

# FAMILY LAWYER MAGAZINE

Spring 2022



The Past, Present, and Future  
of Family Law

Roundtable with 3 AAML Presidents:  
Advancements in Family Law

10 Top Cases from the Last 10 Years

Family Law Firm Marketing in 2032

Top 10 Articles from the Last 10 Years

The Forensic Psychologist's Role  
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## MESSAGE FROM THE PUBLISHER



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



**2022** marks *Family Lawyer Magazine's* tenth anniversary. To celebrate this milestone, we decided to focus on thought leadership: highlighting changes in the culture and practice of family law over the last 10 years, and shedding light on what the future may hold.

To that end, our Editorial Director Diana Shepherd and I recorded multiple 20- to 40-minute video interviews and podcasts – all of which are available on [www.FamilyLawyerMagazine.com](http://www.FamilyLawyerMagazine.com) – with thought leaders in family law to create the Thought Leadership Interview Series. We also invited one of our Advisory Board members, Sharon Klein, to conduct a Roundtable with past and current AAML presidents to discuss advancements in family law (page 8).

We have condensed these interviews down into many of the articles in this issue, including:

- The Past, Present, and Future of Family Law (page 14)
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The entire team at *Family Lawyer Magazine* would like to thank our readers, writers, bloggers, and Advisory Board Members for your support and contribution over the last 10 years.

We especially want to acknowledge a dear friend and a family law attorney who was a giant in family law until he passed away in 2020: Steve Kolodny. Steve helped us start this magazine, and he was an Advisory Board Member and content contributor until he passed away. Thank you again, Steve, you helped make our magazine possible. ■

Dan Couvrette  
866.803.6667 x 124  
[DanC@DivorceMarketingGroup.com](mailto:DanC@DivorceMarketingGroup.com)

*Thank You*  
**For the Past 10 Years!**  
**Here's to the Next 10!**

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### **CEO/Publisher**

Dan Couvrette, Ext. 124  
[danc@DivorceMarketingGroup.com](mailto:danc@DivorceMarketingGroup.com)

### **Assoc. Publishers/Sr. Consultants**

Victor Obenauf, Ext. 138  
[victor@divorcemarketinggroup.com](mailto:victor@divorcemarketinggroup.com)  
Rodger Kauffmann, Ext. 139  
[rodger@divorcemarketinggroup.com](mailto:rodger@divorcemarketinggroup.com)

### **Editorial**

Diana Shepherd, Ext. 131  
[diana@divorcemarketinggroup.com](mailto:diana@divorcemarketinggroup.com)  
Cathy Meyers, Ext. 134  
[cathy@divorcemarketinggroup.com](mailto:cathy@divorcemarketinggroup.com)  
Natalie Bogdanski, Ext. 121  
[natalie@divorcemarketinggroup.com](mailto:natalie@divorcemarketinggroup.com)

### **Marketing/Client Services**

Martha Chan, Ext. 136  
[marthac@divorcemarketinggroup.com](mailto:marthac@divorcemarketinggroup.com)

### **Design & Digital Marketing**

Gina Tan-Bonaparte, Ext. 130  
[gina@divorcemarketinggroup.com](mailto:gina@divorcemarketinggroup.com)  
Atif Nadeem, Ext. 137  
[atif@divorcemarketinggroup.com](mailto:atif@divorcemarketinggroup.com)

### **Accounting**

Catherine Kuay, Ext. 121  
[catherine@divorcemarketinggroup.com](mailto:catherine@divorcemarketinggroup.com)  
Debby Lee, Ext. 121  
[debby@divorcemarketinggroup.com](mailto:debby@divorcemarketinggroup.com)

### **Advisory Board Members**

Joy Feinberg, Family Lawyer, IL  
Sharon L. Klein, Wealth Strategist, NY  
Kiilu Davis, Family Lawyer, AZ

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# Family Law Firm MARKETING IN 2032

Marketing is fairly new to lawyers. Here are some of the major changes that have taken place in family lawyer marketing over the last 10 years – and what may be coming your way.

By Atif Nadeem, Victor Obenauf, and Rodger Kauffmann, Family Lawyer Marketing Experts

**F**ifty years ago, it was considered unprofessional for law firms to market themselves. Lawyers listed their names and contact information in law directories, and they had printed stationery, but that was about it. Today, the attitude toward marketing has changed drastically at many levels, including the bar associations, the law firms, and the clients.

### The Change in Attitude Towards Marketing

Thomson Reuter's study on the 2021 State of U.S. Small Law Firms<sup>1</sup> shows that:

- 80% of them have websites
- Law firms utilize a wide range of marketing options
- Only 16% of law firms do not utilize any of the marketing options indicated (see chart 1)
- 25% of the small law firms said that acquiring new client business was a significant challenge and 50% said it was a moderate challenge.

Over the last 10 years, our marketing agency has definitely witnessed a change in family lawyers' attitude toward marketing – even those who are hesitant about marketing feel the need to do it. Ten years ago, having a website was considered optional; today, it is a must, and many lawyers understand the importance of having good content and search engine optimization (SEO) on their websites. Social media is no longer something they “wouldn't be caught dead” on.

Some law firms are paying to be listed on relevant directories and to display “badges” such as SuperLawyers and Best Lawyers. Videos and podcasts are now considered to be legitimate

marketing options. We have seen an increase in firms advertising on Google. Online reputation management is becoming a concern for many firms since online reviews have gained major momentum among consumers. For the most part, the bar associations have not challenged these marketing options.

Younger attorneys are embracing marketing at a greater rate than attorneys who have been practicing for 15 or 20 years, taking full advantage of all options available to them. They proudly display their Instagram, Facebook, and Tiktok accounts on their websites and email signatures. Aside from the fact that they need to generate new business and cannot wait till they have built up a reputation, social media, videos, and podcasts are simply second nature to them. They do not believe that marketing is distasteful, and they do not need to be convinced that texting is a good feature to offer on their websites.

In time, young attorneys who know nothing about the old restrictions on lawyer marketing will replace reluctant marketers, and the competition will get tougher.

### The “Pay to Play” Model Will Expand

As the leading marketing platforms become ever more entrenched in the daily lives of consumers, marketing freebies will disappear. Businesses will have to pay to be noticed by their prospective clients. Let's take two examples: Google and Facebook.

#### a. Google Ads vs. Free Organic Search Results

Google, which used to provide impartial results, has gradually given way to the “pay to play” model. Today, when you search for “family lawyer,” you will often see three ads across the top

of the page, followed by four ads down the page, and then another four ads at the bottom of the page. Most of the time, unless you scroll down the page, you cannot even see the organic/impartial search results. On smartphones (which now account for the majority of web traffic), consumers will have to scroll for quite a while before seeing organic search results.

This has led some family law firms to shift their spending from optimizing their websites to Google advertising. Google engineered this change because the money law firms pay for SEO does not go to Google – but payment for Google ads does.

#### b. Your Facebook Page

Similar to Google, Facebook has to generate revenue, so it keeps on changing its criteria that determine who will see your posts. They too want to push you towards buying their advertising options.



### Ever-Changing Technology and the Proliferation of Marketing Options

Technology has grown by leaps and bounds in the last 10 years, and it is now growing exponentially. With new technology comes a lot more marketing options and an even more pronounced change in the behavior of family lawyers' potential clients.

The internet has given birth to endless websites, directories, and social media for consumers to pursue when they need a family lawyer. Online content and reviews have become a factor when choosing a professional or service. Websites like AVVO.com, launched in 2007, has over eight million visitors a month – largely because of its lawyer rating system. This relative newcomer forced the more established Findlaw and Martindale Hubbell to change.

Then there are the big technology companies that are investing heavily in new products. Take, for example, the metaverse created by Meta, the parent company of Facebook. Meta is developing and betting on the 3D experience being the next big thing for consumers. Metaverse is touted as “the next evolution of social connection.” It has 3D spaces that will “let you socialize, learn,

collaborate and play in ways that go beyond what we can imagine.”

The metaverse is meant to encompass everything that exists virtually, including virtual real estate parcels that are being purchased by different companies and celebrities. Some of the parcels' prices have already increased by 10 times! The metaverse offers a variety of user experiences and hyper-realistic graphics. However, most developers and investors admit the metaverse is at least 10 years away from mass adoption.

A major law firm, Arent Fox, has already purchased a virtual property next to parcels purchased by big brand names in the metaverse, hoping that their popular neighbors will help bring visitors to their virtual office where lawyers can socialize with clients and meet for business. Arent Fox's crypto chair James Williams said: “We don't know what the metaverse will be like in five years, but we're not waiting five years to find out.”<sup>2</sup> This is their marketing attitude.

### The Specialization of Marketing Family Law Firms

We see the change in technology, the proliferation of marketing options, and the trend of family law firms adopting marketing continue. As family lawyers gain more experience and become more educated about marketing, we foresee them taking a page from sophisticated marketers by creating an in-house marketing position with an annual marketing budget and marketing strategy. Their marketing staff will have the ability to assess and work with ethical providers with relevant marketing expertise.

Gone will be the practice of using a paralegal to do the firm's own Google advertising or to work with a marketing agency. Smaller firms could share the use of marketing consultant if a dedicated staff position is beyond their budget. Having a knowledgeable marketing expert dedicated to the marketing of the law firm will result in a more cohesive marketing effort vs. an unplanned, ad hoc “marketing” spend – thereby improving the overall effectiveness and efficiency of the law firm's marketing endeavors.

We predict that more marketing agencies will start to specialize in marketing family lawyers the way our agency has been doing since 1995. A marketer specializing in family law firms is no different from lawyers specializing in family law. We look forward to this future. ■

[1] [www.lawyermarketing.com/white-papers/state-of-small-law-firms-report](http://www.lawyermarketing.com/white-papers/state-of-small-law-firms-report)

[2] [www.abajournal.com/news/article/major-law-firm-buys-property-in-the-metaverse-and-opens-virtual-office](http://www.abajournal.com/news/article/major-law-firm-buys-property-in-the-metaverse-and-opens-virtual-office)



*Victor Obenauf and Rodger Kauffmann are Senior Consultants and Associate Publishers, and Atif Nadeem is Digital Marketing Lead at*

*Divorce Marketing Group, a marketing agency 100% dedicated to marketing family law attorneys and professionals.*

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## A Roundtable with 3 AAML Presidents: Advancements in Family Law



Sharon Klein



Cary Mogerman



Maria Cognetti



Peter Walzer

The current and two former American Academy of Matrimonial Lawyers presidents, Cary Mogerman, Maria Cognetti, and Peter Walzer, joined in a discussion moderated by Sharon Klein, a divorce financial expert and wealth advisor.

This powerful team provides insights on notable past changes in family law, and offers predictions about how the future may unfold.

**Sharon Klein:** I'm excited to moderate this discussion with three esteemed panelists. Let's start with the business of family law. Peter, how has it changed over the past 10 years – and what do family law firms need to do to adapt, evolve, and prosper in the future?

**Peter Walzer:** Adaptability is key. We've learned that in the last 10 years, especially in the last two years with the pandemic. We've had to adjust to Zoom everything: court appearances, mediation, client interviews. In addition to the technological changes, the practice of family law has become very specialized, and we need to bring in many

other professionals to handle complex cases. For example, we've had to bring in corporate lawyers to deal with entities holding limited liability companies and estate planning specialists to deal with the children and other stakeholders in the family businesses.

There have been major tax law changes in the last few years. The elimination of the alimony deduction has caused tremendous changes in how we look at, build, and arrive at settlements. The tax issues are getting even more complex in the division of property. We need a team of professionals to handle a complex family law case.

**Sharon:** Indeed. For example, the elimination of tax-deductible alimony payments can be a trap for the unwary. The advantageous tax-deductible treatment is grandfathered for people who divorced before 2019. But prenuptial agreements signed before 2019 are likely not grandfathered. Even if a prenuptial agreement was signed with the assumption that the alimony would be deductible, that's probably not going to be the case, and that's a big deal. A collaborative team of advisors is much more likely to identify and tackle important issues like that.

**Peter:** That's so true. Of course, you also need the cooperation of the judge who's going to issue the alimony order and recognize that it would need to be adjusted for the non-deductibility of alimony.

**Sharon:** From a financial perspective, there's a greater awareness of how important it is to take a team-based approach when advising clients. That means having a multi-disciplinary team with the family lawyer, a financial advisor, a trusts & estates lawyer, and an accountant at every stage. The practice of family law has also become more complex – partly because asset analysis has become more complicated. We have cryptocurrency, non-fungible tokens, and a myriad of other complexities. It has become key for financial advisors to help clients understand the nature and tax characteristics of assets and provide sophisticated analytics to inform decisions about how best to divide assets in divorce. Clients and lawyers are attuned to how a team approach can position them for success, and that's a welcome development.

**Peter:** If the assets are in trusts and in corporations, the tax consequences are not always clear to family lawyers. We need the expertise of tax lawyers, forensic accountants, tax accountants, real estate specialists, and more to help us engineer these transfers. And when people have their assets in irrevocable trusts, it's much more difficult to divide them – and the divorce court may not even have jurisdiction over these assets.

**Cary Mogerman:** A lot of the topics we are discussing are interconnected: the way we run our offices, the substance of family law, the business end of it, and how all of that has changed in the last 10 years.

**Maria Cognetti:** In the last couple of years, staffing issues have become crazy! I'm struggling to find paralegals and regular clerical staff. People are now used to working from home and

have developed a whole different lifestyle. During COVID, you still had to be at your desk at 9:00 a.m., but you could go straight from bed to work in seconds. You didn't have to dress up. Now, I find that attorneys I've hired recently have trouble being on time, dressing appropriately, and putting in a full day's work. They aren't used to coming into an office. Over the next 10 years, I hope we'll get back to people wanting to come to work, be active lawyers, and be part of a team.

**Sharon:** There have been a lot of changes during COVID that have affected culture, spirit, and connectivity.

How has the practice of family law changed over the past 10 years, and what needs to change in the practice of family law as we look toward the future?

**Cary:** There are positives and negatives to all change. If we're talking about the craft of lawyering and representing people in the dispute, we're trying fewer cases today than we were 10 years ago – which is good for clients because if we're not trying cases, we're settling them. Trying fewer cases is really a reflection of enhanced predictability as to the application of the law; most of the dark corners and ambiguous areas have been litigated and passed upon by our appellate courts.

The bad news is that there is a diminution in trial advocacy skills and opportunities to gain courtroom experience. Trying disputes in court is always going to be part of what we do, and the profession is suffering because of that diminution.

We're seeing a loss of collegiality and personal contact. Ten years ago, email became the default mode of communication. Unfortunately, emails can't convey warmth or inflection, and people frequently talk past each other in emails. When you're on the phone working through a problem and responding in real-time, that's a real plus for the client that email can't deliver.

We're also witnessing the commoditization of our practice. Legislatures are trying to pass laws that remove the discretion of a trial judge by attempting to put disputes into a series of checkboxes. Checkboxes might seem efficient, but family law is inefficient by its nature. When a client wants a well-considered opinion about an issue, sometimes you have to ruminate, and rumination takes time.

**Maria:** Ten years ago, we didn't have technology in our courtrooms; now, it's a rare courtroom that doesn't have it.

Unlike Cary, I'm actually doing more litigation. I do a lot of custody litigation, and COVID really highlighted the parenting differences between co-parents. They have some serious issues – like whether or not to vaccinate the kids – and a lot more of those issues are ending up in court.

Another big change is a marked increase in sloppy lawyering. I've felt embarrassed for opposing counsel when they show up to Zoom court in a t-shirt and shorts.

We're also witnessing the commoditization of our practice.

**Sharon:** Let's talk about clients. How has your clientele changed in the last 10 years, and how do you see it changing in the future? Are they more informed now? Are they more confused now, more peaceful, more anxious? How would you describe it?

**Maria:** They're more difficult. When email caught on, clients started to expect a fairly quick response. But now they text you day and night. I had someone who texted me all day on a Sunday, and each text would say, "Please respond in 10 minutes." I had another client – a large, complex case – and 99% of the time, we were always available and gave her the best service. One day, she wanted something done immediately, and the person handling it was out sick with a very serious medical matter. I told the client as much as I thought she needed to know, and she responded, "I don't care." I suggested that we weren't the firm for her if that was her attitude about this person who had worked faithfully for her. Ten years ago, when someone didn't like you, they might post a nasty comment on Facebook. Now, they can give you a bad review on Google and it is there for all time.

**Sharon:** No matter how much things have changed, one thing I find is timeless is that divorcing people are looking for advisors who are sensitive to the fact that they are going through a very emotional time. I believe clients want to know you care before they care how much you know.

**Peter:** We are a concierge service. We charge a lot of money, and our clients expect the immediate return of a text, email, or call. If one team member is out of commission, another will step forward. We're like emergency doctors – there for them when they need us.

The practice of family law has become very specialized, and we need to bring in many other professionals to handle complex cases.

I want to address social media from an evidentiary point of view. Clients are posting evidence of what they're doing to each other on Facebook, TikTok, Instagram, and messaging, texting, and WhatsApping. I say my client didn't do something, and the opposing counsel presents Facebook posts showing they did. Of course, lawyers have to distinguish between what's real and what's fake; the authentication of texts or posts on social media has become critical.

**Cary:** There will always be intransigence in family law clients; it is worse at the moment, and I hope it gets better. Some cases are real marathons, which takes a lot out of people. I'll run into a former client a couple of years later, and they now recognize how helpful we were and how much support we provided at a difficult time. It takes a special person to do this work, and we're all that kind of person. You have to be able to power through the difficulty while providing your best work for the client.

**Sharon:** Family lawyers are really champions for their clients. It does take a very special professional to help people through this difficult time when their judgment may be clouded and they may not be able to make decisions easily. I see that all the time and I really admire family lawyers for what they do. ■

This article has been excerpted from a longer video interview. To watch the video or read the full transcript, go to [www.familylawyermagazine.com/articles/roundtable-advancements-family-law](http://www.familylawyermagazine.com/articles/roundtable-advancements-family-law).

**Sharon Klein**, senior vice president and head of National Matrimonial Advisory Practice, Wilmington Trust, was selected by *Forbes* as one of the Top 40 Women Wealth Advisors in the U.S., by *Crain's* as one of the Most Notable Women in Financial Advice and has been inducted in the Estate Planning Hall of Fame. [www.wilmingtontrust.com/divorce](http://www.wilmingtontrust.com/divorce)

**Cary Moger** is a principal at Carmody MacDonald, P.C. Based in St. Louis, Missouri, Cary is the current president of the AAML (2021-2022) and a past recipient of the "Roger P. Krumm Family Law Practitioner of the Year Award" of the Missouri Bar Family Law Section. [www.carmodymacdonald.com](http://www.carmodymacdonald.com)

**Maria Cognetti** is a partner in Cognetti Law Group in Harrisburg, Pennsylvania. She is the past president of AAML (2013-2014) and past Chair of the Pennsylvania Bar Association, Family Law Section. Maria is also the Chair of the joint state Domestic Relations Advisory Committee on Custody. [www.cognettilaw.com](http://www.cognettilaw.com)

**Peter Walzer** is the founding partner of the Southern California law firm Walzer Melcher & Yoda, LLP in Woodland Hills. He served as president of the AAML (2018-2019) and is the past chair of the Los Angeles County Bar Association's Family Law Section. [www.walzermelcher.com](http://www.walzermelcher.com)

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# TOP 10 CASES

## FROM THE LAST 10 YEARS

To help celebrate *Family Lawyer Magazine's* tenth anniversary, here is a top ten list of the most important/influential family law cases over the last decade.

By Laura W. Morgan, Family Law Consultant

Putting together a list of the ten most important/influential family law cases in the last ten years was difficult. As we all know, family law is, for the most part, a matter left to individual states. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court stated that federal courts could not regulate “family law (including marriage, divorce, and child custody).” 541 U.S. at 564. See also *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (family law is a matter “virtually exclusive” to the states). Thus, federal cases affecting family law in the last ten years were few and far between. But when the Supreme Court or another federal court weighs in on a family law matter, you know the opinion is important.

It was also difficult to decide which state cases to include. Sometimes, a state supreme court will issue a decision that is decidedly influential, because other states adopt the reasoning of the ruling. *Tropea v. Tropea*, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996), which set out the standard for considering the relocation of the custodial parent, comes to mind. It can be hard, however, to predict if a recent state supreme court will be influential because influence takes time. We may not know if a decision issued by a state supreme court today is truly influential until years from now.

With these caveats in mind, here is my top ten list of important/influential family law cases over the last ten years. Reasonable minds may differ.

### United States Supreme Court

**1** *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (June 17, 2021).

The City of Philadelphia contracts with private agencies to certify and support foster parents. City contracts and ordinances prohibited these agencies from discriminating on the basis of sexual orientation. When Catholic Social Services refused to commit to certifying same-sex foster parents, Philadelphia refused to renew its contract. Catholic Social Services sued, arguing the city violated the First Amendment by forcing CSS to either espouse support for same-sex marriage or abandon its charitable mission. Philadelphia argued CSS could not claim a right to serve as a City contractor while refusing to follow anti-discrimination rules designed to meet the City’s duty to protect LGBTQ children and parents in the foster care system. The Supreme Court held that the city violated CSS’s right to free exercise. The Court reasoned that the Philadelphia law was not neutral and generally applicable because it allowed for exceptions to the anti-discrimination requirement at the sole discretion of the Commissioner. Additionally, CSS’s actions do

not fall within public accommodations laws because certification as a foster parent is not “made available to the public” in the usual sense of the phrase. Thus, the non-discrimination requirement is subject to strict scrutiny, which requires that the government show the law is necessary to achieve a compelling government interest. The government failed in that showing. [www.supremecourt.gov/opinions/20pdf/19-123\\_new\\_90lb.pdf](http://www.supremecourt.gov/opinions/20pdf/19-123_new_90lb.pdf)

**2** *Monasky v. Taglieri*, 140 S. Ct. 719 (February 25, 2020). The first question presented concerned the standard for habitual residence: Is an actual agreement between the parents on where to raise their child categorically necessary to establish an infant’s habitual residence? The Supreme Court held that the determination of habitual residence does not turn on the existence of an actual agreement. The second question was: What is the appropriate standard of appellate review of an initial adjudicator’s habitual-residence determination? The Court held that neither the Convention nor ICARA prescribed modes of appellate review, other than the directive to act “expeditiously.” The first-instance habitual-residence determination under the Hague Convention was subject to deferential appellate review for “clear error.” Thus, under the Hague Convention, a child’s “habitual residence” depends on the totality of the circumstances specific to the case, not on categorical requirements such as an actual agreement between the parties, and such a determination is subject to review for clear error. [www.supremecourt.gov/opinions/19pdf/18-935\\_new\\_fd9g.pdf](http://www.supremecourt.gov/opinions/19pdf/18-935_new_fd9g.pdf)

**3** *Sveen v. Melin*, 138 S. Ct. 1815 (June 11, 2018). Mark A. Sveen and Kaye L. Melin were married in 1997. Sveen purchased a life insurance policy that year, and the following year he named Melin the primary beneficiary, and his children the contingent beneficiaries. Sveen and Melin divorced in 2007, and Sveen died in 2011. Meanwhile, Minnesota had changed its probate code in 2002 to apply a revocation-upon-divorce statute to life insurance beneficiary designations. Sveen had never changed the designation on his life insurance policy, and Melin was therefore still listed as the primary beneficiary at the time of his death. The Supreme Court held that Minnesota’s automatic-revocation-on-divorce statute did not substantially impair pre-existing contractual arrangements, and thus, application of the statute to revoke the ex-wife’s primary beneficiary designation under life insurance policy that was made before statute’s enactment did not violate the Contracts Clause of the Constitution. [www.supremecourt.gov/opinions/17pdf/16-1432\\_7j8b.pdf](http://www.supremecourt.gov/opinions/17pdf/16-1432_7j8b.pdf)

**4** *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (June 12, 2017). In this case, the Supreme Court cured the unequal treatment of children born to unwed U.S.-citizen fathers by extending a burden to children of unwed U.S.-citizen mothers. The particular statute at issue in the case regulates the transmission of citizenship from American parents to their foreign-born

children at birth, a form of citizenship known today as derivative citizenship. When those children are born outside marriage, the derivative citizenship statute makes it more difficult for American fathers, as compared with American mothers, to transmit citizenship to their foreign-born children. Morales-Santana’s constitutional challenge required the Justices to grapple with two crucial and contested issues: the extent to which constitutional gender equality principles govern regulation and recognition of family relationships and the nature of the judiciary’s role in the enforcement of the Constitution at the border. The Supreme Court declared that the law governing the acquisition of citizenship violates equal protection principles. They remedied the equal protection violation by “leveling down”: that is, rather than giving unmarried fathers and their children the benefit of the more generous standard in the citizenship statute, the Court nullified that standard for unmarried American mothers and their children. [www.supremecourt.gov/opinions/16pdf/15-1191\\_2a34.pdf](http://www.supremecourt.gov/opinions/16pdf/15-1191_2a34.pdf)

**5** *Howell v. Howell*, 137 S. Ct. 1400 (May 15, 2017). A veteran’s ex-wife filed a motion to enforce the divorce decree’s division of military retirement pay after the veteran waived a portion of such pay in order to collect nontaxable service-related disability benefits. The Supreme Court held that states were prohibited from increasing, pro rata, the amount a divorced spouse received each month from his/her veteran’s retirement pay in order to indemnify the divorced spouse to restore that portion of retirement pay lost due to veteran’s post-divorce waiver of retirement pay to receive service-related disability benefits. The Court did not rule out the parties agreeing to such indemnification, although later cases have misinterpreted *Howell* to so hold. The Court also did not rule out increasing alimony to account for the lost property benefit. [www.supremecourt.gov/opinions/16pdf/15-1031\\_hejm.pdf](http://www.supremecourt.gov/opinions/16pdf/15-1031_hejm.pdf)

**6** *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584 (June 26, 2015). The Supreme Court held that the Constitution entitles same-sex couples to civil marriage “on the same terms and conditions as opposite-sex couples.” As we all know, the game-changing nature of this decision cannot be overstated. This decision led to *Pavan v. Smith*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 2075 (June 16, 2017), which held that an Arkansas statute that denied married same-sex couples access to the constellation of benefits that Arkansas linked to marriage was unconstitutional to the extent that the statute treated same-sex couples differently from opposite-sex couples. (The Arkansas statute generally required the name of the mother’s male spouse to appear on the child’s birth certificate when the mother conceived the child by means of artificial insemination, but allowed omission of the mother’s female spouse from her child’s birth certificate.) [www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf)

Cont. on page 36

# The Past, Present, and Future of Family Law



Eight experts offer their views on where the family law system, culture, practice, and technology was 10 years ago, where we are today, and where we are headed tomorrow.

Edited by Diana Shepherd,  
Editorial Director



L-R: Kiilu Davis, Joy Feinberg Jay Fishman, Ken Friedman, Lori Gephart, Randy Kessler, David M. Lederman, and Judge Michele Lowrance (Ret.)

**As** part of *Family Lawyer Magazine's* Tenth Anniversary celebrations, we invited eight thought leaders in the family law arena to share their thoughts on how technology, alternative dispute resolution, diversity, self-help divorce, business valuation, and the practice of family law have evolved over the last decade, the current status quo, and where we might be 10 years from now. Read on to discover their shared views, different perspectives, and how their predictions might affect your future practice.

## THE PAST

### The Culture

For 19 years, Judge Michele Lowrance (Ret.) sat on the bench in Chicago's family court where she had a front-row seat to high conflict litigation in court. "High conflict litigation was the thing they made movies and wrote articles about, the thing we heard about from our neighbor down the street who had a bloodbath in court," she reflects. "I realized I was participating in a process that was eviscerating families, people's souls, people's ability to go on with their lives in a productive, healthy, resilient manner."

A decade ago, some families found it difficult to even get to court, says California family lawyer David Lederman. "About 30 to 40% of the time, litigants wouldn't show up in court for Department of Child Support Services cases because they would have to leave their job for the day, which many couldn't afford to do."

Although the 14th Amendment Equal Protection Clause took effect in 1868, a quick glance at history shows that all men and women were not to be treated equally under the law. Not everyone was thought of as being equal. "It's imperative for us to look at that statement and ask, 'Do people actually believe that?' Because if they don't believe it, then we're always going to be fighting for true equality," says Arizona family lawyer Kiilu Davis, past Chair of the AAML's Diversity Committee. "For a large part of this country, black lives did not matter for a very long time. At one point, we were only considered to be three-fifths of a person."

### The Practice

When she looks back over the last 10 years, Chicago family lawyer Joy Feinberg thinks that things have improved for women in family law. "There are a lot more women in family law today, but we still have a way to go," says Feinberg, a former president of the USA Chapter of the IAML and the Illinois Chapter of the AAML. Over the last two years, she notes that COVID caused a sea change in the practice of family law. "We had to learn how to do things outside the office and courtroom – how to effectively adapt our courtroom skills to be able to tell our stories and connect with the judge over Zoom. That was not easy," she admits.



In 2011, Judge Lowrance released her book *The Good Karma Divorce: Avoid Litigation, Turn Negative Emotions into Positive Actions, and Get On with the Rest of Your Life* (HarperOne) to guide divorcing couples away from bitter courtroom battles towards a more hopeful future. "We started to shift away from high conflict litigation in court as the model towards less adversarial processes such as mediation," she says.

Lori Gephart, president of the International Academy of Collaborative Professionals and a collaborative divorce coach in Pennsylvania, agrees that interest in and knowledge about ADR methods has been rising. "Ten years ago, most people had never heard of Collaborative Divorce; they only learned about it when they came in for a consultation," she says.

### Technology

When Lederman started his solo practice in 1996, he knew he would have to compete against firms that had much larger infrastructures. "I was the practice," he recalls. "I knew I'd need to rely on technology to help me maximize my efforts, and make myself as efficient as I could so I could scale up from there."

Technology also led to the introduction of the self-help divorce market. The Divorce.com platform pioneered online divorce paperwork more than 20 years ago, "offering a self-help approach to the segment of the market who needed an affordable solution to their uncontested, simple divorce," says Ken Friedman, General Counsel and Chief Industry Officer for Divorce.com.

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**“In truth, the practice of family law has become much more sophisticated.”**

~ Joy Feinberg



Past, Present & Future / Cont. from page 15

## THE PRESENT

### The Culture

Many recent studies point to the damage divorce can do to children, and there is a growing awareness that divorcing couples should not fight in front of the children. “We now know the damage that does,” says Lowrance. “This is a new consciousness. There’s an effort being made to protect children of divorce.”

Today, she says, we talk about divorce as the restructuring of a family so children can be proud of – not diminished by – their parent’s divorce. “Alternative dispute resolution, whether it’s mediation or collaborative, is now a part of the conversation. Even in the really high asset or high conflict cases, the lawyers know that they have to be skilled at mediation to stay relevant.”

Randy Kessler, a family law lawyer and mediator in Georgia, believes that more and more clients are addressing their mental health issues as they go through divorce today – and with less shame about how that might affect their outcome. “When a client says, ‘Would it look bad if I went to see a therapist?’ I say, ‘Are you kidding me? The judge is going to say ‘Good for you’ for acknowledging you need some help,’” he says. “Today, when I ask clients what medications they are on and we hear about antidepressants, I don’t bat an eye.”

Davis says he’s had clients ask whether a judge ruled a certain way because of their skin color. “But how do I put that in motion for reconsideration or a motion to amend? Who do I go to? I could be viewed as just ‘another angry black man’ or as someone who wants to drag race into everything.”

### The Practice

Over the last decade, as divorce has become less adversarial, there has been a marked growth in mediation and collaborative divorce.

“We’ve been seeing people coming into the office requesting collaborative divorce more and more frequently,” says Gephart. “This tells us that the collaborative process is really becoming more recognized and that the out-of-court interest-based process is really resonating with people who are considering divorce.”

The IACP’s Diversity, Equity, and Inclusion Committee is working to increase ethnic diversity in collaborative communities and professional organizations in terms of practice groups and professionals who are available to do this work. “We’re focusing on addressing racism and white privilege,” Gephart says. “We’ve also seen that many LGBTQ people prefer the support of a collaborative practice team over going to court.”

Over the last 10 years, Davis has seen more diversity on the bench: more women, people of color, cultures, and religions. “That’s obviously a plus,” he says, “But we also have to recognize that there’s a lack of understanding about cultural differences and what makes us different. We clearly have built-in cultural and implicit biases, and we must continue to educate individuals about these biases. For example, we still have some states that believe mothers should automatically be the primary residential parent, which is backward thinking.”

“Nobody comes to me today without having first checked me out on social media, on our website, and on the internet,” says Feinberg. “People ask a lot of questions and, in truth, the practice of family law has become much more sophisticated.” She adds that the language lawyers and clients use has also become more equitable and accessible. “Right now, you can’t use many words that were acceptable

10 years ago,” says Feinberg. “Wordsmithing today must take into account what the actual word is, what the connotation is, and also how younger people will see it. Our younger lawyers won’t tolerate certain things.”

On a more practical level, Kessler points to improved efficiencies for family lawyers over the past decade. “I think family law has evolved to the point where lawyers can be much more efficient,” he says. “We don’t need a lot of staff. Some lawyers are sole practitioners who are really able to do it all. Ten years ago you couldn’t do it on your own, period.”

Business valuator Jay Fishman believes the current challenges for valuation firms are both internal and external. “Internally, how do you put together a cohesive team if you’re all going to be remote? And externally, what is the future of the client’s business? It would depend on what industry they’re in and how the macroeconomic factors impact them.

“Value is a prophecy into the future: it’s the present worth of future benefits,” he adds. “You can’t just say, ‘The business did this amount this year and I’m going to multiply it by X and that’s going to be the value,’ because we haven’t reached a stable point from which to estimate the future.” He asserts that valuers must use multi-period instead of single-period models because no one knows when “business as usual” will resume. “I’m not sure that 2022 is going to be a base year from which to predict anything,” he concludes.

## Technology

Lederman has two brick-and-mortar offices, but firm work is currently being done in 11 locations. “When COVID hit in 2020,” he says, “it took us about an hour to simply point the phones to cell phones. People took their laptops, stayed at home, and we had no downtime.” For Lederman to consider new technology, it “must fit the standards of speed, security, stability – and sometimes be scalable.”

The COVID-19 pandemic created the conditions and demand for videoconferencing technology to accelerate at an astonishing rate. “The increase in access to justice through the use of virtual hearings has been amazing,” says Lederman. “It’s led to efficiencies for the courts and for the attorneys, which has led to cost-savings for the litigants.” After the courts went virtual, the attendance rate for hearings has been almost 100%, he adds.

“There’s been so much pain since the pandemic began, but it forced the legal profession to adopt technology to create better lawyers and a better process,” says Lederman.

“Courts now embrace technology,” says Kessler. “I can do a mediation, take a break, pop into a court date, then go back to my mediation. Judges enjoy it. Courts love it.

They can be much more efficient.” He adds that many clients have become tech-savvy. “They come in with their own laptop and say, ‘Let me show you a spreadsheet.’” Lawyers look like they are behind the times if they aren’t keeping up with client expectations, he adds.

The reach of the self-help divorce market has also expanded over the last decade as websites became more user-friendly on the front end and more sophisticated on the back end. “We don’t have exact numbers for the self-help divorce market in 2012, but our best guess is that fewer than 50% of divorces were self-help in 2012 compared to 70% to 80% in 2022,” says Friedman.

When asked whether self-help divorce is taking business away from family lawyers, Friedman says no. “The online legal solutions industry’s primary customers are those who never would have gone to a lawyer in the first place,” he says. Although he freely admits that self-help, online divorce isn’t for everyone, he believes that their service could help solve some of the current issues with pro se litigants.

“In California,” he says, “the Judicial Council Task Force on Self-Represented Litigants reported that approximately 80% of dissolution petitioners were unrepresented by the end of their case. That’s an access to justice problem for the public, an efficiency problem for the courts, and an opportunity for those looking to help – both attorneys and companies like Divorce.com.”

## THE FUTURE

### Culture

The experts we spoke with all agree that attitudes towards therapy will continue to shift towards the positive. “More people are getting therapy and more people are getting their children therapy,” says Lowrance.

Gephart says she pictures families growing stronger after collaborative divorce in the future. “They’ll learn the value of working through challenges and peacefully co-parenting,” she says. “Children of divorce will feel more secure and supported with fewer negative consequences from divorce.”

Davis believes that if people are willing to be educated – about race, gender, religion, disability, etc. – then we will move towards equality. “When people decide that they don’t want to have that conversation, we become stuck in quicksand. We currently have a groundswell of people who are saying, ‘My eyes have been opened,’ and that gives me hope.” Although he doesn’t believe that we will see true equality in his lifetime, Davis is heartened by the thought that, “We’ll continue to push that rock until it gets over the hill completely. Hopefully, that will happen within my grandchildren’s lifetimes.”

### Practice

When asked if he thinks the business of family law will keep moving in a more progressive direction, Lederman says he

doesn't think there's a choice. "It would be really hard to justify going backward. The increase in access to justice has been amazing."

Feinberg believes creativity is the key to a successful future practice. "When working on family law cases where there is generational wealth, businesses, and significant assets, you must be creative," she notes. "I believe the ability to be creative about something will continue to set you apart as a family lawyer."

How couples divorce will also change, predicts Gephart. "I see collaborative practice becoming the go-to method for divorce and litigation really becoming more of the rare alternative," she says. "Families with children will recognize the benefit of minimizing conflict since the high conflict between parents is one of the predictors of children who will struggle during and after their parents' divorce."

Fishman believes that family law lawyers will need to pay more attention to the forensic accounting side of the business in the future. "I think that when economics are tough, there's a lot more demand for lifestyle analysis and the calculation of maintenance," he says. "Plugging it in a program and coming out with an answer is not going to work all the time."

For Fishman, one of the most interesting things about being a business appraiser is getting to see how hundreds of businesses work. "Tomorrow, I could be looking at a law practice; next week, I could be looking at a high-tech company or a media personality. Appraisers need to spend more time understanding a business and less time cranking

out macroeconomic variables and models that say whether the specific company's risk premium is six or ten."

"I'm heartened that there are a lot of younger people getting into the profession," he says. "Those of us who have been in the business a long time have a responsibility to create opportunities for the next generation and, to the extent necessary, to counsel them."

### Technology

Friedman thinks that self-help divorce will become more intuitive, easier to navigate, and more focused on providing solutions based on customers' needs. "That's why we're constantly upgrading the system and offering education, on-demand mediation."

The platform will soon offer access to attorneys. "Some of our customers can't or don't want to figure everything out themselves as they go through the paperwork. They may need to ask a few questions, limited scope help, or even full representation." He is excited to work with family lawyers who are interested in offering their services to divorce.com customers who need their legal expertise.

The experts agree that family law will continue to be enabled by technology and it is incumbent on lawyers to keep pace with the tools that will help them become more efficient. "It's only going to go forward, and it's to your benefit to adopt the technologies available to you," says Lederman. "It's really almost unconscionable not to adopt the tools that make you better at what you do."

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This article has been excerpted from our Thought Leadership Interview Series of videos and podcasts. To access the full interviews, go to [www.familylawyer magazine.com/articles/thought-leaders-series](http://www.familylawyer magazine.com/articles/thought-leaders-series).

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**Kiilu Davis** is Managing Partner of KDLaw in Arizona. The former Chair of the AAML's Diversity Committee, he is a Certified Family Law Specialist and a Diplomate of the American College of Family Law Trial Attorneys; he also sits on Family Lawyer Magazine's advisory board. [www.kdlaw.org](http://www.kdlaw.org)

**Joy Feinberg** is a partner at Davis Freidman Law in Illinois. She is a Diplomate of the American College of Family Trial Lawyers and a former President of the USA Chapter of the IAML, the Illinois Chapter of the AAML, and the AAML Foundation. [www.davisfreidman.com](http://www.davisfreidman.com)

**Jay Fishman** (FASA, MBA) is a Managing Director of Financial Research Associates. He is also a recipient of the American Society of Appraisers' Lifetime Achievement Award, editor of the Business Valuation Review, and co-author of several books. [www.finresearch.com](http://www.finresearch.com)

**Ken Friedman** is the General Counsel and Chief Industry Officer for Divorce.com and its portfolio of family law companies. He was previously vice president and Deputy General Counsel at LegalZoom.com, Inc. [www.divorce.com](http://www.divorce.com)

**Lori Gephart** is a collaborative divorce coach, licensed psychologist, and mediator at North Hill Psychological Associates. She is a leader in the international Collaborative Law community and past president of the Collaborative Law Association of Southwestern Pennsylvania. [www.nhpa.com](http://www.nhpa.com)

**Randy Kessler** is a partner at Kessler & Solomiany, LLC, a family law firm in Georgia. He is an author and an adjunct professor at Emory Law School. He has served as the Chair of the ABA Family Law Section, and the Georgia and Atlantic Bar Association. [www.ksfamilylaw.com](http://www.ksfamilylaw.com)

**David Lederman** is the founder of The Law Offices of David M. Lederman in California. A Certified Specialist in Family Law, he served as chair of the State Bar's Family Law Executive Committee. [www.ledermanlaw.net](http://www.ledermanlaw.net)

**Judge Michele Lowrance** (Ret.) is a leader in ADR as a mediator at JAMS in Illinois. A recognized author and thought leader on family law, she has 40 years' experience as a divorce attorney and judge, and she became a divorce mediator in 2014. [www.michelelowrance.com](http://www.michelelowrance.com)

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Family lawyer and LawPay Practice Advisor, Jordan Turk, discusses the trend to streamline law firm operations while adapting to clients' changing needs and expectations.



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## What other significant changes have you seen over the last 10 years?

H.G. Wells said, "Adapt or perish," and law firms are looking for smart new ways of doing business. They prefer billable hours or personal time over administrative tasks, so progressive firms are automating as many of those tasks as possible. When a lawyer has just spent two non-billable hours on routine tasks, they look for ways to make those processes faster and easier via automation.

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## How have client expectations changed over the last decade?

Speaking as a millennial, we want the world to adapt to us as opposed to vice versa. I'm accustomed to paying for everything in my life via credit card or online – which I think is true for most people – particularly over the last few years.

Clients are now expecting a law firm to think of them first. They are expecting a seamless process when it comes to hiring, working with, and paying their attorney.

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All of our CLE programs are free. Claude DuCloux, our Director of Education, handles a lot of substantive CLEs – e.g., rules of evidence, boilerplate language for contracts – while I focus on practice management CLEs – e.g., client intake or compliance. It's one of the ways we give back to our lawyer clients.

## What does the next 10 years look like for family lawyers?

Lawyers will demand or adopt new technology that frees up time and helps their firm run more efficiently. This usually boils down to automation, billing, invoicing, and how you accept payments.

Since COVID, we've seen more and more attorneys quitting stagnant positions to open their own practice or to make a lateral or upwards move to more progressive firms. Many associates are not being paid market value, or they're looking for a better work-life balance, or both.

The law firms that will succeed in the future will automate, use technology to the fullest, and be open to a flexible work environment that leads to improved work-life balance. Many firms did not see the decline in revenue they expected when their staff started working from home in 2020; in fact, they've seen the opposite because lawyers are not wasting valuable time commuting to the office or courthouse. Increasing both billable hours and personal time is a win-win for family lawyers. ■



*Jordan Turk is a family lawyer and a Law Practice Advisor at LawPay, which allows law firms to receive secure payments online in compliance with ABA and IOLTA guidelines. LawPay works with innovative leaders to integrate their payment system with top legal software and service providers.*

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# TOP 10

## Golden Rules of Argumentation

These tips will make you a better lawyer – whether arguing by zoom, in court, or in a settlement conference in the judge’s chambers.

By Steven Peskind, Family and Trial Lawyer

**M**y inbox and Twitter feed are frequently flooded with top 10 lists. Most of the advice is redundant and commonsense (lift weights, read more, get more sleep, etc.), but some of it is truly helpful. So, I decided to create my own top ten list.

Increasingly, I realize the importance of effective argumentation. Few hearings these days, at least in my court, are evidentiary. More often they hinge on arguments, informal ones, like a settlement conference, or formal hearings resolving an issue. With that in mind, here’s my contribution to the top 10 repertoire.

### 1 Bait Your Hook for the Fish, Not the Fisherman

Remember to whom you are arguing. Too often, we flatter ourselves with our erudition and brilliance. But what really matters is impressing the person who will decide the issue: the judge. Clarence Darrow wasn’t Clarence Darrow because of self reverie; rather it was because his

arguments appealed to those before whom he appeared. Give the judge concrete reasons to want to find in your client’s favor.

It’s critical to know your judge. If your judge is more light-hearted, you might want to engage in some informal banter before getting to the heart of the issue. If the judge is more somber, a formal presentation is probably in order. Great salespeople understand the concept of rapport. Aren’t we salespeople after all? We just sell ideas instead of products. Increase the likelihood of making the sale by building rapport with your judge; focus on what they want to hear rather than what you want to say.

Also, remember the judge’s goals are different from yours. Most judges’ goals are to follow the law and resolve an issue fairly for both parties. Craft your arguments with this in mind. While occasionally a judge responds positively to fist-pounding, in my experience it rarely

works. When you approach the issue instead with common sense and a problem-solving demeanor, a more satisfactory result usually follows.

### 2 Be Dignified and Respectful

As the son of a lawyer, the gravitas of the judicial system was instilled in me as a child. This gravitas has sadly eroded. Many lawyers today treat a court hearing like a mud wrestling match at the county fair. Get out of the mud. Be dignified during your presentations. Don’t interrupt your opponent or engage in *argumenta ad hominem*. As Marcus Aurelius observed, the best way to deal with asshats is not to be like them. Trust me, the judges will notice (and reward) good behavior.

### 3 Clarify What You Want First Before Getting into the “Whys”

We live with our cases for months and sometimes years. We internalize them and forget that the judge doesn’t know the facts as well as we

do. Don't just get up and start blabbing about how your client has been wronged. Give the judge a brass tacks context before starting your argument. First, start with what you are asking the judge to do, "Judge, we are here today seeking XYZ....." Next, recite the relevant facts, ethically slanting them in your client's favor. Finally, after these preliminaries are satisfied, argue the reasons why your "ask" is the correct result. To recap:

1. What do you want,
2. What facts support that relief, and
3. Why it's the right thing for the judge to do – in that order.

#### **4 Draft Orders in Advance**

This practice serves two purposes. First, it helps you clarify what you are seeking. Seeing it in writing brings insights. You may determine it's an unrealistic Hail Mary. I often clarify my thinking by writing it down; this exercise will help you do so as well. This practice also helps the judge. When you provide a proposed order at the beginning of your presentation, it's like a playbill at the theater. The requested relief is clear and the judge can follow along as the argument unfolds. Also, when a busy judge has the order in front of him or her, there is the possibility that the judge will just sign it to move on to the next case.

#### **5 Know Both Facts and Law**

As I mentioned above, we internalize our cases when we live with them for extended periods. As such, we tend to focus on the important facts impacting our issues, themes, and theories. Many mundane facts are overlooked as inconsequential: for example, the ages of the children or the date of the marriage. Being the more knowledgeable lawyer, however, adds credibility to both you and your arguments. The better-informed lawyer often walks out the winner. That being said, if you don't know something, admit it rather than trying to bullshit your

way through. An honest mea culpa also creates credibility.

Likewise, know the law. Are you proceeding under a particular statute? Reread it. Familiarity lulls us into false certainty. Because we have read the statute a million times, we think we're certain of its terms. But our minds play tricks on us. I've often been startled by a helpful (or fatal) clause I'd overlooked. Also, stay current with case law. Nothing is more humiliating than being jammed by some new decision of which you were unaware. I set aside an hour every Sunday morning to read new decisions. It's a practice I endorse for all.

#### **6 Don't Argue Directly with Your Opponent (or the Judge)**

Proper decorum demands that you address all arguments to the court. Don't engage directly with your opponent – judges hate this. (See Tip 8, below, about self-control). Don't talk over your opponent; let them finish before you respond. Fear drives us to talk over or attack our adversary. Take a breath and keep it in check. While it seems obvious, don't argue with the judge either. Do you really think you are going to win that argument? Such a confrontation usually results from a lack of control or frustration. Generally, when I find myself fighting the impulse to engage the judge, it's a pretty good indicator that it's time for a vacation! But, if you can respectfully point out that the judge has misapplied a fact or misapprehended the law, it's fair to bring it to their attention to allow them an opportunity to change course.

#### **7 Show and Tell**

Particularly when you have limited time, visual aids tell the story better than verbal presentations. Consider a timeline you can give to the judge illustrating important developments. Or prepare an affidavit for your client summarizing important facts. Increasingly our world is visual, and

your presentations must be as well. Use these aids to better tell the story and support your arguments.

#### **8 Control Your Emotions**

What's harder than not lashing out in the heat of battle? Anger and fear are forever present in the adversarial process, particularly when dealing with unscrupulous opponents. Regardless of the provocation, reactivity rarely benefits you or your client. More often it leads to disaster. Divorce lawyer extraordinaire, Jim McLaren, advises lawyers to learn the art of "Taking the spear." This means to remain unflappable and composed under fire. Self-control is truly a superpower. Strive to maintain it. Many think anger is warranted when outrageous behavior is present. However, you should stay calm and lay out the facts persuasively to invoke the judge's anger. Leave your own rage in the parking lot. I often define a win by how well I kept it together at a hearing rather than by the result.

#### **9 Tell the Truth**

Speaking of self-control, liars truly make me crazy. Today, more than ever, lawyers are shamelessly distorting the facts and law. What to do? First, be the master of your case facts and the law to neutralize the dissembling. Next, remember that you have no control over what comes out of their mouths but you do have control of what comes out of yours. Don't be like them – tell the truth. Lying is unethical and ultimately fatal to your career. Use your energy to outthink them and plan your response. Angry reactivity dilutes your energy and brainpower.

Aristotle instructed that persuasive arguments require three elements: ethos, logos, and pathos. Logos and pathos are the logic and emotional tug of the argument. Those are crafted case by case. But ethos involves the credibility of the arguer. It transcends the present

Cont. on page 50

# How Empathy Contributes to a Lawyer's Success

Family lawyer Christopher Melcher discusses how to discover the root cause of any dispute, and how to use that knowledge to settle cases with *Family Lawyer Magazine's* Diana Shepherd.



## Is it possible to be a truly empathetic family lawyer without burning out – or at least losing perspective?

What you're getting at is the difference between empathy and sympathy. Sympathy is using your own experience to feel sorry for somebody else: you're relating with them based on your own personal experience. Empathy is objective: you're trying to put yourself in their shoes. Whether you've gone through similar experiences or not doesn't matter; empathy is the exercise of trying to see the problem from another's perspective.

Burning out is easy if you make the mistake of treating your client's problems as your own. Lawyers who do that are failing the client and themselves. We can't help clients if we feel sorry for or relate too much to them; we need to be objective to give them the advice they need.

With empathy, there's no risk of burn out because you are not taking on their problems – you're just trying to understand them.

## How did you come to the realization that empathy could actually make you a more successful family lawyer?

Many people spend all their money fighting for years in divorce court. That got me thinking about what was truly driving these disputes. For example, you might think they're fighting over a house, but that's one dimensional; you need

to step back and think about the source of the conflict.

Many lawyers focus on concrete issues without wondering why they are fighting over something seemingly inconsequential. Once we identify the root cause, we can offer options to resolve the dispute.

## When clients are gripped by strong emotions, they may not be able to make smart life-altering decisions. What should you do when a client isn't emotionally ready to hear solutions?

It starts with listening. One of the first things I ask in the initial interview is, "How can I help you?" I already know what their legal problem is from the intake process, but this is about their personal issues. If they say, "I just need to know the steps to get a divorce," then I know this client is after mechanical information.

If they lead with emotions, then I know I have to listen and develop a connection with them before they can move forward.

I use active listening: acknowledging what the client said, then repeating it back to show that I understood them. Only then can I ask them to listen to me.

## How – and why – do you show empathy for your client's soon-to-be ex?

Understanding what's driving the other side's position is for

my client's benefit. Learning what the other side needs and wants will help me create an attractive settlement proposal rather than wasting time on one that's never going to be acceptable.

People want to be heard. I had one case in which my client's ex came with a prepared speech, and the judge initially refused her request to read it aloud. Finally, he let her read it into the record – 20 minutes about all the bad things her spouse had done – then he told her he'd heard everything she'd said. She was fine after that because she felt heard. The money at stake didn't matter to her.

If the core issue is needing to be heard, then we let them have their day in court. Denying them the opportunity extends the case by ensuring they'll fight over minutia.

### How do your clients react to your showing empathy for their exes?

Initially, most clients are not going to understand this process and question whose side I'm on. I start by asking open-ended questions, like, "What's your goal?" or "How do you see this going?" Once they feel heard, they accept that my ultimate goal is to discover what the other side is going to be talking about and they buy into the process.

### How do you maintain your own boundaries when you are empathizing with your clients?

I can't help my clients if I lose objectivity,

so I remind myself that these are not my problems.

At first, putting a lot of time and effort into resolving an issue only to see my client making it worse was very frustrating. I now view myself as a highly paid "janitor": if you're going to get upset because you mopped the floor and then tomorrow the floor is dirty again, then this is not the right career for you. Instead, you must think, "I'm happy to clean this floor every night and have them mess it up every day. This means I'll always have a job!"

### Can you represent a client you dislike? Does empathy help you work with them, or are there other strategies you use?

I'm still working on this. I can't relate to some clients: they're unkind, difficult people. If I have these feelings about a client, I tell myself that I simply don't understand them yet; I haven't made a connection with them, and I need to do that.

After I've done the work to empathize and understand them, if it's still an awful relationship, I'll tell them that it's not a good fit. "It seems like we're spending a lot of time fighting and that you don't trust me. You should have the best representation, and I don't think I'm right for you. You need to find another lawyer." Strangely enough, that's when they want me even more!

I want to enjoy what I do. Most of my clients are wonderful people and I like getting to know them. If a case isn't going well, then we need to change: either build a respectful relationship or part company.

### Can you offer a few tips to your fellow lawyers to develop their empathy and listening skills?

A lot of the lawyers dive into their toolbox and start trying to fix problems. However, we're not going to fix anything unless we diagnose the real problem. I suggest

using these open-ended questions:

- How can I help you?
- What is your goal?
- How do you see this turning out?

These questions encourage your client to talk and you to listen. Once they feel heard, they will usually be ready to hear your advice.

Then do the same thing with the other side. During the initial call with opposing counsel, I ask: "How can I help you? How can I help you represent your client and move this case forward?" It's disarming because they usually think it's going to be a confrontational call.

Having the empathetic process, excellent listening skills, and not giving advice until people are ready to hear it allows us to move forward much better in our professional relationships with clients. ■

This article has been excerpted from a longer video interview. To watch the video or read the full transcript, go to [www.familylawyermagazine.com/articles/empathy-contributes-lawyers-success](http://www.familylawyermagazine.com/articles/empathy-contributes-lawyers-success).



*Christopher Melcher is a partner at Walzer Melcher & Yoda, LLP. He is a Fellow of the American Academy of Matrimonial Lawyers, an adjunct professor at Pepperdine University School of Law in Malibu, and he has presented about 200 CLE programs on complex family law issues.*  
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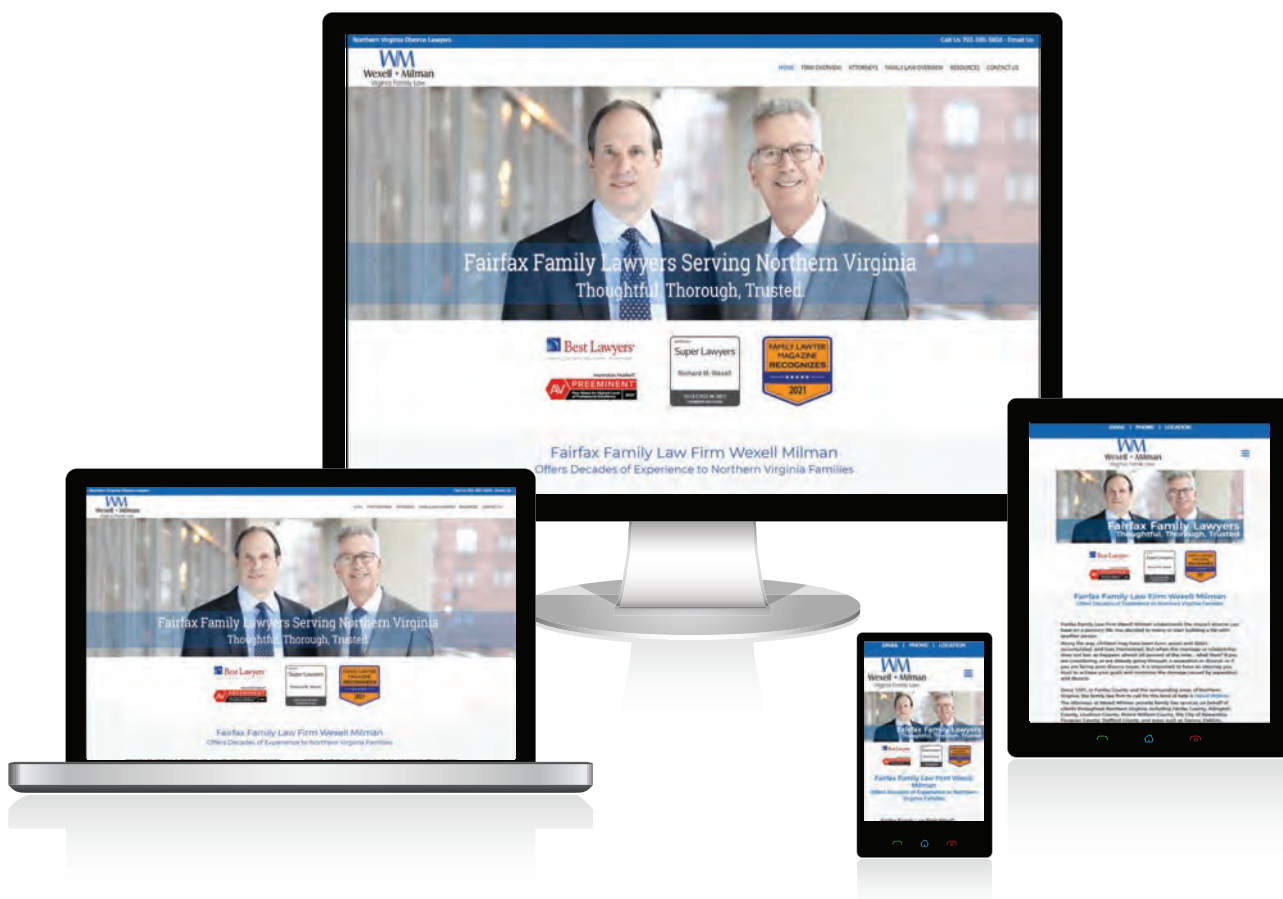
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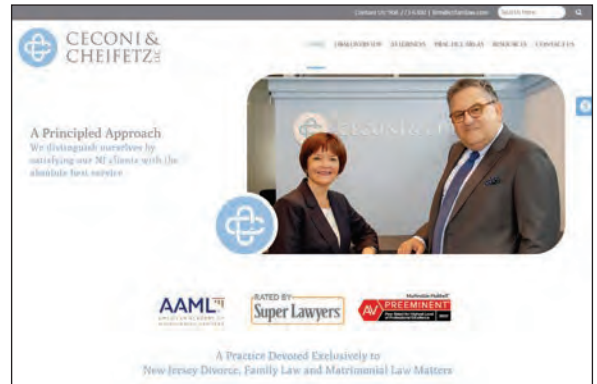
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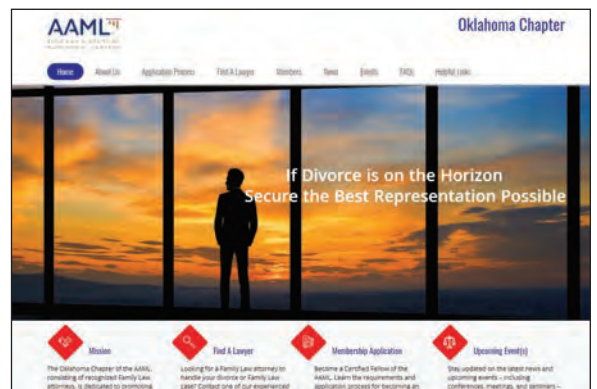
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# The Forensic Psychologist's Role in Custody Cases

Child custody consultant and forensic psychologist Robert A. Simon, Ph.D., discusses the proper role of forensic psychologists in family court – and ways to detect if an evaluator is trusting their gut more than the objective data – with *Family Lawyer Magazine's* Diana Shepherd.

## What roles can a neutral Forensic Mental Health Professional (FMHP) play in child custody litigation?

Broadly speaking, there are two neutral roles. Perhaps the best known is that of a court-appointed custody evaluator – a.k.a. parenting assessors or family consultants, depending on the jurisdiction. A neutral, specifically trained mental health professional does assessments for the family courts and reports back to the court regarding what is in the best interest of the child, what kind of parenting plan makes sense, or other questions that the Court may ask the evaluator to answer. The second neutral role is that of an expert witness. While it may sound surprising that an expert witness is neutral, whenever a mental health professional testifies in a family court proceeding, irrespective of who hired them, they are neutral to the outcome and they are not advocates for the side that hired them.

## Are there any legitimate non-neutral roles for FMHPs in family law?

FMHPs can be retained by attorneys as work-product or behind-the-scenes consultants. When this happens, the forensic psychologist

is retained to assist the attorney(s) with their advocacy and the efficacy of their case plan, case narrative in accomplishing the goals that the attorney's client desires to accomplish. Thus, we become a member of the advocacy team assisting a client to accomplish their desired outcome. In that role, we never testify or give input to the court. We don't write any declarations or affidavits expressing opinions of any kind. We can be non-neutral and aligned with one side if, and only if, we remain silent in the eyes of the court.

Even when we are a part of the advocacy team, the forensic psychologist keeps their eye on children's well-being and best interests. Therefore, the psychologist should not assist in accomplishing outcomes that are not child-centered, developmentally appropriate, or that appear to not be in the children's interests. Finally, it is best to help develop case plans and strategies that minimize the "collateral damage" done to the family as a result of litigation. I personally don't participate in cases where the attorney(s) or the client chooses a litigation approach that is unnecessarily aggressive or derisive of the other parent. We must remember that after the

case is finished, the reconfigured family still has to function to benefit children. The more damage done by the litigation, the bigger mess there is left behind for the family to contend with and the more the children suffer.

## While performing custody evaluations, have you ever had a family lawyer try to nudge you in a direction that favors their client rather than remaining strictly neutral?

The better question is, have I ever not had that happen? There are ways in which lawyers may try to influence or nudge the opinion of the neutral, but there are also procedures and safeguards in place that prohibit the evaluator from having an ex parte communication with an attorney. For example, I will not get on the phone with the father's attorney unless the mother's attorney is also on the line.

I make it very clear to lawyers that I will consider what I learn from their clients, the parties, the children, the collateral contacts, and from the documents I review. I'm not receptive to or interested in their positioning of a case. So when attorneys attempt to influence,



the custody evaluator remains firm, does not accept one-sided communication or participate in it, makes sure that all of their communications include both attorneys, set limits with attorneys and the kinds of information they are open to and not open to receiving (for example, I do not accept letters from attorneys in which they “argue” their client’s case). My job is to do a psychological evaluation, not to be the recipient of attorney spin and argument. That kind of thing is appropriate in the courtroom in front of the judge so that is where such things should take place.

### **What can a family lawyer do if they believe the evaluation is more personal opinion than the result of a genuine forensic investigative process? Are there specific questions to ask that could uncover whether an evaluator is trusting their gut more than the facts?**

I think the word “investigation” is important because the forensic mental health professional is doing a psychologically based investigation into the assertions, concerns, and claims made by each of the parties. While we can use our experience and our “sense of things,” we are the court’s expert, and an expert opinion has a demonstrable base behind it. If I offer the court an opinion about why Johnny is best off spending the Wednesday overnights at mom’s instead of just a dinner visit, then it’s my job to show what data I collected that supports that assertion. This is different than trusting my gut.

An attorney who thinks the evaluator has gone with their gut or personal preferences should ask for the data. “Show me the basis. Show me the data. Draw me a map of how you got to that understanding and indicate to the reference points along the way. The “Trust me. I’m a doctor; I know what I’m doing,” explanation doesn’t fly in court.

### **You have reservations about the use of psychological testing in child custody evaluations. Why is this?**

There are no standards or guidelines for conducting child custody evaluations that require the use of psychological testing. I struggle with psychological testing

because none of the tests we currently have is demonstrably reliable (meaning it produces a similar result on multiple administrations of the measure) and valid (meaning it measures what it purports to measure and nothing else).

Without having reliable and valid measures designed to help us make parenting discriminations in a group of people undergoing custody litigation, I have reservations about the usefulness of the test. I also worry that psychological testing creates the false impression of precision and certainty.

Its proper use is to assist us in generating hypotheses: identifying questions to ask and investigating other kinds of data. If a mental health professional uses testing strictly limited to generating hypotheses, but not as a part of their database or to reach conclusions, then it has a useful role.

### **One of the crucial issues in forensic psychological evaluations is managing and controlling for bias. How can the Court, attorneys, and parents be sure the evaluator is truly neutral?**

Bias comes in many forms. There are overt biases, things like, “I believe young children belong with their mother.” There are cognitive biases that are shortcuts to gathering, analyzing, and making sense of information and data. And there are implicit biases, which are attitudes towards individuals or groups of people that we don’t know we have.

One of the hallmarks of a good forensic investigation is using what we call a multi-modal, multi-method approach to gathering data. We gather different kinds of data from different kinds of sources and we look for convergence of data rather than reaching conclusions based upon one piece of data or one type of data alone. That helps to control for bias.

Here’s an example. Let’s say that a child is showing resistance to leave mom’s house for dad’s house. We don’t start with a preconceived idea about why it’s happening. A priori we propose multiple hypotheses about why it could be happening, and we investigate them all.

Implicit and cognitive biases are

hardwired into the human brain. Our brains can process multiple thousands of pieces of data every second, but we are only aware of a small handful. Some of the data that’s in the periphery might be important, but our brain has to filter it out so we don’t become overwhelmed.

### **Is it best practice for the FMHP to test multiple hypotheses in reaching conclusions and formulating their advisory recommendations for the Court?**

In my view, it’s minimum practice. One of the hallmarks of forensic inquiry is the testing of multiple hypotheses about any phenomenon of interest.

Let’s take my earlier example of a child who’s struggling to transition from mom’s house to dad’s house. I would ask myself what could be causing this? One possibility is that there’s something wrong at dad’s house, that the child has a realistic fear about going to dad’s house. Another is that mom’s negativity towards dad is influencing the child’s behavior. Another is that the child has difficulty with change – including moving from house A to house B. Another is that the parents have so much conflict between them that the child has to reconcile those differences every time they transition from one house to another. If I have these kinds of hypotheses in place, then I can ask questions and seek data that would bear on each of them. ■

This article has been excerpted from a video interview. To watch the video or read the full transcript, go to [www.familylawyermagazine.com/articles/forensic-psychologist-role-custody-evaluations](http://www.familylawyermagazine.com/articles/forensic-psychologist-role-custody-evaluations).



*Dr. Robert Simon, Ph.D., is a sought-after speaker and educator in forensic psychology who has lectured at more than 50 events in the past 10 years. He is the co-author of *Forensic Psychology Consultation in Child Custody Litigation: A Handbook for Work Product Review, Case Preparation, and Expert Testimony* (ABA Book Publishing).*

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## The Evolution of Forensic Accounting

Forensic accountants and business valuers Rod Moe and Heather Moe discuss the evolution of forensic accounting in family law matters with Diana Shepherd, *Family Lawyer Magazine's* Editorial Director.



### What are your general observations about how forensic accounting has evolved over the last decade?

**Heather:** Many people are either getting married later in life and have a key asset that they're bringing into the marriage, or they've inherited money from family – both cases require an analysis of premarital components of these assets. Stock options are a more common form of compensation than a traditional bonus payout these days. Accounting for and identifying those assets has changed over the years. The shift to investment in the virtual world, cryptocurrency NFTs (non-fungible tokens) as well as virtual wallets means a lot of people are investing assets that need to be identified on divorce. Some businesses are now accepting crypto as a form of payment. Cryptocurrency has changed the shape of our world and is bringing a higher demand for forensic accounting services.

### How have the models for valuing businesses changed – particularly over the last two years due to COVID?

**Rod:** There are three types of methods for doing business valuations: the income approach, the asset approach, and the market approach. Unfortunately, there's no one model that fits all. A lot of historical information about the business may not be that applicable now, but you [must] understand what drives the value of the business and what the current income stream is to determine what future income the parties will receive from this and the ability to pay alimony and child support.

### When conducting a lifestyle analysis, how do you deal with unpredictability given the challenging times we've been facing?

**Heather:** Trying to reflect a true picture of someone's lifestyle is constantly evolving. In recent cases, I've utilized the time period prior to the pandemic to truly reflect

how somebody lived. Analyzing the period prior to the pandemic, and then consulting with the client to reflect how they're currently living, ensures that everything's accounted for properly.

### Have you handled many cases that involve cryptocurrency or NFTs?

**Heather:** Recently, the majority of my cases have had some sort of cryptocurrency aspect to them. Frequently, the documentation was not initially disclosed, and we've had to subpoena records identifying that there is a main account – Coinbase, for example – and there's a wallet component where the cryptocurrency is traded. Both of those accounts need to be disclosed or discovered in order to determine what cryptocurrency the other party has.

### Where do you see the practice of forensic accounting and business valuation going in the future?

**Rod:** The demand for forensic accounting services is going to increase as the complexity of assets increases. Lawyers and clients are going to be relying upon forensic accountants to not only make financial calculations but also to prepare exhibits and explain those financial and tax issues in a way that's understandable to all concerned. It just gets more and more technical as we go along. ■



*Rod Moe has over 45 years of experience in tax and accounting; he provides consultation services related to legal matters and often serves as an expert witness. Heather Moe has been a licensed CPA since 2008, and she frequently provides expert witness testimony in court. [www.rodmoecpa.com](http://www.rodmoecpa.com)*

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# Parental Alienation: WHAT FAMILY LAWYERS NEED TO KNOW

Despite decades of case law and peer-reviewed literature, detractors continue to misrepresent and question the existence of parental alienation. Unfortunately, this only serves to keep children with the abusive parent who is brainwashing them.

By Ashish Joshi, Family Lawyer

**P**arental alienation (PA) is a strategy one parent uses to brainwash, manipulate, or program a child to reject or resist contact with the other parent. As Dr. William Bernet states in *Parental Alienation: Science and Law* (Charles C. Thomas, 2020), parents who program or brainwash their children “virtually always blame others for problems, issues, and circumstances that arise.” Despite several decades of case law and peer-reviewed literature on PA, detractors continue to misrepresent what it is and question whether it exists at all.

The psychological harm on children affected by PA is readily apparent, and it can last well into adulthood. For example, in his book *Children Held Hostage: Identifying Brainwashed Children, Presenting a Case, and Crafting Solutions* (ABA Publishing), co-authors Dr. Stanley Clawar and Brynne Valerie Rivlin share this poignant statement by a 21-year-old woman affected by PA: “It screwed up my life during my early years and now I have trust problems in close relationships. Do me a favor, kill me if I ever do this to my kids.”

In *Martin v. Martin* (331 Mich. App. 224, 238 [2020]), the Michigan Court of Appeals stated: “There is no reasonable dispute that high-conflict custody disputes frequently involve acts by one parent designed to obstruct or sabotage the opposing parent’s relationship with the child.” The mother in that case contended that parental alienation is “junk science.”

Alienating parents and the lawyers who represent them may refer to it as junk science, but family courts and researchers alike have acknowledged PA and the harm it causes to alienated children. Judges make findings of fact that support their decisions regarding child custody, parenting time, visitation, restraining orders, and mental health interventions – and PA is a factor that can dramatically change a court’s decision on child custody and parenting time orders.

### Courts Require *Prima Facie* Proof of PA

Family courts require proper evidence before accepting a claim of PA: proof of alienating behaviors on the part of the

alienating parent and of signs of alienation in the children affected by such behavior. And when lawyers fail to present such proof, the courts have rejected hollow claims of PA. For instance, in *Moir v. Moir*, the trial court dismissed the claim because it “found no evidence of parental alienation...”<sup>1</sup> In Ohio, a court opined: “No evidence was submitted that supports a conclusion that Mother engaged in parental alienation... the sole concern raised by the guardian ad litem was unsubstantiated by the evidence.”<sup>2</sup> In California, a court objected to the presentation of an expert witness without a prima facie proof of PA. “[T]he court impliedly found no expert was necessary, because there was no evidence of parental alienation...”<sup>3</sup>

Family courts have acknowledged the severe adverse effects of PA. For instance, a Colorado court found how severe alienation can cause personality disorders and cause a feeling of abandonment in the child.<sup>4</sup> In case after case, from a variety of jurisdictions, family courts have intervened when presented with compelling evidence of PA.

PA is not a legal fiction: it is child psychological abuse. As such, it is important to define PA and debunk common misconceptions regarding it. The widely accepted definition of PA is “a mental condition in which a child – usually one whose parents are engaged in a high-conflict separation or divorce – allies strongly with one parent (the favored parent) and rejects a relationship with the other (the alienated parent) without legitimate justification... The most common cause of PA is the child’s indoctrination by the favored parent to dislike or fear the alienated parent.”<sup>5</sup>

## 5 Fallacies About Parental Alienation

**1 PA theory assumes that just because a child is rejecting a parent, it must be due to alienation.** The theory of PA harbors no such assumptions. If there is a legitimate reason for the rejection – such as domestic violence, abandonment of the child, or physical or sexual abuse – then it may well not be a case of PA. The evidence must fit the diagnosis of PA to attach. Moreover, to determine whether a case is one of PA, mental health professionals rely on the Five Factor Model – not just on the signs the children are displaying.<sup>6</sup>

**2 PA is a legal defense used by abusive fathers in court.** However, the data on PA cases disproves this assertion: in over half of the cases where PA was found to have occurred, there were no allegations of other forms of abuse.<sup>7</sup> PA is a mental condition that favors no specific gender; all genders are as likely to be alienated parents and indeed have been found by courts to have done so where PA was present.

**3 PA should not be recognized because it will be misused by abusers.** For any type of abuse, there is always a risk of abusers pretending to be victims. This risk creates the need for clear standards and reliable screening and assessment tools to prevent misuse. The Five-Factor Model provides that standard by requiring that abuse and neglect are absent before

PA can be diagnosed.<sup>8</sup> The real threat lies dormant in the disagreement over whether PA should be accepted as a concept. While detractors discuss whether PA is a valid concept, the data over the past 35 years has been consistent. What remains are children everywhere experiencing this phenomenon where one parent indoctrinated them against the other parent. Years later, some of those children realize the severity of the alienating parent’s action on their well-being.

**4 PA is unscientific.** This is a false claim. “Clinical, legal, and scientific evidence on PA has accumulated for over 35 years. There are over 1,000 peer-reviewed articles, chapters, and books published on the topic, and the empirical research on the topic has expanded greatly...”<sup>9</sup> In addition, courts do not entertain PA claims if the facts do not support it. Thus, it is untrue, at least when it comes to legal cases, that PA does not require a rigorous, scientific process. A significant amount of the published studies on PA are peer-reviewed, meaning that a team of neutral, independent scholars were either able to recreate the studies or found other suitable methods to confirm the claims asserted in those studies. The claim that PA is pseudoscience is unfounded.

**5 PA is a short-lived response to the parents’ divorce.**<sup>10</sup> Although some divorces can cause a child to favor one parent against the other, PA presents children who absolutely reject a loving parent without any ambivalence or guilt. Consider this quote by a child who was affected by PA: “It happened so slowly that I couldn’t even tell what was happening until you made me talk about my childhood from the family photo album. Holy God, Mom was there and didn’t abandon me, did she?” This type of trauma is not short-lived. This level of trauma can drastically impact the development of a child by causing the loss of a relationship with the other parent that the child never had the chance to properly process.

**Before you take on a case involving parental alienation, ask yourself whether you are truly prepared to face how challenging – and frankly distressing – these cases can be.**

- [1] *Moir v. Moir*, 2016 WL 555838, at \*11 (Mich. Ct. App. Feb. 11, 2016), appeal denied, 500 Mich. 881 (2016).
- [2] *Maxwell v. Maxwell*, 2008 WL 754861, at \*5 (Ohio Ct. App. March 24, 2008).
- [3] *In re Marriage of Daniel*, 2005 WL 1515414, at \*4 (Cal. Ct. App. June 28, 2005).
- [4] *In re Marriage of Humeny v. Ortiz*, No. 05DR2192, at \*4 (Col. D. Ct. June 16, 2021).
- [5] Bernet, W. (2021) *Recurrent Misinformation Regarding Parental Alienation Theory*, The American Journal of Family Therapy, DOI: 10.1080/01926187.2021.1972494.
- [6] Bernet, W. (2020). *The Five-Factor Model for the diagnosis of parental alienation*. Feedback- Journal of the Family Therapy Association of Ireland, 6, 3-15; Lorandos, D. & Bernet, W. (2020). *Parental Alienation: Science & Law*. Springfield, IL: Charles C Thomas, LTD. Harman, J. J., & Lorandos, D. (2020).
- [7] *Allegations of family violence in court: How parental alienation affects judicial outcomes*. Psychology, Public Policy, & Law; Harman, J. J., Leder-Elder, S., & Biringen, Z. (2019). Prevalence of adults who are the targets of parental alienating behaviors and their impact: Results from three national polls. Child & Youth Services Review, 106, 1-13. Bernet, W. (2020). *The Five-Factor Model for the diagnosis of parental alienation*. Harman, J. J., Bernet, W., & Harman, J. (2019). *Parental alienation: The blossoming of a field of study*. Current Directions in Psychological Science, 28, 212-217; Lorandos, D. & Bernet, W. (2020). *Parental Alienation: Science & Law*. Springfield, IL: Charles C Thomas, LTD.
- [10] Richard A. Warshak, *The Parental Alienation Fallacies that Compromise*

## 4 Tips for Working with Alienated Parents and Children

It is good to understand a problem, and it is even better to find a solution. Here are four quick tips on working with families dealing with PA.

**1 Do no harm.**<sup>11</sup> Before accepting such cases, a lawyer should consider whether they are capable and have the experience, training, skill, and time necessary for such difficult and time-consuming cases. PA is counterintuitive; a lawyer's experience in practicing general family law matters may not be enough to be able to competently handle a severe PA case.

**2 Keep abreast of the latest research, publications, and peer-reviewed literature on PA.**<sup>12</sup> PA cases often result in a "battle of experts" and a lawyer who lacks a sound understanding of the professional literature on the topic will not be able to competently cross-examine the opposing expert or educate the court on the nuances of PA.

**3 It is critical to frame the case properly.** Literature from research studies makes it clear that causing severe PA is a form of psychological child abuse, and the primary goal in a PA case must be to protect the child(ren) from further harm at the hands of the alienating parent. Custody and parenting time issues are secondary to this goal.

**4 Learn to manage the clients.** Parents who are targets of alienation can be traumatized and difficult to manage. Frequently involving false allegations of physical, emotional, or sexual abuse, these cases are stressful to litigate. When one parent is manipulating and indoctrinating the children into believing and making false allegations, your ability to reassure the alienated parent that you believe and will help them gather the necessary evidence is essential.

## Misconceptions Surrounding PA Serve the Alienating Parent

Parental alienation is a problem affecting children in every country in the

world. The data about PA shows the real effects on a vulnerable group in our society, and that children exposed to this form of psychological abuse suffer long into adulthood. The misconceptions surrounding PA only serve to keep children with the pathological and abusive parents who are brainwashing and programming the children.

If you are a family law practitioner, before you take on a case involving PA, ask yourself whether you are truly prepared to face how challenging – and frankly distressing – these cases can be. ■

*Decisions in Court and in Therapy*, American Psychology Association, 5.

[11] Ashish Joshi, *A Is for Alienation: Tips on Litigating Parental Alienation in Custody Battles*, NYSBA Family Law Review, 8.

[12] *Id* at 9.



*The managing partner of Joshi: Attorneys + Counselors, Ashish Joshi serves as lead counsel in high-stakes, complex family law cases in state, federal, and international courts. He is the author of Litigating Parental Alienation: Evaluating and Presenting an Effective Case in Court (ABA Publishing, 2021) and a contributing author to Parental Alienation: Science and Law (C. Thomas, 2020). www.joshiattorneys.com*

## Related Article

### Winning Parental Alienation Cases: A Roadmap for Family Lawyers

Family lawyers should view winning parental alienation cases differently from other types of custody cases. Making smart, insightful moves that will correct the alienation is the winning strategy here.

[www.familylawyermagazine.com/articles/winning-parental-alienation-cases](http://www.familylawyermagazine.com/articles/winning-parental-alienation-cases)

Top 10 Cases / Cont. from page 13

**7 U.S. v. Windsor**, 570 U.S. 744, 133 S. Ct. 2675 (June 26, 2013).

In many ways, this case teed up Obergefell. The Supreme Court ruled that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional and that the federal government cannot discriminate against married lesbian and gay couples for the purposes of determining federal benefits and protections. In a nutshell, Edie Windsor and Thea Spyer were married in Canada. New York state, where the parties lived, recognized their marriage as valid. When Thea died, the federal government refused to recognize their marriage and taxed Edie's inheritance from Thea as though they were strangers. Edie challenged DOMA, alleging that DOMA violates the Equal Protection principles of the U.S. Constitution because it recognizes existing marriages of heterosexual couples, but not of same-sex couples, despite the fact that New York State treats all marriages the same. On June 26, 2013, the U.S. Supreme Court ruled that Section 3 of DOMA is unconstitutional and that the federal government cannot discriminate against married lesbian and gay couples for the purposes of determining federal benefits and protections. [www.supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf)

## Federal Court of Appeals

**8 Brackeen v. Haaland**, 994 F.3d 249 (5th Cir. April 6, 2021).

I have included this case because the United States Supreme Court granted certiorari on February 28, 2022. In this case, Texas, Indiana, Louisiana, and individual plaintiffs sued the federal government, contending that the Indian Child Welfare Act is unconstitutional. The Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians intervened in the case. The Fifth Circuit Court of Appeals, hearing the case en banc, held that parts of the law were constitutional and parts were unconstitutional: 1) ICWA's

Cont. on page 39


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# Cybersecurity Strategies for Family Lawyers

Social engineering, phishing, and hacking pose a real danger to your practice. *Family Lawyer Magazine's* Editorial Director, Diana Shepherd, recently spoke with cybersecurity lawyer Bill Sosis about the steps family lawyers should take to protect their data – and their firm.

## Are there specific cybersecurity threats for a lawyer working from home rather than the office?

Yes. When people are home they are away from the systems and the technologies that normally protect them in their office. They are relaxed and more likely to become victims of cybercrimes such as phishing which preys on their curiosity by luring them into clicking links that introduce viruses, ransomware, and other malware into their computers.

## Are data breaches inevitable in a family law practice?

They're inevitable everywhere. Huge companies with state-of-the-art IT departments get hacked, the government gets hacked, but family law practices are especially prone. Nowadays it's easy for a vindictive ex-spouse to hire a professional hacker to target a family law practice.

## A 2016 survey by the American Bar Association found nearly half of the respondents had no data breach response plan in place. Are law firms doing better or worse in 2022?

According to the latest ABA study, firms are doing up to 300% worse now than last year. Working from home has opened the door to threats that exploit people's trust and rely on social engineering. Yet, few firms have response plans in place. But a response plan alone is insufficient. Firms also need plans on how to recover from a cyberattack.

## Does the "paperless" trend pose any risks for family lawyers?

Absolutely. The growth of digitized data is astronomical. While going paperless has some advantages it also

introduces legal and security risks. For example, firms that store their data using "cloud" services need to understand their agreements. These agreements often compromise your data with language that exposes your data to third-party companies that are not listed in your agreement. Bottom line is that there's no such thing as the "cloud." This is just a word that means someone else's computer.

## If a lawyer uses mobile devices for business purposes, what steps can they take to protect their data should those devices become lost or stolen?

The device should have protective measures pre-installed. It should have two-factor authentication to protect you



from hackers. It should include a paid Virtual Private Network (VPN), which encrypts your data from end to end. Even if a hacker intercepts your data, they won't be able to do anything since all they'll get is a bunch of indecipherable gibberish.

### How can family lawyers protect themselves and their clients from cyber-threats in 2022 and beyond?

By implementing training. The human factor is a critical element in cybersecurity. According to the ABA, about 50% of cyberattacks are due to phishing: a social engineering technique that encourages people to click on harmful or nuisance links. Law firms must implement policies and procedures to prevent their team from doing the wrong things – but you have to know what the wrong thing is to avoid it. You should also have firewall protection to monitor traffic and potentially alert you to threats. Resiliency is also crucial. You may have systems to scan, detect, and prevent cyber-attacks – but when a breach happens, the firm must have the ability to bounce back quickly. If you can't recover quickly, you could lose business or even go out of business. ■



*Bill Sosis has over 25 years' experience in information technology as a consultant, business analyst, and project manager. He has led the implementation and upgrades of numerous computer systems in North America, Europe, and Asia.*  
[www.sosislaw.com](http://www.sosislaw.com)

#### Related Article

##### Does Your Firm Have a Cybersecurity Strategy?

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#### Top 10 Cases / Cont. from page 36

mandatory placement preferences violated equal protection; 2) provision of ICWA granting Indian tribes authority to reorder congressionally enacted adoption placement preferences violated non-delegation doctrine; 3) ICWA provision requiring states to apply federal standards to state-created claims commandeered the states in violation of the Tenth Amendment; 4) Bureau of Indian Affairs (BIA) exceeded its statutory authority in promulgating regulations, in violation of the Administrative Procedure Act (APA); 5) BIA regulations were not entitled to Chevron deference; and 6) prospective and adoptive parents whose adoptions were open to collateral attack under ICWA had no fundamental right to care, custody, and control of children in their care. Look for the Supreme Court decision in the future.

[www.ca5.uscourts.gov/opinions/pub/18/18-11479-CV2.pdf](http://www.ca5.uscourts.gov/opinions/pub/18/18-11479-CV2.pdf)

**9** *Andochick v. Byrd*, 709 F.3d 296 (4th Cir. March 4, 2013), cert. denied, 134 S. Ct. 235 (2013).

In *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed.2d 662 (2009), the Supreme Court held that an ERISA plan administrator must distribute benefits to the beneficiary named in the plan, notwithstanding the fact that the named beneficiary signed a waiver disclaiming her right to the benefits. The Kennedy Court left open the question of whether, once the benefits were distributed by the administrator, the plan participant's estate could enforce the named beneficiary's waiver against her. In *Andochick*, the Fourth Circuit took up the question left open by *Kennedy* and held that ERISA does not preempt "post-distribution suits to enforce state-law waivers" against ERISA beneficiaries. Thus, wife number one and wife number two are free to duke it out with each other.

[www.ca4.uscourts.gov/opinions/121728.P.pdf](http://www.ca4.uscourts.gov/opinions/121728.P.pdf)

#### State Supreme Courts

**10** *Stone v. Thompson*, 428 S.C. 79, 82, 833 S. E.2d 266, 267 (July 24, 2019), reh'g denied (Oct. 16, 2019).

A wave of statutes across the country in the 1960s and 1970s abolished common law marriage. One of the last holdouts was South Carolina. This decision abolished common law marriage in South Carolina. "Our review in this case has prompted us to take stock of common-law marriage as a whole in South Carolina. We have concluded the institution's foundations have eroded with the passage of time, and the outcomes it produces are unpredictable and often convoluted. Accordingly, we believe the time has come to join the overwhelming national trend and abolish it." This decision may be the bellwether for the remaining holdouts to abolish common law marriage.

[www.sccourts.org/opinions/HTMLFiles/SC/27908.pdf](http://www.sccourts.org/opinions/HTMLFiles/SC/27908.pdf) ■



*Laura W. Morgan, Esq., is the owner/operator of Family Law Consulting in Amherst, Massachusetts. She provides legal research, writing, and advocacy services; legal memoranda; precis of transcripts; and other written products for trial or appellate court advocacy to family lawyers nationwide.*  
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##### Defining "Habitual Residence" in the Hague Convention

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# TOP 10 Articles

## From the Last 10 Years



To commemorate our 10th anniversary, we have compiled the top ten most read articles on [www.FamilyLawyerMagazine.com](http://www.FamilyLawyerMagazine.com) since it was launched.

By Natalie Bogdanski, Content Editor

### 1 How to Locate Bugs and Wiretaps: A Guide for Family Law Clients

By Skipp Porteous

Published in 2012; Viewed 210,000 times

A “wiretap” is a device attached to the telephone or telephone line that either records both sides of the conversation or transmits the conversation to a listening post where it can be recorded. A wiretap always involves the telephone.

A “bug” is a listening device placed in a room or vehicle. One of a bug’s components is a microphone. The microphones in these devices are usually very small. Some bugs transmit their signal to an external listening post. Video cameras can also be a type of bug.

[www.familylawyermagazine.com/articles/bugs-and-wiretaps](http://www.familylawyermagazine.com/articles/bugs-and-wiretaps)

### 2 Social Media in Divorce Proceedings

By Michele Lowrance and Pamela J. Hutul

Published in 2013; Viewed 102,000 times

According to the American Academy of Matrimonial Lawyers, more than 80% of divorce attorneys surveyed reported an exponential increase in the amount of evidence collected from social networking opportunities in the past five years. The purposes and consequences of social media searches produce rich information that can be used by and against litigants on trial or in settlement negotiations.

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### 3 When Clients Fail to Change Beneficiary Designations After Divorce

By Leslie A. Shaner

Published in 2013; Viewed 55,400 times

At some point in a family law attorney’s career, a current or former client calls to tell you that his/her spouse or ex-spouse has died. The primary reason for the call will be that the deceased ex-spouse has failed to change some type of beneficiary designation/survivorship election on a non-probate asset or has named someone other than the living ex-spouse as the beneficiary/survivor of a non-probate asset as required under a property settlement agreement and/or final decree of divorce.

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### 4 Protecting Your Clients in Parental Alienation Cases when the Courts Don’t

By Plinio J. Garcia

Published in 2013; Viewed 50,600 times

A prestigious attorney recently told me that the Los Angeles family court system sometimes rewards the behavior of alienating parents with legal and physical custody of their children because it is “in the best interest of the child to stop the tug-of-war between parents.” This counsel was trying to explain why we sometimes have to “give up on” our children to minimize the psychological damage of alienation. I was shocked! How can a parent give up on a child, knowing that the other parent is traumatizing him or her? Attorneys should no longer tolerate parental alienation.

[www.familylawyermagazine.com/articles/protecting-your-clients-in-parental-alienation-cases-when-the-courts-dont](http://www.familylawyermagazine.com/articles/protecting-your-clients-in-parental-alienation-cases-when-the-courts-dont)

## 5 Private Investigators Share Some Tricks of the Trade

By Nicholas Himonidis

Published in 2013; Viewed 46,000 times

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

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## 6 Custody Evaluations and Parental Alienation: 10 Questions Answered

By Erik Dranoff and Allison Williams

Published in 2016; Viewed 28,200 times

When clients ask me, “Do I have to have a custody evaluation?” I tell them that in a divorce proceeding, judges really need objective information to help them make decisions about the children. It is particularly important when you have two parents who are making allegations against each other. Sometimes the allegations are very serious, so judges want to get a sense for how well each parent functions from a mental health professional’s perspective. Can they co-parent together? Is the child going to be harmed by being placed with either or both of the parents?

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## 7 How to Draft a Persuasive Closing Argument in Five Easy Steps

By Kimberly A. Quach

Published in 2011; Viewed 21,300 times

As trial lawyers, we all dream of drafting a beautifully crafted, compelling closing argument – a solid summary of the evidence that leaves the Court breathless to draft an opinion in our favor, and our clients clamoring to pay our bills in gratitude for excellent advocacy. We have big hopes about closing when we hear bits and pieces of our client’s and other witnesses’ comments, the judge’s rulings and thoughts, and the other lawyer’s arguments. And we can practically taste how wonderful our closings will be as we view the trial during each of these stages.

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## 8 9 Reasons Why Lawyers Quit Practicing Law

By James Gray Robinson

Published in 2018; Viewed 19,000 times

When I quit practicing law in 2004 after 27 years of being an attorney, I felt like I had failed my parents, my family, and myself. I couldn’t take it anymore; the practice of a general trial lawyer had ceased being the adventure of a white knight and had become the nightmare of a palace dwarf.

I very rarely lost a winnable case, but the ones I lost haunted me... So what happened to that dream, the quest, the oath? After years of self-analysis, I discovered the following about why lawyers quit practicing law.

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## 9 Development and Introduction of Exhibits

By Lynne Z. Gold-Bikin and Stephen Kolodny

Published in 2012; Viewed 17,400 times

Often, dissolution cases become a ‘he said, she said’ fight, with two diametrically different versions of the same incidents and lifestyles. The introduction of documentary evidence to support your client’s side of the story is very effective and may swing the case to your client’s side. Such evidence can range from existing documents to evidence created for trial. Wherever it arises, it can make or break a case.

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## 10 Becoming Skilled at Cross-Examination

By Lynne Z. Gold-Bikin and Stephen Kolodny

Published in 2012; Viewed 12,900 times

Cross-examination shifts the spotlight from the witness to the lawyer. Now is the time for leading questions. Now is the time to control witnesses; to prevent them from saying whatever they want to say. Counsel is never to ask the “W” questions, or give the hostile witness an opportunity to pontificate. Counsel must control the witness so that the only testimony will be what is expected and desired. It is never more true than on cross-examination that counsel should not ask a question to which they do not know the answer.

[www.familylawyer magazine.com/articles/becoming-skilled-at-cross-examination-part-1](http://www.familylawyer magazine.com/articles/becoming-skilled-at-cross-examination-part-1) ■



*Natalie Bogdanski is the Content Editor for [www.FamilyLawyerMagazine.com](http://www.FamilyLawyerMagazine.com). She creates original content and edits submitted articles.*

*If you would like to submit an article to Family Lawyer Magazine, please email it to [editors@familylawyer magazine.com](mailto:editors@familylawyer magazine.com).*

# Premarital Agreements and the Young Couple

Younger couples entering into first marriages are seeking premarital agreements with increasing frequency. Here are the special concerns and terms younger couples and their counsel should consider when negotiating their agreement.

By Linda J. Ravdin, Family Lawyer

Not long ago, the typical person considering a premarital agreement was older, had been widowed or divorced, and had children. If the prenup were for a young adult, they were invariably the beneficiary of tremendous affluence built by their parents or grandparents. Sometimes, that wealth was in the form of a family business in which the child was – or was expected to become – active. Often, parents wishing to keep their wealth in the family encouraged or even stipulated that their adult child must have a premarital agreement.

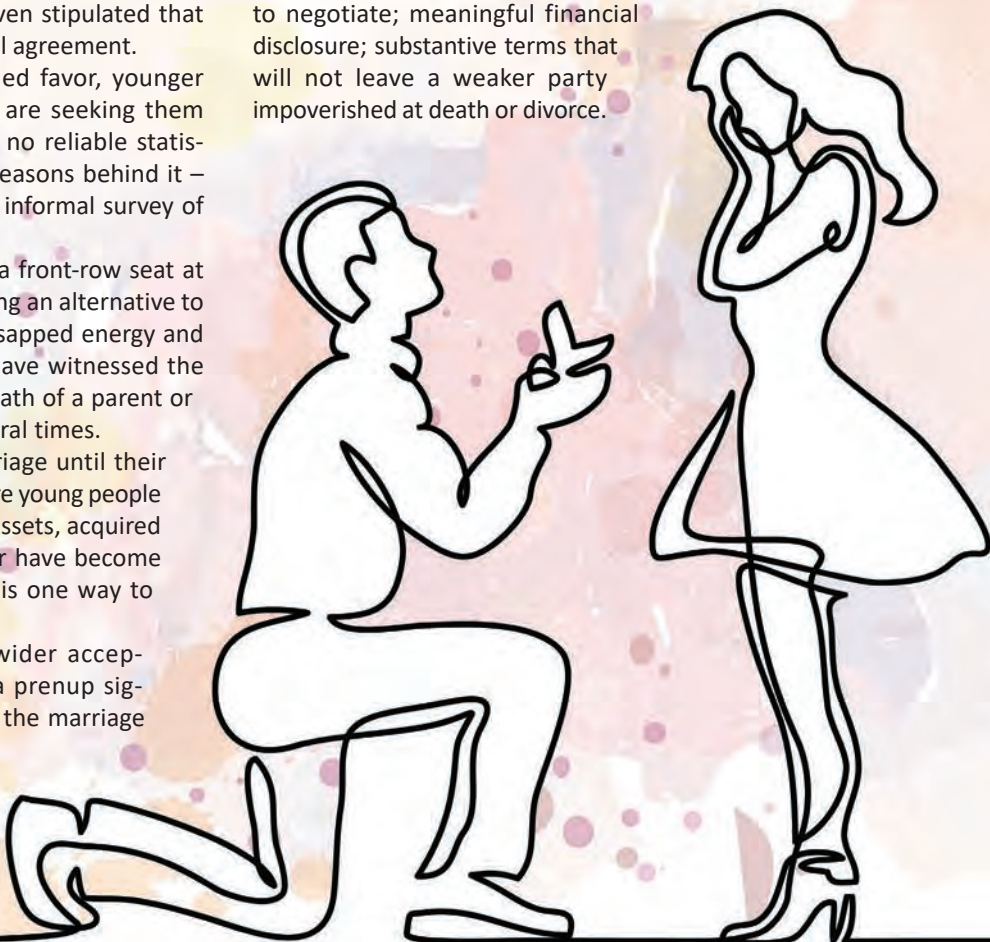
As these agreements have gained favor, younger couples entering into first marriages are seeking them with increasing frequency. There are no reliable statistics to document this trend – or the reasons behind it – but my experience, combined with an informal survey of colleagues, verifies the trend. Why?

- Many of today's young adults had a front-row seat at their parents' divorce and are seeking an alternative to the sometimes bitter fighting that sapped energy and resources from the family. Some have witnessed the tensions over property after the death of a parent or grandparent who was married several times.
- Modern couples are delaying marriage until their early 30s. Some of these more mature young people have established a career, built up assets, acquired a home and retirement benefits, or have become affluent entrepreneurs. A prenup is one way to protect premarital assets.
- These agreements have gained wider acceptance generally. The notion that a prenup signals a lack of faith in the future of the marriage has begun to fade. More and more, people getting married are able to contemplate a

premarital agreement while holding on to their belief in romantic love.

## Validity: Process and Fairness

Whether the parties are young or old, the lawyer for the proponent should seek to meet the highest standards for validity: adequate time for the recipient to consider the terms and hire a lawyer; opportunity to negotiate; meaningful financial disclosure; substantive terms that will not leave a weaker party impoverished at death or divorce.



Some factors that enter into a negotiation when the couple is young include:

- The lawyer may need to take account of the wishes of the client's parents in formulating the terms; sometimes, the true decision-maker is a parent.
- The lawyer for the client's parents may play an outside role in formulating the terms.
- The client may be naïve about the default rules that apply at death or dissolution. The lawyer may need to take additional time to explain.
- Similarly, the client, or the other party, may be naïve about a premarital agreement as a binding contract and may not take the terms or the process seriously; e.g., may not bother to read it, or may refuse to hire counsel.

#### 4 Special Concerns

There are several key factors the lawyer should take into account when negotiating a young couple's premarital agreement. Here are the most critical:

- 1 **The couple may have children.** Children change everything. Even if both parents intend to work fulltime, their plans may change. A child may be disabled or need an unusual level of parental attention. The couple may discover that having a parent at home suits them.
- 2 **The younger the couple, the longer the timeline.** Thirty-year-olds getting married today may still be together in 50 years. The agreement must take account of both the divorce and death scenarios after a long marriage.
- 3 **A provision that fixes the rights of the economically disadvantaged party** at a predetermined level may prove to be grossly unfair to that party if the marriage ends after 20 or 30 years. A spouse may develop health problems and be unable to work. Inflation may erode the value of a fixed cash payment. There are also risks for the wealthier party in fixing an obligation at a predetermined level. If that party loses his or her wealth due to business reverses or bad investments, that will not alter the contractual obligation.
- 4 **A sharing type agreement, often the most appealing to young couples,** does not always serve the weaker party well. Many young couples like the idea of a premarital agreement that allows each to retain inherited and gifted assets but to share equally in the fruits of their labor. But consider a couple where one is already wealthy and the other will only build a meaningful nest egg through working in a demanding job: An agreement under which they equally divide that nest egg, and where there is no room for a judge to consider the other party's nonmarital wealth, may not be a good outcome.

#### 8 Terms to Consider

- 1 **Each party, or only the economically weaker party, retains the right to seek alimony at divorce.** Or the agreement provides for a limited duration support

waiver: for example, a waiver ends upon the birth of a child or the fifth wedding anniversary.

- 2 **Each party retains his/her premarital, gifted, and inherited assets and parties share the fruits of their labor.** For parties whose primary objective is to protect nonmarital assets, especially when each has or will have substantial nonmarital property, this can be appealing as it may comport with their ideas about marriage as an economic partnership.
- 3 **The agreement could single out a specific asset for special treatment,** such as a business, and preclude a spousal claim to share in appreciation – and the costly litigation that goes along with it – while retaining an equal interest in assets acquired from the owner-spouse's compensation.
- 4 **Where there is a big wealth disparity, the agreement could carve out specific rights for the less wealthy spouse during the marriage,** for example, the transfer of a home into joint names, gifts of cash or securities, to enable him/her to build up a nest egg.
- 5 **The agreement could provide for additional property transfers upon divorce,** or it could provide for exclusive rights to a marital home, with the wealthy party paying the costs that go along with it for a period of time after divorce.
- 6 **A surviving spouse could retain the right to a pension plan annuity or death benefit** under a 401(k).
- 7 **The wealthier spouse could agree to create a trust funded at a specified level,** such as 50% of his/her gross estate, and for the survivor to have the income of the trust during his/her life.
- 8 **Parties could consider an obligation for life insurance, although this can be tricky.** An adequate amount today may be insufficient in 20 years. If the insured spouse opts for a 20-year term policy, inexpensive for a young spouse, the cost of replacing it in 20 years may be too high. For some couples, life insurance that builds cash value may be a better option.

It's important to that you – as the lawyer for a young party who will enter into a premarital agreement and a first marriage – be mindful of what makes their situation different from that of an older couple and take these special circumstances into account when negotiating and formulating the terms of the agreement. ■



*Linda J. Ravdin practices family law exclusively with Pasternak & Fidus, P.C. in Bethesda, Maryland. A nationally known authority on the law of premarital and postmarital agreements, she is the author of several books on premarital agreements, including *Premarital Agreements: Drafting and Negotiation* (American Bar Association, 2nd Edition, 2017). [www.pasternakfidus.com](http://www.pasternakfidus.com)*



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# Jurisdictional Disputes During a Pandemic: Temporary Absences Under the UCCJEA

As courts and practitioners continue to navigate the impacts of COVID-19, there has likely been a permanent impact on the interpretation of “temporary absences” under the UCCJEA.

By Adam J. Turbowitz, Family Lawyer

**F**amily law has been impacted by COVID-19 in unprecedented ways. The pandemic has particularly challenged the concept of “temporary absences” as used in jurisdictional disputes within child custody litigation.

Many families have become displaced as a result of quarantines, loss of employment, and school closures, causing them to seek refuge in other states. Others seized the opportunity to work remotely away from home. Some stayed away as quarantines became longer, schools remained closed, and remote work continued. Over 15.9 million people filed change-of-address requests with the USPS between February and July 2020<sup>1</sup>, reflecting a 2% increase in permanent movers and a 27% increase in temporary movers since 2019.

Whether temporary or permanent, these pandemic-related moves have had unanticipated consequences on child custody disputes in cases where one parent wants to remain with a child in a new state.

## The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

Whether the court in a given state has jurisdiction over a child custody proceeding is addressed by the UCCJEA.

Under the UCCJEA, for initial custody determinations, jurisdictional priority is given to a child’s “home state,” which, broadly speaking, is the state in which a child lived with a parent<sup>2</sup> for the six months immediately preceding the commencement of a child custody proceeding. (UCCJEA §102(11)) Generally, a state has home state jurisdiction if it is the child’s home state on the date of commencement, or if it was the child’s home state within six months of the date of commencement, and one parent continues to live in the state after the child was removed.<sup>3</sup>

## Temporary Absences Under the UCCJEA

Since it is impractical to require a child to physically remain, without interruption, in a state for six consecutive months, the UCCJEA allows for “temporary absences.” Specifically, the UCCJEA provides that a period



of temporary absence of either a child or a parent from the child's home state counts toward the six-month home state period. Stated otherwise, the period of temporary absence is essentially ignored when determining the six-month home state period. UCCJEA §102(11).

But the question of what constitutes a temporary absence is not always clear, particularly when that absence is prolonged by a pandemic.

### What Constitutes a Temporary Absence?

Most jurisdictions determine whether a child's stay in a particular jurisdiction is considered a "temporary absence" by examining the totality of the circumstances,<sup>4</sup> including not only the child's physical presence in the state, but factors that speak to intent.<sup>5</sup> Such an analysis can be forgiving to families who were temporarily misplaced due to the pandemic. For instance, in *Matter of Saida A.*, 71 Misc. 3d 611 (Fam. Ct. N.Y. Cty. 2021), the court found that a child's stay in Pakistan for almost one year was a "temporary absence" from New York since the child's return was delayed in part due to COVID-19 travel restrictions. In *Camberos v. Palacios*, 2021 IL App (2d) 210078 (Ill.App. 2 Dist. 2021), the court found that Utah was the child's home state, even though the child resided with the father in Illinois for over six months while under "lockdown."

Although less common, some jurisdictions consider only the child's physical location during the six-month period preceding commencement.<sup>6</sup> Others have declined to consider the parties' future intent in making a home state determination. For example, in *Miller v. Mitchell*, 328 So.3d 1067 (Fla. 3d DCA 2021), the court found that Florida was the child's home state despite the mother's claim that she only extended her vacation from New Jersey longer than six months due to the pandemic.

### Jurisdictional Disputes: Practical Considerations

In a custody proceeding in which the parents are in two different states, it is best to be the first to commence.<sup>7</sup> For initial custody determinations, the UCCJEA affords jurisdictional priority to the state in which the first action was commenced. UCCJEA §206(a).

If you are not the first to file, contest the other state's improper jurisdiction by filing a motion to dismiss the action. Failing to do so could forfeit your jurisdictional claims.<sup>8</sup> It is critical to also commence an action in the state in which you believe the custody determination should be made. Doing so will trigger the court's obligation to conduct a conference with the court in the other state, to determine which state is the appropriate forum to adjudicate the matter. UCCJEA §206(b).

It is difficult to advise clients in this situation, since they may be hesitant to rush to court. Attorneys should be clear that acting quickly may avoid drawn-out jurisdictional litigation – especially important where one parent is separated from the child. Doing so may also avoid the creation of a new

status quo; since the longer a child resides with a parent in one state, the more likely a court is to consider a disruption to that continuity as averse to the child's best interests. On the other hand, following the child to the new state could be considered voluntary acquiescence to the new status quo, and may cast doubt on your client's intent to return to the home state.

Ultimately, as courts and practitioners continue to navigate the impacts of COVID-19, there has likely been a permanent impact on the interpretation of "temporary absences" under the UCCJEA. ■

- [1] 1 "Coronavirus Moving Study: People Left Big Cities, Temporary Moves Spiked in First 6 Months of COVID-19 Pandemic", by Cynthia Bowman (MyMove.com, Oct. 12, 2020).
- [2] 2 This also includes a person acting as a parent. UCCJEA §201(a)(1).
- [3] 3 UCCJEA §201(a)(1). Other bases for a court to exercise jurisdiction over a child custody determination not discussed in this article are set forth in UCCJEA §201.
- [4] 4 *Matter of Marriage of Schwartz and Battini*, 289 Or.App 332 (Or. Ct. App. 2017) (child's absence from Indonesia was not a temporary absence); *Norris v. Norris*, 345 P.3d 924 (Alaska 2015) (the parties' move from Alaska to Mississippi was not a "temporary absence"); *In re M.S.*, 176 A.3d 1124 (Vt. 2017) (Vermont court applied a physical presence test to determine whether a child "lived" in a state and the totality of the circumstances analysis to determine whether a period outside of the state was a temporary absence).
- [5] 5 See *Ex parte Siderius*, 144 So.3d 319 (Ala. 2013) (where parents intend for a child's absence from a state to be temporary, it will count toward establishment of home state); *In re Marriage of Milne*, 109 N.E.3d 911 (Ill.App. 2 Dist. 2018) (children's stay in Canada for over one year was a "temporary absence" since parties intended to return to Illinois).
- [6] 6 See *In re Walker*, 428 S.W.3d 212 (Tex. App. 2014) (Texas did not have home state jurisdiction because child was not physically present for six consecutive months); *In re A.G.B.*, 2020 WL 3397922 (Ohio Ct. App. 2020) (Ohio was not child's home state because child was not physically present with a parent for the preceding six months).
- [7] 7 Note that the UCCJEA contains a definition of the word "commencement" which may be different from what constitutes the commencement of a proceeding in a given jurisdiction.
- [8] 8 See *In re Marriage of Iwed*, 116 P.3d 36 (Kan.App. 2005) (California court refused to relinquish jurisdiction after mother did not challenge jurisdiction or file in the child's home state).



*Adam Turbowitz (JD, Tax LL.M) is a Fellow of the American Bar Foundation (ABA) and a partner at Boies Schiller Flexner. A member of the Council of the ABA's Family Law Section since 2018, he currently serves that Section in a variety of leadership positions. With files from Jessica Bouis and Carly Wheaton, Associates at*

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# 10 Myths About Personality Disorders

Personality disorders have been driving more and more family law cases over the last decade. Here is what you need to understand before the next client with a personality disorder walks through your door.

By Bill Eddy, Family Lawyer,  
Mediator, and Therapist

Over the past 10 years, more and more family law professionals are becoming aware that personality disorders are driving their cases – yet we are still discouraged from openly discussing these disorders in court and during out of court negotiations. Over the next ten years, I believe it will be essential for family lawyers and related professionals to understand personality disorders and start talking about them realistically, so that we can adapt decisions and plans to truly help our clients and their families.

There are ten personality disorders listed in the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association and used throughout the world by mental health professionals.

Known as the *DSM-5*, the current version of this manual is the fifth edition (published in 2013). In this manual, Cluster B personality disorders (narcissistic, borderline, anti-social, and histrionic) are listed as “dramatic, emotional, or erratic.” (DSM-5, 646)

One comprehensive study identifies Cluster B personality disorders as having strong associations with “domineeringness, vindictiveness, and intrusiveness,”<sup>1</sup> which describes many of the parties in our family law cases. This connection is too strong to ignore and avoid discussing for another ten years. In short, personality disorders are an *enduring pattern of dysfunctional interpersonal behavior*.

## MYTH #1: PDs are Rare.

No, they are not. In fact, the *DSM-5* refers to a study which indicates that “approximately 15% of U.S. adults have at least one personality disorder” (DSM-5, 646). This is equal to or more common than the percent of people with a substance use disorder (addiction), yet most people know little about personality disorders because



they are not really part of the public discourse. In many ways, society treats personality disorders like it used to treat addictions 50 years ago, as “hush-hush.” Now, there is widespread public awareness and discussion of substance abuse, court-ordered drunk driving programs, hospital treatment programs, and insurance funding for treatment. Many families and companies can push their loved ones and employees into substance abuse treatment with “interventions.” We are just seeing the beginning of some of this awareness regarding personality disorders.

### **MYTH #2: PDs are Obvious.**

Again, no, they are not. Personality disorders are generally hidden disorders. There is a full range of severity of these disorders. Some people with personality disorders can function well in their jobs and communities but have serious problems in close relationships (e.g., interfamilial), while others cannot even work because they are so dysfunctional. These disorders are often not obvious to people who are dating these individuals until they have known them for six to twelve months. People who hire them often do not know until they are deeply settled into the job. They can get by in many settings for a long time because they look like everyone else on the surface.

### **MYTH #3: Someone Would Know if They Had a PD.**

Usually not. Most people who have one do not know they have it. Personality disorders are enduring patterns of behavior that develop before adulthood, most commonly in early childhood. These individuals lack self-awareness of their own disorders and the impact of their own behavior on those around them. When they get feedback for their negative behavior, they tend to become highly defensive rather than gain insight into their part in the problem, which is often substantial. This is a big part of why they have an enduring pattern of dysfunctional behavior; it seems normal and necessary to them. But it does not work, and they often are unhappy.

### **MYTH #4: People with PDs Know They are Acting Inappropriately.**

Usually not. This is one of the hardest things for family law professionals to accept about personality disorders. These individuals really, truly lack self-awareness of their part in their problems. They honestly believe that others have treated them unfairly, for no good reason, usually when others are reacting to or trying to set limits on their behavior. Since they cannot see their own part in their own problems, they are always searching for other explanations. Some blame life in general or the universe, while others blame specific people (these are the ones with “high conflict” personalities, who are preoccupied with targets of blame and have all-or-nothing thinking, unmanaged emotions, and extreme behaviors).

### **MYTH #5: If One Party Has a PD the Other Party Probably Does, Too.**

No, but perhaps half do. Informal polls taken at dozens of professional seminars on high conflict clients and cases usually indicate that about half of cases have two high conflict personalities and the other half have one such personality driving the case while the other party is a generally reasonable person just trying to protect the children and himself or herself. This is often true in domestic violence cases, in alienation cases, and in other cases in which a likely Cluster B party (domineering, vindictive, and intrusive) persuades the court and other family law professionals that it’s all the other party’s fault – thereby blaming the wrong party or both parties when only one is at fault.

### **MYTH #6: You Should Offer Them Insight into Their Behavior.**

This will fail! Since they lack self-awareness and have an enduring pattern of behavior that they rarely change, any feedback – even “constructive” feedback – feels like a personal attack to them. Not only do they not benefit from the feedback, but it harms your relationship with them. Most people put their energy into trying to get those with personality disorders to “just stop” whatever extreme behavior they are engaged in. But, similar to alcoholism and addiction, it’s more

helpful to learn new behaviors than to try to stop old behaviors. Try to focus these individuals on what to do – rather than what *not* to do – now.

### **MYTH #7: You Should Tell Them How You Feel About Them.**

This really blows up! People with PDs chronically feel stuck in the past because they do not go through the normal grieving and healing process. Their unresolved feelings are often so negative, they just trigger a bigger emotional upset for them, and they cannot easily calm themselves. They can also do anger and upset better than ordinary people, usually because it has been a life-long struggle and their emotions remain unresolved. It is better to calmly focus on the future and what you would like them to do or set limits by talking about the positive and negative consequences of future non-compliance with various rules.

### **MYTH #8: Having a PD Should Not Affect the Parenting Plans.**

We now know this is not true! Research involving more than 900 children of parents with traits (subclinical levels) of three PDs with hostility and unpredictability has shown that PDs can have a huge impact on children. “For the first time, subclinical levels of Borderline, Antisocial, and Narcissistic PD symptoms in parents have been documented to predict behavioral and emotional difficulties in their children as early as the preschool age. When parents were not cohabiting, the variance of the children’s emotional problems explained by parental symptoms increased more than six times.”<sup>2</sup>

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- [1] Wilson S., Stroud, C. and Durbin, C. Interpersonal Dysfunction in Personality Disorders: A Meta-Analytic Review, *Psychology Bulletin*, July 2017; 143(7): 677-734. doi: 10.1037/bul0000101
- [2] Berg-Nielsen, T.S. and Wichstrom, L. “The mental health of preschoolers in a Norwegian population-based study when their parents have symptoms of borderline, antisocial, and narcissistic personality disorders: at the mercy of unpredictability.” *Child and Adolescent Psychiatry and Mental Health*. 2012; 6:19. doi: 10.1186/1753-2000-6-19

## MYTH #9: PDs Are Immutable.

Not necessarily. Historically, many people (including therapists) thought that personality disorders were unchangeable and therefore therapy was pointless. However, over the past two to three decades, breakthrough treatments have succeeded at improving the behavior of some people with personality disorders. For example, there is a fairly successful treatment approach for borderline personality disorder called Dialectical Behavior Therapy, or DBT, which has helped many people overcome the diagnosis with improved self-awareness and self-control. Also, some people with other personality disorders have made progress in therapy, including those with narcissistic personality disorder. However, the vast majority of people with personality disorders neither seek nor receive treatment and remain stuck in dysfunction.

## MYTH #10: They Could Change if They Wanted To.

Unlikely. Remember, a personality disorder is an “enduring pattern” of

dysfunctional behavior. They cannot see their part in their problems and conflicts. In many ways, this problem is like that of alcoholics and addicts, who cannot see the connection of their own behavior to their problems in life. It is even more difficult with personality disorders because the person has experienced their own patterns of behavior as normal and necessary (usually since early childhood). There is no obvious cause of their difficulties, so people assume their behavior is knowingly bad and intentional. In reality, this is the problem: they cannot connect the dots from their own behavior to how others respond, and how they could change. They usually have to be forced into treatment by loved ones, employers, or court orders, just like substance abuse treatment.

## Managing this Hidden Problem Going Forward

Hopefully, over the next 10 years, society and especially family law professionals will come to understand this problem and help parents deal with it in a structured,

treatment-focused way, rather than responding with ignorance, judgment, tolerance, or helplessness. We can and should talk more about personality disorders. We have made a lot of progress as a society with drug and alcohol understanding and treatment, so we know we have the potential to manage this hidden problem that affects so many children and parents today. ■



*Bill Eddy (JD, LCSW), CINO of the High Conflict Institute, developed the New Ways for Families® method of teaching conflict resolution skills to separating and divorcing parents. He is the author of many books, including High Conflict People in Legal Disputes and Splitting: Protecting Yourself While Divorcing Someone with Borderline or Narcissistic Personality Disorder.*  
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## Argumentation / Cont. from page 25

case. When judges mistrust you, the stain will follow you throughout your career. Be prepared and be honest – the gold standards for our profession.

## 10 Listen to Your Opponent

Listen closely to the windy oratory of your opponent. What information is he or she revealing in the argument? Let them educate you about their theories and themes – helpful information, if not that day, for use later in the case. And listen to the judge as well, both with your eyes and your ears. What does the judge’s body language reveal about your theories? Is the judge eye-rolling or rapt? Is the judge patiently absorbing your presentation or restively looking away? If the latter is the case, it may be time to pull back (if still possible) and retool.

A friend of mine, who went on to become a billionaire real estate developer, was fond of the phrase, “Nobody ever got into trouble listening.” If the Judge is berating your opponent’s argument, keep your mouth shut and enjoy. Lawyers always feel they need to be adding to the discussion, but often the best thing to say is nothing!

## Use These Tips to Become a Better Lawyer

These golden rules will make you a better lawyer whether arguing by zoom, in court, or in a settlement conference in the judge’s chambers. Ultimately though, the single greatest superpower is to remember to keep perspective. Lawyers are famous for their large egos. But your client’s life isn’t your life. Disconnect. As the great trial lawyer David Boies stated, “what’s the worst thing that happens to me...I lose?” You’ll do a much better job for your client if you distance yourself

from the dispute. Remember Rudyard Kipling’s brilliant admonishment in his poem, “If”:

*“If you can meet with triumph and disaster  
And treat those two impostors just the same...”*

It’s not about you or your win/loss record; that’s outside of your control. It’s about doing your best: prepare well, perform well, and stay professional. If you follow these golden rules, you will always succeed. ■



*Steven N. Peskind is the principal of Peskind Law Firm in Illinois. He is a Fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers. In 2015, the American College of Family Trial Lawyers elected him as a Diplomat.*  
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