Chapter 38

FAMILY LAW

Kimberly R. Willoughby, Esq.

SYNOPSIS

§ 38.1 • INTRODUCTION TO FAMILY LAW PROFESSIONAL RESPONSIBILITY ISSUES

Family law matters present a number of unique features that make them more susceptible to malpractice claims than many other areas of the law. In most instances, a family law matter is a client's first experience with the legal process. Clients approach their matters with a wariness of lawyers and a fear of the court system. Clients are also going through an extremely stressful event that has lifelong consequences. They are often emotionally distraught. At stake are their money, their children, their sense of self, and their futures. As a result, clients generally function at a lower level than they normally would, and use less reason than they may in other areas of their lives.

The court system is different for family law matters than for other civil matters. First, the process expects and assumes some amount of cooperation between lawyers and parties. Family members stand in a special relationship to one another and to the court system. C.R.C.P. 16.2(a). When children are involved, it is hoped that parties and their lawyers will keep their best interests in mind even while litigating. Joint experts are often used. C.R.C.P. 16.2(g). Judges have a limited amount of time to move dissolution cases through their dockets. In Chief Justice Directive 08-05, the Colorado Supreme Court set the goal that no more than 5 percent of domestic relations cases be open more than one year.

Finally, family law matters generally encompass a number of different areas of the law, as well as heavily drawing on accounting and psychology. Lawyers are expected to, and should, have at least passing familiarity with real estate, probate, tax, corporate, ERISA, criminal, and bankruptcy law.

This chapter is not meant to instruct lawyers about how to practice family law. Rather, it is meant to point out those areas of family law most likely to lead to malpractice claims.

§ 38.2 • COMMUNICATION WITH CLIENTS

§ 38.2.1—Good Communication Practices

A good client-lawyer relationship begins and ends with excellent communication. This is especially so in family law matters. Malpractice claims can often be avoided simply by employing good communication practices.

Family law clients are under a lot of psychological stress. The issues they bring to a lawyer are intensely personal. Also, from the client's perspective, there is always a lot at stake in a family law matter, even if the matter is, legally speaking, quite straightforward. Clients want to know that they are being taken care of by a lawyer who makes them and their issues a priority. Failing to do so can lead to unhappy clients, and unhappy clients lead to fee disputes and malpractice claims.

Lawyers should recognize that clients may also be experiencing anxiety, anger, and depression as a result of their legal issue, which may affect their behavior and cause them to revert to more infantile and regressed modes of relating, behaving, and thinking. Increasing this stress is the typical clash between what a client wishes to happen in the divorce and how the legal process actually unfolds. While attorneys are used to dealing with clients' legal issues, they must recognize that this may be the most psychologically significant and compelling situation in the client's current or entire life. Therefore, family law attorneys benefit from showing empathy toward their clients and communicating understanding of the stresses that confront clients. Simply asking the client to explain what is upsetting him or her, or suggesting to continue the conversation at another time when the client is less emotional, can have a great effect on the client's well-being and on the client-attorney relationship in general. Even clients who do not seem overly emotional can benefit from being asked periodically how they are handling the process.

The need for effective communication also stems from the fact that many clients have never before hired a lawyer. As clients, their level of sophistication and ability to understand the legal process may not be the same as those more experienced in dealing with legal matters.

Lawyers in family law cases need to train themselves to listen well. This can be difficult for lawyers. Family law clients will tell their lawyers all manner of things, relevant to the matter and otherwise. Because the client is not necessarily knowledgeable about what is relevant and what is not, lawyers need to listen to a lot of information to sift out what is relevant. And, importantly, family law clients need to be heard, and are much more satisfied with services if they believe someone has genuinely listened to them.

Family law attorneys can expect to occasionally be the target of a client's emotional outbursts caused by the stresses relating to the divorce. Attorneys should try, as much as possible, to avoid responding in a similarly intense manner. Attorneys are better off responding to their clients' outbursts by telling clients that they should engage the attorney at a later time after they have time to collect themselves or asking them to direct their anger toward finding a practical solution to the problem that is upsetting them.

While many clients undergoing a divorce have limited experience in retaining a lawyer, most have friends and family members who have divorced. These ancillary people often offer inaccurate advice and anecdotal stories about their own experiences. There is also a lot of material on the Internet, in movies, and on television. Consequently, the family lawyer needs to be prepared to have a great deal of one-on-one contact with their client to ensure that the client is fully aware of the law and the nature of all proceedings. This helps the client make good choices based upon legal advice, not on stories from non-lawyers.

Although family lawyers can greatly benefit from good legal staff, lawyers should not substitute legal staff communication with the client for their own personal interaction with clients. Lawyers should ensure that each client is receiving adequate one-on-one contact with them. This can be different amounts of time for different clients.

Lawyers should personally prepare clients for the many case-related events in a dissolution matter. Clients should be prepared for settlement conferences, court conferences, mediations, depositions, and hearings. Clients must attend these events. Lawyers should reduce to writing all appointment times and locations. This practice serves as an additional reminder to the client of the upcoming event, as well as completes the file for the lawyer so that the lawyer knows that the client was informed of events.

As simple as the maxim "communicate with your client" seems, it is taxing for family lawyers. Clients can be emotional, needy, irrational, angry, and just plain draining on the lawyer. However, clients absolutely must be communicated with. Here are some general tips for communicating with clients:

- Listen;
- Avoid legalese when talking to the client;
- Tackle problems with the case or the client as soon as they come up;
- Do not dodge your client;
- Do not give unrealistic expectations; and
- Always let your client know that you are his or her advocate.

§ 38.2.2—Telephone

Family law clients need to be able to contact their lawyers quickly and easily. Lawyers with legal staff should train their staff to handle clients in crisis situations if the lawyer is not available to immediately speak with the client. Staff should also be informed enough about each client's matter to be able to help the client through situations if the lawyer is not immediately available. At the very least, legal staff should be able to assure the client that staff can reach the lawyer, and tell the client when the lawyer will be able to return the call. Lawyers without legal staff should be prepared to give clients alternative telephone numbers, such as cell phone numbers.

Once a conversation has started, the lawyer should listen to what the client has to say and refrain from dominating the conversation. Often, clients simply need to be able to speak with and seek counsel with their lawyer because of the frustration, anger, or sadness they are experiencing. Lawyers are not therapists, and should not try to serve in that role, but some lawyers will be that kind of outlet for their clients. They believe it better that the client have the outburst with them than with the children or the opposing party.

To prevent misunderstandings or lapsed recollections, a lawyer should always make a record of conversations with clients, either by taking contemporaneous notes or by drafting a memo to the file immediately following the conversation. This provides the lawyer with a written record of all conversations, which is useful in tracking the events and goals of the client as well as the direction of the litigation. Because clients may be emotionally distraught during the course of the conversation, a written record can often help both the lawyer and the client ensure that they have not miscommunicated. An issue in malpractice claims is often whether the lawyer and client communicated a fact/date/idea/goal. It is important for the lawyer to have a chronology of events and conversations with the client in order to make sense of what actually was occurring, and, even more importantly, when it was occurring.

§ 38.2.3—E-Mail

E-mail is inexpensive, fast, and always available. It is many clients' preferred means of communication. E-mail works on the individual schedules of the reader and writer. E-mail also produces a written record of the communication.

A common concern for lawyers in the past was the confidentiality of e-mails. While the concern is valid, e-mail is generally considered a safe mechanism for communication and most states' ethics committees have found that lawyers may generally communicate with clients via unencrypted e-mail without violating the duty to maintain client confidences.

Another concern is the family computer, the family e-mail address, and spouses having each other's e-mail account passwords. Before a lawyer begins communicating with a client by e-mail, the lawyer should confer with the client to make sure that the other party does not have access to the e-mail account.

The federal Electronic Communications Privacy Act of 1986 (ECPA)[1] protects "otherwise privileged" e-mails.

> Assuming that a communication is protected by the lawyer-client privilege, that privilege, as a matter of federal law, is not lost if the communication occurs via e-mail and the e-mail is "intercepted." The ECPA defines "intercept" to mean "acquisition of the contents of any wire or electronic communication." Thus, the ECPA privilege clause encompasses both intentional and inadvertent acquisitions of e-mail. In short, if a communication is protected by the lawyer-client privilege, the fact that the communication was transmitted via unencrypted e-mail would not affect a waiver of the privileged character of the communication.

Stephen Masciocchi, "Internet, E-Mail and Encryption: Privilege, Confidentiality and Malpractice Risks," 27 *Colo. Law*. 10, 21 (Oct. 1998).

E-mailing is widely used for a variety of purposes in the family law arena. First and foremost, most lawyers frequently use e-mail to communicate with their clients and opposing counsel. E-mail is effective for communication especially when documents are sent as attachments for opposing counsel to "red-line," or for a client's approval. Lawyers should be cognizant of the fact that when e-mailing attached documents the documents could contain "metadata." Metadata is information about the document that is hidden or, "data about data." The hidden information, or metadata, includes information such as when the document was modified, who modified it, and in some cases, it even can include previous changes to the text. Reba J. Nance, "Law Practice Management Tips," 34 *Colo. Law*.

43 (April 2005). CBA Ethics Committee Formal Opinion 119 says attorneys must use reasonable care to guard against disclosure of metadata containing confidential information. Through Microsoft Word™, the risk of metadata transmittal can be eliminated by simply configuring your program to "remove hidden data." The Microsoft website can provide additional detailed information about minimizing metadata: http://office.microsoft.com, search for "find metadata in legal documents."

Many family law professionals have come to realize that e-mail is an effective tool for divorcing parents to use for communication. E-mail is especially useful for those parents who have gone through, or are in, a high-conflict divorce. Lawyers should instruct their clients that when they e-mail their spouse or ex-spouse, they should use a very business-like tone. Clients should be aware that e-mails can be, and frequently are, offered as evidence during a divorce or allocation of parental rights hearing. Many lawyers and clients find it comforting and useful for the client to copy the lawyer on all e-mails sent to the spouse. By doing this, the lawyer is immediately aware if any problems are occurring with the parenting time arrangements and the lawyer can give feedback to the client on the appropriateness of the content and tone of the e-mails.

Lawyers should maintain a professional tone and demeanor in e-mail correspondence. Because e-mails can be exchanged almost instantaneously between lawyers and their clients and the other lawyer, some lawyers treat e-mails differently than they would treat other written correspondence, both in tone and content. Lawyers are well-served to remember that e-mail is no different than formal correspondence. In other words, think about what you have written before you hit the "send" button, as the e-mail may very well become an exhibit or an e-mail forwarded to others. Clients should be advised not to forward e-mails from the attorney to third parties, in order to protect the attorney-client privilege.

All e-mails received and sent should be a part of the client's file.

§ 38.2.4—Voicemail

Voicemail is a useful tool employed by most business people including lawyers. While it is helpful to have an assistant initially answer calls in case there is an emergency or to transfer a client to another available legal professional, voicemail provides an easy way for persons to leave detailed or lengthier messages. The problem that lawyers face with the use of voicemail is managing the volume of calls they receive. It is therefore quite important for the lawyer to have a method for receiving the messages and returning the calls, such as having voicemails automatically sent to e-mail as an audio recording. Some lawyers choose to have an assistant listen to voicemails and take notes of the voicemail content. This provides a written record of all voicemails received.

Voicemail can also be used to put relevant information in the outgoing messages. Many lawyers change their outgoing message every morning with a detailed description of when they will be available to receive calls and return messages. This is especially convenient for lawyers who have a small or no staff. Also, outgoing messages are useful for informing callers if the lawyer is going to be on vacation or out of the office for a significant period of time. When a lawyer is going to be out of the office for an extended period, the message should refer the client to a person whom they can contact during the lawyer's absence.

Return voicemail messages promptly.

Family lawyers should advise their clients to leave voice messages, especially to the opposing party, very cautiously. Voicemail can become a permanent piece of evidence that potentially could be introduced in court.

§ 38.2.5—Written Correspondence

Written correspondence can often be a lawyers' best source for keeping a formal record of all of the important events that occur in a case. Clients should be copied on all correspondence that comes into the office and leaves the office regarding their matter. Because lawyers regularly rely upon their clients' recollection and interpretation of matters described in formal correspondence between the parties, making sure that clients receive copies of all significant correspondence will allow the client to confirm or dispute any information that is conveyed.

In the age of e-mail communication, written, mailed correspondence can convey that the correspondence is particularly important. While it is often fast and efficient to communicate through other mechanisms such as the telephone or e-mail, often a written follow-up letter to a client is appropriate. Sending a follow-up letter is a matter of personal discretion, but generally a follow-up letter is appropriate whenever the lawyer and a client discuss important issues or make joint decisions about how to proceed. Any time the lawyer receives or communicates a settlement proposal, written correspondence serves as an important means of ensuring that there was a "meeting of the minds" between the parties.

§ 38.2.6—Fee Agreements And Disengagement Letters

Fee agreements and disengagement agreements should always be confirmed in writing, preferably at the time the client gives informed consent, but, if unfeasible, within a "reasonable time" thereafter. Colo. RPC 1.0(b) and (e), and cmt. [1]; Colo. RPC 1.5(b) and cmt. [2]. Best practices dictate that fee agreements should be extremely thorough and be signed by both the lawyer and the client, although the client's signature is not required under Colorado rules. Colo. RPC 1.5, cmt. [2]; and *see* C.R.C.P., Ch. 23.3, Rule 1.

Under the Colorado Rules of Professional Conduct, lawyers must advise new clients of the basis or rate of the fee in writing, and must respond, preferably in writing, to reasonable requests from all clients about the amount of fees and costs incurred. Colo. RPC 1.4 and 1.5. *See also* John Lebsack, "Confirm Lawyer Fees in Writing: Court Changes Colo. RPC 1.4, 1.5," 29 *Colo. Law*. 6 (June 2000). Whenever the fee arrangement is changed, the lawyer should have the client sign an agreement regarding the fee change. Colo. RPC 1.5(b) and cmt. [2].

Under Comment [7A] for Colo. RPC 1.4, it is clear that lawyers must respond to reasonable requests from clients for information about fees and expenses incurred. While the Comment only "strongly recommended" that this response be in writing, prudence dictates a written response. Even though the Comment states that lawyers must respond only to "reasonable requests" from clients regarding fees, the lawyer should make an attempt to answer all requests or questions, irrespective of how unreasonable the client appears to be.

In addition to writing a fee agreement letter or an engagement letter, the termination of the client-lawyer relationship is a significant event that should be addressed in a disengagement letter. The following information should be included in a disengagement letter:

- **Describe the nature of the matter that has been the subject of the representation.** What was the scope of employment set out in the authorization and fee agreement, and has it been modified during the course of the representation?
- **Specify the reason for the termination of services.** In most cases, it will be because the activity requiring the representation has ended, but it may be because the lawyer does not want to participate further in the matter or does not believe his or her representation to be in the client's best interests.
- **Notify the client of any issues remaining for the client or client's new lawyer.** This would be particularly important in timely pursuit of appellate matters. Also, the lawyer should not disengage precipitously, leaving the client without advice or representation in a deadline situation. However, there may be other, less significant actions worth noting that should be accomplished by the client or new counsel.
- **Arrange for file return or disposal in a manner that is acceptable to the client** but that preserves the necessary file contents in the lawyer's office or storage center for an appropriate time period.
- **Include a copy of the Motion to Withdraw as counsel of record.**

When writing a disengagement letter, lawyers should be mindful of Colo. RPC 1.16(d), which states, in relevant part: "Upon termination of representation, a lawyer shall

take steps to the extent reasonable or practicable to protect a client's interests. . . ." For example, in a dissolution of marriage matter, it is prudent for a lawyer to consider all items that may remain to complete the dissolution. Some questions to consider are:

- Whether all of the assets have been transferred and if all documents have been signed for the transference of assets;
- Whether all debts have been paid, or a plan for debt payment or refinancing has been made;
- Whether a qualified domestic relations order (QDRO) or domestic relations order (DRO) has been completed, made an order of the court, and sent to the plan administrator or Colorado Public Employees' Retirement Association (PERA);
- Whether the beneficiaries of life insurance benefits and retirement accounts have been changed;
- Whether new life insurance has been purchased, where ordered;
- Whether estate planning has been modified;
- Whether the client understands that his or her health insurance may be terminated and whether he or she has been notified of Consolidated Omnibus Budget Reconciliation Act (COBRA) rights;
- Whether the client has copies of the completed file, including the decree, support order, and separation agreement; and
- Whether the client is aware of his or her appellate rights and deadlines.

§ 38.3 • CASE MANAGEMENT

§ 38.3.1—Domestic Relations Timeline

The timeline for a domestic relations case revolves around three things: the statute requiring at least 91 days to elapse from the time of service of the petition for dissolution of marriage and the issuance of the decree of dissolution of marriage (C.R.S. § 14-10-106(1)(a)(III)), C.R.C.P. 16.2, and the court's case management order. It would be almost impossible to apply C.R.C.P. 16.2 deadlines to a dissolution of marriage that took only 91 days to complete. However, there are some judges who strive to put cases on a 91-day schedule. Others districts require cases to be resolved or set for trial within 120 days of the filing of the petition. The chief justice of the Colorado Supreme Court has made it a statewide goal that no more than 5 percent of domestic relations cases remain open more than one year. Chief Justice Directive 08-05. When there is a conflict between C.R.C.P. 16.2 deadlines and the case management order, the latter should prevail.

Once a petition for dissolution of marriage is filed, a respondent has 21 days to file a response. C.R.C.P. 12(a). After the filing of the petition, the court will serve upon parties a case management order, which will order parties to set the matter for an initial status conference, file a sworn financial statement and certificate of compliance, exchange mandatory disclosures, and take a parenting class. In general, all of the foregoing is to be completed, to the extent possible, at the time of the initial status conference, which under the rules is to be set no more than 42 days after the filing of the petition. C.R.C.P. 16.2(c)(1)(E) and (e)(2). Some case management orders set a quicker time frame for the initial status conference to be set.

Each court may have its own case management order, C.R.C.P. 16.2(b), and judges expect lawyers to abide by it. Thus, lawyers should read the case management order in each and every case.

The next set of deadlines is keyed off of the permanent orders hearing date. Witnesses must be disclosed no fewer than 63 days (nine weeks) before the permanent orders hearing. C.R.C.P. 16.2(e)(3). Expert reports must be tendered no fewer than 56 days (eight weeks) before the permanent orders hearing. C.R.C.P. 16.2(e)(3); C.R.C.P. 26(a)(2)(B). Discovery must be completed no fewer than 28 days before the permanent orders hearing. C.R.C.P. 16.2(f)(5). Finally, a trial management certificate must be prepared and filed, and copies of exhibits must be exchanged, no fewer than seven days before a permanent orders hearing. C.R.C.P. 16.2(h)(2).

The timeline for post-decree family law matters is governed primarily by the court's case management orders. C.R.C.P. 16.2 also applies, but the hearing dates for post-decree issues are often scheduled too quickly to adhere to C.R.C.P. 16.2 deadlines.

Deadlines matter in family law. Lawyers who abide by deadlines are often able to use the deadlines to their strategic advantage, particularly in discovery matters. Lawyers who miss deadlines give their clients a readily identifiable mistake their lawyer has made, and upon which to base a malpractice claim. Whereas deadlines can be moved via lawyer agreements or court leave, lawyers who simply ignore deadlines do so very much at their own peril.

A good calendaring system is essential. Lawyers should have at least three different calendaring or "tickle" systems. At least one of these should be a paper or cloud-based system as opposed to a server-based system.

§ 38.3.2—Sworn Financial Statements

The single most critical document in a dissolution of marriage matter is the sworn financial statement. The court will always review this document before hearings. When issuing orders, the court will refer back to this document. Sometimes, the sworn financial statement may be the only evidence on a given financial issue. The opposing party and opposing counsel will focus on this document. If there are mistakes in the document, the opposing party will focus in on the error within a "sworn document." The dissolution of marriage process assumes full and fair disclosure of assets, debts, and income. Failure to fully disclose leaves parties open to cases being reopened up to five years after the decree is issued. C.R.C.P. 16.2(e)(10).

Oftentimes, clients are not experienced in producing financial statements. Even more often, they are unfamiliar with the legal concepts of "separate" versus "marital" property or debt. They may not understand how often they are paid or what amount is deducted for taxes. Small business owners may not know what their "income" is. Clients may not know how assets are titled, or how debts are held. Many times, clients do not know what they own and do not know a fair value for their assets. Clients may have no idea what the family spends on a monthly basis. In certain cases, it may be appropriate to hire a forensic accountant expert if one party believes there may be hidden or dissipated assets. Rebecca E. Hatch, J.D., "Uncovering Marital Assets in Divorce Proceedings," 128 Am. Jur. *Trials* 337, § 7 (Aug. 2013).

The importance of correct preparation of a sworn financial statement cannot be over emphasized.

The best practice is for lawyers to prepare the sworn financial statement themselves after a draft has been prepared by the client. The lawyer's draft should be reviewed by the lawyer with the client. Documents that back up information on the sworn financial statement should be sought and reviewed whenever possible.

§ 38.3.3—Initial Status Conferences

The initial status conference is an informal conference between the court and parties and their counsel. It is to be held no more than 42 days after the petition has been filed. C.R.C.P. 16.2(c)(1)(E).

Initial status conferences can be conducted by family court facilitators, judges, or magistrates. C.R.C.P. 16.2(c)(2)(C) and (D). Family court facilitators cannot enter orders but may confirm the agreements of the parties in writing. Any agreements that the parties wish to have entered as orders must be submitted to the judge or magistrate for approval. C.R.C.P. 16.2(c)(2)(C). However, emergency matters may be brought to the attention of

the family court facilitator or the clerk for presentation to the court, and issues related to children are given priority on the court's calendar. C.R.C.P. 16.2(c)(3)(A). Unlike family court facilitators, judges or magistrates who preside over an initial status conference may enter interim orders at any status conference, either upon the stipulation of the parties or to address emergency circumstances. C.R.C.P. 16.2(c)(2)(D).

In theory, the initial status conference is a time when the court determines if the parties have any agreements that can be made orders of the court, sets a discovery schedule, and sets the next court event. In practice, the initial status conference is where temporary orders are made, either by strong-arming, by agreement, or by default. The court may also enter interim orders to address emergency circumstances at an initial status conference. C.R.C.P. 16.2(c)(2)(D). For some magistrates, setting interim child support and maintenance amounts is an emergency issue. Additionally, discovery discussions begin and often end at this conference. The initial status conference also sets the tone of the case, both for the court and between parties and their counsel.

The results of the initial status conference will often stay with the parties for the duration of their case. Clients are generally still getting acclimated to the fact of a divorce and to the legal process at the time of an initial status conference. They are in need of a lot of legal direction and advice at this time. The initial status conference should not be underprepared for, nor its importance to the overall case underestimated.

§ 38.3.4—Temporary Orders

Temporary orders are not automatically entered but may be requested by either party at the initial status conference or by filing a motion. C.R.S. § 14-10-108(2). If the parties have not in good faith attempted resolution of temporary orders, the court may vacate the temporary orders hearing unless an emergency exists that requires immediate court attention. C.R.C.P. 16.2(c)(3)(C).

If a client is unable to support himself or herself during the divorce proceedings, attorneys may request a temporary maintenance award and payment of attorney fees and costs. C.R.S. §§ 14-10-108 and -119. If the permanent orders hearing is continued, temporary orders remain in full force and effect even without a specific court order continuing the temporary orders. *In re Marriage of Price*, 727 P.2d 1073, 1076-77 (Colo. 1986). As temporary orders are not considered a final judgment, there is no immediate right of appeal to the court of appeals. *In re Marriage of Adams*, 778 P.2d 294, 295 (Colo. App. 1989). However, temporary orders as to child support, maintenance, and attorney fees are reviewable as final judgments even if a final decree has not yet been entered. *Hobbs v. Hobbs*, 210 P. 398, 399 (Colo. 1922). An attorney who waits until after the entry of permanent or-

ders to appeal a temporary order risks having the appeal dismissed as untimely. *In re Marriage of Nussbeck*, 899 P.2d 347, 348 (Colo. App. 1995).

§ 38.3.5—Disclosure

C.R.C.P. 16.2(e)(1) mandates that parties to family law cases "owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case." A party must disclose such information without awaiting inquiry from the other party. C.R.C.P. 16.2(e)(1) and (2). When considering what facts are deemed "material," the Colorado Supreme Court has stated that it is "simply a fact that will affect the outcome of the case." *Mt. Emmons Min. Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984). To ascertain the facts that are likely to affect the outcome, lawyers should ask themselves and their clients questions such as: "If I am on the other side of this case, would I want to know this fact?" and "If the positions were reversed and your spouse withheld this information, would it seem unfair to you?" C.R.C.P. 16.2(e)(1) and (2).

The list of mandatory disclosures that the client must produce under C.R.C.P. 16.2(e)(2) is extensive and includes the following:

- Current sworn financial statement;
- Most recent three years of personal and business federal income tax returns, including all schedules and attachments (W-2's, 1099's, and K1's);
- Last three years of personal financial statements, statements of assets or liabilities, and credit and loan applications prepared during the last three years;
- Last three years of business financial statements, including all year-to-date financial statements, and the same periodic financial statements for the prior year;
- Real estate documents reflecting the title documents and all documents stating value of all real property in which a party has a personal or business interest;
- All documents creating debt, and the most recent debt statements showing the balance and payment terms;
- All documents identifying any investment, and stating the current value;
- Documents identifying each employment benefit, and stating the current value;
- Documents identifying each retirement plan and stating the current value, and all plan summary descriptions;
- Documents identifying each account at banks and other financial institutions, and stating the current value;
- Documents verifying each income source in the current and prior calendar year, including income from employment investment, government programs, gifts, trust distributions, prizes, and income from every other source;

- Each self-employed party shall provide a sworn statement of gross income, business expenses necessary to produce income, and net income for the three months before filing of the petition or post-decree motion;
- Documents that show average monthly employment-related and education-related child care expense;
- Documentation of life, health, and property insurance policies and current documents that show beneficiaries, coverage, cost including the portion payable to provide health insurance for children, and payment schedule; and
- Documents that show average monthly expense for all recurring extraordinary children's expenses.

Because this list is comprehensive, it can be time-consuming for the client to collect all of the necessary documentation and it can be difficult for the lawyer to track and organize the client's information. One of the best ways to initiate the disclosure process with the client is to send a letter detailing all of the requirements. Once the client has had the opportunity to review the letter, the lawyer must discuss with the client the importance of providing full, honest, and complete disclosures, as it can be extremely harmful to the client if the court finds that there was any attempt to conceal or hide facts. C.R.C.P. 16.2(c)(1) and (2). Clients should be told that a failure to fully disclose can lead to a case being re-opened and re-litigated years later. C.R.C.P. 16.2(e)(10).

Once the client has completed the disclosures, the lawyer must submit a certificate of compliance stating that all mandatory disclosures have been provided to the other party. C.R.C.P. 16.2(e)(7). With the exception of the sworn financial statement and the child support worksheet, the actual disclosure documents themselves are not filed with the court. C.R.C.P. 16.2(e)(6). A party who signs the certificate of compliance certifies to the best of his or her knowledge that the disclosures are complete and accurate. C.R.C.P. 16.2(e)(7) and (8); C.R.C.P. 26(g)(1). The client remains under a continuing obligation to update the initial disclosures for the duration of the case. C.R.C.P. 16.2(e)(4); C.R.C.P. 26(e).

§ 38.3.6—Discovery

C.R.C.P. 16.2(f) governs the type of discovery that may be permitted in a family law case. Under the Rule, lawyers are permitted to take depositions of parties, experts, and non-parties for purposes of authentication of documents. Lawyers may serve pattern interrogatories and requests for production of documents and a limited number of non-pattern interrogatories and requests for production of documents, but only after the initial status conference. At the initial status conference, parties and their lawyers may request other discovery, such as appraisals and valuations. All discovery must be completed no later than 28 days before hearing, unless it is required that the court extend the time "upon good cause shown or to prevent manifest injustice." C.R.C.P. 16.2(f)(5).

Under the Rule, no additional formal discovery is permitted unless ordered or authorized by the court. C.R.C.P. 16.2(f)(4). Lawyers are well advised to identify all discovery issues before the initial status conference. However, the Rule does provide that the court "shall grant all reasonable requests for additional discovery for good cause as defined in C.R.C.P. 26(b)(2)(F)." *Id.* Before a lawyer requests any discovery beyond what is mandated, the lawyer should discuss the request with the client, as there can be pros and cons to requesting additional discovery, including the expenses incurred in both obtaining and responding to formal discovery requests. The client should be aware that any request made to the opposing party likely will be returned in kind.

When considering whether to request discovery, the lawyer should consider each case on an individual basis. For example, if the opposing party has done a complete job answering the mandatory disclosures, it is often unnecessary to send a complete set of interrogatories. But, if the opposing party is not cooperative with disclosures, or if the parties are extremely adversarial, it is often helpful for a lawyer to depose the other party to try to gain a better understanding the opposing party's position on the facts of the case.

If the opposing party is not being cooperative with discovery, this fact should be immediately addressed with the court. Otherwise, the lawyer could find his or herself at trial without complete discovery. In the absence of a timely filed motion to compel discovery, a court may be unlikely to allow a continuance of a trial for lack of discovery. If a party must go to trial without full discovery, he or she is likely to feel as though the results of the trial were unfavorable as the result of lawyer error.

§ 38.3.7—Non-Expert Witnesses

Choosing lay witnesses for trial can be difficult. First, clients often believe a witness to be crucial to prove a particular point, yet from a legal perspective, the lawyer may deem the witness or the information the witness has irrelevant or of limited value. Additionally, while a client may believe a particular lay witness will testify a certain way, it may turn out that the witness will not testify at all how the client believed he or she would. Finally, many lawyers never, or at the last minute, talk to lay witnesses.

From the malpractice perspective, lawyers run many risks if they do not deal with lay witnesses thoroughly and in a timely manner. They run the risk of not calling a witness that a client believes would have changed the outcome of a hearing. They run the risk of not calling their own and the opposing party's lay witnesses far enough in advance of hearings to know what the witness will say and whether they are in fact important to a case.

Witnesses should be identified as early as possible in a case. Clients should be educated enough about their case to be able to meaningfully help with the identification of

witnesses with relevant testimony. Witnesses should all be interviewed by the lawyer well in advance of hearings. Very often in family law cases, witnesses will not testify as the client believes they will. This needs to be determined before the witness is on the stand. Finally, non-disclosed lay witnesses are easy to have excluded at trial. Careful attention should be paid to disclosing witnesses within the disclosure deadline.

§ 38.3.8—Expert Witnesses

There are a number of types of experts that may be involved in a family law matter. Most often, property appraisers, business valuators, certified public accountants, vocational evaluators, and parental responsibility evaluators are used.

The use and disclosure of expert witnesses is governed by C.R.C.P. 16.2 and the disclosure requirements of C.R.C.P. 26(a)(2)(B). Pursuant to C.R.C.P. 16.2(g), parties are to use joint experts when an expert is needed for an issue. A joint expert is an expert witness either appointed by the court or agreed upon by both parties in the case. The cost of the joint expert is divided evenly between the parties, divided in proportion to each party's income, or paid with marital funds. Expert reports shall be provided to parties 56 days prior to hearing, and rebuttal reports shall be provided 21 days thereafter. C.R.C.P. 16.2(g)(5).

Special care should be taken with joint experts. Clients are generally suspicious of any expert chosen by or even agreed to by the other side. Joint experts should be vetted by the lawyer in order to reveal any close association between the expert and the other side or the other side's lawyer. Failure to do so can lead to the client blaming the lawyer's lack of follow-through for an opinion adverse to the client. Clients must also be clear that the joint expert is really neither side's expert, and that information given to the joint expert is not confidential. Written engagement agreements should be drafted to specifically outline the joint expert's scope of work, and the mechanism to be employed should one party seek to expand that scope. The agreements should also set forth how communication between the joint expert and counsel will be handled, and how requests for the expert's file will be handled.

Parties may also use their own experts for issues. C.R.C.P. 16.2(g)(3). However, the court always has the authority and mandate to control the management of a case, and can potentially bar a party from having his or her own expert on an issue. C.R.C.P. 16.2(b); C.R.C.P. 16.2(g). In practice, the non-joint expert will really be a rebuttal expert where the issue has also been the subject of a report by a joint expert. C.R.C.P. 16.2(g)(3).

Careful attention should also be paid to the choice of experts who are not joint experts. Again, it is the lawyer who is likely to be blamed for the choice of an expert if an opinion is not what the client wanted. Most often, the clients are not in a position to choose

an expert, and rely on the lawyer's choice. Clients also may not understand that just because they have hired and paid for the expert does not mean that they dictate the expert's opinion. Clients should be advised of the likely cost of the expert.

Clients should be advised, in writing, of what experts they may potentially need in a case. If the client decides to not hire an expert, that decision should also be reduced to writing.

Lawyers must also disclose experts, and tender expert reports within the deadlines set for such disclosures. C.R.C.P. 16.2(g)(5). Failure to do so will lead to the expert and his or her report being excluded at trial.

Finally, before hiring and paying for a non-joint expert, the lawyer should satisfy himself or herself that the expert will be admissible under C.R.C.P. 16.2(b) and 16.2(f), CRE 702,[2] and, when applicable, *People v. Shreck*, 22 P.3d 68 (Colo. 2001). Clients who find their experts rejected at trial by the court will consider malpractice claims, especially if the lawyer never advised the client of the possibility of such exclusion of evidence.

§ 38.3.9—Child And Family Investigators And Parenting Evaluators

When divorcing parents cannot agree upon parenting issues, a child and family investigator (CFI) or parental responsibility evaluator (PRE) is often appointed by the court to investigate the family and file a written report and recommendations with the court regarding parenting time and decision-making authority.

CFIs may be lawyers or mental health professionals. Their authority derives from C.R.S. § 14-10-116.5. They are governed by Chief Justice Directive 04-08, as amended December 2012 and January 2016. CFIs are not experts, but they do have to abide by certain standards. CFIs are limited to a presumptive cap of $2,750 in total fees, although this can be exceeded with court permission.

PREs may be appointed in a matter, pursuant to C.R.S. § 14-10-127. A PRE must be a mental health expert, and is an expert witness. Due to the amended Chief Justice Directive limiting the amount that a CFI can charge, many parents now choose a PRE instead of a CFI to avoid limited reports. However, a PRE can be very expensive.

CFIs/PREs carry a significant amount of weight in any family law matter. In preparing their reports, they address a client's psychological profile, family history, dynamic within the marriage, parenting ability, and general personal shortcomings. The written report of a CFI/PRE is extremely personal to the client, and deals with those things

most near and dear to him or her. The CFI's/PRE's report can literally have an impact on a family that lasts years. The report can also result in a psychic injury to a client.

As such, a client cannot be too well prepared for his or her dealing with the CFI/PRE. The client should be made familiar with the CFI's/PRE's role in the case. The client should be told the process that the CFI/PRE is likely to use. The client should understand that there is no confidentiality between him or her and the CFI/PRE. The client should be made aware that the CFI/PRE is neither "on" his or her "side," nor a lawyer for the child(ren). It is probably helpful for the client to be told what a report is likely to look like in terms of substance and issues covered. Finally, the client should be properly warned that the report is more likely than not to contain opinions that the client does not like or even agree with. Where possible, if the lawyer has an idea of what the CFI/PRE is likely to find as the client's deficits, the lawyer should begin to discuss those issues with the client.

Lastly, all CFIs and PREs should be properly vetted before being agreed to by a lawyer.

§ 38.3.10—Alternative Dispute Resolution

Most family law matters will involve mediation at some point. Most districts now require mediation in every dissolution or post-decree matter. This requirement is found in the court's case management order. Even when not court mandated, most family lawyers will recommend mediation to their clients. More often than not, mediation will produce resolutions to at least some of the client's legal issues.

There are some situations where mediation will not be possible, will not be at all effective, or will serve as a medium for continued abuse of one party by the other. In general, these instances are few and far between, but the practitioner should be cognizant enough of the dynamics between the parties to gauge whether mediation should be avoided.

Clients who are successful at mediation are often more satisfied with the outcome of their case because they controlled the final outcome. Parties often understand that they have compromised, but that they have gotten some of what they wanted. Parties who can successfully resolve issues at the dissolution of marriage stage are more likely to also resolve future disputes without court involvement.

For malpractice purposes, lawyers should be careful about how the mediation process proceeds. Clients should be prepared for mediation and the issues to be addressed so that they feel competent to make educated decisions during mediation.

Clients should also be protected from being strong-armed into agreements during mediation or settlement. Mediation can sometimes last for eight hours or more. Settlement conferences can take place literally hours before a hearing time. Under some conditions, it can be in the lawyer's best interests to have a case settle. It is always in the mediator's interests to have a case settle. Mediators and lawyers can put considerable pressure upon stressed and tired clients to settle. If a lot of pressure is put on a client to settle and he or she signs a settlement agreement, a lawyer runs a significant risk of finding the client wishes to rescind a written settlement agreement. Clients may claim duress. Alternatively, the client may claim that he or she did not really understand what he or she was agreeing to. The lawyer also runs a risk of a malpractice claim, particularly if the agreement cannot be rescinded.

§ 38.4 • TRIALS

§ 38.4.1—Trial Management Certificates

Trial management certificates are required to be filed with the court no less than seven days before any hearing. C.R.C.P. 16.2(h)(2). The importance of trial management certificates cannot be over-emphasized. The court will look to the trial management certificate before the hearing, and often, after the hearing while preparing orders. A party's position needs to be clearly and fully set forth in the trial management certificate. Points of law that the court needs to be aware of must also be found in the trial management certificate.

Courts may deem admissible all exhibits that are not objected to in the trial management certificate. Courts will also allow the testimony of any witnesses disclosed on the trial management certificate, and not objected to, and will not allow testimony from witnesses not on the trial management certificate.

§ 38.4.2—Preparing The Client

Clients are generally nervous about going to court. They likely have no experience in a courtroom, and do not know what to expect. Additionally, of course, they are going through a very emotional experience, and the stakes are quite high.

In order to have a client be an effective witness in his or her case, the client needs to be thoroughly prepared. Additionally, the more prepared the client is, the more he or she will trust the lawyer. If the client does not know what to expect, he or she will be less able to weather the unexpected aspects of a trial. Finally, the well-prepared client can exit a courtroom feeling as though he or she "gave it their best shot." This is better for the lawyer than the client leaving feeling as though he or she has been blindsided.

Clients should be told where the courthouse and the courtroom are located. They should be instructed about courtroom etiquette. They should be generally aware of what the lawyer will ask them on direct examination, and what is likely to be asked on cross-examination. Clients should go through at least one mock direct examination with the lawyer, both to help the client with the process and to help the lawyer with the substantive material. Clients should be very familiar with exhibits so that they can properly authenticate them, and testify as to what they purport to prove. They should know what to expect to hear from witnesses they have endorsed, as well as adverse witnesses. They should know that courtrooms are public, and that any person may view the proceedings.

Clients should know that sometimes matters are not heard when they are set to be heard, and sometimes not by the judge they were set in front of. Clients should be advised that judges do not always issue orders on the day of the hearing.

§ 38.4.3—Witnesses

Witnesses for both sides should be interviewed by the lawyer well before the hearing date. Witnesses should know that they are being called, and why they are being called. Witnesses should be properly served a subpoena to testify. The client should be apprised of what the lawyer has been told by witnesses endorsed by the client, and by witnesses for the other party. The client should be given information regarding witnesses well enough in advance of a hearing for the client to provide the lawyer with rebuttal information.

§ 38.4.4—Exhibits

All exhibits should be exchanged with the opposing party at least seven days before hearing. C.R.C.P. 16.2(h)(2). Any objections to exhibits should be noted in the trial management certificate, or in a pre-trial conference.

Clients should review all exhibits well before the hearing date. Witnesses who will be asked to provide the foundation for the admission of an exhibit should be familiar with the exhibit.

All exhibits should be marked prior to trial, and those with more than two pages should be paginated. Exhibits should be well organized. Lawyers who fumble with exhibits at trial lose credibility with the court and with their own clients.

§ 38.4.5—Lawyer Preparation

It is obvious to a client if a lawyer is not prepared for trial. It is also obvious to the court. As preparedness is such an essential element of the lawyer's job, the unprepared lawyer is vulnerable to a malpractice claim when trial results are not what a client hoped.

§ 38.4.6—Limited Hearing Time

Courts are giving parties and their counsel less and less time for hearings. The court must give parties enough time during a hearing to afford them due process of law. *In re Marriage of Goellner*, 770 P.2d 1387 (Colo. App. 1989). However, lawyers must object when given too little opportunity to be fully heard.

§ 38.4.7—Continuances

In many districts, continuances are rarely granted. Even if parties and their counsel agree that they are not prepared to go to trial, and even if in fact they are not, a court may force the parties to go to trial on their hearing date. The only alternative that many judges offer is a dismissal of the case.

Clients who go to trial with unprepared lawyers who are forced to either proceed with trial or have the action dismissed are not satisfied clients. Lack of preparation for a trial makes a lawyer vulnerable to a malpractice suit.

It is unwise to accept representation of a client on the eve of trial.

§ 38.4.8—Appeals

Clients who have gone to trial should be advised in writing that they have 49 days to appeal final district court rulings and 14 days to appeal a magistrate's final ruling to the district court (or 21 days if the parties were not present when the order was entered). C.A.R. 4(a); Colorado Rules for Magistrates 7(a)(5).

With few exceptions, an appellate court can only review a trial court's rulings if an adequate record was made at the trial court level. In general, a lawyer should raise issues and make objections on the record, and state why an objection is being made. If the objection is to the admissibility of evidence, the correct grounds for the objection must be on the record, or, if the objection is to the court's exclusion of evidence, an offer of proof must be made. A client who reads the words, "We do not review this issue because it was not properly raised before the trial court," in an appellate court decision can see a lawyer's error in black and white.

Additionally, if the other parties' value of an asset is going to be objected to, there must be an alternative value submitted by or on behalf of the client. All assets to be divided must be before the court. If not before the court, it will not be error on appeal for the court to have failed to address the asset.

§ 38.5 • OTHER AREAS

§ 38.5.1—Marital Agreements

Pre-marital agreements are rife with opportunities for a lawyer to be sued for malpractice. Clients all too often are in a hurry to complete them, and too focused on the impending wedding date to properly address them.

A client's main goal in the creation of a marital agreement is for the agreement to not be invalidated, and, if there is a divorce, for the outcome to be governed by what he or she believes the pre-marital agreement says.

A marital agreement can be invalidated if it was signed under duress. Lawyers should refuse to prepare marital agreements too close to the wedding date. Additionally, lawyers should ensure that both parties, or at least the less well-off spouse, are represented by independent counsel.

Lawyers should ensure that full and complete financial disclosures are prepared by both parties before the agreement is signed. When at all possible, back-up documents should be provided to substantiate the value of all assets, the terms of all debts, and all income. If this is not possible, time and opportunity should be given to the other party to ask for and receive any back-up documents that he or she may wish to request.

Agreements should be written in language that the parties understand. Care should be taken to ensure that clients do, in fact, understand what the agreement means. Clients also must be advised as to what their rights or responsibilities are in the absence of the marital agreement. Marital agreements that are ambiguous or subject to conflicting interpretations lead to litigation. Litigation over what a provision in a marital agreement means leads to malpractice suits. Lawyers should also take care to ensure there are not conflicting provisions within a marital agreement.

Lawyers and clients should spend time attempting to identify all future issues that may come up between the couple if they divorce. If the lawyer does not draft for a contingency that then ends up being a contested dissolution issue, chances are good that a client will identify this as a failing in the lawyer's work product.

Lawyers should keep all of the drafts of the marital agreement.

If a party for whom a lawyer has drafted a marital agreement does divorce, the drafting lawyer should not be the lawyer for the divorce. It is very possible that the lawyer who drafted the marital agreement will become a witness in the dissolution matter.

§ 38.5.2—Qualified Domestic Relations Orders And Domestic Relations Orders

There are five distinct tasks involved with qualified domestic relations orders (QDRO) and domestic relations orders (DRO)[3]:

1) Resolving the terms of the division of the asset;
2) Preparing the QDRO or DRO;
3) Having the QDRO or DRO pre-qualified by the plan administrator;
4) Having the QDRO or DRO made an order of the court; and
5) Making sure the order is tendered, on time, to the plan administrator.

There are four areas where malpractice claims are most likely to crop up. First, the QDRO or DRO may be incorrectly drafted, leading to a division of the asset contrary to how the parties agreed. This is particularly a problem with drafting provisions regarding the issue of survivor benefits. Sometimes the provisions are ambiguous, sometimes the issue is not addressed at all, and sometimes there is a failure to draft provisions regarding how survivor benefits are paid for during the participant's life. This problem may not be discovered until years after the divorce is final.

Second, a QDRO or DRO may not be filed by the lawyer on time. DROs must be approved and entered by the court upon entry of the decree, or within 90 days thereafter, and submitted to the Public Employees' Retirement Association (PERA) no more than 90 days after the entry of decree and permanent orders. C.R.S. § 14-10-113(6)(c)(1). QDROs must be filed at least prior to the death or retirement of the participant.

Third, a QDRO that specifies a particular amount to be distributed to the spouse may not be filed on time for the plan participant to be able to actually distribute that amount. For example, the stock market may take a significant downturn, and the retirement account may lose too much value to distribute the designated sum to the spouse. Or, the participant may abscond with the funds before the QDRO is submitted to the plan administrator.

Fourth, a lawyer may neglect to have a pension plan expertly valued, or may fail to timely disclose the expert and the expert's opinion, thereby having the opinion excluded at trial.

Errors concerning QDROs and DROs are very difficult to correct. QDROs are governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Ch. 18.

When there are issues that arise that would require the plan administrator to be made party to a case, the case must be removed to federal district court. DROs are governed by Colorado statute, but the district courts have no authority to enter orders contrary to PERA statutes.

Lawyers are well advised to continue their engagement with the client until the court approved QDRO or DRO is formally submitted to the plan participant. It is not a good idea to simply tell clients the QDRO or DRO must be completed and submitted to the plan administrator, and then terminate representation. Many lawyers choose to have a lawyer who specializes in division of retirement assets handle the QDRO or DRO drafting process. If so, the lawyer should speak with the person to be drafting the QDRO or DRO before a separation agreement is signed in order to ensure that all necessary terms of division have been discussed and agreements reached on the same.

§ 38.5.3—Maintenance Terms

Maintenance terms in separation agreements must be articulated in language that is specific and unequivocal. *In re Marriage of Rother*, 651 P.2d 457, 459 (Colo. App. 1982); *In re Marriage of Burke*, 39 P.3d 1226 (Colo. App. 2001). Agreements regarding maintenance should state the date that the obligation begins and, where applicable, when the obligation ends. If maintenance is to be non-modifiable, that fact should be stated very clearly in the agreement. *Sinn v. Sinn*, 696 P.2d 333 (Colo. 1985) (only where parties have expressly agreed to preclude modification should maintenance be incapable of modification). The agreement should clearly state if maintenance is to continue after the death of the obligor, or continue after the remarriage of the obligee.[4] Until 2019, the separation agreement should state that maintenance is to be taxable as income to the obligee, and tax deductible to the obligor.

§ 38.5.4—Bankruptcy

Bankruptcy is a specialized area of federal law that should not be dabbled in. If your practice does not include a significant amount of bankruptcy work, and a client indicates that he or she or his or her spouse may be filing for bankruptcy protection either before, during, or after a dissolution of marriage, refer that client to a competent bankruptcy lawyer.

If a bankruptcy petition is filed during a dissolution of marriage action, the filing stays the division of property and debt by the divorce court. All property and debt of the party or parties filing for the bankruptcy protection now "belong" to the bankruptcy trustee and must be managed by the trustee.

Current child support and maintenance obligations are not subject to the stay, and income assignments can continue against an obligor even after a filing. Debts in the nature of family support are excepted from discharge.

If a spouse owns real property titled in his or her name only and there is a threat of a bankruptcy petition being filed by that spouse before the divorce is final, the other spouse should record a *lis pendens* on the property. Otherwise, the other spouse will not be able to make any claim for his or her share of the marital portion of the property (the increase in value, if any), as the bankruptcy trustee will "own" 100 percent of the property.

Clients who are considering the filing of a bankruptcy petition should not enter into a separation agreement that gives very favorable terms to a non-petitioning spouse. A bankruptcy trustee may avoid a fraudulent transfer of interest of the debtor in property within one year prior to the filing of the bankruptcy petition. This includes property transfers to a spouse incident to a dissolution action if the transfer was intended to defraud the trustee, or was for less than a reasonably equivalent value in exchange — *i.e.*, too favorable.

Further, debtors who make a property payment to an ex-spouse pursuant to court order within the look-back period (one year from the time of the filing of the bankruptcy petition for "insiders," 90 days for all others) may be deemed to have made a preferential payment if all necessary factors are present. A bankruptcy trustee in certain circumstances could demand that payment made to an ex-spouse pursuant to the property distribution orders be returned to the bankruptcy trustee. *See* 11 U.S.C. § 547.

Lawyers should work to ensure that any debt that was joint debt during the marriage is satisfied via the terms of the separation agreement or permanent orders. Thus, if at all possible, all joint debt should be paid or refinanced. This would include joint credit card debt. One method of dealing with joint credit card debt is requiring each party to transfer their fair share of joint credit card debt onto new credit cards under each party's individual name.

§ 38.5.5—Taxes

Taxes touch nearly every aspect of a family law matter. Family lawyers should be alert to tax implications of their agreements, orders, or their clients' actions. Failure to at least be able to issue spot can lead to clients having tax problems that they were not anticipating, or to clients not being able to take advantage of some tax rules. It is not difficult for a client to readily put a dollar value on lawyer errors involving tax issues.

Here are some of the areas that lawyers should be aware of involving taxes:

- It will sometimes be advantageous for a client and his or her spouse to file joint income tax returns for the year that they are divorcing. However, tax returns are to be filed based upon the parties' marital status as of December 31. If parties are reaching a settlement near the end of a year, the option of requesting that the decree be entered after January 1 of the next year should be extended to the client. This request might not be granted by the court, however.
- If parties will not be filing an income tax return together during the divorce process, the separation agreement or court orders should address which party is to claim which deductions, such as the mortgage interest deduction and property tax deductions, for the tax year. Parties should also discuss which party will be claiming the interest or dividend income on jointly held assets, such as jointly held brokerage accounts. If a solely titled asset has been liquidated and there are income tax consequences, such as with the liquidation of a retirement asset, parties should address which party will be declaring the resulting income and how that liability will be equalized, if at all. Parties should address the value of capital loss carry over.
- Head of household filing status is quite advantageous for most taxpayers. If parties are dividing parenting time equally, there should be a discussion about which parent can file as head of household during a given year, when applicable.
- Child support is not taxed to the obligee, and is not tax deductible to the obligor.
- Only the parent who claims the child as a dependent on the income tax return may receive the child tax credit.
- The child care deduction can only be claimed by a parent who is entitled to file as head of household, who has the child in his or her care for 50 percent of the year or more, and who has actually paid child and dependent care expenses.
- Until 2019, maintenance is taxed as income to the obligee, and is tax deductible to the obligor. For maintenance to be deductible, it must meet IRS rules. Just calling a payment maintenance does not automatically make it so. After 2018, maintenance is no longer taxed or deductible.
- For property that increases in value, lawyers should determine the client's basis in the property, estimate what capital gains taxes would be due if the property was sold, and account for tax liability in the valuation of the property.
- Early distribution of retirement assets will trigger income taxes and sometimes penalties.
- It is generally not advisable for a party to enter into an agreement regarding how a certain year's income tax liability will be divided if the parties are not completely certain of the amount of that liability. For instance, sometimes spouses divorcing in February will agree to equally divide the income tax liability for the prior year. However, it may come to pass in September that parties realize that their liability is much higher than they believed in February, and one or both parties are not able

to pay the liability. If one party is a self-employed person, the income tax liability may be very hard to determine until some time into the next year. If the self-employed person failed to pay estimated taxes, the liability can be quite large, and the spouse may not have the information to gauge the liability.

- It is always advisable to enter into agreements that address both liabilities and refunds. Although parties may believe they have a liability for a certain year, by the time returns are prepared, it may be discovered that actually a refund is due.
- It is generally not advisable for a party to enter into an agreement regarding how a certain year's income tax refund will be divided unless the parties are certain of the refund amount.
- Lawyers should draft separation agreements to include a provision for how audits of income tax returns filed during marriage will be handled, to include paying amounts due to the taxing authority, dividing refunds, and handling the costs of the audit.
- Lawyers should advise clients that it is not simply employment that creates income for child support (and sometimes maintenance) purposes. Parties with minor children, and parties with modifiable maintenance terms, may be required to exchange financial information with the other party, including income tax returns. Clients should be advised that events like the sale of property that creates capital gains, receiving money from a retirement fund, winnings income, inheritances, and some personal injury settlements create income for support purposes. Modifiable support payments may be modified based upon those types of income.
- Corporate stock redemption may trigger income to the spouse whose stock was redeemed, or to the business owner, if the business owner had an obligation to redeem the stock. The forgiveness of certain loans by a corporation can be income to the shareholder obligor. A self-employed person who has used corporate funds for personal expenses may receive a W-2 for the value of the corporation paying those personal expenses.
- Clients can deduct lawyer fees for advice related to federal, state, and local taxes on their income tax returns. However, itemization of deductions will be rare beginning in 2018.

It is good practice to have a certified public accountant who can be relied upon for advice in the area of tax. It is also good practice to let clients know, in writing, that they should not rely upon the family lawyer for tax advice, but should consult their own certified public accountant. For some matters, it is advisable to have a certified public accountant be a member of the lawyer's team of professionals for the client's matter.

§ 38.5.6—Death And Divorce

A party may die during the divorce process. Clients should be advised that they may change their estate planning documents during divorce, to include nominating persons to make medical decisions for them if they become unable to do so, and nominating a conservator and guardian. Parties may also change the titling on joint tenancy with right of survivorship property to a tenancy in common. *Taylor v. Canterbury*, 92 P.3d 961 (Colo. 2004). Clients may petition the court to allow a modification of life insurance policies, including the beneficiaries thereof. (No petition is needed if the life insurance beneficiary was not the spouse or the children of the marriage when the petition was filed.) Clients who are ill should be advised that they may request a preferential hearing date for the permanent orders, and the court must set the case for trial not more than 119 days from the date the motion was filed. C.R.S. §§ 13-1-129(1) and (4).

A party will absolutely die sometime after a divorce. Lawyers should advise clients to change beneficiary designations on all life insurance policies, retirement assets, any other assets with a beneficiary designation, and revise all estate planning documents.

Clients whose child support or maintenance obligations are to be secured by life insurance are well advised to own the life insurance policy on the ex-spouse's life that is the security. This gives the client the ability to ensure that the policy premiums are being paid, and that the beneficiary is not changed.

Colorado has a statute that automatically revokes probate and non-probate transfers between divorced spouses. C.R.S. § 15-11-804. Additionally, separation agreements routinely state that each spouse will no longer be a beneficiary of the estate, death benefits, or retirement benefits of an ex-spouse. However, life insurance companies will only pay death benefits to the listed beneficiary. If an ex-spouse is inadvertently still listed as a beneficiary at the time of death, the ex-spouse will receive the benefit. It will be up to the contingent beneficiary, or the beneficiary noted in a separation agreement or court order, to recoup the benefits from the ex-spouse.

Benefits governed by ERISA will be paid only to the designated beneficiary. If that beneficiary inadvertently remains the ex-spouse, the ex-spouse will be paid the benefits. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *In re Estate of MacAnally*, 20 P.3d 1197 (Colo. App. 2000). Because ERISA is federal law, it pre-empts the state revocation law. Benefits governed by PERA will be paid according to C.R.S. §§ 24-51-101, *et seq.*, notwithstanding the revocation statute or language in a separation agreement. Whereas an ex-spouse who receives benefits because of the mistake of failing to remove the ex-spouse as a beneficiary after divorce will likely have a claim brought against him or her to return the benefits, there is often significant cost associated with such an action.

§ 38.5.7—Criminal Law And Divorce

Family law and criminal law often intersect, especially in the area of domestic violence. Lawyers should be informed and aware of whether a client is facing criminal charges related to a domestic violence incident. A lawyer's failure to know and act upon this information may lead to giving the client advice that is problematic for the client's criminal defense.

Criminal defendants have a Fifth Amendment right not to testify against themselves. Lawyers should be very cognizant of what a client testifies to in the divorce proceeding, whether in a hearing or in a deposition, and ensure that testimony is not damaging to the criminal defense. Clients should never waive their right not to testify while a criminal action is pending or could be brought. The best practice may be to simply advise the client to invoke the privilege at all times until the criminal matter is resolved. However, the failure to testify in a civil matter can lead to the opposing side being entitled to certain presumptions.

Lawyers should also tread carefully where a client is subject to protective orders. Clients should be well advised of what they may and may not do while a protective order is in effect, and advised of the consequences for violating a protective order. If a client is the prohibited party on more than one restraining order — for instance a civil protection order and a criminal protection order — it is wise to advise that client to abide by the protective order that is the most restrictive.

§ 38.5.8—Competency Of Clients

Divorcing clients nearly always suffer from a great deal of stress and anxiety. Divorce is a tremendously taxing event on a person. Some clients, additionally, have personality disorders or dementia, which can make representation even more difficult for the lawyer. Finally, some clients are simply not competent in the legal sense of the word. These clients can present serious risks of malpractice and ethics violation claims simply because of the client's own particular mental heath issues.

Some lawyers can readily identify a person with a personality disorder or competency issue, and simply decline to represent such clients. For lawyers who do represent such clients, or only identify the personality disorder or competency issue after representation has begun, it is advisable to have the client agree, in writing, that the lawyer may consult with the client's therapist or a family member. This can allow the lawyer to get a better handle on what the client is dealing with, how it affects other aspects of his or her life, how best to represent the client, and whether a client is able to rationally make decisions at a given time. It may be necessary to have the client formally evaluated by a forensic psychiatrist. Sometimes a therapist should be brought into negotiations and court hearings in order to provide assistance to the client and to advise the lawyer as to how the client is

doing from the mental health standpoint. However, including the client's actual treating therapist may pose confidentiality issues and may compromise the therapeutic relationship.

If a lawyer is representing a client whose mental health status is impeding the ability of the client to effectively participate in the family law matter, the lawyer may wish to have the court appoint a guardian *ad litem* for the client, as suggested by Colo. RPC 1.14 (client under a disability) and C.R.C.P. 17(c). If the client objects, this could very well lead to the client terminating the services of the lawyer. If the client then goes on to hire subsequent counsel, that lawyer should require that a hearing on the competency of the client is held before the court. *In re Marriage of Sorensen*, 166 P.3d 254 (Colo. App. 2007).

A client shall be appointed a guardian *ad litem* for a dissolution of marriage action if the client (1) is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding; (2) is incapable of making critical decisions; (3) lacks the intellectual capacity to communicate with counsel; or (4) is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue his or her own interests. *Id.*

Lawyers should not "strong-arm" a settlement, particularly if a client appears to labor under a personality disorder or an issue with competency. If the client feels forced to sign an agreement, the agreement can later potentially be invalidated under duress or lack of voluntariness claims. The potential for malpractice claims or ethics violation claims against the lawyer will be high in these situations. In matters where the client has a mental health issue or may be incompetent, where the client is on mind-altering medication, and even when the client has simply stated that he or she has been extremely stressed, lawyers should not obtain decrees by affidavit. Rather, when a separation agreement has been signed, lawyers should examine their clients on the record for voluntariness and understanding of the agreement.

§ 38.5.9—Domestic Violence

For clients who are victims of domestic violence, the attorney will have additional challenges to overcome in providing the client with competent representation due to financial and other barriers the client may face as a result of the violence. First and foremost, attorneys should always ask if the address, e-mail, and phone contacts the client provides are "safe," or if the opposing party might have access to what should be confidential attorney-client communications. If telephone calls and e-mail communication may be intercepted by the abuser, it is a good idea to ask the client if there is a friend, relative, or work number where attorneys and staff can safely leave messages without endangering the client. Dorchen A. Leidholdt, "Interviewing Battered Women," *in Lawyer's Manual on Domestic Violence, Representing the Victim* 9-10 (5th ed. 2006) (hereinafter Leidholdt). If the attor-

ney calls the client at home and someone else answers the phone, the attorney should not just hang up because that could cause the abuser to become suspicious. Instead, it is a better practice to ask for someone else and apologize for dialing a wrong number. *Id.* If attending mediation — a controversial and difficult decision in and of itself in domestic violence cases — attorneys should let the mediator know ahead of time if there is domestic violence so the mediator can structure the mediation appropriately, potentially having parties in separate rooms or conducting the mediation over the phone if necessary. Kenneth K. Stuart & Cynthia A. Savage, "The Multi-Door Courthouse: How It's Working," 26 *Colo. Law.* 13 (Oct. 1997).[5] Attorneys should also strategize with the client about getting a protection order in place because, in a small number of cases, the intensity and lethality of domestic violence escalates after the victim leaves the relationship. Peter G. Jaffe, et al., "Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans," 46 *Fam. Ct. Rev.* 500, 501-02 (2008).

If children are involved, attorneys may need to structure parenting time plans differently as a result of domestic violence issues, potentially restricting or suspending contact or initiating supervised contact or exchanges. *Id.* at 501, 517-18. If ex-spouses are prone to become physically violent when in conflict, standard parenting time exchanges may create opportunities for renewed domestic violence issues. *Id.* at 502. Studies indicate that perpetrators of domestic violence are more likely to be deficient as parents, being cold, coercive, rejecting, or abusive toward their children or attempting to alienate the children from the other party or undermine the other party's parental authority. *Id.* at 502-03. Attorneys should preliminarily screen their domestic violence clients considering the three P's — potency (degree of severity), pattern (if the abuse is isolated or recurring), and primary perpetrator (separately or mutually instigated) — to determine whether parenting time should potentially be modified as a result of the abuse. *Id.* at 504-06. Due to the serious consequences that misdiagnosis can have, however, attorneys should avoid making a definite conclusion about the nature and effects of domestic violence or making recommendations about a long-term plan of care and should instead refer the parties to qualified mental health professionals with specialized domestic violence training. *Id.* at 506. Attorneys should also seek corroboration of the domestic violence if the other party is counter-blaming or denying the abuse. *Id.* at 507. Police reports, medical reports, and eye-witness accounts by unrelated third parties are often the most reliable sources of this information. *Id.*

Attorneys may face a variety of communication issues when representing victims of domestic violence. For one, a client may wish to have more contact with the attorney than a non-victim client. Extra caution should be taken when advising clients that are victims of domestic violence to avoid creating false expectations. Elizabeth Murno, "The Practitioner's Guide to Litigating Family Offense Proceedings," *in Lawyer's Manual on Domestic Violence, Representing the Victim* 39, 47 (5th ed. 2006). Attorneys should avoid

telling the client that they are "always available to talk" or that they will return the client's call "soon" without clarifying the client's expectations in advance to avoid dramatic misunderstandings, especially if the client is young. Stephanie Nilva & Kristine Herman, "Advocating for Youth in Domestic Violence Proceedings," *in Lawyer's Manual on Domestic Violence, Representing the Victim* 385, 389 (5th ed. 2006). Furthermore, it is important that an attorney explain to the client that the client needs to be punctual for meetings and to call in advance if he or she needs to reschedule. Leidholdt, *supra*, at 10. Some domestic violence victims' lives are in such a state of transition that it is difficult for them to keep appointments, especially if the abuse was recent or is ongoing or if the victim was forced to leave his or her home. *Id.* It is helpful be clear about what expectations the attorney has of the client, and it is important that those expectations be realistic and with consideration to the client's difficult circumstances. *Id.*

If a client feels that the attorney is untrustworthy, judgmental, or unable to relate to the client's experience, the client may censor himself or herself and the attorney may not get the information needed to represent the client effectively. *Id.* at 9. During the course of the attorney-client relationship, the attorney may have to give the client victim bad news, such as that the abuser gets visitation with the children. *Id.* If the attorney-client relationship is built on trust, it is far more likely that the client will be able to hear the bad news without feeling that the attorney is "the enemy." *Id.* Also, if the client trusts the attorney, the client is far more likely to make sound decisions and act in a way that is in the client's best interest and the best interest of the client's children. *Id.* Attorneys should keep in mind that a trusting relationship may take some time to form with a victim client because the client is emerging from a relationship in which his or her trust has been repeatedly betrayed. *Id.*

Attorneys especially need to be concerned with listening to the abused party's safety-related fears and responding accordingly. Research substantiates the validity of an abused party's predictions and supports the conclusion that a domestic violence survivor is the best expert of his or her own safety. Jane K. Stoever, "Transforming Domestic Violence Representation," 101 *Ky. L.J.* 483, 498 (2013) (hereinafter Stoever) (citing D. Alex Heckert & Edward W. Gondolf, "Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault," 19 *J. Interpersonal Violence* 778, 781 (2004)). A lawyer's own experiences and perceptions often result in the attorney's projecting onto the client the attorney's view of the "right" or "safest" course of action or seeing himself or herself as a "rescuer" for a client who needs to be "saved." Attorneys need to avoid this as much as possible because it is contrary to providing client-centered representation. Law professor and domestic violence advocate Jane Stoever notes that "when attorneys perceive their clients as victims rather than survivors of violence, they may view their clients as weak and unable to act autonomously or in their own interests." Stoever, *supra*, at 500. This misperception causes attorneys to disregard their client's motivations,

strengths, and resources and can make it difficult for the attorney to trust the client's analysis of his or her own situation. *Id.* (citing V. Pualani Enos & Lois H. Kanter, "Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting," 9 *Clinical L. Rev.* 133 (2002)). Attorneys also need to avoid saying things that could cause the client to feel "blamed" for the abuse, such as asking why the client stayed with the abuser for so long. Leidholdt, *supra*, at 11. Ethical issues abound when an attorney subordinates the client's values and wishes and instead imposes the attorney's own ideas of what is "best" for the client. If a lawyer views a client as passive, helpless, and unable to act in his or her own interests, the lawyer is likely to substitute his or her own judgment for the client's and make decisions without the client's input. Stoever, *supra*, at 509. In doing this, the lawyer denies the client's autonomy and may actually increase the client's danger. *Id.*

If children are involved, lawyers should advise their clients that district courts are required to address domestic violence as a threshold issue when allocating parental responsibilities, and that children's statutory rights in Colorado now include the right to reside in and visit in homes that are free of domestic violence and child abuse or neglect. C.R.S. §§ 14-10-123.4, 14-10-124(4)(a)(II). Clients should also know that if a court finds that one of the parties has committed domestic violence, the court must consider as its primary concern the safety and well-being of the children and the victim. C.R.S. § 14-10-124(4)(d).

Effective July 2013, the definition of "domestic abuse" was greatly expanded in one part of Colorado's statutes. Under C.R.S. § 13-14-101(2), "domestic abuse" is defined as "any act, attempted act, or threatened act of violence, stalking, harassment, or coercion that is committed by any person against another person to whom the actor is currently or was formerly related, or with whom the active is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship." There is no case law yet regarding this definition.

Under the Uniform Dissolution of Marriage Act, however, the definition remains unchanged. "Domestic violence" means an act of violence or a threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship, and may include any act or threatened act against a person or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship. C.R.S. § 14-10-124(1.3)(a).

Lawyers should be aware of and communicate to their clients these different statutory definitions, as the court may be liberal in its interpretation of what constitutes domestic violence.

Also, attorneys should be aware of current psychological theories that apply to domestic violence. For example, research shows that a victim's motivation is clearly linked to the degree of hope that change is possible. H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence* 91 (The Office on Child Abuse and Neglect Children's Bureau, 2003) (hereinafter Bragg). Therefore, domestic violence clients may drop their cases, fall out of communication with their attorney, return to an abusive partner, wish to dismiss a protection order, or want to alter child custody and visitation agreements. Stoever, *supra*, at 501. Attorneys should be aware of the process their client is going through; it may be wise to change the case strategy based on the client's varying needs. Furthermore, many victims blame themselves for being in an abusive relationship or believe that the abuse is caused by their own actions or by the other party's drinking or drug use. Leidholdt, *supra*, at 12. Explaining to a client that the domestic violence is the product of the abuser's need to dominate and control and not the victim's psychology or behavior can lift a burden from the victim's shoulders. *Id.* Helping a victim realize that there are other victims in the same situation can also help end the client's isolation. *Id.* Recommending that the client seek counseling or join a support group such as those offered free of charge in both English and Spanish by Safehouse Denver (www.safehouse-denver.org/our-services/non-residential-services) can help a client begin the long-term recovery process.

Other current psychological research and the "Stages of Change" model support that a victim goes through five distinct phases in his or her readiness to change, including pre-contemplation, contemplation, determination, action, and maintenance. Bragg, *supra*, at 92 (citing J. O. Prochaska & C. C. DiClemente, "Transtheoretical Therapy: Toward a More Integrative Model of Change," *in Psychotherapy: Theory, Research, and Practice* 276-88 (1982). Therefore, an attorney needs to gauge how he or she can best help the client and will sometimes be better off helping the client see the benefits or the consequences of the next step, establishing a realistic change strategy, or merely supporting the client. *Id.* For example, the research shows that a victim needs to be at the "determination" stage when developing safety plans and, if he or she is not at that stage, the likelihood of change is compromised. *Id.* at 91. This research replaces outdated theories of domestic violence, such as "learned helplessness."

Attorneys who have clients in domestic violence situations should be prepared to play the role of counselor, advising the client on both legal and non-legal options that may help the client feel empowered, stay safe, and prepare for the future. Colo. RPC 2.1. Non-legal options should include encouraging the client to seek community resources including safehouses, domestic violence advocates, support groups, perpetrator treatment providers, psychological counselors, and other resources.

NOTES

1. H.R. 4952, 99th Cong. (2nd Sess. 1986), enacted by modification to the relevant provisions of title 18 of the United States Code.

2. *See also Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 673 n. 12 (Colo. 1982); *Zick v. Krob*, 872 P.2d 1290 (Colo. App. 1993).

3. A DRO is used to divide a Colorado Public Employees Retirement Association (PERA) defined benefit plan, defined contribution plan, and 401(k) defined contribution plan. PERA is governed by C.R.S. §§ 24-51-101, *et seq*.

4. *See* C.R.S. § 14-10-122(2) (unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated up the death of either party or upon the remarriage of the person receiving maintenance). *See also In re Marriage of Parsons*, 30 P.3d 868 (Colo. App. 2001) (to overcome the statutory termination upon remarriage, an explicit reference to the continuation of maintenance after the recipient's remarriage is necessary).

5. For a summary of the literature regarding domestic violence and mediation, see Leigh Goodmark, *A Troubled Marriage: Domestic Violence and the Legal System*, 113-18 (N.Y. Univ. Press, 2012).