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Chair's Column

Deviation from the Child Support Guidelines: A Pipe Dream or a Reality?

by Brian Schwartz

Effective Sept. 1, 2013, the Supreme Court once again amended the child support guidelines. Once again, the amendments were the result of extensive economic data compiled for the Supreme Court Family Practice Committee, which issued its supplemental report on April 10, 2013.[1] Once again, the child support figures were adjusted, and, by and large, the weekly child support payments decreased from the prior schedule (especially for families with two children). And, once again, family lawyers were left scratching their heads and asking, "How can the child support awards be so insufficient?"

During the comment period, the Family Law Section of the New Jersey State Bar Association, in collaboration with the American Academy of Matrimonial Attorneys,[2] submitted an extensive report (joint report) commenting on the proposed revised child support guidelines. Initially, the joint report acknowledged the difficult task posed for the Family Practice Committee—and I once again applaud the tremendous work effort of the committee. Nonetheless, it seemed incredible that the child support figures once again declined from the previous guideline amounts (which were last adjusted in 2006), notwithstanding what appeared to be a significant increase in the cost of goods and services during that same period of time.

For example, the joint report noted that the Bureau of Labor and Statistics released reports on the Consumer Price Index-Average Price Data for various products. A review of these statistics demonstrated a significant rise in the cost of commonly used products. For example, comparing Jan. 2003 to Jan. 2012, for U.S. cities (average), the statistical data for specific products showed the following:

Product	Jan. 2003	Jan. 2012	Increase
Unleaded gasoline (per gallon)	$1.473	$3.399	131%
White bread (per pound)	$1.042	$1.423	37%
100% ground chuck beef (per pound)	$2.131	$3.292	55%
Whole chicken (per pound)	$1.004	$1.334	33%
Large grade A eggs (per dozen)	$1.175	$1.939	65%

In other words, the joint report noted that despite the significant increase in the costs of goods commonly purchased, somehow the child support awards decreased.

Two of the areas of focus within the joint report were the treatment of extracurricular activities and automobile expenses for a child—two areas of child support that have vexed family law practitioners for years.

Regarding extracurricular activities, depending upon the county in which you practice, those expenses are either considered 'included' in the weekly child support amount in Appendix IX-F or 'not included' and, as such, require a supplemental contribution in addition to the weekly child support amount. In those counties in which the expenses are not included, child support agreements will generally include a provision that the parties share the cost of extracurricular activities.

A review of Appendix IX-A, paragraph 8, of the Rules Governing the Courts of the State of New Jersey, addresses which expenses are included in the child support schedules. Under the section titled "Entertainment," the following list appears included in child support schedules:

> Fees, memberships and admissions to sports, recreational, or social events, lessons or instructions, movie rentals, televisions, mobile devices, sound equipment, pets, hobbies, toys, playground equipment, photographic equipment, film processing, video games, and recreational, exercise or sports equipment.

It would appear, then, that extracurricular activities are included in the basic child support schedules. In reality, foisting 100 percent of these expenses upon the custodial parent seems unfair, but that is the clear dictate of paragraph 8.

As for automobile expenses for a child who has obtained a driver's license, prior to the current amendments, resolution of the issue was less clear. Again, referring to Appendix IX-A, paragraph 8, of the Rules Governing the Courts of the State of New Jersey, under the section titled "Transportation," the following described what had been included in the weekly child support amount *before* the current amendments:

> All costs involved with owning or leasing an automobile including monthly installments toward principal cost, finance charges (interest), lease payments, gas and motor oil, insurance, transportation such as public transit, parking fees, license and registration fees, towing, tolls, and automobile service clubs. The net outlay (purchase price minus the trade in value) for a vehicle purchase is *not* included. (emphasis in original)

It would appear, then, that the costs related to the new driver had been included in the basic weekly child support.

Again, those who practice in this area—and who are parents of a child who has recently obtained a driver's license—know that automobile insurance alone is a significant expense. The website Online DMV notes, "A good average yearly insurance quote would be around $1,500 for a male driver and around $1,200 for a female driver—and that's just when you are added to your parents' policy."[3] This does not include any of the other costs—loan/lease payments, gas, repairs, maintenance, oil, E-ZPass. In all, the costs associated with a new driver are weighty—and subsume a good portion of the weekly child support.

In what appeared to be an attempt to address this issue, at the recommendation of the Family Practice Committee, the Supreme Court amended the paragraph titled "Transportation" to include the following:

> Transportation also does not include expenses associated with a motor vehicle purchased or leased for the intended primary use of a child subject to a support order.

However, on the issue of automobile insurance for a new driver who does not have a vehicle purchased for that driver's primary use (for example, a new driver who is sharing a vehicle with the custodial parent), the Family Practice Committee did not reach a conclusion:

> The issue presented is whether the basic child support amount includes those automobile expenses and insurance costs incurred by a parent that are related to the exclusive use by the child. The Committee believes that such expenses should be an add-on to the basic child support amount. *The Committee also discussed, but did not reach a conclusion as to whether the expenses for the child's car include the cost of insurance for that vehicle as distinguished from the insurance cost for adding a licensed minor driver residing in the home.*[4] (emphasis added)

Responding to the transportation issues within the Family Practice Committee's report, the joint report noted the following problems:

> The Joint Committee expressed numerous concerns with regard to the above-mentioned proposed revision. First, it is not clear why automobile insurance was specifically distinguished and excluded from consideration. By law, every child who receives a driver's license must likewise have automobile insurance. This obligation arises whether there is a specific vehicle titled in that child's name or that child is the user of another vehicle. Yet, the Family Practice Committee recommendation makes a distinction; that is, the Family Practice Committee proposes that only if the insurance cost is related to a vehicle exclusively utilized by the child may that cost be added to the basic child support. On the other hand, a parent of primary residence who adds a child to the policy as an occasional driver may not seek contribution from the parent of alternate residence toward this additional cost. It would seem that this distinction unreasonably favors wealthier parents, as wealthier parents can afford to purchase automobiles for the exclusive use of their child and, therefore, seek contribution from the other parent. The Joint Committee believes that the additional cost of automobile insurance for newly licensed drivers should be an expense not included in the Appendix IX-F and, therefore, be allocated between the parents as an additional expense.
>
> It is also not clear whether the expense considered should include merely the monthly purchase/lease expense alone, or should also include maintenance, gasoline, EZ Pass and other automobile-related expenses. Clarification should also be provided as to these expenses.
>
> The Joint Committee also raised a concern with the level of proofs that should be presented to the Court in relation to this new consideration. The Joint Committee also questions the possibility of a *Gac*-like issue where a litigant unilaterally purchases a very expensive automobile without prior consultation or knowledge of the other parent and subsequently applies for contribution.
>
> The Joint Committee also expressed concern with the imposition of discretion as many of these cases are presented to hearing officers as a matter of first impression. Unfortunately, it is the experience of the Joint Committee that the exercise of discretion by hearing officers often results in appeals to Superior Court Judges. Perhaps cases involving automobile expenses should be screened and sent directly to Superior Court Judges.

Notwithstanding these concerns, the current Rules of Court left unresolved the issue of whether automobile insurance for a new driver is included or not in the basic award.

On May 21, 2013, I had the privilege of appearing before the Supreme Court to further clarify the concerns raised within the joint report. Initially, I advised the Court that, as both a parent and a family law practitioner, I was surprised by the paltry weekly child support awards. I noted that the child support awards barely covered the costs related to raising children in New Jersey. I reiterated the concerns in the areas of extracurricular activities and automobile expenses for new drivers. At one point, I was asked by the justices how I would propose fixing the perceived problems. My answer was simple and straightforward—encourage judges to deviate from the guidelines.

I know—deviation from the guidelines almost never happens. Notwithstanding paragraph 2 of Appendix IX-A (which states that the guidelines are a "rebuttable presumption") and paragraph 3 (which provides a basis for deviation), a deviation from the guidelines is rare indeed. Admittedly, a large part of that is our fault. How often do we provide the court with a basis to deviate? How often do we prepare, for example, a budget page for the children of a specific family to demonstrate why deviation is appropriate? There are many families that make significant financial sacrifices for the benefit of their children. Have you ever had a client with a child involved in hockey? Have you ever had a client with a child who is a technology whiz? Do you know how much automobile insurance costs for a new driver?

In order for a trial judge to deviate from the guidelines, we, as attorneys, must give them the basis. We must demonstrate why this particular family's spending habits differ from the 'common' family. We must demonstrate the costs related to the children in this specific

family, and how the guidelines amount will, in essence, deprive the children of this family from enjoying a comparable lifestyle.

Long ago, it seems we, as lawyers, stopped trying to 'fight the guidelines.' Some of us may have stopped presenting arguments for deviation from the guidelines. Some of us may have stopped arguing for the benefit of the children. In doing so, in many cases, we have burdened the custodial parent with significant costs that should, by all rights, be shared. Perhaps it is time we stop blindly accepting the guidelines, and start asking the court to act equitably—and to deviate from the guidelines. But we, as the attorneys for these parties, must provide the court with a foundation for the deviation. ■

Endnotes

1. For those who have not read the Supplemental Report of the Family Practice Committee, I commend it to you. You can find it at https://www.judiciary.state.nj.us/reports2013/2013_FPC_Supp_Report_all_except_rutgers_report.pdf.
2. A special thanks to Chris Musulin and his child support committee for their tremendous work.
3. http://www.onlinedmv.com/insurance/auto-insurance-costs-new-driver.html.
4. Supplemental Report of the Family Practice Committee, April 10, 2013, page 5.

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.

Editor-in-Chief's Column

Alimony In Light of *Gnall v. Gnall*

by Charles F. Vuotto Jr.

It is with some level of concern that I comment upon the recent Appellate Division decision in the case of *Elizabeth Gnall v. James Gnall,* approved for publication on Aug. 8, 2013.[1] Before commenting on this case, I wish to sincerely express my great admiration for the author of the opinion, the Honorable Marie Lihotz, J.A.D., and the attorneys on the appeal (Dale E. Console and Barry L. Baime). Judge Lihotz is a remarkable jurist and has authored a number of important opinions.[2] Judge Lihotz and both counsel are of the highest caliber of members of the bench and bar. They have contributed greatly to the development of family law in the state of New Jersey and continue to do so. However, it is this author's opinion that the decision in *Gnall* may work to exacerbate the problems associated with the law of alimony in this state, increase the lack of consistency and predictability and give further fodder to the factions clamoring for alimony guidelines. In essence, and in this author's opinion, the wording of this case (although perhaps not the intent) eliminates consideration of limited duration alimony in marriages of 15 years (or more). There are also some other problematic areas, which will be addressed herein.

The Gnalls were married on June 5, 1993, and had three children who, at the time of the appeal were 14, 13, and 11. The complaint for divorce was filed in 2008, thereby characterizing the marriage as one of 15 years duration. The appeal was taken from several provisions of the final judgment of divorce following a 17-day trial, including the propriety of awarding limited duration alimony (LDA). Although there were other issues raised on appeal, this column will focus on the alimony and related issues.

At the time of trial, which commenced on April 8, 2009, both parties were 42 years of age. The wife was highly educated and had a significant employment history, but left the workforce outside of the home to principally care for the children after 1999. She worked in computer programming. She submitted to two vocational evaluations, one by her expert and one by the husband's expert. The husband's expert concluded she could expect an initial annual salary of between $58,000 and $69,000, but judging by her past performance, she could anticipate rapid wage growth and, within two to three years, perhaps earn an annual salary in excess of $115,000. The wife's vocational expert differed on the length and cost of rehabilitation and retraining. He concluded her possible employment as a software engineer could earn her $56,764 at an entry-level position, with a mean salary of $67,763. The husband was a certified public accountant working as a chief financial officer for the American Financial Group of Deutsche Bank. His total compensation ranged from $510,000 in 2005, to $2.1 million in 2010.

The wife's initial case information statement listed total family expenses of approximately $35,000 per month. Her budget was revised downward to $21,041 to reflect the change in residence after the marital home in Ridgewood was sold. The husband listed the family's joint marital lifestyle living in Ridgewood as $23,664 per month, of which he allocated $10,906 for his needs. He also modified his budget after moving to New York City, claiming monthly expenditures of $19,803. The trial court concluded the parties enjoyed an "upper-middle class" lifestyle that was more "modest than what could be afforded on [the husband's] more recent remuneration."[3] The trial judge fixed the wife's and children's monthly needs at $18,000 per month. After concluding she could return to the computer field and earn "between $61,200 and $94,000," the trial judge considered the alimony factors in the course of his obligation to make statutory findings.

Importantly, the trial judge found that the parties 15-year marital relationship was "not short term[.]"[4] The appellate court characterized the trial court's key findings as follows:

> Nevertheless, when he weighed the "relatively young" age of the parties, and their good health and education, which allowed them

> to obtain employment "at good salaries" and thereby support "excellent lifestyles for themselves and their children[,]" the judge concluded "the parties were not married long enough and are not old enough for [defendant] to be responsible to maintain that lifestyle permanently for [plaintiff]." He therefore concluded, "this is not a permanent alimony case."[5]

The above quote strongly suggests the trial judge took action to comply with his obligation to assess the facts of the case in light of the statutory factors and identified those particular factors that, in the discretion of the court, impacted the issue of duration.

The trial judge rejected an award of rehabilitative alimony.[6] The trial judge also noted that the wife had failed to work toward obtaining employment during the two years the case was pending. Consequently, the trial judge imputed $65,000 annual income to her, effective immediately, and awarded $18,000 per month LDA for 11 years.[7] Importantly, the alimony award was to terminate on Sept. 1, 2021, a date that was coincident with the youngest child's anticipated departure for college. Further, the trial judge ordered that the award would not be subject to modification based on the plaintiff's future earnings; rather, modification would be permitted only upon either party's death or the plaintiff's remarriage.[8]

The Appellate Division, in *Gnall*, recognized that in both *Cox v. Cox*[9] and *J.E.V. v. K.V.*[10] the propriety of the trial judge's award of LDA was challenged, and in each case a significant determining factor was the length of the respective marriages. The *J.E.V.* court (quoting *Cox*[11]) stated that "the duration of the marriage marks the defining distinction between whether permanent or limited duration alimony is warranted and awarded.""[12] In *Gnall*, the Appellate Division further expanded the importance of *Cox* by stating that "[t]he Coxes had been married for twenty-two years, a circumstance clearly removing any possibility of a limited duration alimony award."[13] This statement is not found in *Cox,* but is now added to our jurisprudence by *Gnall*.

The *Gnall* court agreed with the trial judge's characterization of the marriage between the Gnalls as "not short-term."[14] However, the appellate panel found fault in the trial court's conclusion that consideration of an award of permanent alimony was obviated by the parties' relatively young ages and the fact that they were not married long enough—commenting it was not a 25- to 30-year relationship. The appellate panel found this conclusion was in error and must be reversed.[15]

It should be noted that the Appellate Division, in *Gnall,* concluded that *J.E.V.* and *Cox* have "painstakingly compared and contrasted awards of permanent alimony and limited duration alimony, and these cases include a recitation of the legislative history underpinning the purpose in adopting limited duration alimony."[16] The question of whether *JEV* and *Cox* are clear with regard to the underlying public policy supporting both permanent alimony and LDA is beyond the scope of this column, but worthy of future discussion.

The following commentary provided by the Appellate Division in *Gnall* provides a new view of permanent alimony versus LDA:

> Contrary to the judge's belief, permanent alimony awards are not reserved solely for long-term marriages of twenty-five to thirty years. While marital relationships of such duration, when coupled with a created economic dependence by one party, typically result in permanent alimony awards, there is no per se rule that permanent alimony is unwarranted unless the twentieth anniversary milestone is reached. Moreover, any attempt to reduce the shared marital experience to a formulaic calculation of compensation based on the number of years "in the marriage," completely disregards the public policy considerations supporting continuation of economic support beyond the spouses' joined personal lives.[17]

As stated, the seminal case distinguishing permanent alimony and LDA is the Appellate Division decision of *Cox v. Cox*.[18] The *Cox* court addressed the legislative intent surrounding the creation of LDA, explaining that the amendment was proposed in order to "establish limited duration alimony as a third type of alimony, to be used in all cases involving shorter-term marriages where permanent or rehabilitative alimony would be inappropriate or inapplicable but where, nonetheless, economic assistance for a limited period of time would be just."[19] The *Cox* court discussed the legislative exclusion of LDA awards in long-term marriages, quoting from the *Divorce Study Commission Report*, as follows:

> In particular, it is singularly inappropriate in long marriages. It is, therefore, the clear

> and unequivocal view of the Commission that such term alimony should be limited to shorter marriages and not be ordered in long-term marriages.[20]

In *Gnall*, the Appellate Division emphasized that although courts must consider the duration of the marriage when fixing alimony, the length of the marriage and the proper amount of duration of alimony do not correlate in any mathematical formula, citing to *Lynn v. Lynn*.[21] The *Gnall* court found this concept was reinforced by the Legislature confining LDA awards to those "shorter-term marriages," where the facts make a permanent alimony award "inappropriate or inapplicable."[22]

The recitation of the existing case law concerning permanent alimony versus LDA (*i.e.*, as found in *Cox* and *J.E.V.*), however, does not necessarily serve the practitioner. As suggested earlier in this column, the standards in those cases may not provide a clear public policy or clear guidance[23] to the practitioner or trial courts when trying to determine whether a particular case calls for permanent alimony versus LDA. For example, the following stated reasons for awarding LDA possibly raise more questions than answers among lawyers and trial judges:

- LDA was designed to "fill a void."[24]
- LDA was added as a remedy to address the dependent spouse's post-divorce needs following "shorter term marriages where permanent or rehabilitative alimony would be inappropriate or inapplicable, but where, nonetheless, economic assistance for a limited period of time would be just."[25] What are 'shorter term marriages' where permanent or rehabilitative alimony would be inappropriate or inapplicable?[26]
- LDA is distinguishable from permanent alimony because of the length of the marriage (when the courts do not specify the impact of one length versus another).
- In order to avoid misuse of LDA to the disadvantage of supported spouses divorcing after a 'long-term marriage,' the law prohibits an award of LDA "as a substitute for permanent alimony in those cases where permanent alimony would otherwise be awarded."

The decisional law of this state must define key terms (*i.e.*, long-term or short-term) or refrain from using them. There is no question that the courts are relying, almost exclusively, on the duration of the marriage to mark the key differentiating factor between permanent alimony and LDA.[27] If this is the correct approach, which one may question, we need guidance on what these terms mean.

With all of the foregoing having been laid out by the Appellate Division, the following paragraph is the most troubling in the decision:

> We do not intend to draw specific lines delineating "short-term" and "long-term" marriages in an effort to define those cases warranting only limited duration rather than permanent alimony. We also underscore it is not merely the years from the wedding to the parties' separation or commencement of divorce that dictates the applicability or inapplicability of permanent alimony. *Nevertheless, we do not hesitate to declare a fifteen-year marriage is not short-term, a conclusion which precludes consideration of an award of limited duration alimony.*[28]

In this author's opinion, each of the three sentences of this paragraph is problematic. The words "short-term" and "long-term" are used over and over again in our case law, and yet we are left to guess what they may or may not mean. For years, attorneys representing dependent spouses in a 10-year marriage would cite to *Hughes v. Hughes*[29] for the proposition that a 10-year marriage was of sufficient length to justify permanent alimony. Most practitioners (and courts) viewed that decision as an anomaly, and did not follow it for that proposition.

The second sentence of the aforementioned paragraph is also problematic. Initially, although the court states the length of the marriage is not the only factor that "dictates the applicability or inapplicability of permanent alimony," it is that factor above all others that forms the basis of the appellate court rejecting the trial court's award of LDA. Further, this sentence contradicts *Cox*, which provides that:

> In determining whether to award limited duration alimony, a trial judge must consider the same statutory factors considered in any application for permanent alimony, *tempered only by the limited duration of the marriage. All other statutory factors being in equipoise, the duration of the marriage marks the defining distinction between whether permanent or limited duration alimony is awarded.* (Emphasis added).[30]

Where all other factors are in 'equipoise,' a prior appellate panel has stated that the years of the marriage do, in fact, represent the single most important factor. However, notwithstanding the troubling aspects of the first two sentences, the last sentence of the aforementioned paragraph is perhaps the most troubling. There is no question that this paragraph stands for the proposition that LDA cannot be awarded in a marriage of 15 years or more. The problematic sentence bears repeating, and reads as follows:

> *Nevertheless, we do not hesitate to declare a fifteen-year marriage is not short-term, a conclusion which precludes consideration of an award of limited duration alimony.* (Emphasis added).[31]

Working through the double negatives, broken down into its component parts, this sentence conveys three messages:

1. A 15-year marriage is not a 'short-term' marriage.
2. If the marriage is not one of short-term, a court cannot consider awarding LDA.
3. Therefore, LDA cannot be considered in a 15-year marriage.

Notwithstanding the emphasis on the need for the court to analyze all of the facts of every case in light of the statutory factors, there is nothing in the remainder of the opinion that alters the three messages delineated within that sentence. This is confirmed by the first sentence of the court's concluding section of the decision, which provides that:

> *In summary, we reverse the order of limited duration alimony and remand for consideration of an award of permanent alimony.*[32]

The appellate court left no option to the trial court on remand to consider LDA (or any other form of alimony). Therefore, the appellate court directed the trial court, on remand, for consideration of an award of permanent alimony. As such, the trial court must either award no alimony or permanent alimony. There is nothing in the body of the decision or the directive from the appellate court that would allow any other result.

Some may argue this is an exaggeration of what the appellate court said, and that the above statement is a reaction to the trial judge concluding this was a 'short-term' marriage. However, that's *not* what trial judge said. According to the appellate court, the trial judge said the following:

> *Nevertheless, when he weighed the "relatively young" age of the parties, and their good health and education, which allowed them to obtain employment "at good salaries" and thereby support "excellent lifestyles for themselves and their children[,]" the judge concluded "the parties were not married long enough and are not old enough for [defendant] to be responsible to maintain that lifestyle permanently for [plaintiff]." He therefore concluded, "that this is not a permanent alimony case."* (Emphasis added).[33]

Therefore, the trial judge did *not* conclude that this was a short-term marriage. In fact, he expressly said that it was "not short-term."[34] The trial judge went beyond the length of the marriage, however. Essentially, the trial judge based his decision on multiple statutory factors, as he was required to do. It appears the trial judge did his job in analyzing the factors. The appellate court, however, interjected it's own analysis of the factors (inserting its own views of which factors should and should not be given greater weight), such as emphasizing the length of the marriage and de-emphasizing the age of the parties.

In other words, in *Gnall* the appellate court diminished the trial judge's rationale for awarding LDA versus permanent alimony based upon the age of the parties. The trial court took, perhaps, one of the few statutory factors that actually relates to duration (which highlights the fallacy of attempting to determine duration of alimony by an analysis of the statutory factors), and determined it was not going to award permanent alimony based on the age of the parties. Now we have the appellate court saying a dependent spouse's age alone also cannot obviate permanent alimony.[35] If you do not identify the statutory factors that actually relate to a determination of duration for lawyers and trial courts, and then you take one of the few factors that actually does and indicate that a trial court cannot rely on it to support its determination of duration, then the courts are further confusing the directive to determine the duration of alimony by an analysis of the factors.

This writer does applaud the *Gnall* court for providing additional factors that appear to be intended to relate to a determination of the duration of alimony, as follows:

1. the duration and cause of the claimed economic dependence;

2. sacrifices made to assure the non-dependent spouse's financial success;
3. whether the dependent spouse's return to full-time employment causes disruption to the needs of the children;[36] and
4. the nature and extent of the dependent spouse's predicted financial independence, measured against the non-dependent spouse's continued ability to provide financial assistance.[37]

Adding to the problems associated with this decision is the court's reliance on the need to maintain the dependent spouse at the marital standard of living. As this author has opined in prior columns (and as recently noted in *J.E.V.*[38]), the emphasis on maintaining the marital standard of living should be reduced. The *Gnall* court grounded its implied support of a permanent alimony conclusion upon the need to maintain Ms. Gnall at the marital standard of living.[39] The appellate court in *Gnall* concluded that the trial judge failed to fully assess all evidence regarding the 15-year marital enterprise, including the plaintiff's ability to achieve something close to the marital standard of living in the future, without the benefit of the defendant's economic assistance.[40] Respectfully, that appears to be putting the cart before the horse (*i.e.*, the fact that a dependent spouse in an LDA case cannot maintain the standard of living is not a basis not to award LDA[41]). If every possible LDA award is dependent on the dependent spouse maintaining the marital standard of living, far fewer cases will qualify for an LDA award.

The *Gnall* appellate court concluded that:

> Accordingly, the award of limited duration alimony is reversed and the matter is remanded for an evaluation of an award of permanent alimony.[42]

This directive on remand, in conjunction with the court's statement that "nevertheless, we do not hesitate to declare a 15-year marriage is not short-term, a conclusion which precludes consideration of an award of limited duration alimony," makes clear that the trial court on remand is limited to awarding permanent alimony or none at all.

Aside from the various troubling aspects of this decision, as noted above, it also appears to be at variance with other appellate decisions. The appellate court, in *Gordon v. Rozenwald*,[43] declined to review an LDA award for consideration of permanent alimony where the parties agreed to a 15-year term selected at the end of a 15-year marriage. The *Gordon* court stated, "[t]here is nothing inherently unfair about the agreed upon duration of this term."

The appellate court, in *Weaver v. Weaver*,[44] remanded for review of LDA in lieu of permanent alimony after a 14-year marriage. In *Jones*,[45] a post-judgment matrimonial matter, the defendant appealed from an order denying her motion to extend the term of her LDA and convert it to permanent alimony, as well as an order denying reconsideration, arguing primarily that the decision was not supported by substantial, credible evidence and she was entitled to extended alimony, as a matter of equity, because she was married for 18 years. The appellate court found the judge made extensive factual and legal findings that were amply supported by the record, and therefore affirmed substantially for the reasons expressed below, including that the defendant failed to establish unusual circumstances under N.J.S.A. 2A:34-23(c) or a substantial change in circumstances on the issue of the ability to support herself to justify extending her alimony under the *Lepis* standard. The court further found that, although the defendant was potentially entitled to permanent alimony given the marriage's duration, she chose to accept a property settlement agreement that provided for LDA, and she did not show that the agreement was unconscionable or so inequitable that judicial interference was warranted.

On a separate note, I would be remiss if I did not mention that there are certain other interesting aspects of this decision, including the court's clarification with regard to the definition of the 'marital standard of living.'

The appellate court noted that:

> We reject plaintiff's suggestion that the marital standard of living, as used in *N.J.S.A.* 2A:34-23(b)(4), is defined by the dollar amount of expenses incurred immediately prior to filing for divorce. The "standard of living enjoyed during the marriage" is a concept that certainly includes objective criteria, such as the actual amount spent for mortgages, real estate taxes, car payments, and food expenses. However, it also encompasses more subtle components such as the intervals between car purchases, whether there has been a preference for new or pre-owned vehicles, and the frequency of and nature of restaurants when dining out.[46]

On another separate note concerning the imputation of income to the wife in *Gnall*, although the recognition of the need for a dependent spouse to contribute as best he or she can to his or her support and the support of the children, the appellate court deviated from this view regarding the *pendente lite* period. The appellate court stated:

> We are aware of no authority mandating a dependent spouse, absent from the workforce, by agreement, for a significant period of time, to immediately prepare for and return to work *pendente lite*, absent notice of this expectation presented by motion or court directive. We are not suggesting able spouses do not hold the responsibilities to support themselves; we are only finding there is no support in this record for the judge's conclusion resulting in the immediate imputation of $65,000 annual income.[47]

After taking nearly two pages to detail the law regarding imputation of income, the appellate court then made an unexpected reversal regarding the *pendente lite* period. Why doesn't the dependent spouse have an obligation to pursue his or her earning potential *pendente lite*? Does this suggest the supporting spouse need not work during the *pendente lite* period unless the parties agree or an order is entered? The obligation to work to one's fullest capacity and to contribute to his or her support and that of the children is no less imperative during the *pendente lite* period than it is post-judgment. Respectfully, there should be no need for there to be a motion or court directive for this obligation to be triggered. That doesn't mean a dependent spouse who has been out of the work force for a significant period of time does not require a ramp-up period prior to achieving his or her full earning potential. However, the obligation to begin to *pursue* that earning potential is triggered immediately upon the commencement of divorce proceedings, and should not be suspended during the *pendente lite* period. Dependent spouses will now take this paragraph and argue they have no obligation to work *pendente lite*. This language is unfortunate.

Conclusion

In conclusion, it is this author's sincere concern that this case is going to lead to the following:

1. arguments that LDA cannot be awarded in a 15-year (or longer) marriage;
2. arguments that any marriage longer than eight years is long-term;
3. arguments that a dependent spouse's age alone cannot obviate permanent alimony;
4. arguments that the inability of a dependent spouse to maintain the marital lifestyle is a basis to receive permanent alimony; and
5. arguments that a dependent spouse should not have to commence efforts to work to his or her fullest during the *pendente lite* stage of a matrimonial litigation unless compelled to do so by court order or court directive.

Who is to say that a 15-year (or even 22-year) marriage is long-term? Life expectancy increases with age as the individual survives the higher mortality rates associated with childhood.[48] People marry and divorce as adults; therefore, life expectancy must be viewed from that perspective. According to the table of life expectancy found in the 2013 *New Jersey Lawyers Diary and Manual*, an individual between the ages of 45 and 46 (most people tend to get divorced in their mid-40s), can expect to live another 34.7 years[49] (*i.e.*, to around age 80[50]). If true, then a 15-year marriage represents only 18.75 percent of that person's life. Is that long-term?

There needs to be a change to our law concerning limited duration alimony. It cannot be barred in 'long-term marriages' and relegated only to 'shorter-term' marriages (however those terms are defined). As lawyers charged with identifying all factual nuances and possibilities, I'm sure we all can envision many factual circumstances where limited duration alimony would be appropriate even in a 'long-term' marriage. If we are truly to analyze each case on its facts in light of the statutory factors (in addition to those that may be added by case law) and not rely solely on one (or limited) factors, then there should be no bright line rule barring limited duration alimony based only on the length of the marriage. ■

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Endnotes

1. *Gnall v. Gnall*, 2013 N.J. Super. LEXIS 115 (App. Div. Aug. 8, 2013).
2. *See Finamore v. Aronson*, 382 N.J. Super. 514 (App. Div. 2006); *Genovese v. Genovese*, 392 N.J. Super. 215 (App. Div. 2007); *Colca v. Anson*, 413 N.J. Super. 405 (App. Div. 2010); *State Div. of Youth & Family Servs. v. T.G.*, 414 N.J. Super. 423 (App. Div. 2010); *New Jersey Div. of Youth and Family Services v. J.C.*, 423 N.J. Super. 259 (App. Div. 2011); *Jacoby v. Jacoby*, 427 N.J. Super. 109 (App. Div. 2012); *Milne v. Goldenberg*, 428 N.J. Super. 184 (App. Div. 2012); *Clark v. Clark*, 429 N.J. Super. 6 (App. Div. 2012); *Reese v. Weis*, 430 N.J. Super. 552 (App. Div. 2013).
3. *Gnall*, 2013 N.J. Super. LEXIS 115 at 14.
4. *Id*.
5. *Id*.
6. *Id*. at 14-15.
7. *Id*. at 15. This award translates to an alimony obligation of $216,000 per year.
8. *Id*.
9. 335 N.J. Super. 465 (App. Div. 2000).
10. 426 N.J. Super. 475 (App. Div. 2012).
11. *Cox*, 335 N.J. Super. at 483.
12. *J.E.V.*, 426 N.J. Super. at 486 (*quoting Cox*, *335* N.J. Super. at 483).
13. *Gnall*, 2013 N.J. Super. LEXIS 115 at 27.
14. *Id*.
15. *Id*. at 28.
16. *Id*. at 24.
17. *Id*. at 28.
18. 335 N.J. Super. 465 (App. Div. 2000).
19. *Id.* at 477-78 (*quoting* S. No. 54, 6-7, 208th Leg. (N.J. 1998) (statement of Sens. Kavanaugh and Martin) (emphasis added) (*citing Report of Commission to Study the law of Divorce,* Recommendation 13 (April 18, 1955)).
20. *Id.* at 482 (quoting *Divorce Study Commission Report, supra,* at 47) (emphasis added).
21. 91 N.J. 510, 517-18 (1982).
22. *Gnall,* 2013 N.J. Super. LEXIS 115 at 29 (*citing J.E.V.*, 426 N.J. Super. at 485-86 (internal quotation marks and citations omitted).
23. The word "guidance" should not be interpreted as meaning "guidelines" in the typical sense.
24. *Gordon v. Rozenwald*, 380 N.J. Super. 55, 65 (App. Div. 2005).
25. *J.E.V.* quoting *Cox supra* note xii.
26. Footnote number 6 from the *Gnall* decision is, perhaps, somewhat responsive to this question. The footnote reads, "In May 2011, the United States Census Bureau reported the results of the survey of income and program participation (SIPP) by the American Community Survey, showing the current average length of a marriage is eight years. *See* Rose M. Krieder & Renee Ellis, Number, Timing and Duration or Marriages and Divorces, at 15 (2011), available at http://www,census.gov.prot/2011pubs/p70-125.pdf." *Is the appellate court suggesting by inclusion of this footnote that marriages beyond eight years are long term?*
27. The quote from *Cox* is critical: "In determining whether to award limited duration alimony, a trial judge must consider the same statutory factors considered in any application for permanent alimony, *tempered only by the limited duration of the marriage. All other statutory factors being in equipoise, the duration of the marriage marks the defining distinction between whether permanent or limited duration alimony is awarded."* 335 N.J. Super. at 483 (emphasis added).
28. *Gnall*, 2013 N.J. Super. LEXIS 115 at 29 (emphasis added).
29. 311 N.J. Super. 15 (App. Div. 1998).
30. *Cox*, *335* N.J. Super. at 483.
31. *Gnall*, 2013 N.J. Super. LEXIS 115 at 29 (emphasis added).
32. *Id*. at 50 (emphasis added).
33. *Id*. at 14.

34. *Id*. at 27.
35. *Id*. at 29.
36. It should be noted that the trial judge did link the cessation of LDA to the children. The alimony award was to terminate on Sept. 1, 2021, a date that was coincident with the youngest child's anticipated departure for college.
37. *Gnall*, 2013 N.J. Super. LEXIS 115 at 30-31.
38. *J.E.V.*, 426 N.J. Super. 475.
39. *Gnall*, 2013 N.J. Super. LEXIS 115 at 32.
40. *Gnall*, 2013 N.J. Super. LEXIS 115 at 32-34.
41. N.J.S.A. 2A:34-23(b).
42. *Gnall*, 2013 N.J. Super. LEXIS 115 at 34.
43. *Gordon*, 380 N.J. Super. 55, 74 (App. Div. 2005).
44. A-1449-03T5, 2005 WL 1562798 (App. Div. July 5, 2005).
45. A-0238-12T4 (App. Div. June 17, 2013), http://njlaw.rutgers.edu/collections/courts/appellate/a0238-12.opn.html (last visited Sept. 13, 2013).
46. *Gnall*, 2013 N.J. Super. LEXIS 115 at 25.
47. *Id*. at 40-41.
48. Wikipedia, http://en.wikipedia.org/wiki/Life_expectancy (last visited Sept. 13, 2013).
49. *New Jersey Lawyers Diary and Manual,* 2013, at 412.
50. This also jibes generally with the US Census Bureau statistics. *See* United Census Bureau, http://www.census.gov/compendia/statab/cats/births_deaths_marriages_divorces/life_expectancy.html (last visited Sept.13, 2013).

Executive Editor's Column

Instead of Limiting Discussions to Alimony, Why Should There Not Be an All-encompassing Family Law Review Commission?

by Ronald G. Lieberman

As every family law practitioner knows by now, wholesale revisions to the existing statutory and decisional authorities on alimony have been discussed heatedly and repeatedly for some time. Four bills now pending in the New Jersey Legislature, A-3909, A-4525, A-4532, and S-2750, would cause those wholesale changes.

But why is alimony the only segment of the entire body of family law being discussed for reform? Why not review child custody, equitable distribution, domestic violence, child protection and permanency, and/or adoption? There is no movement afoot to review the body of law existing on child custody. Yet the determination of the best interests of children is the keystone of family law and the protection of children is a duty all family law judges take extremely seriously. Limiting a review of family law to alimony misses the entire point of what is being called 'reform' these days. As Mark Twain once said, "Nothing so needs reforming as other people's habits."

Thinking broadly and creatively, by considering a family law review commission sanctioned by our Legislature to bring our entire body of family law into the 21st century makes sense. A comprehensive review of family law and its proceedings would meet the goals set forth by alimony reformers to update New Jersey's family law. A family law review commission should look at all of the statutes and procedures enacted to effectuate the law governing family and matrimonial matters so all family law litigants, including self-represented litigants, are ensured increased access to justice; fairness and due process can be ensured; and more consistent family law rules, policies, and procedures can be considered.

This state has not had anything approaching a comprehensive family law review commission for 15 years now. Most recently, in 1998, the New Jersey Supreme Court issued a report stemming from the Special Committee on Matrimonial Litigation, co-chaired by now retired Judge Linda R. Feinberg and Lee M. Hymerling, Esq. That committee was charged with examining all aspects of matrimonial practice, from the manner in which these cases were handled by lawyers to the manner in which they were managed by the court system. But, the committee did not review the actual substantive law of family practice and divorce because substantive law is determined by the Legislature.

A family law review commission would not be the creation of the New Jersey Supreme Court. Instead, the commission would be mandated by law. The commission should review each statute governing any area of family and matrimonial law, and study the major decisional authorities interpreting each statute.

As family law practitioners know, family law touches on the most central aspects of people's lives. The thousands of cases heard each year in New Jersey's family law courtrooms speak to the importance families in the community place on the ability of the courts to resolve their disputes peacefully and with finality. The community relies on its courts to meet these needs, but if the community loses faith in the ability of the law to keep pace with changes in society, then the foundation upon which laws are founded begins to crack. Our obligation to New Jersey families includes preventing that fissure. After all, when Shakespeare said "kill all the lawyers," he was referring to the first thing to be done to ensure civilized society turned into anarchy.

This proposed commission should be made up of a sizeable number of private, experienced family law practitioners, retired judges not currently on recall to the Judiciary, trial court administrators, public attorneys, family court division managers, and laypersons. If such a

commission was created, it could only benefit from having as its members people with as varied and wide-ranging backgrounds and experiences as possible.

It would not be an easy task for such a commission to look critically at the equitable distribution statute, (N.J.S.A. 2A:34-23.1); the custody statutes, (N.J.S.A. 9:2-1 and 9:2-4); and Title 9 and Title 30; as well as the entirety of the divorce statute (N.J.S.A. 2A:34-23), in order to determine whether each has kept current with the passage of time and current societal needs.

But, if certain segments of society are advocating for alimony reform, is their silence to be interpreted to mean that all other areas of family law are working just fine? The law is designed to protect against injustice. There can be no harm in ensuring that all facets of family law are doing just that—protecting against injustice.

As George Washington said, "The administration of justice is the firmest pillar of government." The proposed commission would only firm up that crucial pillar of government.

Avoiding Malpractice Claims in Matrimonial Actions

by Mark Biel

This article reflects the author's experiences as both a matrimonial litigator and a defense expert witness in legal malpractice cases. In addressing measures every matrimonial practitioner should take to substantially reduce the risk of a malpractice claim, it provides an abbreviated primer regarding the legal malpractice standards.

In order to succeed on a claim for legal malpractice, a claimant must satisfy the following requisite elements: 1) the existence of an attorney-client relationship creating a duty of care upon the attorney; 2) breach of such duty; 3) proximate causation of damages sustained; and 4) actual damages.[1] The general rule in New Jersey is that: "An attorney is only responsible for a client's loss if that loss is proximately caused by the attorney's legal malpractice."[2]

Succinctly stated, an attorney is obligated to exercise the degree of knowledge, care and skill necessary to the practice of one's profession in which others similarly situated ordinarily possess and is obligated to exercise reasonable and ordinary care and diligence in the use of that skill and in the application of his or her knowledge to the client's cause.[3] What constitutes a reasonable degree of care is not to be considered in a vacuum, but with reference to the type of service the attorney undertakes to perform.[4] Fundamentally, an attorney has a duty to the client to pursue the client's interest diligently and with the highest degree of fidelity and good faith.[5]

Matrimonial cases are fraught with potential malpractice claims, often driven by the emotional residue of a failed marriage and a litigation result below the expectations of the litigant, making the divorce lawyer a new target. In the author's judgment, there are five acts of omission that form the greatest exposure to a malpractice claim asserted against a matrimonial lawyer, including:

1. failure to properly communicate with the client;
2. failure to document the file;
3. failure to complete legal responsibilities;
4. failure to draft clear, understandable agreement clauses; and
5. failure to explain in detail within an agreement the underlying bases for the substantive provisions particularly when they represent a compromise.

If the matrimonial attorney adheres to the suggestions set forth here, he or she will dramatically minimize the chance of being sued for malpractice, and if a malpractice suit is filed, employing these suggestions will place the practitioner in a position that shows he or she fulfilled all of the duties and responsibilities to the client.

Make the Client Execute a Retainer Agreement in Accordance with R. 5:3-5

There is a specific rule in family actions requiring a retainer agreement not only must have annexed to it a statement of client's rights and responsibilities, but also a description of legal services; limitation of what legal services will not be provided; billable rates; the effect of counsel fee awards; methodology of billing; and the right of an attorney to withdraw from representation. Clients should be advised in writing to read the agreement carefully and not to execute it before all questions respecting the agreement are answered to their satisfaction.

Disarm the Client of Unrealistic Expectations

In most cases, even during the initial interview it is wise to get a feeling about whether the client is willing to listen and generally accept counsel's advice or whether the client has his or her own scorched-earth agenda. It is important to set the tone at the outset of the case. While the practitioner certainly should welcome the client's input, since he or she has sought counsel, and generally speaking will follow the advice provided, if the demands of the client are unreasonable, the attorney should not take the case. A client married three years demanding a permanent alimony result is going to be a problem. A client who demands equal parenting time despite a conflicting employment schedule is going to be a problem. If the practitioner cannot reason with the individual, it is best not to represent them.

Remember, just as RPC 3.3 requires candor with the tribunal, RPC 1.4 (c) mandates a lawyer must explain a

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Accordingly, the practitioner has an obligation as an attorney to educate the client and clearly express his or her opinion to the client with respect to the results that are palpable and inevitable.

Bill Monthly With Enclosed Statements

While Rule 5:3-5(a) requires that bills are to be rendered no less frequently than once every 90 days, that is far too long a gap between bills. Bills should be sent out monthly, generally at the beginning of the month. Billing systems should be designed so the client can understand the bills, including all disbursements from the trust account and what remains on account. When the account is substantially depleted, a written request should be made for supplemental or replenishment retainers, a provision that should be part of the written retainer agreement. Putting aside the fact that the practitioner wants to be paid for his or her services in a timely fashion, a formal and timely billing methodology enhances the professionalism of the attorney/client relationship.

Communicating With the Client

It is important to comply with RPC 1 .4(b): "A lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information."

The client should receive a copy of every pleading, transmittal letter and document in a timely fashion. If there is voluminous discovery in the case and it becomes too time consuming or expensive to replicate a copy of everything for the client, it is important to advise the client in writing to come into the office to review each and every document if he or she wishes to do so. Once that task has been completed, it should be confirmed in writing.

Additionally, part of the communication process includes the prompt return of clients' telephone calls and responding to clients' faxes and emails. It is important to retain in the file the proof of these responses to avoid any assertion by a former client that communication was either untimely or non-existent.

Comply With All Discovery

Matrimonial cases, early on, involve the execution of a case management order (CMO) setting the parameters of discovery. Practitioners should never assume a case is going to be expeditiously settled so that discovery can be cut short. What if it does not settle and the case proceeds on a litigation track and time has run out with respect to discovery compliance? What if the request for an extension is denied? If the case is then tried and evidence is barred for failure to comply with discovery the practitioner is setting him or herself up for big problems. Accordingly, whether the discovery involves interrogatories; notices to produce; depositions; authorizations; or subpoenas, it is important to stay on task. The same imperative should apply to appraisals. If a joint appraiser is not being used to value real estate, for example, it is important to make sure the appraisals on behalf of the client are timely completed. If a client needs to advance the fees, it is important to follow up in writing advising the client that if the fee for the appraiser is not advanced by a certain date the appraisal will not be completed and it will be his or her fault. Of course, a properly crafted retainer agreement should provide that all such costs are to be advanced by the client.

Withdrawing from the Case

If a practitioner finds him or herself in a problematic position with a client, particularly because the client is not honoring financial responsibilities under the retainer agreement; is not cooperating in providing requested information necessary to process the case; or is greatly at variance with the practitioner regarding how the matter should be resolved, it is best to withdraw from the case.

The applicable rule to consider is Rule 5:3-5(d) (Withdrawal from Representation), as amended effective Sept. 1, 2013. Under the new rule, an attorney can withdraw 90 days or more prior to the scheduled trial date upon the client's consent. If the client does not consent, counsel will need leave of court. Within 90 days of trial an attorney may only withdraw by leave of court on motion, and notice to all parties. Accordingly, the earlier the move to withdraw is made, the more likely it will be successful.

Once out of the case, the attorney should make sure the successor counsel receives the case file timely and in good order. In no event should the file be withheld until the fee balance is paid. A copy should be retained of everything transferred to the successor counsel. Even if the practitioner trusts the successor counsel to retain the file in good order should it be needed in the future, at a minimum every piece of correspondence between the practitioner and the client should be retained.

Settling the Limited Duration Alimony Case

N.J.S.A. 2A:34-23 cautions that limited duration alimony (LDA) should not be substituted for permanent alimony where permanent alimony is appropriate. Regarding the length of the limited duration obligation, the statute provides:

> In determining the length of the term, the court shall consider the length of the time it would reasonably take for the recipient to improve his or her earning capacity to a level where Limited Duration Alimony is no longer appropriate.

In crafting a property settlement agreement where support is settled on an LDA basis, it is important to not simply set forth a one-line provision regarding the amount and duration of alimony. If it is, for example, a seven-year term, and there is a viable argument for a lesser term, or even a greater term including permanent alimony, it is best to set forth specifically how the parties and counsel arrived at the compromise. The practitioner should further acknowledge that if the matter is litigated both the amount and duration might be different (either greater or less), and indicate clearly that the parties understand that and waive their right to court determination. If there is a game plan for the supported spouse to improve his or her earning capacity the specifics of the game plan should be set forth as related by the client. The greater the description of how the alimony calculus was reached the more protection afforded to matrimonial counsel.

An example of the kind of language that may be appropriate follows:

> Husband's alimony obligation shall not be subject to a modification during the course of the bargained for term nor extended for any reason. The parties have agreed and stipulated that alimony paid by Husband to Wife represents bargained for Limited Duration Alimony. Each of the parties through the negotiations leading to the settlement of this case have maintained disparate positions. For example, Husband's position has been that the alimony to be paid, if any, should be for a lesser duration and amount. Wife's position has been that it should be for a greater duration and in a greater amount. Both parties have compromised their positions in an effort to resolve their case. Each of the parties has been advised by their attorneys that pursuant to N.J.S.A. 2A:34-23 and New Jersey case precedent an award of alimony for limited duration may otherwise be modified based upon either changed circumstances or upon the nonoccurrence of circumstances that a court found would occur at the time of the award. The parties have also been advised that in such event the court has the authority to modify the amount of such alimony in the future although the court could not modify the length of the term except in unusual circumstances. The parties have also been advised that in the event this case had been tried, in determining the length of the term, the court would have considered the length of time it would have reasonably taken Wife to improve her earning capacity to a level where a Limited Duration Alimony would no longer be appropriate.
>
> In settling their case each of the parties has expressed their desire and reaffirms that desire herein to bring finality to this litigation including avoidance of any post-judgment applications. They accordingly agree that irrespective of any change of circumstances the parties, including by description but not limitation any increase or decrease in the income levels, assets or liabilities of either of the parties, neither party shall seek an upward or downward modification of the limited duration alimony set herein, either as to the length of alimony or the amount of alimony. In settling their case, the parties understand that each has waived the right to present testimony respecting the occurrence of circumstances in the future which would have impacted the court's decision in deciding the length and amount of alimony including testimony respecting a time frame for Wife increasing or improving her earning capacity. The parties, in light of the totality of all of the circumstances involved in the settlement of this case including a desire to avoid post-judgment litigation, reaffirm their desire that the support provisions contained in this agreement shall be non-modifiable during and at the expiration of the term set forth herein regardless of any future developments, whether anticipated or

unanticipated, which might occur. All of the principles expressed hereinabove, including the right to seek modification under cases such as *Lepis v. Lepis* and its progeny have been fully explained to each of the parties by their respective attorneys and each of the parties nonetheless acknowledges that the waivers contained herein are to be considered final, unconditional and irrevocable.

Never Settle a Case Without Completed and Signed Case Information Statements With Tax Return and Income Information

To the extent that the parties are anxious to bring early closure to their case without engaging in any discovery, waiver language can be used in the settlement agreement to protect the practitioner. Nonetheless, under the predicates of *Crews v. Crews*[6] and *Weishaus v. Weishaus*[7] it is not enough to simply reference the incomes of the parties for purposes of calculating alimony and/or child support in the settlement agreement. Each of the parties should, at a minimum, complete and execute case information statements (CISs) to which there should be appended the last year's tax returns and, if applicable, contemporary pay stubs. It is important that the client has reviewed his or her spouse's CIS and acknowledged its general accuracy.

The following language is suggested to be placed in the property settlement agreement:

> While the parties have elected not to engage in formal discovery in settling their case, they represent herein that each party has executed a Case Information Statement; that each party had the opportunity to review the other party's CIS and that each accepts the representations set forth therein as accurate.

This language, coupled with the general waiver of discovery language in the agreement, significantly insulates the matrimonial attorney from an argument later raised by a former client that the practitioner blindly accepted financial representations from the other side without any documentation whatsoever; that those representations, in hindsight, proved to be untrue; and that the practitioner never complied with the predicates of *Weishaus* requiring some benchmarks to be established in the event of a subsequent *Lepis* application.

Never Blindly Accept Valuation Numbers

What about representing a client whose spouse has a controlling interest in a successful manufacturing company? What if the case involves a long-term marriage and the company is subject to equitable distribution? The business has provided an upper-middle class lifestyle for the parties. The business-owner spouse, in his CIS, asserts the value of his interest in the business is 'only' $500,000 based upon discussions with his business accountant.

Without a forensic evaluation, how does the practitioner know his business interest in the company is not worth $5 million? Suppose the case is settled based upon a stipulated $500,000 value and two years later the same business interest is sold for $5 million. If the asset appears to be significant, it is important not to just stipulate to a value without creating substantial legal exposure. Depending on the complexity of the business, an extremely detailed forensic evaluation replete with a final report, as opposed to a preliminary evaluation establishing at least a range of values, may not be needed, but a forensic report will be needed. In some instances a joint valuation, as opposed to separate valuations, may suffice. In any event, the client and the practitioner should not be bullied by a controlling spouse who refuses early on in the case, either directly or indirectly by refusing to advance the costs, to eschew a valuation. If ultimately a motion has to be filed for forensic fees, so be it. If the client is so intimidated, however, that he or she does not want to accept the advice to engage an accounting expert, then to protect him or herself, the practitioner must seriously consider withdrawing from the case.

If, however, the practitioner elects to remain in the case, at a minimum there are two things that need to be done. The first is to make sure to have written to the client recommending obtaining a forensic accountant and outlining the specific danger of not doing so. Second, the property settlement agreement should contain language similar to the following:

> Defendant has represented that the value of his interest in XYZ Manufacturing Co. is $500,000. Plaintiff has been advised by her attorney that he is unable to verify such value and has accordingly strongly recommended in writing that Plaintiff engage an independent forensic accountant to value said business. Against counsel's advice, Plaintiff has elected to

stipulate to said $500,000 as the value of XYZ Manufacturing Co. and reiterates herein his (or her) waiver of the right to obtain an independent forensic evaluation.

This is not to suggest that every asset requires a forensic evaluation, particularly when the value is obviously limited and the cost of litigation is paramount. Sometimes it makes sense to stipulate a value of a small, marginally successful business, particularly when both parties are aware of the business operation; there is not a cash component; and there are no meaningful business perquisites. In such an instance, there is a small likelihood of intangible value to the business and the need for forensic evaluation may well be unnecessary. Similarly, estimating the values of garden-variety real estate properties or used business equipment may also be appropriate. But when the value of an asset not under the control of the client is one that may have substantial value, the practitioner should insist on a forensic valuation, even in the face of protestation by the client.

The Danger of an Anti-*Lepis* Provision, Particularly in a Permanent Alimony Case

Lepis v. Lepis[8] and its progeny provide that alimony may potentially be modified based upon changed circumstances. Similarly, N.J.S.A. 2A:34:23 provides:

> An award of alimony for a limited duration may be modified based either upon changed circumstances, or upon the non-occurrence of circumstances that the court found would occur at the time of the award. The court may modify the amount of such an award, but shall not modify the length of the term except in unusual circumstances.

Matrimonial attorneys may find themselves in a position to negotiate so-called anti-*Lepis* provisions either for the supporting or the supported spouse. For example, the supported spouse may be willing to agree to alimony for a certain term of years but may urge that there be no modification even if the supporting spouse's income drops. On the other hand, the supporting spouse may ask for a similar provision because he or she wants a fixed number and does not want to be involved in subsequent court applications in the event it is asserted that his or her income has increased. While the appropriateness of anti-*Lepis* provisions may be both obvious and without much risk when alimony is being provided short term, when the length of the term is more extensive or, in the case of permanent alimony, without a specific termination date, the provisions become more problematic. What happens if the supporting spouse is involuntarily terminated? What happens if the supported spouse's income does drop dramatically, and payments become impossible? What happens if the supporting spouse becomes ill and unemployable? What happens if the supported spouse doubles or triples his or her income?

While there well may be a time and place for an anti-*Lepis* provision, it is important to be mindful of the risks and, most importantly, to make sure the risks are identified as a compromise in the property settlement agreement and that a letter to the client is in the file outlining those risks. It is also important to make sure the client is advised in writing that if the matter is litigated, anti-*Lepis* provisions are unattainable, since they will not be awarded by a court.

The reason for this approach is obvious. If there is a substantial change in circumstances that makes compliance either unattainable or arguably unjustifiable, the former client is going to look to the matrimonial attorney and ask why he or she 'allowed' such a provision to be placed in the agreement.

Finally, it is important to advise the client in writing that anti-*Lepis* provisions are not etched in granite. A court, post-judgment, can still overlook them if circumstances indicate enforcement would be unreasonable.[9]

Alimony Buyouts

Generally speaking, alimony buyouts occur in one of two ways: 1) at the time the case is being settled; or 2) on a post-judgment basis as one client starts to approach retirement age. The practice tip here is not to negotiate an alimony buyout without the assistance of a forensic accountant. Alimony buyouts involve an amalgam of several issues, including calculating a ballpark termination date; consideration of the present day value of a lump sum payment that involves some discount; and a calculation of the buyout being a tax-free buyout rather than implicating the normal alimony provisions of IRC Sections 71 and 215. The practitioner should have the analysis outlined in writing by a forensic accountant to protection him or herself from a latter assertion that the buyout was too high or too low.

If a buyout is being considered and the practitioner represents the supported spouse, a letter should be

provided to the client confirming both the benefits and risks involved in the buyout. It is important to remember that in a post-judgment buyout, the likelihood is that the parties will not be testifying in court on their understanding of the agreement. Accordingly, the attorney's best chance of protecting him or herself if and when the client runs out of money in the future and seeks to blame the practitioner is through a letter that has laid everything out in detail. The letter should include language that indicates the client has weighed and considered all of the benefits and risks, including the potential the supporting spouse may be employed beyond the date upon which the buyout calculations are based, but nonetheless agrees to assume those risks to trade certainty for uncertainty. Counsel should have the client acknowledge and agree to the terms of the letter in writing.

Alimony and Equitable Distribution Tradeoffs

Sometimes in the settlement negotiation process there are discussions involving payment of a lesser amount and/or duration of alimony in exchange for a disproportionate division of marital assets. A potential big mistake as an attorney is to fail to describe the dynamics of those tradeoffs in a property settlement agreement. It is important to be detailed and specific in the agreement. For example, if the supported spouse is receiving all of the equity in the marital home in exchange for a reduced quantum of alimony and/or a lesser term of alimony, the agreement should describe specifically what equity the supported spouse would have received if the matter were litigated and describe specifically what the supported spouse is now actually receiving. The same is true with respect to the disproportional distribution of any other assets, as well as any other considerations that play a part in arriving at the alimony calculus. As is the case with alimony buyouts, if the tradeoffs are significant, the practitioner should always use the services of a forensic accountant.

The following is an example of descriptive language:

> The parties have had the marital home appraised through a joint appraisal and there is stipulated equity in the marital home of $1,000,000. Wife has been advised that she has an entitlement to 50 percent of the equity in said home. She has discussed with counsel the potential range of her alimony entitlement both as to quantum and duration and has received and reviewed with counsel a report from the forensic accountant showing the upper level of the aggregate award after adjusting for tax consequences and present day value calculation to be $800,000 and the lower level of the award to be approximately $600,000. Nonetheless, wife has elected to receive all of the equity in the marital home, i.e, an additional $500,000 in exchange for an unconditional and unequivocal waiver of alimony. She acknowledges her desire to resolve the case on this basis notwithstanding that her overall financial award will be less than that which her attorney and forensic accountant have calculated based upon her attorney's recommendation as to the likely range of an alimony award. She desires to do this for the following reasons: (1) her desire to retain the real estate as a potential appreciating asset; (2) her ability to sell the asset and receive lump sum proceeds should she desire to do so; (3) the likelihood that all or substantially all of the proceeds of sale would be net of tax; and (4) her desire to trade certainty for uncertainty since alimony would terminate in the event of her remarriage and could potentially be modified or eliminated in the event of her permanent cohabitation.

It is important to make sure, both in the terms of the settlement agreement and in correspondence to the client, that there is documentation that this is a decision made by the client with full knowledge and understanding.

Obtaining Deferred Equitable Distribution Security

As a general proposition, while child support and alimony is not dischargeable in bankruptcy, even with language in a property settlement agreement arguably protecting a deferred equitable distribution payout against bankruptcy discharge, the provisions may not be enforceable and the client, as the recipient, may have to become involved in bankruptcy proceedings as an unsecured creditor. Accordingly, if part of the settlement involves deferred equitable distribution and there is available security, counsel should insist it be provided. It may take one of several forms: a mortgage against the property; a stock pledge agreement with respect to corporate assets; the escrowing of stock or liquid cash accounts;

or the withholding of a deed transfer until all equitable distribution payments are made.

It is not always about bankruptcy either. Even without bankruptcy, an obligor can simply stop paying, asserting a dearth of cash flow to make the payments. It is important to avoid the assertion of a former client that he or she is unprotected and counsel should have done something at the time of the divorce to provide protection while it was available.

Deferred Equitable Distribution When There is No Available Security

Some cases may involve a client who is entitled to a certain amount of equitable distribution but because of a dearth of distributable assets the distribution needs to be deferred and paid over time. What if there is no viable security to protect that payment stream?

In such an event, there will always be risks placed upon the prospective recipient, and the biggest risk is that the payor may seek relief in bankruptcy, including a discharge from the deferred equitable distribution obligation. Keep in mind that while alimony and child support are not dischargeable in bankruptcy, equitable distribution has the potential of being discharged. The same may be true not only with respect to the settlement of deferred equitable distribution of assets but with respect to the payor assuming certain credit card liabilities and potential tax deficiencies as part of the overall settlement of equitable distribution.

While provisions in a property settlement agreement cannot insure non-dischargeability, counsel can best protect the client by tying in the concepts of deferred equitable distribution and indemnification with their relationship to the support and maintenance of the payee's family. While the author suggests counsel advise the client, if he or she is the supported spouse, in writing regarding the possibility that a bankruptcy may not provide absolute protection, it is wise to utilize some language in a property settlement agreement as follows:

> Husband represents and warrants to Wife that he has no present intention to file a petition in bankruptcy and agrees to the extent he may later decide to do so, he will not seek to discharge any of his obligations to Wife hereunder and that this Agreement shall remain in full force and effect. Husband further recognizes and agrees that Wife requires the income stream from the deferred equitable distribution payout by Husband to Wife pursuant to the terms of this Agreement in order to appropriately support herself and the children of the marriage, notwithstanding that for purposes of this Agreement same has been denominated as equitable distribution. In the event this matter had been litigated to a conclusion, Wife's position would have been that assets should have been sold or, alternatively, Husband should have borrowed funds in order to accommodate the amount due to Wife which is now being paid through a deferred equitable distribution schedule. If such alternative result had occurred she would have had funds necessary to properly support herself and the children but as an accommodation to Husband has agreed to accept a deferred equitable distribution with each party expressing their understanding that the timely payment pursuant to the schedule is necessary for appropriate support and maintenance. Husband acknowledges Wife's financial circumstances at the time of the settlement and ratifies herein the need for him to timely pay all deferred equitable distribution payments for wife and the children to be appropriately supported.
>
> This agreement also contains indemnification provisions whereby Husband has indemnified Wife from: (a) any responsibility for certain credit card obligations which are identified in this agreement and (b) any responsibility for deficiencies, including interest, penalties and professional fees in the event of an audit with respect to any previously filed joint state and federal income tax returns of the parties. The parties confirm their understanding herein that there is an interrelationship between these indemnification provisions and the appropriate support and maintenance of Wife and the children such that these indemnifications shall likewise not be dischargeable in bankruptcy in the event of such filing by Husband since the indemnification provisions represent support provisions designed to enable Wife to meet a necessary budget in order to maintain an appropriate standard of living for herself and the children. The parties have specifically examined and considered with their respective attorneys

the decisions of *Gianakas v. Gianakas*, 917 F.2d. 749 (3d. Cir. 1990) and *Schorr v. Schorr*, 341 N.J. Super. 132 (App. Div. 2001) and have incorporated the reasoning of such cases herein. These provisions specifically express the intent of each of the parties at the time of settlement of this case; the financial circumstances of the parties at the time of the settlement; and the reasons for the deferred equitable distribution payout and the indemnification provisions.

(Practice Tip: These provisions clarify the need for the recipient/spouse to receive deferred equitable distribution payments for support purposes and the language tracks the touchstones of *Gianakas* as reaffirmed by the New Jersey Appellate Division in *Schorr*. The provisions also underscore the need for the continued viability of the indemnification provisions both with respect to credit card debt and income taxes in the event of a bankruptcy proceeding.)

Make Sure Downward Deviations from the Child Support Guidelines are Documented by Child-related Considerations

Counsel should never state in a property settlement agreement that child support is waived or will be paid below the guidelines, unless there is language in the agreement supporting that result based upon specific child-related considerations. These considerations may include such concepts as carrying a substantial mortgage in order to maintain an existing home for the benefit of the children and their stability or, for example, the agreement requires the payment of some other substantial child-related expenses for which the payor might not be otherwise responsible.

It is fundamental that the right to child support belongs to the child and may not be waived by a custodial parent.[10] Even an explicit waiver agreement cannot vitiate a child's right to support.[11] That fundamental doctrine has been reiterated time and again by the courts, most recently in *Gotlib v. Gotlib*.[12] Also note that Appendix 1X-A (Consideration and the Use of Child Support Guidelines) provides that the use of the guidelines are to be applied as a rebutttable presumption establishing a child support order, further indicating that the guidelines must be applied in all actions in which child support is being determined. The appendix further provides: "If support guidelines are not applied in a specific case or the guidelines-based award is adjusted, the reason for the deviation and the amount of the guidelines-based award (before any adjustment) must be specified in writing on the guidelines worksheet or in the support order." Additionally Rule 5:6(a) indicates the guidelines may be modified and disregarded by the court only "where good cause is shown." Accordingly, the practitioner should make sure the deviation is well documented in the agreement.

Putting the Case Through

If the case is settled on the day it is scheduled for trial or presented to the early settlement panel, and has any degree of complexity, counsel should not place the settlement on the record and have the client testify. If ultimately the client is dissatisfied with the settlement, he or she will then assert the practitioner pressured him or her into settling. Counsel should take notes and prepare a property settlement agreement (or final judgment with stipulations); have the client review it; and then put the case through when the emotions have cooled and the client has had the opportunity to review everything in the office.

In response to *Entress v. Entress*,[13] the Supreme Court adopted Rule 5:5-9, which permits a settlement to be placed on the record and a judgment entered orally with a contemporaneous written final judgment entered either in the form set forth in Appendix XXV of the rule or in another form as consented to by the parties. If the written judgment is in the form provided by the appendix, it is to be submitted as an amended final judgment of divorce within 10 days. The rule should not be read as requiring counsel to place the stipulations on the record and have a judgment entered on the day of a matrimonial early settlement program (MESP) or trial. The rule simply provides a methodology, not a mandate.

That said, other than in the most simplistic of cases, the client should be present to testify under oath (in conformity with the terms of a properly drafted agreement) that the settlement is entered into freely and voluntarily, without duress or coercion; without influence of any substances; and with a full knowledge and understanding of all of the terms and provisions; and that the client is satisfied with the legal services provided. If there are specific tradeoff terms, as discussed above, the practitioner should take the time to make reference to those terms in the examination of the client when obtaining the assent of the client on the record.

Draft Every Settlement Provision Agreement With Clarity

Every provision in the agreement should be drafted devoid of ambiguity or multiple interpretation. Whether the agreement has been drafted by the adversary or counsel, it should be read carefully with this question in mind: "If you or another lawyer looked at the provisions several years later in a post-judgment context, would they be readily understood and subject to only one interpretation?" If the question cannot be answered affirmatively, the language should be modified and clarified. When there are formulas involved, do not hesitate to illustrate with hypotheticals and examples. The author has seen too many agreements devoid of illustrations, which would have had the effect of clarifying the terms well into the future.

Life Insurance

In most cases, spousal support and/or child support protection is provided by life insurance policies. Matrimonial attorneys should protect themselves against an assertion that they should have implemented and monitored this protection with a provision such as:

> Wife (or husband) specifically understands and acknowledges that her attorneys have no responsibility and will not be monitoring the status of life insurance coverage to be maintained by husband pursuant to the terms of this Agreement, Wife accepting this responsibility as her own. Wife further specifically understands and acknowledges that her attorneys will not be reviewing any of Husband's life insurance applications to confirm the accuracy of the representations made therein, Wife accepting this responsibility as her own.

End of the Case Checklist

One of the most important things to be done, and one of the obligations often overlooked by matrimonial attorneys, is to make sure every task necessary to conclude the case is accomplished. A checklist should be prepared and provided to the client and, if necessary, to opposing counsel. The file should not be closed until everything on that list is accomplished. At a minimum, that may mean the preparation, execution and filing of transfer deeds; and preparation, execution and filing of IRC 408(d)(6) rollover orders, qualified domestic relations orders (QDROs) or domestic relations orders (DROs). In addition to making sure such orders are executed and filed with the court counsel should make sure they are filed with the implementing company or governmental agency and that a letter has been received from the appropriate entity acknowledging receipt of the order and confirming that it is in appropriate form for implementation.

If practitioners follow these recommendations they will dramatically reduce the risk of a successful malpractice claim. Keep in mind that the Supreme Court ruling in *Saffer v. Willoughby*[14] has provided an incentive for plaintiffs' attorneys to bring legal malpractice actions. That case provides that "a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in prosecuting a legal malpractice action."[15] While a practitioner cannot prevent the action from being asserted, he or she can certainly minimize the risk of a successful claim and, in some instances, even defeat the claim in a summary judgment proceeding. ■

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Endnotes

1. *Sommers v. McKinley*, 287 N. J. Super. 1 , 9-10 (App. Div, 1996); *Albright v. Burns*, 206 N.J. Super. 625, 632 (App. Div. 1986); *Conklin y, Hannoch Weisman*, 145 N.J. 395, 416 (1996).
2. *2175 Lemoine Avenue v. Finco, Inc.*, 272 N.J. Super. 478, 497 (App. Div. 1994). *See also Gautam v. DeLuca*, 215 N.J. Super. 388, 397 (App. Div. 1987); *cert. den.* 109 N.J. 39 (1987).
3. *St Pius X House of Retreat v. Diocese of Camden*, 88 N.J. 571 , 588 (1982); *Taylor v. Shephard*, 136 N.J. Super. 85, 90 (App. Div. 1975) *aff'd o.b.* 70 N.J. 93 (1976).
4. *St. Pius X, supra* at 588. *Cf. Ziegelheim v. Apollo*, 128 N.J. 250, 260 (1992); *Levine v. Wiss and Co.*, 97 N.J. 242, 246 (1984).
5. *Matter of Yetman*, 113 N.J. 556, 562 (1989); *Matter of Stein*, 97 N.J. 550,563 (1984).

6. *Crews v. Crews*, 164 N.J. 11 (2000).
7. *Weishaus v. Weishaus*, 180 N.J. 131 (2004).
8. *Lepis v. Lepis*, 83 N.J. 139 (1980).
9. *Morris v. Morris*, 263 N.J. Super. 237, 245-246 (App. Div .1993).
10. *L.V. v. R.S.* 347 N.J. Super. 33, 41 (App. Div. 2002); *Martinet v. Hickman*, 261 N.J. Super. 508, 512 (App. Div. 1993); *Savarese v. Corcoran*, 313 N.J. Super. 240, 246 (Ch. Div. 1997) *aff'd* 31 1 N.J. Super. 1 82 (App. Div. 1998).
11. *Kopak v. Polzer*, 4 N.J. 327, 333 (1980); *Martinet, supra*. at 512.
12. *Gotlib v. Gotlib*, 399 N.J. Super. 295, 305 (App. Div. 2008).
13. *Entress v. Entress*, 376 N.J. Super. 125 (App. Div. 2005).
14. *Saffer v. Willoughby,* 143 N.J. 256 (1996).
15. *Id.* at 272.

Tweeting, Friending and Linking In: Social Media Policies and Ethical Constraints on Lawyers Using Social Media

by Jamie P. Clare and Randi W. Kochman

Social networking has become increasingly popular among attorneys and the general public. On Oct. 4, 2012, Facebook announced it had exceeded one billion users, double the 500 million users it reached in July 2010, and 10 times the number of users it had in Aug. 2008. Facebook now boasts 600 million mobile users. LinkedIn, the professional networking site launched in May 2003, reports more than 225 million users in more than 200 countries and territories. Twitter, the micro-blogging site, administers 400 million tweets per day.

The Rise of Social Networking Among Attorneys and Resulting Ethical Implications

A Nov. 2012 survey by the *American Lawyer* reported social networking technology is in use by 75 percent of responding firms. Among them, LinkedIn is used by 90 percent, Twitter by 64 percent and Facebook by 61 percent. A total of 78 percent of AmLaw200 firms have blogs or blogging attorneys.

Lawyers are using social media to uncover sometimes critical, relevant evidence and information about their cases, parties and claims in matrimonial and family law litigation, as well as in personal injury, criminal and employment matters. In acting as employers, lawyers also use social media to aid them in hiring. Given the predominance of social media use by the public and among legal professionals, it is crucial that attorneys understand the ethical constraints and legal ramifications of its use. As employers and practitioners, attorneys must be keenly aware of the pitfalls arising from their use of social media or social networking sites.

Lawyers now face potential claims for ineffective assistance of counsel and legal malpractice for failing to conduct at least rudimentary Internet searches using social media to investigate the factual underpinnings of their cases or to discover pivotal information about the adverse party. In personal injury and criminal matters, social media is utilized to screen potential jurors concerning their views and truthfulness during the *voir dire* process. Social media also has given rise to a plethora of ethics complaints against attorneys, firms and those they employ.

Consider the case of two New Jersey defense attorneys whose paralegal used Facebook to 'friend' the plaintiff in a personal injury action. The paralegal discovered the plaintiff was enjoying travel, dancing and other activities that would tend to refute his claims regarding the seriousness of his injuries. Believing they were zealously advocating on behalf of their clients, and believing the information their paralegal had obtained was available publicly, the attorneys used the information garnered from Facebook to their client's advantage and settled the case.

Despite the excellent result counsel obtained, and the District II B Ethics Committee's conclusion the matter did not state facts constituting unethical conduct, the attorneys now find themselves the subject of a complaint before the New Jersey Office of Attorney Ethics (OAE). The complaint charged counsel with violating New Jersey Rule of Professional Conduct (RPC) 4.2 for communicating with a represented party; RPC 5.3(a), (b) and (c), for failure to supervise a non-lawyer; RPC 8.4(c), for conduct involving dishonesty in violation of ethics rules through someone else's actions or inducing those violations; and RPC 8.4(d), for conduct prejudicial to the administration of justice. In addition, supervising counsel is charged with breaching RPC 5.1(b) and (c), which impose ethical obligations on lawyers for the actions of attorneys they supervise.

While the courts determine the OAE's jurisdiction over the matter, and the outcome of the case before the OAE is by no means a certainty, the fact remains counsel have become embroiled in litigation they may have been able to avoid through implementation of a comprehensive social media policy.[1]

Amendment of the ABA Model Rules

The American Bar Association (ABA) has addressed emerging technologies in its recent rule changes. In Aug. 2012, the ABA approved changes to the Model Rules of Professional Conduct, including rules pertaining to attorney competence, communications with a client and confidentiality, and the use of technology in attorney marketing. In general, the model rules have been clarified and expanded, rather than overhauled, to account for the advent of social networking.

Regarding competency, Model Rule 1.1 commands a lawyer to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Comment 8 to Rule 1.1 has been specifically revised to include reference to "relevant technology," as follows:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Simply put, a lawyer may not be providing competent or diligent representation if he or she fails to use the Internet to search for potentially relevant information about his or her case. Further, a current trend in the courts is to impose an ethical duty on attorneys to employ social media, for example, to locate a defendant to effect service, to find impeachment evidence, to research a potential juror's litigation history or to discover information concerning a potential transaction.[2]

With respect to confidentiality of information, the ABA amended Model Rule 1.6 to add new Section 1.6(c), which requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. Comment 18 to the model rule explains, among other things, factors to be considered in determining the reasonableness of the lawyer's efforts to preserve confidentiality. These factors include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use). Comment 18 continues, however, with the *caveat* that whether a lawyer may be required to take additional steps to safeguard a client's information to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of the rules.

Attorneys must use, and are required to advise their clients to use, secure channels to communicate to avoid the inadvertent disclosure of privileged or confidential information and case strategy in whatever medium they choose to communicate. Lawyers must be diligent to prevent against disclosures by refraining from blogging or posting on social media information that may be construed as privileged or confidential, or concerns strategy. Attorneys, likewise, must avoid employing or disclosing privileged or confidential information in marketing materials posted on social media in violation of the model rules. By way of example, Model Rule 1.6, Comment 19, provides, in pertinent part, when transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.

The ABA also amended Rule 1.18 pertaining to duties to a prospective client, Rule 7.1 regarding communications concerning a lawyer's services, Rule 7.2 pertaining to attorney advertising and Rule 7.3 concerning direct contact with prospective clients to account for technological innovations and the use of social media. In general, the comments to these rules have been broadened to embrace electronic communications and social networking. Attorneys should review the rules and comments, and the corresponding New Jersey RPCs, to avoid ethical breaches involving competency, confidentiality, false advertising and the unintended creation of attorney-client relationships through the use of social media.

Recent Legislation Regarding Social Media

In May 2013, the New Jersey Assembly passed a revised social media privacy bill barring employers from forcing current workers or job applicants to disclose user names and passwords for social media sites. The measure has yet to be approved by the New Jersey Senate, but it is expected to pass without objection in its current form.

The revised bill no longer gives employees a private cause of action for violations of the statute and allows employers to investigate compliance with applicable laws, regulations and reports of work-related misconduct when employers receive specific information concerning a personal social media account. Under the revised bill, employers may also access and use information about employees and applicants found in the public domain and may require workers to disclose whether they have a personal social media account.

Presently, seven states have enacted laws that prohibit employers from demanding access to personal social media accounts, and dozens more have introduced similar legislation. Although New Jersey employers may be permitted to inquire about employee social media accounts, they should be cautious when using information obtained from those sources in making hiring and disciplinary decisions, in light of successful claims by employees for discrimination, invasion of privacy, violations of the National Labor Relations Act, Stored Communications Act and related state laws. For the same reasons, employers should not access a private, password-protected, social media or email account.[3]

The Social Media Policy

Social media policies may protect firms and their employees from claims, assist in avoiding ethical breaches and protect firm clients from similar claims. As with all handbook materials, a firm should be able to clearly establish it adopted, distributed and received acknowledgements of receipt of its social media policy.

A social media policy should, at the outset, alert the firm's members, associates, paraprofessionals and staff to the variety of adverse consequences that can arise from the misuse of social networking, including the creation of unintended attorney-client relationships, contrary positions advocated against the firm or its clients, disclosure of sensitive or confidential information, copyright violations, violations of the Rules of Professional Conduct and potential damage to the firm's reputation. The policy should identify clearly all social networking activity to which the policy applies, both inside and outside of the office, and prohibit attribution of postings placed on social networking sites to the firm or the implication such postings are endorsed or written by the firm. The policy also should incorporate by reference a firm's existing email, voicemail, Internet, harassment, equal opportunity and confidentiality policies.

An effective policy will allow limited use of the firm's information technology (IT) systems to access social networking, provided the use does not interfere with or impact normal business operations. The policy should require employees to comply with all firm policies, not compromise the security or reputation of the firm and not burden the firm with unreasonable costs. The policy also should require anyone participating in a social network to be responsible to read, understand and comply with the site's terms of use. Importantly, the policy must contain a comprehensive list of guidelines for the content of all postings on social media sites and identify an individual or member of the firm to whom questions regarding the content of any posts should be brought. A law firm's social media policy also must prohibit 'pretexting,' or posing as a confidante or as one who is seeking a genuine social or business relationship to obtain information, as this poses the significant ethical and legal implications previously discussed.

Advances in social media and technology have made the practice of law both more efficient and more complex. Employers and firms utilizing social media must familiarize themselves with all relevant ethical rules and authorities to ensure compliance and to avoid involvement in unintended litigation. A well-drafted social media policy is crucial, and can protect a firm by safeguarding its confidential business and client information and ensuring attorneys are properly guided regarding the appropriate interplay between the use of social media and the practice of law.

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Endnotes

1. *See Office of Attorney Ethics v. Adamo and Robertelli*, Supreme Court of New Jersey, District XIV Ethics Comm., XIV-2010-048E & -0485E.
2. *See* Levitt and Rosch, Duty to Google Questioned, *ALI/ABA Newsletter*, Nov. 19, 2007 and cases cited; *see also Johnson v McCullough*, 306 S.W.3d 551 (Mo. banc 2010)("Litigants should not be allowed to wait until a verdict...to perform a Case.net search for jurors' prior litigation history...the search could also have been done in the final stages of jury selection...."). New Jersey lawyers may obtain the *voir dire* list from the court clerk 10 days before trial. R. 1:8-5.
3. *See, e.g.*, *Pietrylo v. Hillstone Restaurant Group*, Docket No. 2:06-cv-05754 (D.N.J. 2008).

Ethical Divorce Financing: A Guide for Practitioners

by Corrie Sirkin

Third-party divorce funding firms can provide an option for clients to level the legal playing field and prevent a disparity in income from impacting their results. Spouses need not remain financial hostages. Third-party divorce lenders can advance clients money to pay legal bills, expert fees and living expenses in exchange for an interest in their ultimate divorce settlement,[1] which is something attorneys are specifically prohibited from doing pursuant to the New Jersey Rules of Professional Conduct.[2] Obtaining third-party divorce funding can, therefore, remedy an imbalance of power; place litigants on more equal footing; dissuade the moneyed spouse from dragging out proceedings; and, incentivize settlement in ways not previously considered possible.[3] On the other hand, having access to additional funds may provide some spouses with the financial ability to attempt to punish the other spouse by prolonging the divorce.

Unlike typical financing firms, third-party divorce funding firms do not usually look at the borrower's income and credit score. Rather, they look at the borrower's marital asset pool and likelihood of success when making their decision to lend. In addition, some lenders review the record of the borrower's divorce attorney.[4] Also unlike typical forms of financing, those borrowing from third-party divorce funding firms are not required to make monthly or periodic payments during the pendency of the divorce litigation. Rather, the lender is paid in full at the conclusion of the case, from the borrower's settlement proceeds.

The typical client for a third-party divorce funding firm is an unemployed, non-moneyed female spouse who is raising small children.[5] The moneyed spouse typically owns a business with a subjective value; has offshore holdings; has illiquid assets; or, is hiding assets.[6] Spouses of doctors, hedge fund or finance company managers and accounting partners are some prototypical clients.[7] In these types of complicated cases, reaching a fair divorce settlement may depend on the non-moneyed spouse's ability to engage a business valuation expert, forensic accountant or private investigator. In addition, the moneyed spouse in these types of cases may try to pressure the non-moneyed spouse into accepting an unfavorable settlement by withholding support, cancelling access to accounts and credit or refusing to pay bills; in effect, trying to blackmail the non-moneyed spouse into accepting a settlement.[8] Similarly, the moneyed spouse may try to delay litigation and/or enforcement by changing attorneys; filing unnecessary motions; requesting adjournments; or, refusing to appear at hearings.

Moreover, spouses without control of marital assets often have no idea how they are going to pay their daily expenses pending a divorce, let alone a hefty retainer. It can be difficult to obtain a proper *pendente lite* support award when a client has no information regarding the marital expenses. That said, some of the more traditional divorce funding sources, such as loans from friends and/or family, may be looked upon skeptically by the court, which might wonder whether the loans will actually have to be repaid.

New Jersey Ethics Opinion 691,[9] which pertains specifically to personal injury cases but can be applied in the divorce context as well, advises that a lawyer may ethically refer a client to a third-party 'factor' or lender, with some important *caveats*. For instance, the committee's advisory opinion specifically states that it should not be "construed as sanctioning this or any other related business activity." The opinion also requires that the lender "neither provide legal advice nor seek to control the direction of the litigation" as conditions precedent. In other words, counsel must not allow his or her responsibility to the client to be diluted in any way.[10] Also required is that lender documents executed by the client contain an acknowledgement and agreement to place the assigned amount in escrow at the time of settlement and forward that amount directly to the lender, and that the items subtracted to arrive at a net settlement amount be clearly listed. Finally, any risk of insufficient net settlement proceeds must fall on the lender alone.

New Jersey statutes do not specifically regulate third-party litigation funding in the context of divorce. Therefore, attorneys referring clients should choose a lender

who engages in the best practices of the industry. First, the lender should comply with each state's usury cap and Federal Truth in Lending Laws,[11] as a major criticism of this industry is its unusually high interest rates of up to 480 percent APR.[12] Moreover, some courts have refused to uphold third-party divorce funding contracts,[13] which could expose an attorney and/or law firm to potential litigation regarding the disbursement of monies in escrow after the underlying divorce is settled.

Second, the attorney and/or law firm should not allow a lender to influence litigation in any way. Another common criticism of third-party divorce funding is that the lender may interfere with litigation or attempt to direct the divorce proceedings.[14] Most times, however, the interests of the client and third-party lender are the same: to maximize the settlement and minimize the costs. Another risk is the attorney being swayed by his or her ongoing or repeat relationship with a third-party divorce funding firm. Attorneys must be cognizant of these possibilities and make sure the client's interests are placed at the forefront at all times.

There is also the potential for a conflict of interest when any third party compensates an attorney. The Rules of Professional Conduct prohibit lawyers from accepting compensation from third parties without the informed consent of the client.[15] Lawyers must also be careful not to allow a third party to interfere with "the lawyer's independence of professional judgment or with the lawyer-client relationship."[16] Finally, the attorney must protect the confidentiality of information disclosed[17] and "exercise independent professional judgment and render candid advice."[18] Whether funded by the client or a third party, the attorney should discourage unnecessary spending and encourage reasonable settlement.

Additionally, best practices require that attorneys and law firms exercise caution regarding the attorney-client privilege when dealing with third-party divorce funding firms. The attorney-client privilege may not attach to documents and information provided to the third-party lender. The Rules of Professional Conduct require that a lawyer "shall not reveal information relating to the representation" unless the client consents after consultation.[19] Moreover, "[t]he attorney must ensure that the client fully understands the risks of disclosure of such information, including the possible loss of the attorney-client privilege, before securing the client's authorization to disclose information the financial institution may require in order to assess the risk of the transaction."[20] In New Jersey, the attorney-client privilege rule provides that communications between lawyer and client in the course of relationship and in personal confidence are privileged, including those made through "necessary intermediaries and agents."[21] Therefore, disclosures to third-party divorce funding firms may be privileged. Nevertheless, attorneys should provide lenders with information that would be discoverable by the adverse party.[22]

Finally, New Jersey's work product doctrine may apply to information provided to third-party divorce funding firms, as they are "prepared in anticipation of litigation or for trial."[23] The standard for disclosure in New Jersey is that work product need only be disclosed if the other side is "unable without undue hardship to obtain the substantial equivalent of the materials by other means."[24] In most divorce lender situations, the client is the non-moneyed spouse and, therefore, does not have access to much information regarding the parties' assets. Therefore, work product doctrine concerns may be more applicable to attorneys and law firms in states with case law and statutes that are less robust than New Jersey's when it comes to protecting privileges.

Considering the foregoing, third-party divorce funding firms can provide an invaluable service to clients who cannot obtain traditional litigation funding, but have substantial potential settlements. Nevertheless, the Supreme Court of New Jersey has not explicitly ruled on the validity of third-party litigation funding in the divorce context, so attorneys should be ever mindful of the Rules of Professional Conduct when recommending it to their clients. ■

Corrie Sirkin is an associate with Lesnevich & Marzano-Lesnevich, LLC, which has clients who have a lending relationship with BBL Churchill Divorce Financing.

Endnotes

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Managing Discovery Costs in the Information Age

by Susan M. Usatine

Today, litigators are facing an emerging lexicon of new words, terms, and acronyms, such as de-duping, inaccessible data, and ESI. The days of transfile boxes filling law firm war rooms and 'eyes-on' document reviews have made way for terabytes of electronically stored information (ESI) and technology-assisted review (TAR). As a result, e-savvy litigators who grasp the new technology's impact on strategy, and even trial outcomes, are positioned to limit their clients' e-discovery costs. This article proposes three steps litigators can employ to build a cooperative and largely transparent e-discovery process that ultimately reduces collection, review, production, and hosting costs while still producing quality results.

Developing a Quality e-Discovery Process

Litigators should familiarize themselves with The Sedona Conference's (TSC) recommendations and guidelines. TSC is a nonprofit, 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights, and as such, is a leading resource in the e-discovery world. Specifically, TSC's *Commentary on Achieving Quality in the e-Discovery Process* lists four considerations useful in the development of a quality e-discovery process.[1] These considerations are as follows:

1. Failure to employ a quality e-discovery process can result in the failure to uncover or disclose relevant evidence, which can affect the outcome of litigation.
2. An inadequate e-discovery process may allow privileged or confidential information to be inadvertently produced.
3. Procedures that measure the quality of an e-discovery process allow timely course corrections and provide a greater assurance of accuracy.
4. A poorly planned e-discovery effort can also cost more if the deficiencies require that e-discovery be redone.[2]

Given these considerations, there are three steps every litigator can take to develop an e-discovery process that will produce quality results and increase the likelihood the client will prevail on a motion to shift e-discovery costs.

Step One: Protect (and Get) What is Needed: Containing Collection Costs

As all litigators know, preserving, identifying, and collecting information today is more complicated than it was 10 years ago. It does not help that the court rules governing discovery have not evolved as quickly as technology. Currently, New Jersey's discovery rules largely mirror the Federal Rules of Civil Procedure (FRCP), which prescribe the procedure for obtaining discovery, including e-discovery in the federal courts. These federal rules include:

- FRCP 16: pretrial conferences, scheduling, and management;
- FRCP 26(f): discovery, duty of disclosure;
- FRCP 33: interrogatories, options to produce business records;
- FRCP 34: production of documents, ESI;
- FRCP 37(f): failure to make disclosures, ESI, and good faith; and
- FRCP 45(d): subpoena practice.

In New Jersey, the laws governing ESI collection, obligations, and best practices are substantially similar to the aforementioned federal rules. The New Jersey rules include:

- Rule1:9-2: subpoenas;
- Rule 4:10-2(a): scope of discovery;
- Rule 4:10-2(f): claims that ESI is not reasonably accessible;
- Rule 4:10-2(g): limitations on frequency of discovery;
- Rule 4:17-4(d): option to produce business records, including ESI, in response to interrogatories;
- Rule 4:18-1: production of documents and ESI;
- Rule 4:23-6: failure to make discovery, sanctions; and
- Rule 4:5B-2: providing that in most cases the pretrial judge may conduct a case management conference if it appears the conference will, among other things, address issues relating to ESI discovery.

Based on the rapid increase in technology and its relationship to both the federal and state rules, building an effective and defensible e-discovery process will largely depend on the litigator's active participation in all phases of ESI discovery. Thus, actively participating in the identification and preservation of ESI is the first step in establishing the defensibility of an e-discovery process, in addition to being a critical component of ESI motion practice (such as motions for protective orders, to compel, and/or to shift costs). ESI's dynamic nature requires that counsel act quickly and intentionally to preserve/identify potentially relevant ESI. Satisfying the preservation obligation and timely suspension of automatic purge/archive procedures requires counsel's understanding of the nature of the action *and* the types of records (email, databases, word processing files, calendars, and spreadsheets) that are subject to preservation. At the inception of the case, or when litigation becomes reasonably foreseeable, counsel should consider the following:

- the characteristics of the client's current computer system and the system at the time of relevant events;
- the physical location of ESI, including: 1) user-controlled data, including hard drives, flash drives, smartphones, CDs, DVDs, personal laptops, and email accounts; and 2) corporate-controlled data, including server-based shared (structured and unstructured) data and email files, custom (accounting, purchasing, and client relationship management) systems on local networks and the cloud;
- the accessibility of the ESI, including: 1) active data (for instance, a hard drive), which is the most accessible, 2) near-line data (such as CD-ROMs), and 3) offline storage archives (for example, removable optical disks). Less accessible data includes: 1) back-up tapes (sequential access devices are largely unorganized), and 2) erased, fragmented, or damaged data (data retrieval is not always achievable and requires significant processing); and
- defining the goals of filtering, applying the filter, and testing the outcome.

Finally, counsel should be actively involved in determining answers to the following questions: 1) Who will conduct and document the ESI collection? Will it be the client, information technology (IT), and/or a third party?; 2) Will the client, IT, or a third party conduct the collection remotely or onsite?; and 3) Will it be a targeted collection, or will it be a staged collection?

It is important for counsel to remember that all of the ESI decisions should be documented, and largely disclosed to opposing counsel.

Step Two: Manage a Quality Review and Production

Efficient ESI review and production requires a defensible process that is led by an attorney who understands: 1) the complexities of ESI, and 2) that the best practice for counsel to follow is cooperation with opposing counsel and transparency regarding the steps taken to preserve and produce ESI. Many New Jersey judges have endorsed TSC's cooperation proclamation, which acknowledges cooperation in discovery is consistent with zealous advocacy.[3] The proclamation unequivocally states, "[t]he effort to change the culture of discovery from adversarial conduct to cooperation is not utopian. It is instead, an exercise in economy and logic."[4] In short, the proclamation interprets the FRCP pertaining to e-discovery as a mandate for counsel to act cooperatively, a proposition supported by case law indicating the Judiciary's agreement with this principle.[5] Methods to accomplish cooperation include:

1. utilizing internal ESI 'point persons' to assist counsel in preparing requests and responses;
2. exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of ESI;
3. jointly developing automated search and retrieval methodologies to cull relevant information;
4. promoting early identification of form or forms of production;
5. developing discovery budgets based on proportionality principles; and
6. considering court-appointed experts, volunteer mediators, or formal alternative dispute resolution (ADR) programs to resolve discovery disputes.

Indeed, counsel's failure or refusal to cooperate violates what TSC recognizes as a lawyer's twin duties of loyalty: acting as a zealous advocate for clients while fulfilling his or her professional obligation to conduct discovery in a diligent and candid manner.

Similarly, the cooperative and largely transparent use of TAR can greatly reduce review and production costs while producing predictable quality results. For these reasons, counsel should consider using TAR to assist in identifying potentially responsive material through automated searches and protocols designed by counsel,

de-duping identical or near identical ESI, and eliminating from the data set irrelevant file types, including obviously irrelevant SPAM.

Furthermore, counsel can take additional steps to manage e-discovery reviews and productions. For instance, counsel should employ quality control measures to ensure the consistency between reviewers throughout each stage of the review. In addition, defensibly minimizing the number of records being reviewed for privilege leads to a more efficient cost-effective review, since the privilege review is generally more nuanced than the responsiveness review. Counsel should consider filtering file extensions, document sources, keyword searches, metadata, and any internal designations of privilege to automatically designate these records as potentially privileged. Finally, counsel should thoroughly consider implementing a Federal Rule of Evidence 502 clawback order or similar protocol.[6]

Step Three: Motions to Accomplish Cost Savings

Litigators in New Jersey should be aware of Judge Michael A. Hammer's decision in *Juster Acquisition Co., LLC v. N. Hudson Sewerage Auth.*,[7] the seven-part *Zubulake v. UBS Warburg, L.L.C.*[8] test, and, more generally, the doctrine of proportionality. Generally speaking, counsel seeking to limit discovery must establish that the requesting party's requests are "unduly burdensome," and, as a result, the scope of the requests should be narrowed and/or the cost of collection should be shifted, in whole or in part, to the requesting party. Discovery of ESI, as provided in Rule 34, is specifically limited by Rule 26(b)(2)(B), which provides, in pertinent part:

> A party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.[9]

Briefly stated, Rule 26(b)(2)(C), referred to as the proportionality rule or proportionality doctrine, requires the court limit discovery in a proportional manner if it determines the discovery sought is unreasonably cumulative, duplicative, or can be obtained from another source that is more convenient, less burdensome, or less expensive.[10] In short, in these situations the burden or expense of the proposed discovery outweighs its likely benefit considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the discovery in resolving the issues.

Juster Acquisition Co., LLC v. N. Hudson Sewerage Auth.[11] is a recent decision illustrating the importance of knowing the ins and outs of a client's data in the context of a motion for a protective order and/or to shift e-discovery costs. Specifically, in this multi-million dollar breach of contract case, Juster Acquisition Company submitted a request for production to North Hudson Sewerage Authority (NHSA) that included 49 requests for documents and a list of 67 proposed search terms.[12] In response, NHSA sought a protective order and claimed the search terms were overly broad and likely to produce results duplicative of the 8,000 pages of documents NHSA had previously produced.[13] In the alternative, NHSA sought an order shifting the costs of the new searches to Juster.

Judge Hammer denied NHSA's motion for a protective order due to NHSA's failure to present any facts, analysis, or sufficient legal authority to support its claim that the proposed new search terms were unreasonably cumulative and/or duplicative given the nature of the dispute.[14] Furthermore, Judge Hammer denied NHSA's motion to shift fees to Juster due to NHSA's failure to meet its burden of demonstrating the requested data was inaccessible, such as by alleging the backup data tapes were erased, fragmented, or damaged.[15] Instead, "by asserting that it has hired an outside vendor to perform the word searches, NHSA acknowledged that the ESI is accessible."[16]

Moreover, Judge Hammer also analyzed the facts presented by the motion under the seven-part proportionality test in *Zubulake v. UBS Warburg, LLC*.[17] Specifically, these seven factors include:

- the extent to which the request is specifically tailored to discover relevant information;
- the availability of such information from other sources;
- the total cost of production, compared to the amount in controversy;

- the total cost of production;
- the relative ability of each party to control costs and its incentive to do so;
- the importance of the issues at stake in the litigation; and
- the relative benefits to the parties of obtaining the information.[18]

In utilizing this test, the court found the balance of the factors fell in Juster's favor, particularly because the alleged cost of running the keyword searches and eliminating duplicates was approximately $6,000 to $16,000 in a multi-million dollar contract dispute.[19] Accordingly, it is apparent from this precedent that when filing motions to accomplish discovery cost savings, counsel should be prepared to provide detailed information regarding the accessibility of the requested information and the corresponding cost and burden associated with providing it.

Key Takeaways

Magistrate Judge Andrew J. Peck, of the United States District Court for the Southern District of New York, states: "Counsel must be *competent* and must *cooperate* with each other to cost-effectively preserve and produce ESI."[20] Efficiency in this arena can only be accomplished by litigators who actively manage ESI preservation, collection, and review. While it is beyond cavil that technology is what caused the ESI explosion, e-savvy counsel realize that technology is also the best tool to tame the ESI beast.

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Endnotes

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