, the most highly skilled do not need to resort to adversarial excess to prevail. Their competence alone will carry the day without the use of bluster and sharp elbows" (Losey, 2009). It is not only possible, it is necessary to respond to overzealousness with calm professionalism.

2 Practice Sympathetic Detachment. In mediation, the most effective attorneys are able to communicate to their clients both the strengths and the weaknesses of their case. Effective attorneys evaluate their cases realistically and caution their clients about the costs and risks of trial. Our Aspirational Ideals urge lawyers to "maintain the sympathetic detachment that permits objective and independent advice to clients." One of our goals in practicing professionalism is to earn the privilege of being "the moral voice of clients to the public in advocacy while being the moral voice of the public to the clients in counseling." The lawyer who loses the detachment required to remain objective will escalate his own client, distort his client's expectations, and lose the moral voice needed in counseling the client toward a realistic resolution.

3 Avoidable Fees? Is There Such a Thing? A report by the Special Committee on Resolution of Fee Disputes of the ABA noted that "disputes concerning fees are universally recognized as constituting the most serious problem in the relationship between the Bar and the public." Generally, the legal system accepts that an hour worked reasonably supports an hour billed. Under the Aspirational Statement of Professionalism, attorneys commit to "expeditious and economical achievement of all client objectives." Attorneys should "aspire to fair and equitable fee arrangements." To protect themselves and their clients, attorneys must realistically estimate, regularly communicate, and periodically re-estimate their legal fees to keep clients aware of the accumulating cost of litigation. A lawyer must effectively walk the fine line between adequate preparation versus legal fees and expenses that exceed a client's capacity. If an attorney wins the case and renders the client destitute, it is a perilous problem for our profession.

Retired Chief Justice Norman Fletcher said it best: "I have concluded that professionalism, in a legal sense, is to a great extent practicing the golden rule. It is not 'do my opponent in before my opponent does me in,' but rather, it is 'do unto your fellow attorneys, the judges, and society as you would have them do unto you.'" ■

Wendy Williamson has been a practicing attorney and mediator in Savannah, Georgia since 1986. Wendy served as Executive Director of the Mediation Center for 10 years and recently joined the Cohen Team of Miles Mediation in Savannah. www.milesmediation.com

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Social Security and Divorce

Courts struggle with the question of how Social Security benefits should be treated in equitable distribution. Here are a few critical issues to consider.

By Theodore K. Long, Jr., Pension Analyst

According to federal statute, Social Security benefits are not divisible in divorce proceedings, and therefore cannot be considered a marital asset subject to distribution. However, federal law does not prohibit the division of pension benefits that are received in lieu of Social Security. And in some jurisdictions, courts consider Social Security when dividing other assets.

Social Security is the federal government's version of a defined benefit pension plan. Many government employees contribute to their government pension plans but not to Social Security; for these employees, a portion of their pensions constitutes a replacement for Social Security. The benefits payable under these governmental plans could be described as being made up of two parts: actual pension and the "hypothetical" Social Security. A pension substituting for Social Security may be treated as marital property and distributed upon divorce.

Actuarial Analysis with Social Security Offset

When calculating the spousal portion of a defined benefit pension plan, you must reduce the benefits to present value – which is used to determine an appropriate credit under an immediate offset division of assets. A Social Security offset reduces the value of pension benefits subject to equitable distribution based upon hypothetical or actual Social Security benefits.

When government employees don't pay Social Security taxes, it will reduce the Social Security benefits available to themselves as well as their spouses or widow(er)s. In this situation, the government applies one of two basic offsets:

1. The Government Pension Offset (GPO). The GPO affects Social Security spouse's or widow(er)'s benefits. A person receiving a government pension in lieu of Social Security loses two dollars of his or her spouse's or widow(er)'s benefit for every three dollars of the government pension he or she receives. For example, for a monthly civil service pension of $600, two-thirds of that ($400) must be deducted from the spouse's or widow(er)'s benefits.

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Women of Influence

In a field once dominated by men, female attorneys have risen to the top of their profession. We asked attorneys from three all-female family law firms about their experiences, and whether gender has affected how they practice law.

By Diana Shepherd, Divorce Financial Analyst

Gender equality has been in the news in the last few months: the 2016 "Global Gender Gap Report" by the World Economic Forum revealed that it would take another 170 years to reach economic gender equity, if change continues at its current rate; Google "Did Hillary Clinton lose because she is a woman?" and you will get 19,400,000 results; and on January 21, Women's Marches took place around the world. The reinvigoration of the women's movement inspired us to ask four very successful female family lawyers what it has taken for them to rise to the top, and what role – if any – gender plays in their practices.

The Good Old Days?

Janet Boyle, an experienced family lawyer and co-founder of Chicago's Boyle Feinberg, an all-female law firm with 6 attorneys, notes that women in numbers first started going to law school and entering the profession in the 70s and 80s. "I was often minimized; women were not readily accepted as equals." She experienced being called "honey" and "dear," and the internal fear that those gray-haired males who dominated the legal profession might be right: that she was an imposter, and not as good as the men. "Yes, we had to be tougher, stronger, and more prepared, but too many women tried to mimic men: dress like them, cuss like them, and fight like them," she remembers. "It was hard to figure out how to be feminine while being strong." As a trailblazer, Janet fought her way up against the prevailing belief that she must have a male boss who was allowing her to "play at being a lawyer" to being an attorney with a top reputation – and her own boss.

Janet's partner, Joy Feinberg, says her first female role model was her strong single mother. An avowed feminist, Joy's mother never allowed any excuse to keep her or her children from believing that anything was possible. When Joy first started trying cases within two weeks of becoming a lawyer, the "joke" at that time was, "Ms. Feinberg is prepared for trial. Why can't any of you men be prepared like her?" She also remembers that "There would have been five women in that courtroom if every woman who practiced in the field had been present." When Joy became a divorce lawyer, she found some great female judges to guide her. "Judge Monica Reynolds put me into a weekend family program to learn about the destruction of the entire family from the alcoholic or drug user, and Judge Susan Snow told me that I needed to learn to get along with the guys." Judge Snow insisted that Joy join her coed divorce lawyer softball team; Joy learned strategy about baseball, which would sometimes translate into case strategies.

The Female Advantage

New Jersey attorney Allison Williams believes that women family lawyers actually have an advantage over their male counterparts. "Most women have been taught since childhood to be 'feminine': to collaborate, cooperate, share, and seek consensus," she asserts. "Most men have been taught since childhood to be 'masculine': hierarchical, directing, authoritative, to seek dominance, and to win. Masculine characteristics form the foundation of our adversarial legal system."

Allison says that women attorneys had to learn and master those masculine attributes. "But we still have our innate

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feminine attributes – which gives us a significant advantage in family law practice. Women attorneys can offer the best of their natural feminine attributes as well as the best of their learned masculine attributes." Women attorneys can be competitive and aggressively pursue "the win" in litigation, she says, but they can be equally successful with negotiated settlements.

The founder of Williams Law Group, Allison sees definite advantages in having an all-female workplace – for the partners and associates. "Men are usually less shy about acknowledging their accomplishments and downplaying their development areas than women are," she says. "In our firm, the attorneys can be vocal about their own successes and promote their own advancement without the ever-so-subtle backlash from male colleagues."

The attorneys and clients share the experience of being female in a world that "celebrates patriarchy and maleness," says Allison. "The experience of being spoken over, looked past, and being criticized for the mere act of disagreeing is disempowering – and we can relate to that." She thinks that unspoken commonality creates a connection between attorney and client that makes the client's experience better. "Feeling resigned to a certain level of disrespect inherent in merely existing in a female body is a common theme for women – and in family law litigation. The law is often an abusive place for many, attorneys included. Our office is the antidote to that."

The Legal Profession Reflects New Cultural Norms

Although their original plan was not to have an all-woman firm, in the 20+ years since New Jersey family law firm Shimalla, Wechsler, Lepp & D'Onofrio was founded, "fewer than five men approached us for jobs or even responded to ads for associates," says partner Amy Wechsler.

Since all four partners developed their legal careers while raising young children, they have always been supportive of each other's needs to balance work life and family life. "Years ago, when we started our careers at firms managed by men, we did not encounter respect for our commitment to raising families while working as lawyers," says Amy. "We were afraid to say we had to leave court early for a child's appointment or activity. Today, lawyers and even judges make time for family events. Over the last few decades, as more women have taken on leadership roles in the legal profession, and men are more active in raising their children, emerging societal norms have generated support of work-life balance for both men and women," Amy points out.

Clockwise from top: Amy Wechsler, Janet Boyle, Joy Feinberg, and Allison Williams.

Although all their attorneys are women, the ratio of male to female clients has consistently been about even. "When clients tell us why they chose our firm, our gender is not usually one of the reasons they give," says Amy. "Essentially, clients hire us because they think we will advocate effectively for their best interests and do a good job for them."

Extending Their Influence

Some of the best advice the partners at Shimalla, Wechsler, Lepp & D'Onofrio can give young women is to get involved in the legal community. Amy says they have all benefited from involvement, networking and taking on leadership roles in their county and state bar associations.

Each week, the attorneys in Allison's law firm have the opportunity to meet with a senior attorney for mentoring. "Mentoring comes not just from the top down, but from an atmosphere where each and every person contributes to the success of every other member on the team," she says.

Janet, who has a Masters in Taxation, and Joy, who has helped the profession and judges re-think the philosophy on how to divide pensions, take the concept of women being highly competent in the financial aspects of divorce seriously. In 2016, they offered a series of 12 lectures on divorce financial Issues to other female divorce lawyers. Joy and Janet also mentor their firm's younger attorneys by having them participate in week-long trial advocacy training, year-long coaching sessions to be rainmakers, and by giving them opportunities to speak and write. "We are really good at what we do, but we always strive to get better," Janet says. "It's what we do: we are women." ■

This article has been edited for space; to read the full responses to our questions, visit www.familylawyermagazine.com/articles/women-of-influence-full-answers

Diana Shepherd (CDFA®) is the Editorial Director of Family Lawyer Magazine and a co-founder of Divorce Marketing Group.

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EMAIL HACKING ON THE RISE

Can – and should – lawyers share confidential information via email?

By Nicole Black, Lawyer and Legal Technology Expert

In early 2016, there were reports of a new hacker scheme targeting lawyers' confidential client emails. This new type of fraud occurs when hackers intercept emails between real estate attorneys and their clients and then use the information obtained from the emails to steal closing funds. Once the hackers intercept an email, the fraudulent plot is underway and the hackers use the stolen information to mimic the real email addresses of buyers, sellers, counsel, and real estate companies and then direct those involved in real estate closings to transmit funds to bank accounts controlled by the hackers.

In other words, the hackers take advantage of the fact that email is inherently unsecure and unencrypted. Because emails are akin to sending postcards written in pencil through the post office, it's incredibly easy for those who have the know-how – such as the hackers described above – to intercept emails and read them.

Since lawyers often share confidential information with their clients via email, this particular hacking scheme is especially disturbing. As it stands, communicating with clients using email remains ethical, since email communication received the green light from most bar associations in the late 1990s. This was because email was becoming a widely used business tool and more secure methods of communication were unavailable at the time.

Emailing Confidential Information

Times have changed. There are more secure alternatives for client communication than email – something bar associations have recently begun to acknowledge. In fact, some have issued opinions requiring lawyers to balance the sensitivity of the information being discussed with the security offered by the specific technology being used. (See, for example, ABA Formal Opinion 11-459 [2011] and Texas Ethics Opinion 648.)

Issued in April 2015, the Texas Opinion considers whether lawyers can share confidential information via email. The Committee concluded that "considering the present state of technology and email usage, a lawyer may generally communicate confidential information by email. Some circumstances may, however, cause a lawyer to have a duty to advise a client regarding risks incident to the sending or receiving of emails arising from those circumstances and to consider whether it is prudent to use encrypted email or another form of communication."

The Committee listed six different situations where lawyers might consider a more secure communication method than email, including sending an email:

1 that communicates highly sensitive or confidential information via unencrypted email connections;

2 to or from an account that the email sender or recipient shares with others;

3 to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer;

4 from a public or a borrowed computer or where the lawyer knows that the emails may be read on a public or borrowed computer or on an unsecure network;

5 if the lawyer knows that the recipient may access it on devices that are potentially accessible to third persons or are not protected by a password;

6 if the lawyer is concerned that the NSA or other law enforcement agency may read the email, with or without a warrant.

For many lawyers, most email communications sent to clients will fall under one of the above categories. That's why, whether it's due to ethical issues or the rising threat of hackers, unencrypted email is becoming an increasingly undesirable option for client communications. The good news is that there are better, more secure methods available for discussing confidential matters with clients.

Safer Alternatives to Email

Web-based client portals are among the most popular alternatives to email because they allow lawyers to securely share case-related information with their clients, all in one convenient location. This replaces the cumbersome back-and-forth process of unsecure, threaded emails with the ability to securely communicate in an encrypted, controlled online environment.

That's why, according to the 2015 ABA Legal Technology Survey Report, the number of lawyers communicating and collaborating with clients online increased every year from 9% in 2011 to 33% in 2014.

While no technology is 100% secure, online communication portals are increasing in use because they provide lawyers with a more secure way to communicate than unencrypted email. ■

Nicole Black is a Rochester, New York attorney and the Legal Technology Evangelist at MyCase, a law practice management software company. She is the author of Cloud Computing for Lawyers *(2012) and co-author of* Social Media for Lawyers: The Next Frontier *(2010), both published by the American Bar Association. www.MyCase.com*

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Apps to Propel Your 2017 Efficiency

An iPad attorney muses about his favorite apps to help you create efficiencies in your practice this year.

By Mark Unger, Family Lawyer & Technology Consultant

As I muse about the future, I find myself focusing on some of the core apps that will drive my iPad-attorney life this next year. The following is a short day-in-the-life of such existence, offered to you in the hope that you too will create efficiencies in your practice and a better quality of life in your personal domains.

Notability

This is my go-to app for note-taking. You can import a PDF in order to continue taking notes; it allows text or handwriting; and, most significantly, it allows for recording during note-taking (with notice to the other party depending on your jurisdiction). When playing back the recording, it will automatically show you what you were writing or typing at the time of the recording. Top potential uses are client intake, notes during hearings, etc. Notability also provides automatic backup via iCloud sync or Dropbox, Box, or Google Drive.

www.gingerlabs.com

Day One Journal

This app is great for client journaling or tracking events with their ex or soon-to-be ex. Your client can type or dictate notes on a particular day and insert pictures or screenshots of text messages into those notes. Their notes can then be exported in a complete timeline as a PDF, giving the attorney a ready-made timeline of activity between the parties.

Day One for Mac allows you to sync from your Day One Journal on an iPhone or iPad, has touch-bar support for the new MacBook Pro, and has an IFTTT channel and encryption to allow you to work between devices and/or provide for additional methods of sharing. Dropbox or iCloud syncing is supported only in the classic (prior) version of the app.

www.dayoneapp.com

Slack

It's no more advisable to text message between staff and clients using iMessage or SMS than it is to use this as a form of primary communication within the office; it may be instantaneous, but it is less secure, difficult to track for billing purposes, and spreads outside of your billing system or practice management system – so it is very difficult to search for past communication on a specific topic. Slack (free and paid versions) provides business-grade instant messaging that can be arranged on a per-case basis, for direct messages, or by general office topics, making it the best way to contain communication within the office. The free version includes 5GB of file storage, two-factor authentication, and two-person voice/video calls; the "Standard" version also includes increased security, group calls, and custom retention policies; and the "Plus" version includes more security and storage.

www.slack.com

TranscriptPad

I have used this app to review, tag (label), and categorize relevant portions of transcript testimony in preparation for a hearing on a Motion to Enter Order and for additional relief. It quickly let me pull testimony from prior hearings when opposing counsel brought up issues that there wasn't notice of in the relief being sought. Not only were the requests denied, but my additional relief was granted. The workflow includes creating issues or keywords when the case starts (like #childsupport or #possession) and then using those words in hearing, for later search and tagging to automatically create a cross-examination outline, or to address the issues later in court.

www.litsoftware.com/transcriptpad

TrialPad

This app is excellent for presenting documents, photos, or testimony on screen while using the iPad. Import entire folders that you've already created on your desktop via Dropbox, Box, Citrix Sharefile, Transporter, or WebDAV. TrialPad allows you to organize, annotate, and present most evidence – including callouts, highlights, and side-by-side document comparison – edit/show video, add exhibit stickers, free hand annotation, and save admitted documents/evidence as "key doc" for pulling later for closing or additional review on cross examination, etc.

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DocReviewPad

Add entire folders and files in the same way as TrialPad in order to highlight, annotate, redact, add custom bates stamps, and create reports. You can add "issue codes," which can then be transferred into a Key Docs folder in TrialPad for presentation purposes.

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OurFamilyWizard

If you haven't experienced OurFamilyWizard yet, you likely need to – especially if you are advising your client how to prepare for possible, if not inevitable, future disputes. While Day One Journal is the way to document events and text communications, etc., with an opposing ex-spouse, OurFamilyWizard is the way to preserve communication, requests for reimbursement, calendaring, etc. It supports expert and attorney access and viewing or download of activity. One of the proactive co-parenting benefits is that if required at the time of divorce, it tends to be a disincentive to ugly texting issues that we have seen in some cases.

www.ourfamilywizard.com ■

Mark I. Unger is a divorce lawyer, mediator, and consultant in San Antonio, Texas. He has practiced family law almost exclusively since 2007, and launched Muse Legal Technology Consulting in 2015 to help solo and small firms increase efficiency in their practices.
www.muselegal.com

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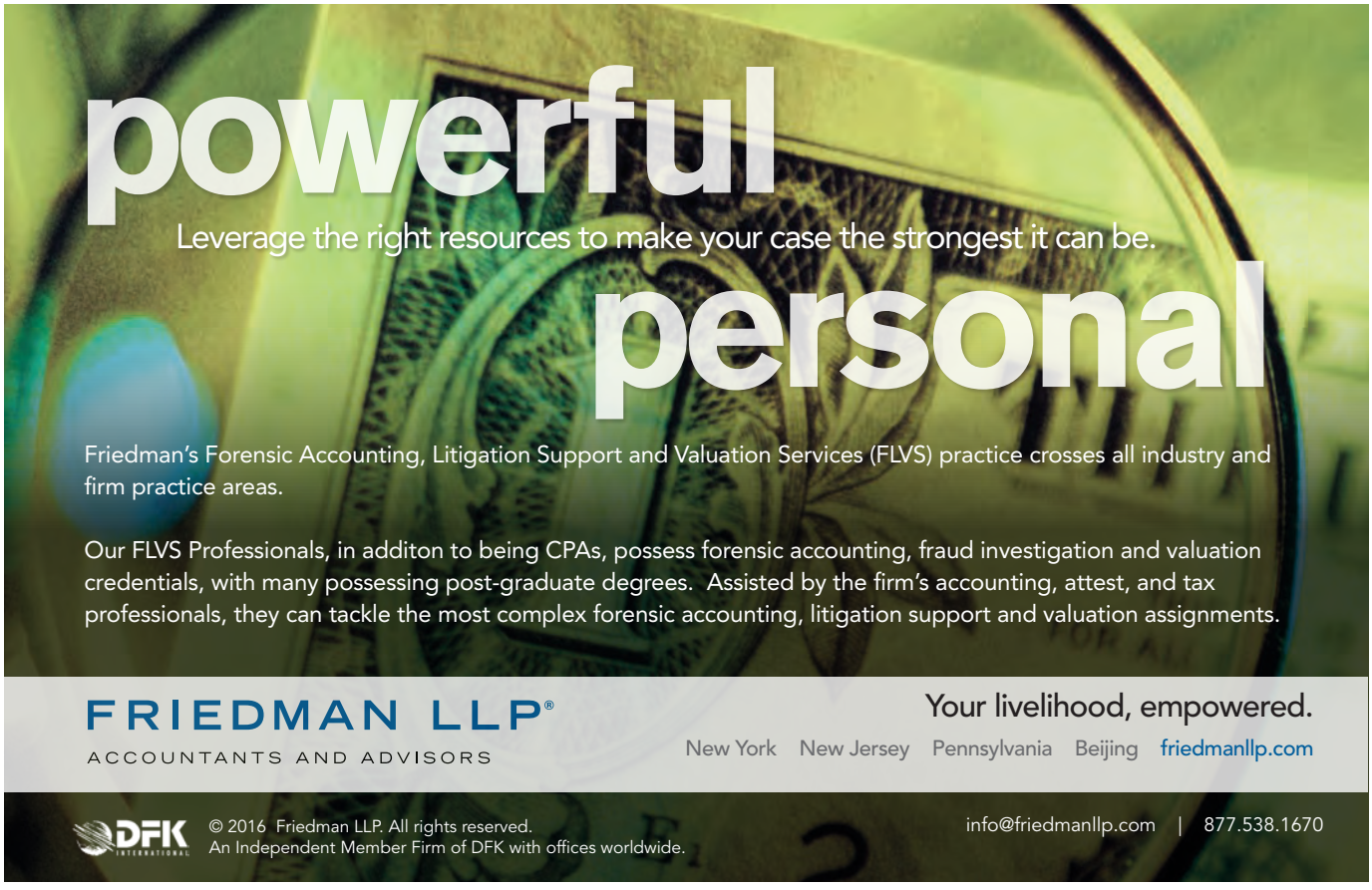

Best Practices for Using a Valuation Expert

Involving the ideal valuation expert for your case early in the process will help to secure your client's business assets and financial future.

By Arik Van Zandt, Business Valuator

Your new client has an equity interest in a closely held business that is at stake in their divorce settlement. Whether they are the "in" spouse who runs day-to-day business operations and keeps the company's documents or the "out" spouse with limited knowledge of the business, bringing the right valuation expert onto your team early in the process is critical in protecting your client's financial position.

Quickly identify and engage a premier valuation expert before the opposing attorney can retain them. The expert can then hit the ground running and assist in gathering appropriate documents and information. Experts have comprehensive lists of information they request for valuation assignments and can cater those lists to the subject company's industry. Getting the necessary information to value a company may be compromised if the expert is not immediately involved in the process.

Carefully Develop a Supported Opinion

Allocating sufficient time for the expert to develop a reasoned, supported opinion allows them to conduct thorough research on the company's industry, comprehensively assess company-provided data, and review relevant testimony prior to issuing the valuation report. Rushed opinions lead to mistakes and oversight.

Insufficient preparation time can also lead to missed deadlines. The expert should do everything possible to ensure the work gets done in a timely manner, but if you engage them after the discovery deadline, their report might be inadmissible. Although some family law courts have been known to admit a late opinion, you should not count on it.

Avoid Discovery Blind Spots

A major concern for many valuation experts is whether the family law attorney has provided them with all available information. There are few things worse than being in a deposition or on the stand when a document is put in front of the expert that they have not seen before. Cherry-picking which information to give your expert in order to save money or obtain a desired result will put the expert's work, and your client's case, in jeopardy. Work with the expert closely throughout the engagement, updating them as new discovery becomes available so they can determine whether the information is relevant to the analysis.

Quickly identify and engage a premier valuation expert before the opposing attorney can retain them.

The expert can also be used to inventory, index, and manage the document production – which increases the chances that they will be aware of all discovery. Top valuation experts have the tools to handle large quantities of data that they can distill down to a useful index for case-management purposes. For assignments that involve asset tracing, electronic data mining, analysis, and discovery tools can be used to perform financial forensic exercises.

Create Powerful Testimony and Questions

After the reports have been exchanged, work with your valuation expert to develop deposition and cross-examination questions for the opposing expert. Valuation experts understand the impact, sensitivity, and relevance of the assumptions and inputs that go into a valuation assignment, as well as how hard it can be to defend them. Having a comprehensive list of questions to ask in deposition or at trial, with follow-up questions depending on the answers, will create a more detailed record.

An expert can also provide helpful insights at mediation and run real-time scenarios based on new inputs during a negotiation. Finally, when it comes time for trial, use your expert to help develop exhibits that will ultimately assist in presenting the best case. ■

Arik Van Zandt is a Managing Director at Alvarez & Marsal's valuation practice. He specializes in the valuation of business and other assets, supporting divorce counsel by providing financial analysis reports, asset tracing, and serving as an expert witness. www.alvarezandmarsal.com

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GOOD WORK ALONE WON'T GROW YOUR PRACTICE

Attorneys who believe that good work always translates into business have taken a naïve approach to marketing. The most successful rainmakers use referral-based marketing in a purposeful, consistent way.

By Michael Hammond, Practice Advisor

"I've always depended on the kindness of strangers." When Tennessee Williams wrote this line in "A Streetcar Named Desire," he had no idea that Blanche Dubois's words would perfectly describe the marketing mantra of many attorneys.

In real life, many attorneys fervently believe that "if I do my job well and do good work, the world – and paying clients – will beat a path to my door." While this optimism is laudable, it is a naïve and anachronistic approach to marketing. Clients don't come to you because of the quality of your work product; they come to you because they believe you can solve their problems. But they won't believe you can solve their problems until they know you well enough to trust you. Trust comes when you connect and communicate with clients effectively, and it is the foundation of the lawyer-client relationship. Client trust can also begin when someone they trust tells them that you can be trusted. Good work alone is not enough.

Hope Is Not a Strategy

There was a time – a golden age two or three generations ago – when the growing demand for legal services far outstripped the existing supply of lawyers. Today, the growing supply of lawyers far exceeds the demand for their services. Clearly, it is true that some business may result from doing your work well. When people are

pleased, they will tell others. But this indirect, passive approach to marketing will always prove inadequate to fill your practice consistently unless your reputation is large and your niche is narrow.

A select few who are already well-known for rare levels of expertise in narrowly-defined niche areas will find clients who will beat a path to their door without any direct effort on their part. Outside of this narrow exception, many of the rest of us just hope for the best. Hope is not a marketing strategy. In today's world, the provision of legal services is a highly competitive industry with a growing number of non-lawyers as well as lawyers competing for the available business.

Can You Rely on the Kindness of Strangers?

Attorneys who believe that good work alone translates into business take a passive and reactive approach to marketing their practice. Passively waiting for clients to appear seldom produces results; carefully identifying and actively seeking out their best prospective clients will lead to a more successful and satisfying practice. Instead of merely reacting to the perceptions others already have of them, attorneys must work directly to shape the perceptions of who they are, what they do, and why in a clear, compelling, and memorable way.

Identifying, nurturing, and focusing on key referral sources – including clients – is the catalyst for proactive, professional-services marketing. Relationship-oriented attorneys who use referral-based marketing in a purposeful, consistent, and authentic way are the most successful rainmakers. They are able to convert "strangers" who need their legal services (or know others who need them) into clients and referral sources who know them, like them, and trust them because they took the time to cultivate relationships with them.

Death of a Salesman

For many attorneys, the "good work is enough" approach to marketing is born out of an aversion to doing anything that smacks of "sales". I've heard countless attorneys say that one of the reasons they went to law school was so they wouldn't have to go into sales. Many attorneys who are dubious about marketing are confusing professional-services marketing with product marketing. Product marketing focuses on presenting the features and benefits of the product in order to make a sale to the buyer: "Here's why this is the newest and best widget; how many widgets can I sell you?" Professional-services marketing focuses on the client and their particular situation: "I've solved this type of problem for many people before; let me tell you how I would solve your particular problem now."

For attorneys who confuse product sales with professional-service marketing, the thought of any marketing is repugnant to them because they believe that it requires a departure from who and what they are, when, in fact, the exact opposite is true. Professional-services marketing requires you to identify the type of client you serve; clearly articulate the legal service you provide to them, along with the benefit they derive from that service; and emphasize what differentiates you from all of the other providers of that service. In short: you must define who you are and what you do in a very clear, convincing, and compelling way. ■

Michael Hammond is a "founding father" of Atticus and is a Certified Practice Advisor. He has extensive experience in lawyer marketing, one-on-one business coaching, and strategic planning. www.atticusonline.com

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Social Security / Cont. from page 25

The reduction is based on the worker's benefit but applied to the spouse's or widow(er)'s benefit. For example, if someone is eligible for a $500 spouse's or widow(er)'s benefit from Social Security, he or she will receive $100 a month ($500 minus $400). If someone takes their government pension annuity in a lump sum, Social Security still calculates the reduction as if they chose to receive monthly benefit payments. The GPO ensures that Social Security benefits of government employees who don't pay Social Security taxes are calculated the same as workers in the private sector who pay Social Security taxes.

2. The Windfall Elimination Provision (WEP). The WEP affects the benefits of workers who earned a pension from an employer who does not withhold Social Security taxes and who also qualify for Social Security from other, covered employment. The reduction could be up to one half of the worker's benefit, but it does not apply to survivor benefits.

The Remarriage Penalty

Widow(er)s or divorced widow(er)s cannot receive Social Security benefits if they remarry before age 60, or before age 50 if they are disabled. Benefits from a former spouse generally end if a divorced spouse remarries; however, they could receive benefits from their new spouse (although it could be considerably less than the widow(er)'s benefit). If someone over 60 is receiving a widow(er)'s benefit, they will continue to get that benefit even if they remarry. ■

Theodore K. Long, Jr. is a nationally recognized expert in all issues relevant to valuing and dividing retirement benefits in divorce. He is the founder and president of Pension Appraisers, Inc., which has served family law attorneys and their clients nationally since 1989. www.pensionappraisers.com & www.QdroDesk.com

The Benefits of Positive Procrastination

If your procrastination is intentional, you may find yourself better able to manage your to-do list and attack problems with increased energy and creativity.

By Jon Eric Stuebner, Family Lawyer

Family lawyers are constantly faced with an ever-growing to-do list, impending deadlines, and problems requiring a solution. Almost any family law attorney has likely either said, or heard a colleague say, "I work better under pressure" to justify putting off a work task with a set deadline. This is the essence of the common understanding of procrastination, which the American Heritage Dictionary defines as "to put off doing something, especially out of habitual carelessness or laziness." While procrastination generally has a negative connotation, it turns out that certain types of procrastinating behaviors can be beneficial. All forms of procrastination involve some form of delay, but it is the *how* and *why* of that delay that will determine the impact on your work.

Whether or not procrastinating behaviors can be beneficial or harmful will often depend on whether the behavior is irrational or intentional. The American Heritage Dictionary definition sets forth the irrational or passive type of procrastination. If you consistently put off tasks because you simply don't want to do them or because you are paralyzed by indecision, you are unlikely to reap any positive benefits from the delay. You will likely find yourself scrambling at the last minute, stressed, and unable to think beyond a single approach. However, if your procrastination is intentional or deliberate, you may find yourself better able to manage your to-do list and attack problems through a variety of approaches.

Positive Procrastinators Start Early

Whereas negative procrastination often stems from an inability to self-regulate, self-regulation is inherent in positive procrastination. Tasks will likely be accomplished at the same time regardless, but how you get there can be drastically different and result in vastly different outcomes. Despite the seeming contradiction, positive procrastinators start early. But starting early doesn't mean finishing early – and starting early can mean only taking small steps towards completing the task. By taking even a small step or completing a small part of the overall project, you are putting that project in your brain's working memory. Positive procrastinators put the project in their working memory and then let it simmer. For a family law attorney, this could take on a variety of forms. If you have a motion on your to-do list, start the caption and maybe add just the procedural history. If it's a response, read the motion right away, but that may be it to start.

How many of us have had great ideas while driving, in the shower, or right before falling asleep? Our brains often

work best when we aren't forcing them to. By starting early on only a small piece of the project and then stopping, we allow our subconscious to process the task at hand. When it comes time to read the case law or start drafting the legal argument, you may find that you have already created a mental outline or come up with an approach that you hadn't previously considered. By allowing some time to positively procrastinate, your brain is working out solutions without conscious effort.

The sense of urgency that comes from procrastinating can be a good thing. With urgency comes focus that might not otherwise be present. However, without taking a deliberate and intentional step to start early, when you sit down to start writing the day before the draft is due, you are more likely to feel your palms sweat, heartbeat increase, and mind go blank. Nevertheless, self-regulation is still integral to the process. You still have to give yourself enough time to actually complete the draft.

Detach from Your Work

Another aspect of positive procrastination is simply stepping away from your work. How this is done can vary, but often involves stepping away physically, emotionally, psychologically, and intellectually. Attorneys – and perhaps family law attorneys in particular – are notorious for taking their work home with them. Modern technology, most prominently the smartphone, has certainly made some aspects of the legal practice more convenient, but has also made it easier and more common for attorneys to feel chained to their work. This often leads to fatigue and decreased self-regulation, which then results in negative procrastination.

Positive procrastination involves detachment from one's work. Everyone knows the mantra "all work and no play…," but for attorneys, this is much easier said than done. Attorneys are regularly required to engage in highly complex mental processes and are faced with ever-increasing workloads. However, by slowing down and taking the time to psychologically detach from your work, you allow your brain and body the time they need to recover from the fatigue that inevitably comes from an attorney's daily activities. Failing to do so can negatively impact health and work performance.[1]

> **"By slowing down and taking the time to psychologically detach from your work, you allow your brain and body the time they need to recover from the fatigue that inevitably comes from an attorney's daily activities.**

So, how is that accomplished? Attorneys can learn to detach in a number of ways. First, physical detachment is not enough. It's not enough to just leave the office. As stated before, we now have access to our email on our phones and remote access to office files through the Internet. Research suggests that psychological detachment can result in less fatigue and greater self-regulation. Psychological detachment means the ability to cease attributing mental functions towards work-related activities. In other words, when you are at home or away from work you have time in which you are not working, worrying about work, or thinking about work. That is not to say that work cannot be done outside the office, but that it is important to have some time set aside for completely non-work-related activities.

Take a Break

Additionally, short breaks can provide a needed mental respite from a particularly complex task. Even when under the pressure of a deadline, getting up and walking away from your computer, getting a breath of fresh air, or taking a short walk can end up saving time because you will likely be more engaged upon your return. That time may likely be otherwise spent staring blankly at the screen desperately trying to put the next sentence to paper without success.

Many attorneys may already be employing positive procrastination techniques without realizing it. While there is some overlap with general abilities to prioritize work, utilizing positive procrastination may be beneficial to the practicing family lawyer, especially those who consistently find themselves behind the eight ball with deadlines or under constant fatigue. However, positive procrastination may not be for everyone. Every attorney has their own approach to their work. For those of you who never procrastinate, more power to you. For the rest of us, revel in the fact that not all procrastination is bad, and there just may be some truth to the statement that you work better under pressure. ■

Jon Eric Stuebner is an associate attorney at Gutterman Griffiths Family Law in Littleton, Colorado. His practice has focused on dissolution cases, allocation of parental rights, and post-decree disputes. www.ggfamilylaw.com

[1]For more information see, Dan Defoe, "Work Context and [Lawyer] Procrastination: Psychological Processes and Factors Which Influence Self-Regulation Failure", *Psycholawlogy*, August, 12, 2014 (http://www.psycholawlogy.com/2014/08/12/work-context-lawyer-procrastination-psychological-processes-factors-influence-self-regulation-failure/)

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Crafting an Attorney-Client Agreement

Among your well-written briefs, checklists, witness questions, and timelines, the most important document in your client's file may be the attorney-client agreement.

By P. Mars Scott, Family Lawyer

Your attorney-client agreement should not only state your fee arrangements with your clients, it should also define your professional relationship with your client – from the scope of your representation, to the duties and responsibilities, to how to maintain confidentiality. With a little bit of forethought, you can place provisions in your agreement that can greatly assist you with client and case management, and possibly avoid malpractice or ethical claims from being filed against you.

The *Annotated Model Rules of Professional Conduct* (ABA Book Publishing, 2016) does not address written attorney-client agreements. There is no prohibition for you entering into a detailed agreement on all aspects of a client's case. With people able to learn about the legal system on the Internet, today's sophisticated client appreciates a more detailed explanation of their professional relationship with you.

Define the Scope and Responsibilities

Start your agreement with an explanation of the scope of your representation. State exactly what you've agreed to do for them (e.g., "I agree to represent you in your dissolution action filed in the 1st Judicial District Court of the State of Montana"). State when the engagement starts ("when the agreement is signed and the retainer paid"), and when it ends ("when the engagement is formally resolved and the terms implemented, or pursuant to the Rules of Professional Responsibility"). Make clear what the engagement does not include: an appeal, for example.

The agreement should define your responsibilities. For instance, you will:

- take all appropriate actions to complete the engagement;
- inform your client about developments in their case;
- promptly respond to a client's questions;
- keep all information covered by attorney-client privilege confidential – but since that privilege is not absolute, you may be required to disclose some information under certain circumstances;
- obtain their approval before incurring any major expenses for depositions or investigators; and
- secure their consent before settling their case.

Clients like to see these types of provisions in writing.

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Crafting an Agreement /
Cont. from page 40

The agreement should also define the client's responsibilities. For instance, the client must:

- keep you updated on their contact information;
- notify you if they will be away for an extended period of time;
- check for communications from you regularly;
- be truthful;
- provide you with all pertinent information about their case, and inform you promptly of any new developments;
- cooperate with you and your staff;
- appear for appointments, depositions, mediations, and court proceedings;
- obtain independent tax advice (if appropriate);
- pay their bills in a timely manner; and
- treat your office personnel with courtesy and respect.

This last provision can be extremely helpful in managing clients who think problem-solving is based more on strong feelings rather than on a process, and your staff will appreciate the protection.

Managing the Case

Consider provisions for managing the case and decision-making. Rule 1.2 of the Model Rules states the lawyer shall abide by the client's decisions concerning the objectives of representation and that the lawyer must consult with the client regarding the means by which they are to be pursued. The Comment to this Rule notes that a lawyer and client may disagree about the means to be used to accomplish the client's objective; because of the varied nature of the matters about which a lawyer and client might disagree, and because the actions in question may implicate the interests of a tribunal or other person, the Rule does not prescribe how such disagreements are to be resolved.

Your signed attorney-client agreement could help resolve some of these issues ahead of time. For example, stipulate that you may assign associate counsel, paralegals, legal assistants, and staff at your discretion to assist in the prosecuting of the engagement – or that you will make the final decision to grant continuances, set deadlines, or discuss issues with opposing counsel. These types of provisions can avoid stressful case-management discussions with your clients later on.

Think about explaining certain issues that clients may not be aware of in the agreement. For example, note that attorney-client privilege does not apply to the third parties, so if they discuss their issues with third parties, those parties could be subpoenaed to testify about those discussions; or that if they use their work computer to communicate with you, that communication is not privileged and it may also violate their company's policies. Point out that the internet is not secure – especially if they're using free WiFi – and if they use email or text messaging to communicate with you, they assume the risk. Note that intercepting or reviewing emails intended for another person may violate state and federal laws and that you might not be able to use the information in their case. It's better to have these types of warnings in writing at the beginning of the case than to put them on a checklist of things to discuss with your client; you could forget to do so, or your client could say they don't remember the warnings.

Other general provisions to consider include the length of time you will keep their records; that you make no warranty about the outcome of their case; how you will manage their money held in your trust account; and your billing and collection policies.

End the agreement with standard contract provisions for choice of law, severability, time is of the essence, complete and binding agreement, and acknowledgements.

Among your well-written briefs, checklists, witness questions, and timelines, the most important document in your client's file may be the attorney-client agreement. The formality of the agreement gives your clients confidence that they are working with a professional law firm that takes legal responsibilities seriously, and it gives you a restful night's sleep because you know that the most important issues in your relationship with your client have been disclosed and agreed upon by both of you. ■

Consider provisions for managing the case and decision-making… These types of provisions can avoid stressful case-management discussions with your clients later on.

P. Mars Scott is the owner and founder of P. Mars Scott, P.C. Law Offices in Missoula, Montana. He has practiced family law for 36 years, is an AAML Fellow, has a Martindale-Hubbell AV Preeminent rating, and is past-president of the Family Law Section of the State Bar of Montana. www.pmarsscott.com

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