I. Introduction

The authors of this article, along with attorney Susan Kaye, are the original drafters of the recent revisions to Family Code §2337 (the “bifurcation” statute), which allows early termination of marital status. Family Code §2337(a) provides that “(i)n a proceeding for dissolution of marriage, the court, upon noticed motion, may sever and grant an early and separate trial on the issue of the dissolution of the status of the marriage apart from other issues.” Prior to being amended effective January 1, 2008, Family Code §2337(c) set forth conditions that a court may impose if one of the parties requests to terminate marital status prior to finalization of the property division. AB 861 (Ch. 141, Stats. 2007) amended Family Code §2337 to update that list and to add a new Family Code §2337(d), which sets forth mandatory conditions that apply when the community estate includes retirement benefits. These sections are designed to work together to safeguard retirement plan rights and facilitate the equal or substantially equal division of the community estate. In addition, under amended Family Code §2337 the joinder of retirement plans is no longer necessary in many cases.

II. Key Amendments to Fam. Code §2337(d) Affecting Retirement Matters, Effective January 1, 2008

The Legislature amended the bifurcation statute effective January 1, 2008, to amend existing subsections and add new subsections (d) and (e). New subsection (d) mandates that retirement orders issue with the entry of a Judgment of Bifurcation.

Editor’s Note: There were significant editing errors in the version of this article that appeared in the Spring 2008 ACFLS newsletter. We have corrected those errors and are reprinting this article, Part One, in its correct form to go along with Part Two, which appears immediately thereafter. Your Editor apologizes for any confusion the errors caused readers and any unwanted effect of the errors on this excellent series of articles. – DG

Continued on page 16 (Family Code §2337, Part One)
There is good news, bad news and great news for this issue of the newsletter. The good news is that the articles continue to be superb, entertaining and enlightening. More good news is that our newsletter has become a well-respected source of cutting-edge family law information. We are now regularly asked for reprints from the newsletter for distribution at classes, including judicial officer instruction. Our organization has worked hard to build a newsletter of quality and we are getting the recognition that our contributors deserve.

The bad news – at least for me – is that this is my last issue as newsletter editor. Beginning with the next issue, Debra Frank will take over as editor. She has lots of experience in doing this and I have no doubt that Debra will continue the tradition of excellence established by my predecessors. She is already beating the bushes for articles, so keep them coming.

The great news is that this issue continues to provide a forum for the thoughts and analyses of our colleagues and includes another batch of great articles. Ron Granberg follows up on his very interesting panel presentation at the State Bar Annual Meeting on Marital Settlement Agreements by discussing postmarital agreements containing what he calls a “Not Made in Contemplation of Divorce Clause.” Accountant Jim Schaefer teams up with another attorney, this time John Harding, to discuss the use of visual exhibits in tracing cases. Arnie Breyer, who is practicing California family law from Hawaii these days, discusses Marriage of Elkins and its implications for family law practice. Steve Temko has consolidated transmutation cases, including the recent Marriage of Holtemann, into a chart so that we can keep them handy. Brian Boone, who contributed to the Spring 2008 issue, gives us another look into the details of forensic accounting for family law, this time discussing the valuation of goodwill in professional practices and the risk of valuing post-separation efforts. Ann Fallon, Jim Crawford, Jr., and Michael Low have given us the second in their three-part series on amendments to Family Code §2337, the bifurcation statute. Finally, Leslie Shear reflects on the challenges facing family law practice and family law courts in an uncertain economy in her “Tipping Points” column, and Heidi Tuffias finishes up the issue with her column, this time discussing “Family Law Olympics.”

As has become our tradition, the pictures in our centerfold highlight the social aspects of the organization. In this issue, we include pictures from the ACFLS reception at the State Bar Annual Meeting in Monterey. It was very well attended and everyone enjoyed the camaraderie of their colleagues and families. It’s always nice to see other family law attorneys outside of work for a change.

Once again, I thank all of our contributors for making this another excellent newsletter issue. I will read the upcoming issues with interest. Let us work together to keep this publication the premier family law newsletter that it has become.
The ACFLS Board and Spring Seminar Committee met at the State Bar Annual Meeting in Monterey, and I predict that we are on our way to another fruitful year serving the specialty of family law and to another sold-out Spring Seminar.

Due to a conflict with other important family law meetings, we had to change the dates of the Spring Seminar and that required a change of hotels, but it all looks to be to the good. The 2009 Spring Seminar will address Complex Property Characterization and Disposition Issues in Family Law, which will include all of the difficult issues we run into on a regular basis and how those issues are compounded by tough economic times. The seminar will be held on April 19 and 20, 2009, at the Wyndham Palm Springs Hotel. So mark the dates now and join us for our usual stellar cast of speakers and commentators, including Steve Wagner and Dawn Gray, Ron Granberg and Robert Blevans, Ann Fallon and Jim Crawford, Garrett Dailey, Peter Walzer, Tom Woodruff and commentators Justice Donald King [retired] and Judge Jerilyn Borack. We are currently firming up two Southern California judges who will add to the panels’ quality.

Although still in the planning stages, we are aiming for a casual Friday night of cocktails, Greek food, dancing and music and a more formal dinner on Saturday. And of course, you will have the afternoons off to golf, hike, bike or bask in the sun.

Our Holiday Party and Annual Meeting in San Francisco are fast approaching. Both are scheduled for December 6, 2008, at the Westin St. Francis Hotel. ACFLS will present a Special Recognition Award to Judge Robert Schnider, who is retiring from the Los Angeles Superior Court. Judge Schnider has written for the Rutter Group, devoted countless hours and trips to influence legislation impacting family law and brought dignity, integrity, broad analytical skills and thoughtful fairness and consideration to family law, first as a certified family law specialist and later as a judicial officer. The award recognizes Judge Schnider’s contributions to elevating the status and practice of family law throughout the state.

On another note, ACFLS has been invited to contribute to the tasks of the Elkins Commission, and we are in the process of determining how we can be most helpful to them. The organization is also in the formative stage of a presentation by Los Angeles Superior Court Judge Thomas Trent Lewis on complex child support issues. We are also considering seminars on e-discovery and transgender issues. Chime in and let us know what you think and what topics would be of interest!

We have a new slate of officers for 2009. You will receive a ballot in the next couple of months, and please vote. The slate presented by the Nominating Committee to the Board is as follows:

- **President**: Joe Bell, Nevada County
- **President-Elect**: Leslie Shear, Los Angeles County
- **Treasurer**: Robert Friedman, Los Angeles County
- **Treasurer-Elect**: Jennifer Crum, San Mateo County
- **Secretary**: Patricia Rigdon, Los Angeles County
- **Secretary-Elect**: Shane Ford, Alameda County
- **Director North**: A. Peter Trombetta, Sonoma County
- **Director North-Elect**: Michael Samuels, Marin County
- **Director South**: Stephen Temko, San Diego County
- **Director South-Elect**: Karen Freitas, Los Angeles County
- **Newsletter Editor**: Deborah Frank, Los Angeles County
- **Newsletter Editor-Elect**: Dawn Gray, Nevada County
- **Director at Large, Secto NE**: Nancy DiCenko, Sacramento County
- **Director at Large, North**: Vivian Holley, San Francisco County
- **Director at Large, South**: Frieda Gordon, Los Angeles County
- **Central California Chair**: David Borges, San Luis Obispo County
- **Director at Large: Sterling Myers, Los Angeles County
- **Legislative Coordinator**: Diane Wasznick, Sacramento County
- **Technology Coordinator**: TBD.

I have sent letters inviting each of the new certified specialists in the state to join ACFLS and gotten a terrific response. I plan to continue the project by sending letters to other certified specialists who have not joined us.

This is my last President’s column, since Joe Bell will be ably assuming the reins of ACFLS in December, and will address you in the next Newsletter. To all of you, thank you for being my friends and colleagues, guides and teachers. As expected in this position, I have learned as much as I have imparted (and I may have even mastered Robert’s Rules of Order). We have pulled together to put out killer newsletters, presented a sold-out Feldman seminar, a sold-out Spring Seminar as well as programs throughout the state, and we have increased our membership and standing. To those who took the laboring oar on these projects, my heartfelt gratitude (you know who you are). And to my Board and all ACFLS members: You have honored me greatly. Thank you.
Introduction

You have seen postmarital agreements that contain a clause stating “This agreement is not made in contemplation of divorce” and, in fact, you may have drafted postnups containing this clause (hereafter, the “Not Made in Contemplation of Divorce Clause”). The first paragraph of the postmarital agreement form found at section 210.31 of Matthew Bender’s California Family Law Practice and Procedure, Second Edition states:

Purpose
1. The parties to this Agreement intend to transmute the character of personal property. This Agreement is not made in contemplation of a separation or marital dissolution.

The use comment to the section 210.31 form warns drafting attorneys:
This form is not designed to be used by parties contemplating dissolution or legal separation. For discussion and forms relating to agreements between spouses incident to legal separation or dissolution proceedings, see Chapter 211.

The third paragraph of the postmarital agreement form found at section 9.B of the Rutter Group’s California Practice Guide: Family Law states:

C. The parties do not presently contemplate a separation and have no intention of obtaining a dissolution of marriage.

This article analyzes the Not Made in Contemplation of Divorce Clause in our post-Delaney, post-Burkle II world.

Five Kinds of Postnups
Most postnups fall into one of five categories:
1. The “Tardy Prenup” Postnup;
2. The “Shift Happens” Postnup;
3. The “Estate Planning” Postnup;
4. The “Reconciliation” Postnup; and
5. The “Divorce Preparation” Postnup.

The Tardy Prenup Postnup
The Tardy Prenup Postnup results from fiancées who find themselves unable to finalize their prenup before the wedding. Factors contributing to this inability include:
• The Family Code section 1615(c)(2) requirement that a party sign the prenup no sooner than seven calendar days after being first given the prenup and advised to seek independent legal counsel;
• The Family Code section 1615(c)(1) requirement that each party have independent legal counsel;
• The difficulty in finding competent family law attorneys still willing to draft prenups;
• The complexities of prenup drafting; and
• Normal human procrastination when faced with a disagreeable task.

The Shift Happens Postnup
The Shift Happens Postnup results from a shift in financial fortune, such as:
• An inheritance;
• A separate property gift;
• A creditor problem;
• A spouse’s decision to use separate funds to benefit community property; or
• A business venture.

The Estate Planning Postnup
The Estate Planning Postnup is made in conjunction with estate plan revisions.

The Reconciliation Postnup
The Reconciliation Postnup occurs when reconciling spouses wish to define their respective property interests. Burkle II, infra, involved a Reconciliation Postnup.
**The Divorce Preparation Postnup**

The Divorce Preparation Postnup occurs when a person tricks his or her spouse into signing a postnup waiving rights and files for divorces once the ink on the spouse’s signature is dry. The Divorce Preparation Postnup is a breach of fiduciary duties.

**Burkle II Validated a Reconciliation Postnup, Holding That It Wasn’t a Divorce Preparation Postnup**

In *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712 (*Burkle II*), Wife unsuccessfully attempted to set aside a postnup. Husband argued that it was a valid Reconciliation Postnup, in contrast to Wife’s characterization of the postnup as a sneaky Divorce Preparation Postnup. “Ms. Burkle protests the parties did not agree to reconcile; the [postmarital] agreement constitutes a ‘pre-packaged divorce;’ and a dissolution proceeding was pending when the agreement was executed.” *Id.*, at p 748.

The court rejected Wife’s argument, upholding the agreement as a valid Reconciliation Postnup. It observed that it would be good practice for parties entering into a Reconciliation Postnup to first dismiss any dissolution proceeding pending between them.

“Needless to say, given the vagaries of available proof, the parties to a dissolution proceeding who hope to reconcile and at the same time resolve property issues in a postmarital agreement would be well advised to dismiss the proceeding before executing an agreement. Dismissal will avoid the uncertainties attendant upon the need to later present sufficient proof that an agreement was executed while the dissolution proceeding was in abeyance and that neither party contemplated the *imminent* dissolution of the marriage.” *Id.*, at p 749, footnote 32; emphasis added.

Note the court’s observation that “. . . neither party contemplated the *imminent* dissolution of the marriage.” *Id.*, at p 749, footnote 32; emphasis supplied.

The court rejected Ms. Burkle’s contention that the postnup was invalid on grounds that the parties failed to satisfy the disclosure requirements of Family Code sections 2104 and 2105, holding that “because the postmarital agreement was not executed in connection with the *imminent* dissolution of the marriage, Family Code sections 2104 and 2105 do not apply.” *Id.*, at p 749; emphasis supplied.

Again, note the court’s observation that “the postmarital agreement was not executed in connection with the *imminent* dissolution of the marriage…” *Id.*, at p 749; emphasis supplied. Perhaps you should take a hint from *Burkle II* and use this clause in your next postnup: “This agreement is not made in contemplation of imminent divorce.” Or, as this article suggests, perhaps you should eliminate the Not Made in Contemplation of Divorce Clause from your next postnup altogether.

**Benefit of a Not Made in Contemplation of Divorce Clause: Uncovering a Hidden Divorce Preparation Postnup**

A Not Made in Contemplation of Divorce Clause may save you from becoming an unwitting accomplice to a Divorce Preparation Postnup. Consider the following hypothetical case. Harold Bickerson hires you to draft a postnup between wife Wanda and him. Harold doesn’t inform you of his intention to divorce Wanda the minute the postnup is signed. He misrepresents the reason for the postnup, disguising it as an Estate Planning Postnup or, perhaps, a Shift Happens Postnup. He also fails to mention the financial/emotional control he is exerting over Wanda to extort her into signing the agreement.

When you show Harold a draft of the postnup containing the Not Made in Contemplation of Divorce Clause, Harold blanches and asks you to delete the clause. The discussion that follows alerts you to the fact that you have been hired to prepare a Divorce Preparation Postnup. You decline the representation, refusing to draft a deceitful agreement.

**Disadvantage of a Not Made in Contemplation of Divorce Clause: Uncomfortable Cross Examination of Postnup Proponent**

If a postnup you draft includes a Not Made in Contemplation of Divorce Clause and the agreement’s validity is litigated, the party contending that the agreement is valid may have to endure some uncomfortable cross examination. Consider the following hypothetical case. When Harold and Wanda married each other, they each had a child by a prior marriage. After ten years of marriage Wanda inherited a million dollars, which Harold wants to use to start a business. Wanda asked you what effect her contribution of the inherited funds to the new business would have in the event of divorce or her death. You discussed with Wanda the wonders and uncertainties of *Pereira v. Pereira* (1909) 156 Cal. 1 and *Van Camp v. Van Camp* (1921) 53 Cal.App. 17.

Wanda asked you to draft a postnup. You prepared a good faith Shift Happens Postnup. Under its terms, the method by which Wanda and the community share any increase in the business’s value during coverture is fairly determined with mathematical formulae rather than through the vagaries of *Pereira/Van Camp*. You included a Not Made in Contemplation of Divorce Clause in the postnup.

Harold filed a dissolution petition against Wanda on October 15, 2007, two years after the postnup was signed. The issue of its validity has been bifurcated for early determination and today, October 15, 2008, Judge Solomon decides whether or not it is valid. Harold contends that it is invalid, while Wanda desires its enforcement. Like Wanda, you would like to see the postnup held valid. (You hate it when an agreement you drafted is invalidated.)

Watch the sport Harold’s Attorney has with Wanda regarding the Not Made in Contemplation of Divorce Clause.

Continued on page 32 (Granberg)
Your new client, Haddah Nevada, is a fortunate woman, for many reasons. First, her father left her a substantial separate property estate when he passed away. Second, her husband William decided to file for divorce just after his Google options vested. Third, William likes to put property in his name alone, and fourth, she hired you to represent her in the divorce. Aside from the obvious reasons of your charm, oral argument skills, barracuda reputation and incredible legal research abilities, the main reason that she is lucky she hired you is that you know why the third reason makes such a big difference in her case.

Between bouts of sobbing, at your second appointment Haddah tells you that her separate estate enabled her and William to buy lots of property during marriage. She remembers that he bought several parcels of residential real property, a few prosperous businesses and many gold Krugerrands. He purchased the artwork that hangs on the walls of their principal residence from then-unknown artists who have turned out to be very well known, and he showered her with vintage jewelry before it became all the rage. Their pattern was to use her separate property for part of the purchase price and take out a loan for the remainder. Nothing is in her name, she says, but William put title to every titled asset in his name as “a married man.” She leans toward you across the desk and asks what all of this means for her financial future. She waits to hear your golden words.

You begin by reassuring Haddah that everything she is describing is community property and that she is entitled to half of all community assets. You then begin to tell her about reimbursement rights under Family Code §2640 and how her separate property is protected by the strong public policy in favor of reimbursement stated in that code section. Every community asset, you tell her, is subject to a reimbursement right on divorce. You reassure her that her separate property used to acquire the assets will be fully reimbursed if they are appreciating assets, and if there is not enough equity in a particular asset to reimburse her in full, she will be awarded the property. She seems content enough with this explanation and you move on to discuss other issues.

In the wee small hours of the nights that follow, you feel uneasy about the advice you have given Haddah. Is it true, you wonder – while you listen to the tick of the clock in the dark – that Haddah is only entitled to reimbursement of her separate property contribution? After all, you think, none of these assets is jointly titled; some are not titled at all and the others are only in William’s name. Does that make a difference, you wonder? You have a vague feeling that it does but you are not entirely sure how to formulate the argument, the way to get the result you want, or of the road that leads to a better award for your client. And that’s where you still are when you read this article.

**Does Family Code Section 2640 Apply to Untitled or Solely-titled Community Property?**

A discussion of co-ownership between the separate and community estates rather than reimbursement.

Dawn Gray, J.D., CFLS

Nevada County
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Let’s start back at the beginning. What is the character of the property Haddah describes? The documents she and William provide support her version of the facts, and the assets in question are either untitled or are solely titled in William’s name “as a married man.” He took title this way for convenience, but is not claiming that they are his separate property. Hmmmm . . . maybe they are all Haddah’s separate property, after all, she was the one who put up the cash for the purchase. But what about the loan proceeds used to pay for the remaining sale price? You call me to brainstorm and to draft your trial brief.

The first thing I will tell you is that in my opinion, Family Code §2640 only applies to jointly-titled property, and that as a result of how William acquired these assets – either untitled or in his own name – the court should hold that they are co-owned by Haddah’s separate estate and the community estates. Co-ownership, you say? Isn’t an asset all community or all separate? Not necessarily, say I.

Each estate contributed funds for the purchase.

Both the community and Haddah’s separate estate contributed to the purchase of each asset; Haddah with funds from her separate property inheritance and the community with loan proceeds. Loan proceeds acquired by a married person during marriage are presumed community property, and there is no evidence here that either party can rebut this presumption by evidence that the lender relied solely, or even primarily, on separate property for repayment. See, e.g., Gudelj v. Gudelj (1953) 41 Cal.2d 202, 259 P.2d 656, and Marriage of Grinius (1985) 166 Cal.App.3d 1179, 1187, 212 Cal.Rptr. 803. So, as of the date of acquisition of each asset, Haddah and the community estate both contributed cash to the purchase, and they own it in proportion of their contributions relative to the purchase price, with the community assuming the loan (so, in reality, the community owns no “net” equity in the property as of the date of purchase, but it hasn’t contributed any of its own funds to it either.) And, as the property appreciates, each estate’s interest increases in value.

Tracing makes all the difference.

On divorce, Family Code §2550 requires the court to value and divide the community estate. However, before it can do so, it must decide which assets are in the community estate and which are not, i.e., which assets are community property and which are separate property. For this reason, Family Code §2551 requires the court to characterize the parties’ property for purposes of carrying out its mandate under §2550. Pretty simple so far.

Various presumptions aid the court in characterizing property. Most importantly, Family Code §760 states the general community property presumption based on the time of acquisition of an asset. The Nevadas’ assets were definitely acquired during marriage, so the §760 presumption applies. However, unlike with regard to the Family Code title presumption of §2581, discussed below, Haddah can rebut the general community property presumption by tracing. That makes all the difference to Haddah as to her separate estate’s rights in the property.

Although property acquired during marriage is subject to the general community property presumption “(t)hat presumption can be rebutted by tracing the funds used to acquire the property . . . to a separate source.” Marriage of Dekker (1993) 17 Cal.App.4th 842, fn. 8, 21 Cal.Rptr.2d 642. See also, Marriage of Jafeman (1972) 29 Cal.App.3d 244, 105 Cal.Rptr. 483. The burden of proof for overcoming the general community property presumption is on the party attempting to trace the acquisition of the asset to a separate property source (Somp v. Somp (1967) 250 Cal. App.2d 328, 58 Cal.Rptr. 304) and the standard of proof is a preponderance of the evidence (Marriage of Aufmuth (1979) 89 Cal.App.3d 446, 152 Cal.Rptr. 668, disapproved on other grounds in Marriage of Lucas (1980) 27 Cal.3d 808, 166 Cal.Rptr. 853). These rules are very well established. Also, “(s)ince this general community property presumption is not a title presumption, virtually any credible evidence may be used to overcome it, including tracing the asset to a separate property source . . . .” Marriage of Haines (1995) 33 Cal.App.4th 277, 290, 39 Cal.Rptr.2d 673. This is the ONLY presumption that applies to the Nevada’s property.

Here, Haddah can directly trace a percentage ownership interest in the assets back to a separate property source, i.e., her separate property inherited funds, thereby overcoming the community property presumption as to that percentage. The result is that her separate estate is a co-owner of the property with the community estate in the ratio of the estates’ respective contributions to the asset’s initial acquisition, and Family Code §2640 does not apply.

Title is vital.

The reason that this is so is that the title presumption contained in Family Code §2581 does not arise here. The title presumption applies on dissolution to property acquired by the parties and held in joint title. If it applied, it would render the entire asset community absent proof of a writing stating to the contrary. However, because Family Code §2581 does not apply to an untitled or solely-titled asset, and the only presumption that applies is the general community property presumption, there is no barrier to Haddah’s tracing to a separate property source to establish the purchase of a separate property interest in the asset in question as of the date of its acquisition. Haddah used her separate funds to buy an interest in each asset and the community used its funds to buy the remainder of the interest in each asset. The respective estates are co-owners, and that is how the court should award the assets.

What about §2640?

Family Code §2640 states (in relevant part) that “[i]n the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party’s contributions to the acquisition of property of the community property

Continued on page 24 (Gray)
During a continuing legal education program I attended this past spring, appellate attorney Dick Sherman discussed the California Supreme Court’s recent ruling in *Elkins v. Superior Court.* As all of us are aware, the Petitioner in *Elkins* had challenged a local rule implemented by the Contra Costa Superior Court expressly intended to *expedite* family law trials. The rule required parties to present direct evidence by written declaration; witness testimony on direct examination was not allowed other than in “unusual circumstances.” At the request of the Supreme Court, ACFLS submitted an amicus brief “…generally supporting petitioner’s contentions.” Also submitting amicus briefs in support of Petitioner were the Northern and Southern California Chapters of the American Academy of Matrimonial Lawyers and the Family Law Section of the Contra Costa County Bar Association, which had commissioned a professional survey of family law practitioners in that county inquiring into their opinion of the rule.

In sustaining Petitioner’s challenge, the Supreme Court rendered an especially satisfying opinion that expressly referenced the amicus briefs, recognized the importance of family law and its impact on society and directed “…[t]rial courts [to] employ fair proceedings when the stakes involve a judgment providing for custody in the best interest of a child and governing a parent’s future involvement in his or her child’s life, dividing all of a family’s assets, or determining levels of spousal and child support.” At long last, when faced with complex fact situations – not to mention an ever-changing body of law – family law attorneys and their clients can be confident that they will not be advised by a harried bench officer that they have only a limited time within which to present their case because the court’s time is better served hearing a $5,000 fender bender case. The Supreme Court has spoken, and it is now the law of the State of California that “[t]he same judicial resources and safeguards [will] be committed to a family law trial as are committed to other civil proceedings.” No longer will a family law matter be treated as the “Rodney Dangerfield” of the trial calendar!

All of this, however, comes at a price. In Dick Sherman’s view, *Elkins* was a “double edge sword.” To be sure, family law cases would finally, in the words of the late Mr. Dangerfield, “get some respect,” but at the same time family law attorneys would actually need to know what they were doing when trying a case! You know, become familiar with such interesting concepts as admissible evidence, when to object and all that other really good stuff found in the Evidence Code and the Code of Civil Procedure. As Dick so aptly put it – with tongue planted firmly in cheek – “Ouch.”

While Dick’s discussion of *Elkins* was both entertaining and informative, it served to underscore what I had always considered to be a serious and ongoing problem. Throughout my years of active practice, which included trying both civil and criminal cases as well as family law matters, I came across far too many family law attorneys who were clueless when it came to the rules of evidence, practice and procedure, in spite of an express legislative mandate that these rules are applicable in all family law matters. Such an inexcusable inattention to detail was widespread and created, in my view, a self fulfilling prophecy. If the lawyer trying the case wasn’t concerned about whether or not the rules of civil procedure were being

Continued on page 30 (Breyer)
### Summary of Transmutation Cases and Changes Since 1984

**Where does *In re Marriage of Holtemann* (2008) 166 Cal.App.4th 1166, 83 Cal.Rptr.3d 385, fit in?**

**Stephen Temko, J.D., CFLS, CALS, AAML**

**San Diego County  estemko@aol.com  www.stephentemko.com**

<table>
<thead>
<tr>
<th>CASE</th>
<th>DOCUMENT</th>
<th>RULING</th>
<th>HOLDING</th>
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<td>Pre-1984</td>
<td>“Pillow talk,” oral trans. or conduct</td>
<td>All ok</td>
<td>YES Trans</td>
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<td>1984 Legislation: goal preventing or minimizing disputes, fraud and perjury. “There is no question that the Legislature intended, by enacting section 5110.730 (a) (852), to invalidate all solely oral transmutations.” (<em>MacDonald</em>, citing Commission report, at pp. 224-225.)</td>
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<td>MacDonald SC 1990</td>
<td>Acquiesce IRS; IRS consent form</td>
<td>“Bright line test”: 1) writing, 2) signed, 3) express declaration showing intent to change character from four corners</td>
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<td>Benson SC 2005</td>
<td>No S/F exception; No part performance</td>
<td>Oral agreement; H performed, W reneged</td>
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<td>Depo transcript</td>
<td>Belief about ownership</td>
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<td>Campbell 1999</td>
<td>Wife used SP on H’s photo shop and remodel. H reneged on promise to change title to joint tenancy</td>
<td>No equitable estoppel; no extrinsic oral evidence</td>
<td>NO Trans</td>
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<td>Petersen¹ 1999</td>
<td>Statement of acct. effect is to alter char.</td>
<td>Does not reveal legal ownership</td>
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<td>Barneson 1999</td>
<td>Instructions to journal /transfer stock</td>
<td>“Transfer” not a transmutation. Trans. must be unambiguous; don’t “slip into” one</td>
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<td>Jewelry to wife</td>
<td>Section 852(c) exception did not apply: diamond substantial gift, no express declaration, no writing</td>
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<td>DMV</td>
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<td>Bibb</td>
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<td>Used word “grant”</td>
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<td>Revocable Trust</td>
<td>No express declaration; stated all SP retains SP character</td>
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<td>Starkman 2005</td>
<td>Revocable Trust Assignment to Trust Stock Transfer Form</td>
<td>No express declaration even though all property transferred to CP</td>
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<td>Estate Planning Spousal Property Transmutation Agr. &amp; Decl. of Trust</td>
<td>Used word “transmutation”</td>
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</tbody>
</table>

¹ Money Market Statement of Account identified husband and wife as joint tenants. The money market statement of account does not clearly and unambiguously establish a right of survivorship. Our reading of *Estate of MacDonald*, supra, 51 Cal.3d at pages 272-273, compels a conclusion that the reference to joint tenancy on the account statement does not satisfy the requirement of an express written declaration pursuant to Civil Code section 5110.730 (now 852). First, there are no signatures on the statement. Second, the account statement does not reveal that the legal effect of the joint tenancy designation was to alter the character or ownership of community funds. Third, the statement does not indicate William and Loretta consented to such a change.

² The Bibb grant deed stated: “For a valuable consideration, receipt of which is hereby acknowledged, E.L. Bibb, as surviving joint tenant hereby grant(s) to E.L. Bibb and Evelyn R. Bibb, his wife as joint tenants the following described real property in the City of Berkeley[,] County of Alameda, State of California: Legal description attached hereto and made a part hereof by reference[,] Dated January 24, 1995[,] [signature line] E.L. Bibb.”
**Valuation of Goodwill in Professional Practices and the Risk of Valuing Post-separation Efforts**

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**Introduction**

Absent private transaction data establishing a clear market for the sale of a professional practice to third parties, the most common method used to value goodwill in such a practice for purposes of a marital dissolution is the capitalization of excess earnings method. This method involves comparing the earnings of a specific professional (i.e., the earnings over and above a fair return to the investment in tangible assets) to an appropriate measure of the earnings of his or her peers. The difference may represent “excess earnings” to the owner. Once the valuation analyst determines the extent of any excess earnings, he or she divides the amount of those earnings by a capitalization rate (i.e., a required investment rate of return adjusted by an expected earnings growth rate) to determine the value of goodwill.

Conceptually, the goodwill formula appears simple because there appear to be only two moving parts: excess earnings and an income capitalization rate. Valuation experts will often debate the finer details of these moving parts. This article focuses on one particular part of the equation and will therefore not discuss issues such as the impact of differences in methods and opinions relating to the valuation of a professional practice.

Editor’s Note: In Brian Boone’s article in the Spring 2008 newsletter, there were several errors in the text and the charts. The chart on page 22 should have listed income from tangible assets at $20,000 and not $200,000; the total is correct so the error does not extend into the exhibit. In the body of the article itself, on page 17, third column, first paragraph, the $150,000 amount was correct but the $1,000,000 above that number should have been $100,000.

I also had requests for clarification of the article and charts. In response, Brian said this:

“The chart at page 22 of that issue shows the net spendable income after support when including the excess earnings and the royalty income, which income is already used to value the underlying assets. In contrast to the first chart, the chart at page 23 shows the net spendable income after support when excluding the excess earnings and royalty income. One chart includes only fair compensation and the other includes both fair compensation and excess earnings. The difference for the husband, for example is approximately $12,000 annually ($182,816 less $169,184).

I do not believe that only the fair market earnings of the business should be included as income available for support. A way to avoid double dipping is to exclude the excess earnings (used for valuation purposes) from the income available for support. I am illustrating that the actual amount of the double dip is not as great as is often imagined. By using a royalty interest in the example, juxtaposed with the excess earnings, I am also indicating that double dipping is not a concept that is exclusive to excess earnings and the related valuation of practice goodwill. The royalty interest is valued based upon the present value of expected future income while the same income is considered available for support purposes. My point in response to the argument often made regarding double dipping when dealing with goodwill in a professional practice is that if they are going to argue against that, why not make the argument when dealing with a commercial rental property or a royalty interest!”

Brian M. Boone is a principal shareholder of Schultze, Boone & Associates in Sacramento. His practice focus is providing expertise in valuation, forensic accounting and financial analysis for marital dissolution cases. His experience also includes public accounting where he audited large commercial entities and worked in private industry as the Controller and Chief Financial Officer for a large mortgage banking company.
practitioner’s tangible assets and related required rates of return, the appropriate capitalization rates or the methods for establishing the normalized total earnings of professional practices. Rather, it will focus on only one part: the methods of determining fair compensation and the associated risk of valuing and dividing the subject professional’s post-separation or post-marital efforts as a community asset, assuming that all else is equal in the moving parts of the “excess earnings” valuation equation.

**A Hypothetical Scenario for Illustrative Purposes**

Assume that you want to purchase a law practice. For the purposes of this hypothetical, assume that the selling attorney’s reputation, experience and capability are transferable to you in a sale. You are trying to decide between law practice A and law practice B, both of which are in the same area of the law and in the same geographic location. Law practice A generates $1.2 million in collections on gross billings annually and law practice B generate $1 million per year in collections on gross billings, and both practices provide the owner with $500,000 per year in owner’s cash flow (i.e., total practice income to owner.) The owner you will be replacing in practice A works 1,600 billable hours per year while the owner in practice B works 2,100 billable hours per year. Practice B employs one paralegal and an office manager; practice A employs an associate attorney, a paralegal and an office manager. Both practices have identical premise leases and the same amount of equipment and supplies. Both attorneys passed the bar in the same year and have consistently practiced in the same field of law.

Assume that the lawyers in the two practices are similarly situated in every way with the exception of the required billable hours each has to expend and the inclusion, in one of the practices, of an associate attorney. See Figure 1, below. Query: which practice is more valuable? Or, put another way, assuming that each practice is selling for the same price, which one would you rather have: Practice A, which generates the same owner’s income as practice B but requires you to work only 1,600 hours, or practice B, which requires you to work 2,100 billable hours? Clearly, when it comes to evaluating a practice, a professional’s time is a valuable resource and the time and effort that he or she is required to expend is an important economic consideration.

**Some Relevant Case Law**

Selling Your Tracing!

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Tracing. It is a critical task in many divorces. While it cannot be used to overcome presumptions arising from form of title, tracing can rebut the community property presumption that applies to property that is not titled, and it can also vest a party with significant reimbursement rights. These can be huge issues in a case.

Despite the importance of tracing, many times actually presenting a tracing is about as exciting as watching paint dry. How often have all of us struggled through bland, black and white Excel spreadsheets? How many times have we looked at a stack of years of bank statements and asked, “What am I going to do with these?” How many times have we wondered if the eyes of our judicial officer are glazed over as witnesses crawl through line-by-line tracing histories? It doesn’t have to be this way. Tracing can be sexy! Or at least it can be made a whole lot more exciting, understandable and efficient. Tools and techniques are available to help you sell your tracing to the court and really make it sing.

An effective tracing has many parts. Entire books are dedicated to the topic. My favorite is Gray and Wagner, Complex Issues in California Family Law, Vol. D, “Tracing Separate and Community Funds,” published by LexisNexis. At its most basic, tracing will require testimony from the client. This is essential to prove the source of the funds in question and how those funds were handled. The client will also have to testify that he or she intended to acquire a separate property interest with the funds and communicated that intent to the other spouse. Of course, there will also be testimony regarding the specific transactions.

An accountant’s assistance is essential for more complicated scenarios. An expert can wind his way through the litany of transactions, often referred to as a mechanical tracing, and provide the court with the line-by-line history necessary for an effective tracing. In other words, an expert can march through the spreadsheet. But we want more. We want our tracing to have impact. We want it to be understandable. We want it to grab the court’s attention. We have to sell it!

One way to sell your tracing is by utilizing a qualified accountant who has experience with family law cases. Familiarity with the process expedites the work flow. Utilizing a professional who is experienced with rules of evidence and the language of the courts will also make that witness more credible in the judicial officer’s eyes. It doesn’t end there. In this day and age of dazzling technology, there are many other techniques by which you can sell your tracing.

Jim Schaefer’s companion article gives you the nuts and bolts of the technology and applications that can be used to communicate tracing evidence. In a nutshell, he is talking about graphics. More insightfully, he brings to light the idea of utilizing an accountant who goes beyond black-and-white ledgers by implementing color, charts, other graphics and electronics to deliver the message. It’s the accounting expert as number cruncher, story teller, artist, and projectionist. Lights, Charts, Cameras, Action! All great stuff – provided you can persuade the court to consider it. And that is the bottom line. If the court won’t consider it, it’s worthless. If the other side appreciates this deficiency, the exercise will also have zero settlement value.

Even in family law, everything starts with the Evidence Code. All the graphics in the world aren’t worth a thing if they don’t fall within the definition of admissible evidence. We know that for evidence to be admissible, it must be relevant (Evid. Code §351). Relevant evidence is any information tending to prove or disprove a disputed fact (Evid. Code §210). At the discretion of the court, relevant evidence is admissible so long as it expeditiously assists the trier of fact (Evid. Code §350).

That plain old black-and-white spreadsheet that I have mentioned is called a “summary,” and the use of summaries is as old as the Evidence Code. There are two generic types of summaries: summary charts of evidence produced at trial and summaries of voluminous records. There are two foundational requirements for summaries. First, the witness must lay a foundation. Testimony is required to establish that each of the line items in the summary is based on other admissible evidence, such as the testimony of another witness or an admissible writing such as a cancelled check or a bank statement. Second, the summary and related testimony must save time for the court (Evid. Code §1523, Exclusive Florists, Inc. v. Kahn (1971) 17 Cal.App.3d 711).
Because tracings can be very complicated, courts are fairly relaxed when interpreting these statutes. We can make it even easier for the court to embrace our evidence by making it easier to understand. A quick practice tip: rare is the day when a busy family law judge will choose direct evidence on 500 cancelled checks over a reliable summary! That's where accountants like Jim Schaefer with little tricks of the trade are so invaluable. Black-and-white is boring. Nothing in the Evidence Code that says color should not be used, nor is there any provision in the Evidence Code creating a blanket prohibition on the use of graphics. Communications experts long ago coined the maxim that *a picture is worth a thousand words.* This rule applies to evidence. Many young research attorneys, clerks, and interns who work with the court grew up with computers, charts, and graphics. They expect to see that stuff, and likely ponder the pleading or brief that is without such an effective tool.

The biggest impediment to using this fresh style of tracing is our judicial officers' lack of familiarity with them. That is simply a matter of time. As these techniques are utilized with greater frequency, they will become the default and the lawyer who does not utilize them may end up presenting a case that falls short of the court's expectations. Don't assume your judicial officer will be comfortable seeing charts and story boards in her courtroom. There is no doubt they can be used under the Evidence Code, but that does not guarantee that they will also fit within your judicial officers' comfort zone. Make a few calls to your colleagues to learn about their experiences, or pick your accounting expert's brain on his. Consult the court's local rules. Check with your opposing counsel regarding a joint letter to the judge asking for her policies on the use of blow-up and projectors. With a bit of advance notice the court will be much more comfortable with your progressive method of delivering the facts and your trial will flow.

One final point to keep in mind: Rules, rules, rules. If your tracing utilizes the services of a testifying expert, all of that expert's materials in support of the tracing are discoverable and need to be made available for discovery in advance of your hearing or trial. For example, consider this recent ruling issued in a Santa Barbara County case:

All experts will be prepared to give a complete and comprehensive deposition. No supplemental work, diagrams, exhibits, pictures, PowerPoint presentations, schedules, etc. that are not presented at the deposition will be permitted at trial. Of course I recognize that a party whose expert deposition is taken first may want to contradict what a subsequent expert has testified to. Such rebuttal testimony will be permitted provided the testimony and exhibit or PowerPoint is identified within 7 business days after the deposition presentation has been made and the new exhibit is made available to the opposition.

A “follow-up” deposition based upon that new information will be permitted on agreement of counsel or with court permission.

The last thing you want is exclusion of your tracing for failure to satisfy procedural timelines. Build the constraints into your case preparation and start early putting them together to make sure everything is complete in timely fashion.

Tracings are integral to family law. Why not take a complicated process and make it easier to understand? I can't think of any reason not to. Selling your tracing is easy to do with just a short step out of the black-and-whitebox. Here's to making evidence exciting!
Selling a Tracing with Gusto
(You Guessed It — With Demonstratives)

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Introduction
OK, so you have hired a forensic, she/he has traced the funds and now it is time to sell the story. You have a terrific set of facts, but selling a tracing can be difficult (and as boring as watching sap run). This article demonstrates techniques and formats for selling a mechanical tracing with demonstratives.

foundations
If you are as deeply interested in this topic as I am, I would also direct you to my prior articles for ACFLS (beginning with the Winter 2007 newsletter), entitled “Tasty Recipes for Family Law Technology,” “A Prescription for Feldman’s Logistical Challenges,” and “Technology Trumps Feldman.” These articles discuss production, scanning, redaction, indexing, Bates stamping and all those necessary chores that must be completed with precision. Although this work is extremely important, it does not sell your case, and in many cases 80% to 90% of the information is simply “chaff.” However, as my firm performs the “chaff” work, we are looking ahead to two important concepts:

#1 – Learning the story, and
#2 – Determining the absolutely best way to sell it!

Learning the story is oftentimes more difficult in complex family law cases than it first appears. The problem with learning the story is that there are too many unconnected facts to enable family law counsel to get a good macro view of the case. I will save learning the story for a subsequent article. In this one, I will assume the story is well understood.

Before we proceed, it is important for readers to understand that good graphics take some lead time to prepare. You will want to consider foundation issues and rules of evidence. You will also generally provide opposing counsel considerable time to review them prior to presenting in court. Otherwise, your expensive graphics may never see the light of a courtroom.

The Problems in Selling the Tracing

The principal problem in selling the tracing is in the primary profession that does the selling – the forensic accountant. Most forensic accountants are steeped in accounting theory, income tax regulations, family law theories affecting forensic accounting and those sorts of important but pretty esoteric topics. Their training does not generally include:

1. Communications,
2. Graphic design, or
3. Professional selling skills.

The addition of excellent graphics to the equation with practice on how to explain the story is an important step in transforming the forensic accountant into the salesperson you need.

First Steps
Before anyone raises their computer mouse, consideration should be given to the venue, the audience and format. For example, some family law courtrooms:

• Contain projection screens, projectors, and Elmo visual presenter cameras.
• Were not originally intended as family law courtrooms and thus have a jury box which is an excellent place for setting up easels.
• Are too small for floor standing easels and projection is the only alternative.

I find that many judges prefer well-designed diagrams that aid them in understanding the case. Some do not. Knowing your judge is always key – particularly in planning to sell the tracing.
My first preference is to utilize the court-provided visual equipment such as an Elmo visual presenter and projector. My assumption is that the court will maintain the equipment and if there is an equipment failure the court will be inclined to rectify any technical problems.

At times when space permits, I will augment the court’s equipment with large format graphics mounted on foam boards. In my planning, I take into consideration the important differences in the projection medium vs. large format graphics. The former disappears as soon as the next item is projected. The latter can stay on an easel and complement projected graphics and/or graphics on other easels.

If you are telling a story sequentially, I generally prefer large format graphics displayed on numerous easels. Some courtrooms will accommodate up to five easels. Thus one can sell the tracing in storyboard fashion not unlike the cells in a comic strip.

Formatting the Graphics

In formatting the graphics, ideally the design will consider the witness, the judge, and the facts or story. I cannot emphasize enough that it is very important that the graphics portray the story fairly. I find that complete facts gain credibility and aid your case. Graphics that omit facts or show facts incorrectly are worse than no graphics at all.

I find that good tracing graphics generally fall into three formats that are best used in a set:

1. Timeline;
2. Asset descriptive; and
3. Banking document supported.

In discussing each format, I have considered the venue of the ACFLS newsletter and prepared examples in blue and white. Blue and white graphics differ from most graphics prepared for courtroom testimony, settlement conferences, mediations and depositions; full color demonstrations would generally be used in these venues.

Good graphics start during the above described “chaff” phase. That is to say, as your team is addressing fiduciary duty issues and producing any-

where from a notebook of documents to perhaps 40 boxes, this is the time to learn the story and capture key documents for the selling process.

Due to the size and format of the ACFLS newsletter, the sample demonstrations in this article are overly simplified. If you would like to review actual courtroom style graphics, feel free to send me a request by email to Jim@SchaeferCPA.com.

The Timeline

This graphic is particularly important in cases involving long-term marriages or significant property held before marriage. The graphic should be as simple as possible and include dates of marriage and separation, key dates, etc. An example appears below.

Let’s see what the timeline is doing for the case. First, it is providing a view from 10,000 feet. It shows the court that there are three key facts. It shows Pre-DOM wealth from lottery winnings and Pre-DOM asset purchase. About 1980 the real property is rolled over into replacement real property and a brokerage account. Thus we have explained our story – but we have not yet “sold” anything. That will come later.

We have also aided the forensic accounting witness in that the graphic shows there are three points to explain – highlighted as #1 to #3 at the bottom of the diagram.

In this diagram, we have done much to build on. We have set the stage for the court and provided an easy testimony tool for the forensic accountant and even for the husband.

Asset Descriptive

In communications, many people enjoy gaining a familiarity with the details being discussed. Thus it can be helpful to next present a nonfinancial graphic depiction of the details shown in the timeline. An example, shown at the top of this page, is a modified county map with descriptions for parcels, etc.

Continued on page 35 (Schaefer)
Historically, starting in the early 1980s, family law litigants could “join” a retirement plan through a clerk’s administrative action without the necessity of a hearing on joinder. This practical measure was seen as streamlining the practice that had developed during the ten-year period between the passage of ERISA in 1974 (which did not address the rights of former spouses) and the Retirement Equity Act of 1984 (REA), which created the QDRO to secure the rights of former spouses. Use of the Judicial Council forms allowed Plans to be put on notice of the claim of a non-employee spouse while avoiding having to attend innumerable joinder hearings in divorce actions. However, with the passage of REA, the Plan’s duty toward a claimant under the applicable provisions of ERISA was largely clarified as was the preemptive effect of those provisions on the family courts. Among other things, REA requires ERISA-covered plans to have “QDRO Procedures” to educate litigants regarding the QDRO process and the manner in which benefits are frozen by federal law pending a determination by the plan administrator or a court of competent jurisdiction of the sufficiency of a state court division order (ERISA 206(d)(3)(G)(i)(I)).

Under Family Code §2337(d)(1) as amended effective January 1, 2008, joinder will not be required for most plans. Here is the text of the new subdivision:

(d) Prior to, or simultaneously with, entry of judgment granting dissolution of the status of the marriage, all of the following shall occur:

1. The party’s retirement or pension plan shall be joined as a party to the proceeding for dissolution, unless joinder is precluded or made unnecessary by Title 1 of the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. Sec. 1001 et seq.), as amended (ERISA), or any other applicable law.

Under this provision, “joinder” of retirement plans will not be required for most retirement plans because joinder is precluded by all federal government plans and is unnecessary to enforce a claim against a private industry ERISA plan under ERISA §206(d)(3). Moreover, by ERISA standards, given proper notice of a claim, the Plan has a fiduciary duty toward the claimant (ERISA §204(d)(3) and ERISA §404).

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Regardles of which of the three methods of retirement security under Family Code §2337(d)(2) is chosen, the resulting order must be delivered to the Plan to secure the claim. Family Code §2337(e) states that “[t]he moving party shall promptly serve a copy of any order, interim order, or attachment entered pursuant to paragraph (2) of subdivision (d), and a copy of the judgment granting a dissolution of the status of the marriage, on the retirement or pension plan administrator.”

III. Securing Retirement Interest: A Choice

Under Family Code §2337(d), joinderpleadings are replaced with specific “QDRO-like” language designed both to give proper notice to a Plan of a marital interest and to freeze the benefits. Here is the text of Family Code §2337(d)(2) (bracketed language is the author’s):

2. To preserve the claims of each spouse in all retirement plan benefits upon entry of judgment granting a dissolution of the status of the marriage, the court shall enter one of the following in connection with the judgment for each retirement plan in which either party is a participant:

[Choice 1 – the normal QDRO]
(A) An order pursuant to Section 2610 disposing of each party’s interest in retirement plan benefits, including survivor and death benefits.

[Choice 2 – a less detailed “interim” QDRO]
(B) An interim order preserving the nonemployee party’s right to retirement plan benefits, including survivor and death benefits, pending entry of judgment on all remaining issues.

[Choice 3 – the provisional QDRO (use boxed language in the Judgment)]
(C) An attachment to the judgment granting a dissolution of the status of the marriage, as follows: EACH PARTY (insert names and addresses) IS PROVISIONALLY AWARDED WITHOUT PREJUDICE AND SUBJECT TO ADJUSTMENT BY A SUBSEQUENT DOMESTIC RELATIONS ORDER, A SEPARATE INTEREST EQUAL TO ONE-HALF OF ALL BENEFITS ACCRUED OR TO BE ACCRUED UNDER THE PLAN (name each plan individually) AS A RESULT OF EMPLOYMENT OF THE OTHER PARTY DURING THE MARRIAGE OR DOMESTIC PARTNERSHIP AND PRIOR TO THE DATE OF SEPARATION. IN ADDITION, PENDING FURTHER NOTICE, THE PLAN SHALL, AS ALLOWED BY LAW, OR IN THE CASE OF A GOVERNMENTAL PLAN, AS ALLOWED BY THE TERMS OF THE PLAN, CONTINUE TO TREAT THE PARTIES AS MARRIED OR DOMESTIC PARTNERS FOR PURPOSES OF ANY SURVIVOR RIGHTS OR BENEFITS AVAILABLE UNDER THE PLAN TO THE EXTENT NECESSARY TO PROVIDE FOR PAYMENT OF AN AMOUNT EQUAL TO THAT SEPARATE INTEREST OR FOR ALL OF THE SURVIVOR BENEFIT IF AT THE TIME OF THE DEATH OF THE PARTICIPANT, THERE IS NO OTHER ELIGIBLE RECIPIENT OF THE SURVIVOR BENEFIT.

The California Judicial Council has approved the incorporation of the “provisional QDRO” language into the final Judgment form FL-180 so that all litigants – not just those seeking early termination of marital status under Family Code §2337 – will be given the opportunity to help secure their retirement interests by using this language.

Regardless of which of the three methods of retirement security under Family Code §2337(d)(2) is chosen, the resulting order must be delivered to the Plan to secure the claim. Family Code §2337(e) states that “[t]he moving party shall promptly serve a copy of any order, interim order, or attachment entered pursuant to paragraph (2) of subdivision (d), and a copy of the judgment granting a dissolution of the status of the marriage, on the retirement or pension plan administrator.”
IV. Other Amendments Effective January 1, 2008

These will be discussed in Parts Two and Three of this Article. [Ed. Note: Part Two follows this article.] They include the following:

Family Code §2337(c)(7)(A):

(7)(A) The court may make an order pursuant to para­

graph (3) of subdivision (b) of Section 5600 of the

Probate Code, if appropriate, that a party maintain a

beneficiary designation for a nonprobate transfer, as

described in Section 5000 of the Probate Code, for

a spouse or domestic partner for up to one-half of or,

upon a showing of good cause, for all of a nonprobate

transfer asset until judgment has been entered with

respect to the community ownership of that asset,

and until the other party’s interest therein has been
distributed to him or her.

Family Code §2337(c)(8):

(8) In order to preserve the ability of the party to defer

the distribution of the Individual Retirement Account or

annuity (IRA) established under Section 408 or 408A

of the Internal Revenue Code of 1986, as amended,

(IRC) upon the death of the other party, the court may

require that one-half, or all upon a showing of good

cause, of the community interest in any IRA, by or for

the benefit of the party, be assigned and transferred

to the other party pursuant to Section 408(d)(6) of the

Internal Revenue Code.

Family Code §2337(c)(9):

(9) Upon a showing that circumstances exist that would

place a substantial burden of enforcement upon either

party’s community property rights or would eliminate

the ability of the surviving party to enforce his or her

community property rights if the other party died

before the division and distribution or compliance

with any court-ordered payment of any community

property interest therein, including, but not limited

to, a situation in which preemption under federal law

applies to an asset of a party, or purchase by a bona

fide purchaser has occurred, the court may order a

specific security interest designed to reduce or elimi­

nate the likelihood that a postmortem enforcement

proceeding would be ineffective or unduly burden­

some to the surviving party.

Endnotes:

i For an example of an Interim QDRO, see Form 20.73 in CEB,

Marital Settlement and Other Family Law Agreements, Second


ii The provisional language has sufficient QDRO features to trig­
ger the Plan’s QDRO review process. The language will either

satisfy the Plan’s QDRO requirements or the Plan will indicate

that more information is needed. Either way, the parties should

be notified at their respective mailing addresses of acceptance

or further refinements needed and plan deadlines for action to

be taken to perfect the QDRO. It is anticipated that plans will

forward their QDRO Procedures and (if requested) the Sum­

mary Plan Description and model orders that might allow the

parties, or either one of them, to complete the process of having

a final QDRO(s) entered and accepted by the Plan(s). (ERISA §206

d(i)(3)(G)(ii)(I); see also Chapter 2: Administration of QDROs in

QDROs The Division of Pensions Through Qualified Domestic

Relations Orders, U.S. Department of Labor, Pension and Welfare

Benefits Administration, 1997 available on the Internet at: www.
dol.gov/dol/pwba.

iii “A SEPARATE INTEREST EQUAL TO ONE-HALF OF ALL

BENEFITS ACCRUED OR TO BE ACCRUED UNDER THE PLAN.”

This is artful language that seeks to have the Plan pay the Alter­

native Payee a separate interest irrespective of the death of the

Participant such that a survivor benefit award is not needed to

secure the Alternate Payee’s interest. This approach is supported

by Treas. Reg. §§1.401(a)-13(g)(4)(B)(2) and (C)(2). However, many

Plans do not award a separate interest until the Alternate Payee’s

actual retirement date, securing that interest instead as an entitle­

ment to part of the pre-retirement survivor annuity. The problem

is that the pre-retirement survivor annuity that will be payable

among all of the survivors is usually only 50% or 75% of the

employee’s total interest. Therefore, a time rule percentage of the

pre-retirement survivor annuity would yield less than the sepa­

rate interest. This disadvantage may be countered by an award

of the entire community interest or some other device and is

addressed later in the language from §2337(d)(2)(C) quoted above.

iv With respect to same sex domestic partnerships, any DRO

will almost certainly be rejected as non-qualified unless the non­

employee is a dependent. Under DOMA, a domestic partner may

not be considered a “spouse” for plan purposes, and thus may

not qualify as an alternate payee as such. ERISA §206(d)(3). Note

that if a Domestic Partner QDRO is approved, the employee will

be taxed on the distribution regardless of what the order might

provide. IRC §402(e). However, the income will not be subject

to the 10% penalty tax for early distributions. IRC §72(t).

v Unlike ERISA plans, State, County and Municipal governmental

plans allow the selection of a survivor option for a former spouse

at the point of retirement but do not treat former spouses as

“spouses” for pre-retirement survivor benefits. Nor do they allow

the former spouse to be the triggering life for a “free” spousal

continuance benefit where that is part of the employee’s contract.

Special attention must be paid to securing the interests of former

spouses in death benefits, particularly during the pre-retirement

period. Sometimes life insurance is the only viable option.

vi Domestic partners – see fn iv, above.

vii The court can only award all of the pre-retirement survivor

benefit to the nonemployee spouse if only a spouse or former

spouse is eligible for the pre-retirement survivor benefit. In such plans, if the entirety of the benefit is not awarded to the

former spouse and there is no current spouse, the benefit would

otherwise revert to the Plan at the pre-retirement death of the

employee. Note that the award of the entire benefit to the former

spouse is conditional upon there being no other eligible survivor.

Continued on page 18 (Family Code §2337, Part Two)
The authors of this article, along with attorney Susan Kaye, are the original drafters of the recent revisions to Family Code §2337. Part One of this series described the importance of new Family Code §2337(d), which mandates the action that must be taken to preserve retirement benefits and reduces the need for joining plans. This part will discuss Sections 2337(c)(7) & 2337(c)(8), which are two of several revisions made under the umbrella of discretionary conditions the court may impose upon the bifurcation of marital status.

Section 2337(c) gives the court the discretion to impose certain conditions upon granting a Judgment terminating marital status, depending upon the particular facts and circumstances of the case. The prefatory language reads as follows:

(c) The court may impose upon a party any of the following conditions on granting a severance of the issue of the dissolution of the status of the marriage, and in case of that party's death, an order of any of the following conditions continues to be binding upon that party's estate:

One of the conditions the court may impose under subdivision (c)(7) is the designation or continued designation of a party as a beneficiary of an asset subject to non-probate transfer.1 Non-probate transfer assets are generally those that pass by way of a trust arrangement or beneficiary designation. Typically encountered non-probate transfers include IRAs, revocable living trusts, pay-on-death accounts, joint tenancy real property and non-qualified employment-related compensation arrangements. This condition is now included in Section 2337(c) because of two other laws that have been in effect since 2002: Family Code §2040(b)(2),2 which gives a party the right to revoke a non-probate transfer despite the ATROS, and Probate Code §5600, which generally provides for the automatic revocation of a spousal beneficiary designation on a non-probate transfer asset at termination of marital status.3

Family Code §2337(c)(7) is intended to provide guidance to family law practitioners to safeguard beneficiary designations in those circumstances in which such designations in fairness should remain in place, notwithstanding Family Code §2040(b)(2) and Probate Code §5600 referenced above. The new provision reads as follows:

(c)(7)(A) The court may make an order pursuant to paragraph (3) of subdivision (b) of Section 5600 of the Probate Code, if appropriate, that a party maintain a beneficiary designation for a non-probate transfer, as described in Section 5000 of the Probate Code, for a spouse or domestic partner for up to one-half of or, upon a showing of good cause, for all of a non-probate transfer asset until judgment has been entered with respect to the community ownership of that asset, and until the other party's interest therein has been distributed to him or her.

Practice tip: Note that the mere recital of the language of Family Code §2337(c)(7) as a condition of terminating marital status would not be sufficient to provide the required protection. Nor is it appropriate to make a general statement that a party is to remain a beneficiary for “all” non-probate transfer assets, without naming them specifically, as this may violate subdivision (c)(7)(B). It is necessary to name the specific non-probate transfer asset(s) for which a party is to remain a designated beneficiary and to state the percentage of that designation.

Subdivision (c)(7)(B) lists those exceptions to the general rule of subdivision (c)(7)(A) for non-probate transfers in which it is highly unlikely that the other party has a beneficial interest or that either party has a beneficial interest. For those rare circumstances in which the other party does have a potential beneficial interest in a non-probate transfer described in subdivision (c)(7)(B), however, the court does have the power to make an appropriate order. Family Code §2337(c)(7)(B):

Except upon a showing of good cause, this paragraph does not apply to any of the following:

(i) A nonprobate transfer described in Section 5000 of the Probate Code that was not created by either party or that was acquired by either party by gift, descent, or devise.

(ii) An irrevocable trust.

(iii) A trust of which neither party is the grantor.

(iv) Powers of appointment under a trust instrument that was not created by either party or of which neither party is a grantor.

(v) The execution and filing of a disclaimer pursuant to Part 8 (commencing with Section 260) of Division 2 of the Probate Code.

(vi) The appointment of a party as a trustee.
Subdivision (b)(8) provides for the division of IRAs at the time of bifurcation. Section 408(d) of the Internal Revenue Code generally provides for the tax-free division of IRAs in connection with a marital dissolution, regardless of whether the IRA is separate property or community property.

**Practice tip:** Section 408(d) of the Internal Revenue Code will not permit a tax-free division of IRAs to parties in same sex marital dissolutions, nor will Section 1041 of the Internal Revenue Code apply with respect to other transfers of property.

**Endnotes:**

1 Since 2002, the ATROs have contained a definition of non-probate transfer assets as follows: “Nonprobate transfer” means an instrument, other than a will, that makes a transfer of property on death, including a revocable trust, pay on death account in a financial institution, Totten trust, transfer on death registration of personal property, or other instrument of a type described in Section 5000 of the Probate Code. FC §2040 (d)(1).

2 FC §2040 (b)(2) excludes from the ATROs a “Revocation of a nonprobate transfer, including a revocable trust, pursuant to the instrument, provided that notice of the change is filed and served on the other party before the change takes effect.” This revision to FC §2040 and Probate Code §5600 were introduced in Bill No. 873, Ad Stats 2001, C417.

3 The relevant portions of Probate Code §5600 read as follows:

(a) Except as provided in subdivision (b), a nonprobate transfer to the transferor’s former spouse, in an instrument executed by the transferor before or during the marriage, fails if, at the time of the transferor’s death, the former spouse is not the transferor’s surviving spouse as defined in Section 78, as a result of the dissolution or annulment of the marriage. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for purposes of this section.

(b) Subdivision (a) does not cause a nonprobate transfer to fail in any of the following cases:

(3) A court order that the nonprobate transfer be maintained on behalf of the former spouse is in effect at the time of the transferor’s death.
ACFLS at the State Bar Annual Meeting

ACFLS gathered in Monterey in September for the State Bar Annual Meeting (and our ACFLS Board Meeting). Our ACFLS-sponsored CLE program, “The Custody Lawyer as Storyteller: Drafting Admissible and Effective Declarations” (presented by Leslie Ellen Shear and Diane Goodman) drew more than 100 attendees, and was videotaped for possible inclusion in the State Bar’s On-line MCLE offerings.

Members gathered for wine, hors d’oeuvres and socializing at the annual ACFLS State Bar reception:

1. Board members Mike Samuels and Nancy DiCenzo
2. Denise Granberg and Webmaster Bonnie Riley
3. Board members Leslie Ellen Shear and Dawn Gray
4. Past Presidents Alan Tanenbaum and Vivian Holley, and Georgette Tanenbaum
5. President Elect Joe Bell and Executive Director Lynn Pfeifer
6. Paul Brimberry and Nancy DiCenzo
7. ACFLS Member Directories and brochures
8. Los Angeles Family Law Commissioner (and CFLS) Gretchen Taylor
9. Board member Caralisa Hughes and Past President Ron Granberg
10. Presenter Diane Goodman and Commissioner Gretchen Taylor
11. Teresa Merzoian Borges, Past Presidents Alan Tanenbaum and David Borges, and Bonnie Riley
12. Bartender extraordinaire Fred Pfeifer
13. Board members Frieda Gordon and Joe Bell, President Sharon Bryan, and Denise Granberg
14. Bryan Baker samples the buffet
## ACFLS Legislation Report
### October 2008

**Carol Delzer, J.D., CFLS**  
**ACFLS Legislative Coordinator**  
**Sacramento**  
**carol@familylawcenter.us**

<table>
<thead>
<tr>
<th>BILL #</th>
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<tbody>
<tr>
<td>AB 1679 [Evans]</td>
<td>Paternity actions records</td>
<td>Fam 7643</td>
<td>07/01/2008 – Chaptered by Secretary of State. Chapter No. 50, Statutes of 2008</td>
<td>Gives access to UPA court files to parties, attorneys, and their acting authorized agent.</td>
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<tr>
<td>AB 2068 [Aghazarian]</td>
<td>DV: stalking; victim notice of restraining orders</td>
<td>New Gov 6103.3</td>
<td>07/21/2008 – Chaptered by the Secretary of State. Chapter Number 153, Statutes of 2008</td>
<td>Requires law officer to notify victim of service of restraining order, as specified, within 24 hours.</td>
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<tr>
<td>AB 2070 [Bass]</td>
<td>Foster care: incarcerated parents</td>
<td>W&amp;I 361.5, 366.21, 366.22, 366.26, 366.3</td>
<td>09/18/2008 – Enrolled and to the Governor at 11:00 a.m.</td>
<td>This bill would provide special circumstances for incarcerated parents of foster children to receive or exempt them from court-ordered services.</td>
</tr>
<tr>
<td>AB 2096 [Bass]</td>
<td>Foster children: extracurricular activities</td>
<td>W&amp;I 727</td>
<td>09/17/2008 – Enrolled and to the Governor at 12:45 p.m.</td>
<td>Foster care to apply a prudent parent standard, to determine the appropriate extra curricular and enrichment activities for the foster child.</td>
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<tr>
<td>AB 2117 [Evans]</td>
<td>Dependent children: psychotropic meds</td>
<td>W&amp;I 369.5</td>
<td>08/07/2008 – In committee: Set, first hearing. Held under submission.</td>
<td>Expands authority of juvenile court judge to make orders regarding the administration of psychotropic meds of dependant child or ward.</td>
</tr>
<tr>
<td>AB 2341 [Maze]</td>
<td>Reunification services</td>
<td>W&amp;I 361.5</td>
<td>09/18/2008 – Enrolled and to the Governor at 11:00 a.m.</td>
<td>Changes time frame to expedite reunification services for children depending on their age.</td>
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<td>AB 2483</td>
<td>Wards &amp; dependent children: program of supervision</td>
<td>W&amp;I 301</td>
<td>07/16/2008 – Chaptered by the Secretary of State. Chapter Number 132, Statutes of 2008</td>
<td>Imposes requirement that program of supervision without petition for dependency not begin prior to attorney consultation.</td>
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<tr>
<td>AB 2553</td>
<td>DV ex parte orders</td>
<td>New Fam 6320.5</td>
<td>08/04/2008 – Chaptered by the Secretary of State. Chapter Number 263, Statutes of 2008</td>
<td>Specifies “statement” of findings that court must make in any case of denial of DV ex parte orders.</td>
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<tr>
<td>AB 2651</td>
<td>Foster care, adoption, and dependent children</td>
<td>Fam 8712 H&amp;S 1522, 1522.1, Penal 11167.5, 22280 W&amp;I 309, 361.4, 16501.1</td>
<td>09/18/2008 – Enrolled and to the Governor at 2:00 p.m.</td>
<td>Prohibits foster children adoption when prospective adoptive parent or adult living in home has been convicted of a felony.</td>
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<td>AB 2960</td>
<td>Custody orders: sexual abuse</td>
<td>Fam 3064</td>
<td>07/01/2008 – Chaptered by Secretary of State. Chapter No. 54, Statutes of 2008</td>
<td>Amends ex parte custody modification restriction to allow exception where there is evidence of recent or continuing sexual abuse of child.</td>
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<td>AB 3015</td>
<td>Foster care</td>
<td>W&amp;I 16001.9, 16003</td>
<td>09/17/2008 – Enrolled and to the Governor at 2:45 p.m.</td>
<td>Would require training for administrators, foster parents, and caretakers to include information of existing laws and procedures.</td>
</tr>
<tr>
<td>AB 3051</td>
<td>Dependent children</td>
<td>Probate 1517</td>
<td>07/21/2008 – Chaptered by the Secretary of State. Chapter Number 166, Statutes of 2008</td>
<td>Provides that appointments based on administration of funds may continue after the court’s jurisdiction is terminated.</td>
</tr>
<tr>
<td>SB 1241</td>
<td>Public safety</td>
<td>Civil 56.1 Penal 538, 830.2, 1170.11, 11102.1, 1167.5, 12020, 12076, 12082, 14204 Vehicle 13352, 40002 W&amp;I 731.1, 733, 1731.5</td>
<td>09/17/2008 – Enrolled and to the Governor at 1:00 p.m.</td>
<td>Makes technical, non substantive changes to procedures for the enforcement of child custody orders and support obligations.</td>
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<tr>
<td>SB 1255</td>
<td>Child custody</td>
<td>Fam 3041.5</td>
<td>07/01/2008 – Chaptered by Secretary of State - Chapter No. 57, Statutes of 2008</td>
<td>Extends the effective date of the provisions of drug testing person seeking custody, visitation, or guardianship until January 1, 2013.</td>
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<td>SB 1333</td>
<td>Paternity judgment: reconsideration</td>
<td></td>
<td>07/01/2008 – Chaptered by Secretary of State. Chapter No. 58, Statutes of 2008</td>
<td>Authorizes the reconsideration of the denial of a motion filed under certain provisions if requirements were met.</td>
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<tr>
<td>SB 1612</td>
<td>Guardian ad litem</td>
<td></td>
<td>07/22/2008 – Chaptered by the Secretary of State. Chapter Number 181, Statutes of 2008</td>
<td>Requires a court to appoint a guardian ad litem in certain circumstances for a minor parent.</td>
</tr>
<tr>
<td>SB 1726</td>
<td>Adoption</td>
<td>Fam 7630, 7660.5, 8632.5, 8802, 8639</td>
<td>09/17/2008 – Enrolled and to the Governor at 3:00 p.m.</td>
<td>Donor in a licensed sperm bank shall not be considered natural father of child conceived from donation.</td>
</tr>
</tbody>
</table>
estate to the extent the party traces the contributions to a separate property source.” By its clear language, this section only applies to community assets. Thus, before the court can hold that it applies, it must characterize the property in question.

In other words, the court decides the characterization issue first, and applies the general (and rebuttable) community property presumption to do so. A party’s ability to rebut that presumption arises before there is any question of whether or not §2640 applies to assets that the court ultimately characterizes as community. Characterization precedes a determination of reimbursement rights because §2640 only applies “in the division of the community estate under this division. . . .” If a party contributing separate funds to an asset is permitted to trace that contribution back to the initial acquisition, as ANY party can do relative to untitled or solely titled assets, he or she establishes an ab initio separate property ownership in that asset. Family Code §2640 never applies to that interest, because that interest is excluded from “the division of the community estate under this division. . . .” Here, Haddah did not apply ANY separate property to the acquisition of a community asset because her separate funds purchased her a separate property asset as of the date of the property’s acquisition. The only community interest was what William acquired with community funds – and §2640 does not apply because there was no separate property contribution to the acquisition of that interest.

The result would be different if the asset in question was jointly titled. In that situation, Family Code §2581 renders the entire asset conclusively community in the absence of an agreement to the contrary, and trumps the law permitting a party to trace the acquisition back to a separate property source. Thus, where the asset in question is jointly titled and Family Code §2581 applies to render it conclusively community, the only remedy for the spouse contributing separate funds to its acquisition is reimbursement under §2640.

Family Code §2640 only applies to community assets once they are determined to be community. Therefore, it only applies if the parties stipulate that an asset is entirely community property or the court characterizes it as entirely community by application of the conclusive title presumption of Family Code §2581. Thus, Family Code §2640 does not apply in a situation in which one party contributes separate funds to the acquisition of an untitled asset or an asset held in one spouse’s name alone that was acquired with community funds.

What about sole title as one spouse’s separate property?

If one spouse contributes separate property to the acquisition of property in the other spouse’s name, Family Code §2640(c) requires reimbursement “unless there has been a transmutation in writing pursuant to Chapter 5 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement.” In many such cases there may also be undue influence arguments or other breach of fiduciary duty considerations. In addition, the common law presumption in favor of title currently codified in Evidence Code §662 may come into play. However, the court must still determine an asset’s character prior to determining any reimbursement rights therein, because Family Code §2640 rights only apply to assets that have been determined to be community.

Co-ownership is not uncommon.

There certainly is no prohibition on co-ownership of property between the separate and community estates; many cases have resulted in such a situation. In Schuyler v. Broughton (1886) 70 Cal. 282, 284, 285, 11 P. 719, for example, the California Supreme Court said over 120 years ago that

“(t)he sum of two hundred dollars, which the plaintiff, as the wife of W. H. Schuyler, acquired by gift, was therefore her separate property, and the land in which she invested that money was to the extent of the investment her separate real property.

. . . We have, then, a case arising out of a transaction by a married woman, in which she purchased a tract of land, in part with money belonging to her separate funds and in part with money belonging to the community funds; so that the land became in part separate property of the wife, and in part common property of the husband and wife. Under the law, a husband and wife may acquire and hold real property in joint tenancy, tenancy in common, or as common property. Section 161, Civil Code. By the purchase the wife, therefore, became a tenant in common of the land with her husband in proportion of the separate estate to the whole purchase price.”

Forty years later, in Vieux v. Vieux (1926) 80 Cal.App. 222, 251 P. 64, the Second District reversed the trial court’s holding that the property was entirely H’s separate asset, holding that to fail to attribute some interest to the community based on its payments toward acquisition would be a constructive fraud on W. It said that where H paid the down payment from separate property funds on property which both parties selected before marriage and made payments on it during marriage with community funds, “(i)n effect, it was somewhat in the nature of a partnership relationship that existed between the parties – the husband on the one side, and the community, consisting of the husband and the wife, on the other side.” It concluded that

“the husband having acquired an inchoate right, on compliance with certain conditions, to become an absolute owner of the property in question, and the facts showing that the required conditions were met with funds furnished by the community, aided by other funds issuing directly from the property agreed to be purchased, justice demands that the rights of the parties should be measured by the direct contributions made by the respective parties to the purchase price of the property. Accordingly,
the judgment of the trial court herein should have indicated that the community interest was entitled to share in the title to the property in the same proportion as the amount contributed to the purchase price by the community, to wit, $553.68, bore to the sum of $833.86 – the total amount paid by the respective parties therefor.”

In Faust v. Faust (1949) 91 Cal.App.2d 304, 204 P.2d 906, the parties purchased real property one month after their marriage. Because of H’s financial issues, they took title in W’s name alone and she used her separate property funds to make the down payment. They made the payments with community funds and H improved it; they ultimately sold it for $6,460. W then used the funds to purchase a second property for $12,500, taking title in her name as her separate property and using her separate property funds and the sale proceeds from the first property. The trial court held that $8,388 was community property and awarded $4,194 of the sale proceeds from the first property to H. He appealed, and the Second District affirmed, holding that the community and separate estates owned the second property in proportion to the estates’ respective contributions.

Similarly, in Mears v. Mears (1960) 180 Cal.App.2d 484, 507, 4 Cal.Rptr. 618, the First District said that “[t]he uncontradicted and unimpeached testimony of the wife was that $189.17 of the purchase price came from the proceeds of the sale of furniture which she inherited from her father and $85.53 from community funds. In her complaint the wife admitted that the community property contribution was 31 per cent. In view of the principles hereinabove alluded to, the court should have allocated to separate and community property the respective percentage of the contributions to the purchase price.” The First District cited Vieux in Marriage of Jafeman (1972) 29 Cal.App.3d 244, 256, 105 Cal. Rptr. 483, as authority for the statement that “[i]f community funds are used to pay part of the purchase price on property acquired by one spouse prior to marriage, the property cannot be considered wholly community for the separate and community sources of the property can be traced.” 17 years later, in Loring v. Stuart (1989) 79 Cal. 200, 21 P. 651, the California Supreme Court said that “in September, 1884, [W] made a contract to purchase the mortgaged premises for $300, and that she paid the purchase price, and took a deed for the property in her own name on the 9th of January, 1885; that she borrowed $225 of the purchase money, and made the balance by keeping boarders; that she executed the note and mortgage in suit to secure payment of the $225 borrowed and other money owing by her to the mortgagee. Now, conceding that the borrowed money was community property, still it appears that a part of the purchase money was the defendant’s earnings, and her separate estate. . . . In such a case, it was said, the wife becomes a tenant in common of the land with her husband in the proportion that the separate funds paid by her bear to the whole purchase price. Under this rule defendant owned at least a part of the mortgaged premises and had a right to execute the mortgage.”

Co-ownership is also common as to post-separation separate property contributions to community assets. In Marriage of Wolfe (2001) 91 Cal.App.4th 962, 110 Cal. Rptr.2d 921, for example, the Third District said that as to such contributions, “[t]here is little logic in a rule that presumes an unconditional gift when one spouse uses community funds to improve the other spouse’s property. Husbands and wives rarely plan for dissolution of a marriage, and if they did, it is fanciful to suppose that a spouse would wish the divorcing partner to walk away from the marriage with property enriched by an infusion of community funds and with no obligation to reimburse. The presumption is simply not grounded in human nature or experience. Nor is it in accord with public policy, which presumes acquisitions during a marriage to be community (Lucas, supra, 27 Cal.3d at pp. 812-814, 166 Cal.Rptr. 853, 614 P.2d 285), and disfavors changes in characterization without strict adherence to formalities; this ensures thoughtful deliberation before decisions with potentially far-reaching consequences are made. (See Estate of MacDonald (1990) 51 Cal.3d 262, 272 Cal.Rptr. 153, 794 P.2d 911.) As we explained, our courts do not indulge such a presumption when community funds are used to assist in the purchase or to reduce an encumbrance on a separate asset. The application of community funds results in what amounts to co-ownership of the asset.” Emphasis added.

So, co-ownership of property between the separate and community estates is not uncommon in the family law context, and there is certainly no prohibition against the court’s making such an award. As discussed above, Family Code §2640 reimbursement only applies to assets that have been determined to be community property. The title presumption of Family Code §2581 only applies to jointly titled assets and the only presumption applying to untitled or solely assets is the general community property presumption. Under long-standing law, tracing to a separate property source is sufficient to overcome that presumption. Thus, before solely titled or untitled property can be characterized, the party contributing separate funds to its acquisition must be permitted to trace his or her contribution and establish his or her separate property percentage interest therein. Once the party does so, that interest must be confirmed as separate property and Family Code §2640 does not apply to that interest, nor to the remaining (i.e., community) interest because there has been no separate property contribution thereto. Thus, it is this author’s contention that Family Code §2640 reimbursement only applies to jointly titled assets to which one party has made a separate property contribution which are either stipulated to be community property or which are deemed community under the Family Code §2581 title presumption.

Certain matters merit consideration which may be said to reasonably contribute to, diminish, or affect, the intangible value of professional goodwill at the time of dissolution and the continuity and retention of benefits thereof which the professional practitioner will continue to enjoy after the marital dissolution. In that context some such factors are the practitioner’s age, health, past demonstrated earnings power, professional reputation in the community as to his judgment, skill, knowledge, his comparative professional success, and the nature and duration of his business as a sole practitioner or as a member of a professional corporation to which his professional efforts have made a proprietary contribution.

The court also said:

The fact that “professional goodwill” may be illusive, intangible, difficult to evaluate and will ordinarily require special disposition, is not reason to ignore its existence in a proper case.

The court issued a caution by saying:

Mindful of the nebulous area into which we venture, we believe that for purposes of a marital dissolution, the parties are primarily concerned with the existence, value and consequences of the “goodwill” of a professional business in an economic sense, as distinguished from legal or accounting concepts.

We think it follows that in marital cases the expectancy of future earnings is not synonymous with, nor should it be the basis for, determining the value of “goodwill” of a professional practice, but is simply a factor to consider in deciding if such an asset exists. A community property interest can only be acquired during the marriage and it would be inconsistent with that philosophy to assign value to the post marital efforts of either spouse.

Although the Lopez court cautions against basing a valuation of goodwill upon the expectancy of future earnings, it also cites an authoritative source and clearly acknowledges that the economic concept of goodwill is related to future receipts and that the economic value of any asset is based on the (net) future receipts that the asset will produce.

I have highlighted three concepts paraphrased from the Lopez opinion that I believe are extremely important to consider in valuing professional practice goodwill in a marital dissolution with specific consideration for the risk of valuing post-marital efforts of the professional:

- consideration of past demonstrated earnings power;
- concern with the existence, value and consequences of goodwill in an economic sense; and

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**Hypothetical Scenario**

**Law Practice Comparison**

**Goodwill Based Upon "Average Salaried" Standard**

<table>
<thead>
<tr>
<th></th>
<th>Law Practice A</th>
<th>Law Practice B</th>
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<tbody>
<tr>
<td>Established Average Collections from Gross Billings</td>
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<tr>
<td>Established Owner’s Income (wages, profit, perks, and retirement after a fair return to tangible assets)</td>
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<tr>
<td>Less:</td>
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<tr>
<td>Median Income for Environmental and Land Use Attorneys</td>
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<td></td>
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<tr>
<td>Excess Earnings</td>
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<tr>
<td>Valuation Multiple (1 divided by the capitalization rate)</td>
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</tbody>
</table>

Note: Investment in tangible assets and leasehold terms are equal for each practice.

* assumes proper comparison based upon experience and demographic elements
valuation of what was acquired with community efforts and not of the post-separation efforts of either spouse.

**The issue of the level of reasonable or fair compensation:** Rosen, Garrity & Bishton and Ackerman, cited above, discuss the use of compensation surveys and the comparison of a professional to their peers. A key consideration for a practitioner is the standard for the level of peer compensation to use for comparison with the subject to determine the extent of excess earnings. The standard set forth in Garrity & Bishton is to compare the subject professional's income to an "annual salary of the average salaried person," while Rosen and Ackerman discuss a comparison to the "similarly situated professional." The use of one standard versus the other can have a significant impact on the level of goodwill determined to exist. The Rosen court agreed with the position stated in the amicus brief submitted by the California Society of Certified Public Accountants that in addition to the "average salaried" standard set forth in Garrity & Bishton, "reasonable compensation may also be based upon the cost of hiring a non-owner outsider to perform the same average amount that the other people are normally compensated for performing similar services – the 'similarly situated professional' standard."

**Our Hypothetical Scenario for Illustrative Purposes Revisited**

A valuation expert has been asked to value both practices from our hypothetical scenario for marital dissolution purposes. The practitioner first uses the standard set forth in Garrity & Bishton and determines that the median (or average) compensation for lawyers comparable to both lawyers in practice A and practice B is $250,000 per year. Since both practices generate $500,000 in annual income to the owner on average, the indication is that there is $250,000 in excess earnings in each practice. Remember that both practices have the same equipment, the same premise lease and are in the same area of law and geographic location. For the sake of argument, if the expert applies the same valuation multiple of 2 times excess earnings, both practices will have goodwill valued at $500,000. See Figure 2, previous page. Recall, however, that the lawyer in practice A had to expend far less of the valuable resource of his time and therefore preserved much more free time than the lawyer in practice B. Should the practices really have the same value?

For the sake of comparison, the expert uses the standard accepted by the appellate court in Rosen, i.e., the normal compensation for the "similarly situated" lawyer, as well as a proper demographic comparison, by benchmarking fair compensation based upon the level of billable hours. She determines that Lawyer A bills the median level of hours for a comparable lawyer in the industry and that Lawyer B bills 1.1 times more hours than comparable lawyers in the 90th percentile. She then finds that the fair compensation for Lawyer A is $250,000 (the median, to match that he is working the median level of billable hours) and that goodwill for that practice is $500,000 (i.e., $250,000 excess earnings multiplied by 2). She further finds that the compensation for the 90th percentile of comparable lawyers is $455,000 and calculates fair compensation for Lawyer B at $500,000 (i.e., $455,000 multiplied by 1.1). Finally, she determines that there are no apparent excess earnings and there is no related goodwill value. See Figure 3, next page.

Thus, the application of the "average salaried" standard leads to a $500,000 difference in value from the application of the "similarly situated" standard that adjusts for the difference in billable hours. Does this make sense? Which method is the most appropriate? The answer to that question will obviously materially impact the case. Lopez tells us to consider the existence, value and consequences of goodwill in an economic sense; in other words, to think like an economist. A good economist will not limit consideration to the flow of dollars but will consider all resources that are expended or consumed relative to the resources received. An economist will look at the limited time available to a professional and will consider the extent to which that resource is expended or exhausted in the function aimed at the generation of "net income."

A proper economic analysis of practice B would tell us that in addition to operating expenditures, the owner is required to expend 2,100 hours — 500 hours in excess of the median — to generate his income and would include a deduction in the valuation to reflect that extra resource demand, all else being equal. In fact, an economist would likely apply utility theory and reason that the required rate per hour for the next 500 hours would be higher than the rate for the first 1,600 hours, which is when earnings will cover basic needs. The first hours expended are more readily sacrificed for income than the hours that are sacrificed for more and more luxury. Those remaining hours are at a premium, because once your basic needs are met you are less and less motivated to sacrifice free time, which is already constrained by the time you have sacrificed in the name of income generation, for more work time. This concept is further amplified by the impact of our progressive tax system that allows us to take home less and less of the next dollar earned. Utility theory indicates that the pay for those additional 500 hours should be at a higher rate to provide sufficient compensation for a more limited resource. Of course, different people have different utility functions because they value things differently, but utility theory that considers those diminishing returns applies to everyone.

To value practice B based upon compensation at the median (which reflects the expenditure of 1,600 billable hours) ignores the expenditure that will be required of the valuable economic resource of an additional 500 hours, post-separation or divorce. By ignoring the requirement of the expenditure of the additional 500 hours in the determination of fair compensation, a valuation analyst is, in effect, capturing the present value of the portion of the income of practice B (in the capitalization of the resulting excess earnings) that will result only from the professional's additional post-separation efforts. Lopez instructs us to concern ourselves with the existence, value and consequences of goodwill in an economic sense and also clearly states that it would be improper to value the post-separation efforts of either spouse and failure to adjust for the additional expenditure of the valuable and limited resource of time in the determination of fair compensation is a violation of those constraints.

Continued on page 28 (Boone)
Some Practical Considerations

Comparable metrics to benchmark the level of efforts of a professional to his/her peers can often be difficult to find. Altman Weil publishes law practice economics metrics such as billable hours. The Medical Group Management Association (MGMA) publishes relevant medical practice economic metrics in their Physician Compensation and Production Survey. These were formerly published by the American Medical Association, which now appears to refer its members to the MGMA surveys. Studies for other professional fields are often available as well. Other articles deal with the limitations of studies and the methods for using survey or study data that will lead to a reasonable and fair comparison; good discussions of these types of issues can be found in Rosen and Ackerman. This article focuses only on the risk of valuing post-separation efforts and intentionally avoids the distraction of also dealing

Hypothetical Scenario
Law Practice Comparison
Goodwill Based Upon "Similarly Situated" Standard

<table>
<thead>
<tr>
<th></th>
<th>Law Practice A</th>
<th>Law Practice B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Established Average Collections from Gross Billings</td>
<td>$1.2 Million</td>
<td>$1.0 Million</td>
</tr>
<tr>
<td>Established Owner's Income (wages, profit, perks, and retirement after a fair return to tangible assets)</td>
<td>$500,000</td>
<td>$500,000</td>
</tr>
<tr>
<td>Less:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income for Similarly Situated Environmental and Land Use Attorneys</td>
<td>250,000</td>
<td>500,000</td>
</tr>
<tr>
<td>Excess Earnings</td>
<td>$250,000</td>
<td>$0</td>
</tr>
<tr>
<td>Valuation Multiple (1 divided by the capitalization rate)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Valuation</td>
<td>$500,000</td>
<td>$0</td>
</tr>
</tbody>
</table>

Table: Benchmark

<table>
<thead>
<tr>
<th>Benchmark:</th>
<th>Law Practice A</th>
<th>Law Practice B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median Billable Hours for Environmental and Land Use Attorneys</td>
<td>1,600</td>
<td>1,909</td>
</tr>
<tr>
<td>90th Percentile Billable Hours for Environmental and Land Use Attorneys</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Actual:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subject Lawyer's Billable Hours</td>
<td>1,600</td>
<td>2,100</td>
</tr>
<tr>
<td>Adjustment Factor: Ratio of Subject Billable Hours to Benchmark</td>
<td>1.0</td>
<td>1.1</td>
</tr>
<tr>
<td>Comparable to Median</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Comparable to 90th Percentile</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Fair Compensation:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Median Income for Environmental and Land Use Attorneys</td>
<td>250,000</td>
<td>455,000</td>
</tr>
<tr>
<td>90th Percentile Income for Environmental and Land Use Attorneys</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Times Billable Hours Ratio to Benchmark</td>
<td>1.0</td>
<td>1.1</td>
</tr>
<tr>
<td>Fair Compensation for Similarly Situated Professional:</td>
<td>$250,000</td>
<td>$500,000</td>
</tr>
</tbody>
</table>

Note: Investment in tangible assets and leasehold terms are equal for each practice.

* assumes proper comparison based upon experience and demographic elements
with those issues and other many and varied professional practice valuation issues.

The question for any expert should be, why did you choose the median compensation for comparison purposes? Rather than blindly compare compensation of a professional to the median income for professionals (even when reasonably comparing to professionals practicing in the same field, with the same specialty, with proper demographic comparability and with comparable professional experience), a valuation expert working on a valuation for marital dissolution purposes should consider the internal staffing and structure of the particular professional practice at issue and the extent to which it has elements that are unrelated to pre-marriage or post-separation efforts.

For example, the expert should ask whether there is a trained workforce that bills hours and provides a profit margin to the practice, or whether the owner charges a billing rate that is well outside the median and the ability to do so developed during the marriage. If these elements are not in place and the subject professional has extensive billable hours, works extensive clinical practice hours or performs extensive surgical procedures, then what appears to be excess earnings at first glance may really be the result of the professional working, in effect, more than one job. In such a case, the valuation analyst needs to understand the risk of valuing post-separation (or even pre-nuptial) efforts and must discuss this issue with counsel.

There is a potential socioeconomic impact that can result from failing to consider this issue. Hours worked can often be linked to the breakdown of the professional’s marriage and to parenting concerns. Take the case of a lawyer who works excessive hours to generate higher than average earnings but to the extent that the generation of that income is at the sacrifice of his “necessary” time with his wife and with his children. He may realize through the difficult divorce process that he needs to change his value system and commit less time to the practice and more time to his children and future relationships. Assume, however, that at the same time that he realizes this, his practice is valued for divorce purposes based upon his historical income levels generated by excessive hours and a comparison to the median professional who worked considerably fewer hours (according to the “average salaried” standard.) In order for him to recover that resulting “buyout” amount for divorce purposes along with a reasonable return for the risk, the professional would be indentured to working those historical long hours after dissolution. The impact is potentially even more profound if the court also bases child and spousal support upon those historical earnings that required excessive hours rather than a work regimen that allows for more parent time. From a socioeconomic standpoint, this can make a bad family situation even worse and is a particularly salient consideration for valuing professional practice goodwill that is not truly transferable on the open market.

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followed or that the evidence before the court was actually admissible, why should the judge hearing the case be concerned? After all, if it is unimportant to family law attorneys that their clients receive an “. . . adversary trial proceeding governed by the rules of evidence established by statute . . .,”7 why not dispense with trials altogether? It really should have come as no surprise that a court would ultimately enact the type of local rule struck down in Elkins.

All of that, fortunately, is behind us and it’s time to move on. Just as ACFLS played a major role in the briefing of Elkins, it should take the lead in the post-Elkins world. Through educational programs and any other means available, a concerted effort should be made to ensure that all attorneys who are called upon to try a family law case have the ability to do so effectively and in a professional manner.8 We might begin by directing family law attorneys to some of the very fine advocacy programs already in place.9 In the meantime, and in an effort to jump start the process, please indulge me while I “preach to the choir” and offer seven very basic practice tips that I hope you will pass on to those of our colleagues with limited trial experience. It can’t hurt – and it just might help.

1. **Trial strategy begins immediately upon being retained.**

Many clients are resistant to being the one to “ask for the divorce” for any number of reasons. When faced with such a client, I always attempted to put their concerns to rest and assured them that I will use my best efforts to settle the case amicably. At the same time, I would somewhat forcefully advise that from a tactical standpoint, the case proceed to trial it is best to be the Petitioner. The reason for this is obvious. In all civil and criminal trials, the Plaintiff/Petitioner presents his or her case first. I cannot stress enough how important this is, as it allows you to exert a great deal of control over the manner in which the trial proceeds. Of course, if the other side has already filed by the time the client comes into your office, so much for practice tip number one!

2. **Prepare a timeline.**

The next order of business is to prepare a timeline for trial preparation and the trial itself. The manner in which a case is brought to trial is governed by the Code of Civil Procedure’s very strict time limitations. Preparing a timeline and consulting it on a regular basis will help ensure that no critical deadline is missed.

3. **Do discovery.**

Effective representation requires that you be aware of every aspect of the opposing party’s case. In family law matters, we have a bit of a head start by virtue of the statutory mandate that all assets and liabilities subject to division in a dissolution proceeding be fully disclosed.10 We also have the benefit of statutory and case authority mandating that spouses act in accordance with fiduciary standards.11 I would never, however, rely solely on these authorities and forego formal discovery in any situation involving substantial assets. Also, the aforementioned authorities may be of little use in situations in which custody, ability to earn and/or various other issues common to family law matters are before the court. Written discovery, including Interrogatories, Requests for Admissions and Requests for Production of Document, are invaluable in accurately framing the issues and getting the factual information necessary to a successful resolution of the case. Of particular importance is learning the identity of any potential witnesses the opposing party might call to testify.12

Sure, technically, the other party is required to disclose everything without formal discovery, but do formal discovery anyway. Just think of it as taking a “belt and suspenders” approach. It might not be that fashionable, but your pants are sure to stay up!

4. **Gather evidence.**

Equally important is determining what evidence you will need to support your position. More often than not, this will include consulting with professionals whose “expert testimony” might be relevant to issues such as valuing real property and/or a business or professional practice, determining the ability of the other party to obtain gainful employment, and recommending what custody arrangement will be in the children’s best interest.

It is important to remember that prior to formally designating any of these professionals as an expert witness they are considered “consultants,” whose identities and opinions are not discoverable. Make sure any consultants you have retained have adequate time within which to review and analyze the applicable facts upon which their opinion will be based. Once they have formed an opinion on a particular issue, be sure to discuss it with them in detail. Only when you are confident that a consultant’s opinion and proposed testimony are both credible and able to withstand cross examination should you designate that consultant as an expert witness.

By taking this simple precaution, you avoid the risk of being embarrassed by an “expert” who, in the final analysis, is less supportive of your position than anticipated.

Become familiar with all of the provisions of the Code of Civil Procedure governing the disclosure of expert witnesses13 and file a “Demand for Simultaneous Exchange of Expert Witness Information”14 immediately upon determining which consultants you intend to call as expert witnesses. This will compel the other party to disclose its expert witnesses or be precluded from calling them to testify at trial.

5. **Take depositions.**

The next order of business is the deposition. This, to my mind, is the most important discovery tool available to trial counsel. Examining the other party and any potential witnesses he or she may call to testify, including experts, is an absolute necessity. By taking a deposition you avoid the cardinal sin of trial practice – asking a question at trial to which you...
6. Evaluate the evidence.

Now it’s time to perform a bit of the trial lawyer’s alchemy and transform the lead of all the information you have spent those many months gathering into the gold of admissible evidence [yours] and inadmissible evidence [theirs]. There’s no real magic involved, but it does take thought and preparation. Look first to what facts will be necessary to prove your case and what witnesses you will need to introduce these facts into evidence.

To insure that what you intend to have your witness testify to is actually going to result in admissible evidence, you will need to have a working knowledge of the Evidence Code. This will enable you to anticipate and successfully argue against any objections opposing counsel might raise and ensure that your witnesses’ testimony will be admitted into evidence.

When preparing for the other party’s case, use what is in effect a mirror image of the same basic approach. If your discovery has been complete and you have adequately familiarized yourself with the Evidence Code, you should have a pretty good idea as to what facts they will attempt to get before the court and whether or not you can successfully keep these facts out of evidence. Be prepared to effectively articulate your objections.


Finally, put together your “trial book.” Preparing a trial book always took me back to my high school years when my preference was a large, loose-leaf notebook with dividers. The trial book should contain everything you will need during trial including your trial brief, the witnesses you intend to call and a summary of the testimony you intend to elicit from each, a list of the exhibits you intend to introduce, the applicable law in support of potential objections and whatever else you might think of. Having a well organized trial book sure beats fumbling through your file when trying the case!

In this article, I have neither hidden nor attempted to sugar coat my opinion that there are far too many family law attorneys trying cases who lack the basic skills required to do so competently. It has not, however, been my intention to in any way demean the efforts and abilities of those attorneys who may have limited, if any, trial experience but who are attempting to adequately represent their clients. Nor is this article intended to provide a complete and comprehensive overview as to what constitutes effective trial advocacy. Instead, it is my hope that I might have motivated some among you to make the effort to develop and hone your skills as a trial lawyer. I assure you that a reputation as a capable litigator will make settling cases much easier, providing an obvious benefit to both your clients and your workload. Developing these skills takes time, hard work and brings to mind a very old, somewhat cheesy, vaudeville joke. A fellow is walking down the streets of New York when he is stopped by a passerby who asks how to get to Carnegie Hall. His reply: “practice, practice, practice!”

Endnotes:

2 Elkins, supra, at 1367 [footnote 19]
3 Elkins, supra, at 1368
4 Elkins, supra, at 1368
5 I actually observed on one occasion, after opposing counsel’s objections had continually been sustained, an attorney complain to the Court that all of the objectionable evidence should be admitted and considered because this was a family law matter, not a “real trial”!
6 “…the rules of practice and procedure applicable to civil actions generally, including the provisions of … the Code of Civil Procedure, apply to, and constitute the rules of practice and procedure in, proceedings under this code.” Family Code §210
7 Elkins, supra, at 1368
8 I need to stress that I am not advocating abandoning mediation, collaborative law or any other form of alternative dispute resolution. I am a great believer in settling cases with a minimum of conflict. The fact remains, however, that family law is a “trial practice.” When we are called upon to try a case, we owe it to our clients to do it properly. Any family law attorney who feels that they are lacking in the requisite trial skills and is unwilling to acquire those skills should refer all trial matters out to competent trial counsel.
9 There are also several very helpful practice manuals available through CEB, The Rutter Group and others.
10 Family Code §§2100 et seq.
11 e.g. Family Code §1100; In re Marriage of Feldman (2007) 153 Cal.App. 1470, 64 Cal.Rptr.3d 29
12 The witnesses a party intends to call to testify at trial is classified as “work product” and is not discoverable. It is appropriate, however, to inquire as to any person or persons who might have information concerning the case which, in effect, achieves the same result.
13 Code of Civil Procedure §§2034 et seq.
14 Code of Civil Procedure §2034.210
15 Let’s face it, most trial attorneys are frustrated actors!
16 Once again, there are also some very good practice manuals available that specifically address trial objections, admissible evidence, etc.
17 This is not, of course, to suggest that there are not many family law attorneys who possess excellent trial skills.
H's Attorney  Good morning, Your Honor. As his first witness Petitioner Harold Bickerson calls Respondent Wanda Bickerson to the stand pursuant to Evidence Code section 776.

Judge  Come forward and be sworn, Ms. Bickerson.

[clerk administers oath]

H's Attorney  Ms. Bickerson, I'm going to ask you some questions about opinions you held approximately three years ago. Is that all right?

Wanda  I suppose so. At least to the extent that I can remember what I believed three years ago.

H's Attorney  Of course. In the following questions, when I use the term “at that time,” I will be referring to three years ago, is that acceptable?

Wanda  Yes.

H's Attorney  Approximately three years ago did you have any idea what the divorce rate was in the United States?

Wanda  I remember reading a statistic of 50% around that time. So my best recollection is that three years ago I believed that the divorce rate was around 50%.

H's Attorney  At that time were you familiar with a document called a “prenuptial agreement,” sometimes nicknamed a “prenup”?

Wanda  Yes.

H's Attorney  At that time what was your understanding about what a prenup was?

Wanda  My understanding was that a prenup was an agreement people signed before they got married that would determine what happened to their property if they divorced.

H's Attorney  At that time were you also familiar with a document called a “postnuptial agreement,” sometimes nicknamed a “postnup”?

Wanda  Yes.

H's Attorney  What was your understanding about what a postnup was?

Wanda  My understanding was that a postnup was an agreement people signed during their marriage that would determine what happened to their property if they divorced.

H's Attorney  I'll show you a document that has been pre-marked as Petitioner's Exhibit 1 for identification, and ask you if you recognize it.

Wanda  Yes. That's the postnup Harold and I signed.

H's Attorney  Can you identify your signature on Exhibit 1 for identification?

Wanda  Yes – that's my signature on page 18.

H's Attorney  Can you identify Harold's signature on Exhibit 1 for identification?

Wanda  Yes – that's Harold's signature, also on page 18.

H's Attorney  How long ago was the postnup signed?

Wanda  Harold and I signed it three years ago, on October 15, 2005, just like it says here on page 18.

H's Attorney  Your Honor, I move Petitioner's Exhibit 1 for identification into evidence.

Judge  Any objection from Respondent?

W's Attorney  No, Your Honor

Judge  It is admitted as Petitioner's Exhibit 1.

H's Attorney  Whose idea was it that you and Harold sign a postnup?

Wanda  It was my idea.

H's Attorney  Why?

Wanda  Because in August 2005 I inherited a million dollars from my Uncle Jed.

H's Attorney  Was a million dollars a substantial sum of money relative to your and Harold's circumstances three years ago?

Wanda  Yes. A million dollars a huge amount of money relative to our circumstances at the time. At that time Harold and I had been able to accumulate assets totaling only about $50,000 after ten years of marriage. Rearing children is expensive.

H's Attorney  So I've heard. What was your understanding regarding the purpose of the postnup?

Wanda  Harold had an idea for a business he wanted to start, and he wanted to use my million dollars to start it.

H's Attorney  What was the problem with that?

Wanda  Well, I'm not sure I can explain what the law is on that subject. Since you're a lawyer and I'm not, that's not really a fair question, is it?
This isn't a test of your legal knowledge, Ms. Bickerson. That would be unfair. Please just tell Judge Solomon what your understanding was at the time.

My cousin Vinnie – Vinnie’s a lawyer, you see – told Harold and me that if we got a divorce, lawyers and business appraisers would receive huge fees handling our case.

This isn’t a test of your legal knowledge, Ms. Bickerson. That would be unfair. Please just tell Judge Solomon what your understanding was at the time.

Wanda

My cousin Vinnie – Vinnie’s a lawyer, you see – told Harold and me that if we got a divorce, lawyers and business appraisers would receive huge fees handling our case.

H’s Attorney

Did Vinnie tell you why that was?

Wanda

Vinnie said it was because of two things called “Piranha” and “Van Camp.”

H’s Attorney

Do you know what “Piranha” and “Van Camp” mean?

Wanda

No. Just that they make divorces expensive.

H’s Attorney

So what did you do?

Wanda

I consulted a lawyer, who prepared a postnup.

H’s Attorney

Did Harold have lawyer, too?

Wanda

Yes.

H’s Attorney

Who were the lawyers?

Wanda

I hired Teresa Truth to prepare the postnup and Harold hired Jeremy Justice to review it on his behalf.

H’s Attorney

Did Ms. Truth prepare the postnup?

Wanda

Yes.

H’s Attorney

Is it your understanding that the postnup benefits Harold or you?

Wanda

It is my understanding that the postnup benefits me.

H’s Attorney

Are you asking Judge Solomon to rule that the postnup is legally binding?

Wanda

Yes.

H’s Attorney

How is it, according to your understanding, that the postnup benefits you?

Wanda

It is my understanding that the postnup makes a portion of my inheritance community property, but not as large a portion of my inheritance as “Piranha” and “Van Camp” would have made community property.

H’s Attorney

I am now showing you lists of assets and liabilities attached to the postnup. Do you see the exhibit entitled “Wanda Bickerson's Assets And Liabilities”?

Wanda

I do.

H’s Attorney

Is the list of assets and liabilities on that exhibit accurate?

Wanda

It most certainly is!

H’s Attorney

Is it your practice to tell the truth in documents you sign?

Wanda

It most certainly is!

H’s Attorney

When someone enters into a contract with you, is he justified in relying on the statements in the contract as being true?

Wanda

Absolutely.

H’s Attorney

When someone enters into a contract with you, is it your intention that he rely on the statements in the contract as being true?

Wanda

I suppose so.

H’s Attorney

Did you know that the postnup was an important document before you signed it?

Wanda

Yes.

H’s Attorney

Did you read the postnup carefully before you signed it?

Wanda

Of course I did.

H’s Attorney

Please listen carefully to my next question. I don’t want you to reveal the contents of your conversations with Ms. Truth. Please answer my question with a simple “yes” or “no.” My question is: before you signed the postnup did Ms. Justice thoroughly discuss its contents with you?

Wanda

Yes.

H’s Attorney

Did you understand the postnup before you signed it?

Wanda

I believe so.

H’s Attorney

Was it your intention that all statements in the postnup be true?

Wanda

It certainly was.

H’s Attorney

Was it your intention that Harold rely on all statements in the postnup as being true?

Wanda

Yes.

H’s Attorney

Were all of the statements in the postnup in fact true?

Wanda

Absolutely.

H’s Attorney

Ms. Bickerson, please read the first sentence of the postnup out loud to Judge Solomon.

Continued on page 34 (Granberg)

Continued on page 34 (Granberg)
Wanda: “This agreement is not made in contemplation of divorce.”

H’s Attorney: Is that a true statement?

Wanda: Yes.

H’s Attorney: Do you remember testifying as follows a couple of minutes ago, and I quote: “My understanding at that time was that a postnup was an agreement people signed during their marriage that would determine what happened to their property if they divorced?”

Wanda: I remember saying that, yes.

H’s Attorney: Three years ago at the time the postnup was signed you believed that the very purpose of a postnup was to determine what happened to married persons’ property if they divorced, isn’t that correct?

Wanda: I guess so.

H’s Attorney: Is it still your contention that this statement in the postnup was true: “This agreement is not made in contemplation of divorce”?

Wanda: I guess so.

H’s Attorney: In your opinion, would it be fair to say that you carry a spare tire “in contemplation of having a flat tire”?

Wanda: No.

H’s Attorney: Do you carry a spare tire in your car?

Wanda: Yes.

H’s Attorney: You do so in case you have a flat tire?

Wanda: I suppose.

H’s Attorney: You don’t expect to have a flat tire, do you?

Wanda: No.

H’s Attorney: Then whose divorce did you contemplate when you made it?

Wanda: Well. My divorce, I guess. But only if it happened. And I didn’t think it would.

H’s Attorney: Do you remember testifying a couple of minutes ago that when you signed the postnup it was your belief that approximately 50% of the marriages in the United States ended in divorce?

Wanda: I remember saying that, yes. But I never thought Harold and I would divorce.

H’s Attorney: If you and Harold were never going to divorce, then why have a postnup?

Wanda: Just in case.

H’s Attorney: So your testimony is that your postnup didn’t contemplate certainty of a divorce, but it did contemplate possibility of a divorce, is that a fair statement?

Wanda: I guess so.

H’s Attorney: But the postnup would been meaningless – a useless exercise – unless there was a divorce, is that your understanding?

Wanda: I don’t know. I guess that’s right.

H’s Attorney: So you did enter into the postnup “in contemplation of divorce,” isn’t that true?

Wanda: No. I didn’t say that. The fact that something is a possibility doesn’t mean that it is planned for.

H’s Attorney: Do you do in case you have a flat tire?

Wanda: Yes.

H’s Attorney: You don’t expect to have a flat tire, do you?

Wanda: No.

H’s Attorney: In your opinion, would it be fair to say that you carry a spare tire “in contemplation of having a flat tire”?

Wanda: Objection, Your Honor. Argumentative.

Judge: Sustained.

H’s Attorney: No further questions.

Fiduciary Duties versus Not Made in Contemplation of Divorce Clause

California law is well equipped to invalidate a sneaky Divorce Preparation Postnup on breach of fiduciary duty grounds (e.g., Fam. Code §721(b); Marriage of Delaney (2003) 111 Cal.App.4th 991). The puny Not Made in Contemplation of Divorce Clause pales in comparison with such mighty fiduciary duty authorities when it comes to protecting spouses against postnup abuse.

Conclusion

Where does this leave us?

Should your next postnup include a Not Made in Contemplation of Divorce Clause?

Here are three suggestions:

1. Include the clause in the initial draft that you show your client, to help you decide if you have been asked to facilitate a Divorce Preparation Postnup disguised as a Shift Happens Postnup.

2. Continue the representation if you determine that the agreement is in good faith.

3. Omit the clause from your final draft.
Asset descriptive graphics do not sell or prove anything. However, they are helpful in providing background and orientation for the court. The background of an orientation segment can be key.

**Banking Document Supported**

The banking document supported graphic can be very boring. However, when it comes after the timeline and the asset descriptive graphics and is well practiced, I find that the “audience” is interested and ready for the “real deal” to be presented.

The expert witness’s presentation is key. Even if the expert has testified a hundred times, he should explain the demonstrative to his spouse, his office manager and a paralegal in counsel’s office. This is important because people view images differently. Through a series of explanations, the expert learns how the diagram might be interpreted and how to modify his explanations so that the story is well understood.

It is important to make this part of the testimony interesting. For example, I generally illustrate the real deal banking documents that led to the timeline discussed above. Below is a mockup of the banking document supported format.

**OK, Don’t Take Your Bows Too Early**

What’s that you say? This case was too easy. The facts were simple. Your case is much more complicated. Let’s have a look.

My first suggestion for complex situations is that you simplify the story. If you complicate the story, bring extra toothpicks for all eyelids in the courtroom.

My alternative suggestion is to adjust and modify. For example, I had a case involving three sets of transactions. Each set of transactions involved four financial accounts and 10 transactions in each.

You can try to explain the story without graphics. It is not pretty.

As many experts do under these circumstances, you can try to explain with arrows and boxes as I have shown above. That just does not work with a complex set of facts. Below is a format for complex situations that does work.

The expert simply explains that the analysis starts at row 2 and progresses through various accounts until the funds are spent on a vacation at row 6. It is a simple upper left to lower right flow and analysis. To make it convincing, add a column for Bates Stamp numbers with references to the underlying financial documents. When properly explained by the expert witness, this is a winning format for complex situations.

If you follow the above steps, I predict the opposing side will never want it presented in a courtroom. They will settle, stipulate or whatever to avoid the loss of credibility provided by such a powerful illustration when backed by Bates numbered documents.

I hope this article will allow you to look at your story-selling and prospective tracing testimony in new ways. In preparing this article, I have worked to anticipate your needs and questions. If I have not answered yours, feel free to contact me at Jim@SchaeferCPA.com or 909-625-7909 ext. 113.
This uncertain economy presents enormous challenges for family law courts, practitioners and litigants. How can we most wisely use the resources we have to meet those challenges? As family lawyers, what can we do to help ensure that courtroom time is only used where it is really necessary? What can we do to work with the courts to use their resources most wisely?

When the California Supreme Court pushed for increased funding for California’s family law court in *Elkins v. Superior Court* (*Elkins*) (2007) 41 Cal.4th 1337, it certainly wasn’t contemplating the current economic crisis. Now, California expects a multi-billion dollar budget shortfall, so further cuts are clearly in our future. The California Chapter of the Association of Family and Conciliation Courts adopted a resolution calling our failure to adequately fund our family courts a public health crisis jeopardizing the health of the children of the state. (See www.custodymatters.com for full text.)

I’m troubled to see the *Elkins* Commission launch yet another round of focus groups – we have the findings from the focus groups conducted in connection with the Family Law Court 2000 reform proposal [www.courtinfo.ca.gov/courtnews/02970397.pdf](http://www.courtinfo.ca.gov/courtnews/02970397.pdf), and more recently from the Judicial Council’s 2005 and 2006 in-depth studies of public and attorney confidence in the California courts [www.courtinfo.ca.gov/reference/4_37pubtrust.htm](http://www.courtinfo.ca.gov/reference/4_37pubtrust.htm). We know from the Public Confidence studies that the public and lawyers both perceive family courts as unfair. We don’t need further casual or superficial opinions of litigants and lawyers and other participants in the system to figure out what’s wrong. We aren’t test-marketing a new flavor of toothpaste. Instead we need experienced and smart professionals stepping back and figuring out how to increase settlements and more effectively use CDR (consensual dispute resolution) to reduce the demand on trial courts, and how to ensure that those cases needing adjudication are heard by a bench officer with substantial family law experience and expertise. Nothing else will work. Surely we could stop spending money to hunt for a magic wand when what we need is inspired leadership. This is a moment for vision, not more surveys. It seems to me that the family law community ought to turn to the people who have engaged in deep thinking about these issues rather than gathering surveys of quick takes.

One resource that the Commission might find helpful is Ury, Brett & Goldberg (1993) *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* published by the Harvard Law School’s Project on Negotiation.

While the Commission conducts the focus groups, every day is a challenge in California’s family courts and in our offices. Instead of the long-hoped-for increase in family court funding, we are probably looking at further cuts. Here in Los Angeles County (serving approximately one-third of the population), I’m
told that the Superior Court is struggling with a 50-judge shortage. Waits for mandatory child custody mediation are hitting the 90-day point, and waits for one-day, solution-focused child custody evaluations are even longer. Los Angeles’ single long-cause family law courtroom is setting trials about one year out. We will enjoy better courthouse facilities as the result of an across-the-board filing fee increase.

Meanwhile, we can anticipate a significant increase in demand on the family courts. Some pundits posit that more couples divorce during recessions, but U.S. Census Bureau data indicate that economic recessions have not had major effects on the divorce rate over the last 25 years. Economic hard times are likely to find us facing more support modification and enforcement, more complex property valuation and disposition challenges, and probably the frequency and seriousness of domestic violence.

Instead of dividing up appreciation, we may be finding ourselves trying to figure out how to get folks out of their dissolutions without a lot of debt. Lost jobs or reduced income will mean less money available for support, add-ons to support a plan? We’ve already cut back the amount of mediation time.

This state of affairs leaves us with some hard questions to answer. For example, do the benefits (and calendar time savings) associated with pre-hearing mandatory custody mediation outweigh the cost to children of being stuck in limbo without a parenting plan for three months after their parents apply to the court for a temporary parenting plan? We’ve already cut back the amount of mediation time each family gets, thereby greatly diluting the benefits of the process.

Family law practitioners are going to be taking a hard look at our overhead structure and keeping a close watch on collections. We are likely to feel pressed to accept more work (and get further behind).

Everyone will be experiencing more stress – clients, lawyers, forensic experts, CDR providers, bench officers and court personnel.

In recent years, we’ve seen the appellate courts stressing the importance of the formal adjudication procedures and demanding that family courts provide due process. In In re the Marriage of Seagondollar (2006) 139 Cal.App.4th 1116, 1119-1120, the Court of Appeal held,

Virtually from start to finish, the trial court handling this matter failed to follow or even apply the rules and procedures governing family law matters and, by failing to do so, denied Timothy the opportunity to be meaningfully heard. The rules of procedure for reaching family law decisions — contained in the Family Code, the Code of Civil Procedure, the California Rules of Court, and local court rules — are not mere suggestions. The rules of procedure are commands which ensure fairness by their enforcement.

In Elkins v. Superior Court (Elkins, supra, at p.1366, our Supreme Court expressed the same view,

That a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice. In the absence of a legislative decision to create a system by which a judgment may be rendered in a contested marital dissolution case without a trial conducted pursuant to the usual rules of evidence, we do not view respondent’s curtailment of the rights of family law litigants as justified by the goal of efficiency. What was observed three decades ago remains true today: “While the speedy disposition of cases is desirable, speed is not always compatible with justice. Actually, in use of courtroom time the present judicial process seems to have its priorities confused. Domestic relations litigation, one of the most important and sensitive tasks a judge faces, too often is given the low-man-on-the-totem-pole treatment.” (In re Marriage of Brantner (1977) 67 Cal.App.3d 416, 422, 136 Cal.Rptr. 635.)

Clearly the ideal would be the “just in time” model that industry is using. We should design our family courts so that the parties and counsel self-select the pace (regimented case management systems remind me of Lucy and Ethel on the chocolate factoryassembly line), and can expect the court to provide an experienced and expert family law bench officer to be available without huge delays when a factual or legal issue must be adjudicated.

I find myself wondering in each case: How much due process do these litigants need for a fair and wise outcome? How much due process can these litigants afford? How much due process can the family court afford to offer? What is the role of the family law attorney as gatekeeper to the client’s “day in court”? Retiring L.A. County Judge Robert Schnider observed in his presentation at this year’s State Bar Annual Meeting that informal procedures and case conferences often work well for many litigants. Not every issue requires every formality, and not every litigant can afford those processes. The challenge is to make these choices mindfully in collaboration with the client rather than sending each file through the assembly line.

The Elkins court (at p. 1346) highlighted the “unusual burdens and restrictions that have been imposed upon family law litigants at the local level in response to increasing case loads and limited judicial resources.” Justice George exhorted us to exert pressure on the government to adequately fund our family courts in order to maintain the public trust:

In light of the volume of cases faced by trial courts, we understand their efforts to streamline family law procedures. But family law litigants should not be subjected to second-class status or deprived of access to justice. Litigants with other civil claims are entitled to resolve their disputes in the usual adversary trial proceeding governed by the rules of evidence established by statute. It is at least as important that courts employ fair proceedings when the stakes involve a judgment providing for custody in the best

Continued on page 38 (Tipping Points)
interest of a child and governing a parent’s future involvement in his or her child’s life, dividing all of a family’s assets, or determining levels of spousal and child support. The same judicial resources and safeguards should be committed to a family law trial as are committed to other civil proceedings.

Trial courts certainly require resources adequate to enable them to perform their function. If sufficient resources are lacking in the superior court or have not been allocated to the family courts, courts should not obscure the source of their difficulties by adopting procedures that exalt efficiency over fairness, but instead should devote their efforts to allocating or securing the necessary resources. (See Cal. Stds. Jud. Admin., § 10.17, subd.(b)(5)(A) & (B).) As stated in the advisory committee comment to the California Standards for Judicial Administration: “It is only through the constant exertion of pressure to maintain resources and the continuous education of court-related personnel and administrators that the historic trend to give less priority and provide fewer resources to the family court can be changed.” (Advis.Com. Com., Cal. Stds. Jud. Admin., foll. § 5.30(c).)

Courts must earn the public trust. (See Cal. Stds. Jud. Admin., § 10.17, subd.(b)(5)(A) & (B).) We fear that respondent’s rule and order had the opposite effect despite the court’s best intentions.

Id. at pp. 1368-1369

Clearly it is time for the bar to step up our zealous and effective advocacy for reallocation of Superior Court resources and priorities to recognize the volume, complexity and social importance of family law courts. We are losing experienced bench officers who love family law to the strain of impossibly-large calendars. Every family law section and bar group might begin by adopting the AFCC-Cal resolution that failure to adequately fund California family courts is a threat to the public health of California’s children and families.

Meanwhile, we need to figure out how to do more with less. Here are some things for the toolbox. Email me your thoughts, and I’ll include the best suggestions in a future column.

1. Expand our use of limited scope representation. The limited scope model helps clients engage in cost-benefit analysis and have a budget for each stage of their cases. My limited scope retainer agreement1 requires a refillable retainer and prepayment for all services. The limited scope model offers particular benefits for attorneys in this economy – we aren’t signing a blank check for the entire case and are spared the need to bring a motion to be relieved if the client stops paying or the attorney-client relationship sours. The limited scope model also helps relieve the court from working with self-represented litigants on complex issues, and also reduces the number of motions to be relieved on the court’s calendar.

2. Disagree without being disagreeable. One of the greatest challenges of our work is sustaining and improving our skills at disagreeing without being disagreeable – in negotiation and litigation. As stress increases, patience decreases. Given the increased amount of stress that litigants, professionals and institutions are facing this year, I’m pushing myself to go back to reading books on negotiation2 and consensual decisionmaking, and trying to be mindful about using those skills and techniques in every setting.

3. Work out stipulations re uncontested facts. I’m working to negotiate such stipulations whenever possible, because they reduce the cost of the litigation, reduce the use of judicial time, create a history of successful collaboration between the sides in litigation and focus the decision-makers’ attention on the contested issues.

4. Prepare written offers of proof. I also have started preparing written offers of proof about what my live witnesses would say. When the court has less time available than anticipated, I find that counsel will allow the written offer of proof to substitute for live testimony to avoid delay, and then we use the remaining court time for cross-examination. If the court denies me the opportunity to make an offer of proof, I would insist on lodging the written offer, or file a declaration describing the denial, and attach the offer of proof – but so far they have been accepted.

5. Take testimony of out-of-town witnesses and parties via Skype. In one case I have in Pasadena, we’ve been taking the testimony of the mother and witnesses from Beijing via Skype. It is far less expensive than flying them in from Beijing, and (unlike CourtCall), we can observe their demeanor. The L.A. Superior Court actually has the set-up and staff to have videoconferencing in three courtrooms each day, and the charges are pretty reasonable. But with a cellular broadband modem, mikes, and an external monitor, it isn’t all that expensive to do it yourself (with court permission). The laptop with camera faces the counsel table, and the extra monitor sits on the bench.

6. Use a Code of Civ. Proc. §663 motion to vacate for errors of law or fact. This motion offers an inexpensive tool for persuading a court to correct a mistake where there are no grounds for a motion for reconsideration or new trial, without the expense and delay of a writ or appeal (a proper 663 motion can extend the deadline for appeal). Be certain to review the very short timeline and procedural requirements for this motion. But see Payne v. Rider (C055242 decided 11/4/08) for circumstances in which the motion is improper, and the deadline for appeal is not extended.

Endnotes:

1 I developed my limited scope retainer agreement after reviewing the State Bar’s model limited scope agreement at www.calbar.ca.gov/state/calbar/calbar_home_generic.jsp?id=10113.

I do not watch sports at any other time but whenever the Olympics roll around, I am obsessed. Whether it is swimming, skiing, gymnastics or curling, I follow it all. It is not the beauty of each sport, the competition, the triumph or the excitement, although those are nice. It is the journey fraught with self doubt, failure and plain old bad luck that I love. I am also fascinated with the fact that there is an objective way for the athletes to know how good they are, to know whether they are the very best. It is so hard for us as family lawyers to know if we are any good, never mind whether we are gold medalists. It would be nice to have an Olympics of our own where the standards and results are consistent and clear. Events like:

- **Short Track Decisionmaking**: Making 25 really complicated decisions in 42 seconds, all of them HAVING to be right.
- **Synchronized Exposition**: Telling the court or counsel that your client has done something really horrible in a way that supports your contention that he is very honest and credible.
- **Balance Beam**: Preparing Disclosures worthy of the Feldman court without charging your client an obscene amount of attorney fees.
- **Wrestling**: Understanding and explaining conflicting cases to an impatient client yourself because every situation is so different and there are so many avenues to go with each one. Most professionals have the ability to gauge success by the satisfaction of customers, and it is certainly nice for our clients to be satisfied.
- **Fencing**: Being able to remain compassionate and unharmed when dealing with a client who is trying to skewer you. The fact that we were able to meet payroll for the 124th consecutive time, judging on my shoulder, day in and day out, who could tell me how I am doing. Since there is no such expert, we can consider what other people say about the job we have done to and around us, the fact that we were able to meet payroll for the 124th consecutive time, that our Memorandum of Points and Authorities was fifteen pages without adjusting the font (each word a gem that was absolutely necessary) and every year the State Bar keeps renewing our membership.

But more than all that, we gauge our success in solitude using the internal barometer that lives deep inside each of us and unfortunately tends to make itself heard mostly between 2:00 a.m. and 4:00 a.m. We have those private moments where the client is happy or not or we settled or litigated or won or lost, when we say to ourselves ‘I did a good job, these people are better off because I was their lawyer.’ And there are also those sad days when we know we could have done better or been more compassionate, or when we just plain stumbled and fell.

So for us there are no Olympics, no public competitions that we can win to show we are the best, no scale by which we can show our moms that we are 92 out of 100. Our success can only be assessed by the harshest, most biased and subjective of critics—ourselves. Wouldn’t it be easier just to have ten judges holding up signs from 1 to 10 and be done with it?
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