

## **Wealth, Fame and Fortune: Navigating the Treacherous Waters of High Stakes Family Law Litigation**

by

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### **I. Introduction**

The rich and famous get married, have children, argue, and break up just like the rest of us, but because of their money and fame, their cases have unique issues. The import of these issues are magnified by the heat and light given off by their wealth and celebrity. The client may live on a ranch in Wyoming, own a vacation home in Florida, relax at a pied-à-terre in Paris, and abide at an estate in Beverly Hills. Clients may work in Dubai and have business interests throughout Asia. Their children may attend boarding school in Vermont. Questions of personal jurisdiction, support jurisdiction, custody jurisdiction, property jurisdiction, and jurisdiction over marital status challenge attorneys from the inception of these cases.

Child and spousal support take on an entirely different meaning when the client earns a hundred thousand or even one million dollars each month. The client's income may vary from year-to-year. It may be earned or it may be inherited. It may be buried under layers of trusts and corporations located in countries across the globe. The application of the guideline support formulas may make little sense. Attorneys must address novel issues and retain experts who can testify on the value of unique assets and marital lifestyle.

Security and confidentiality issues can be a matter of life and death to clients and their families. Courts commonly divide and

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allocate real estate and personal property, but corporate structures and trusts may make investigation challenging. Further, the value and allocation of intellectual property, royalties, and other extraordinary property add to the complexity of these cases.

The powerful are accustomed to their employees doing whatever they ask. Their attorneys walk a fine line between abiding by legal and ethical proscriptions and satisfying clients who are used to having their orders go unquestioned. Attorneys work under scrutiny of the press who can either enhance or damage their reputations. Because of the notoriety of cases involving prominent clients, attorneys may attract an ethical investigation. High profile attorneys in controversial cases may be more likely to rouse a criminal investigation and prosecution than other cases that would not garner any attention.<sup>1</sup>

Representing high profile clients may be alluring, but unless the case is handled thoughtfully and ethically, harm can come to both the client and the attorney. Counsel must have the expertise to represent the client effectively and have a team in place to handle the extraordinary work flow. Confidentiality, ethics, privacy, and security must be a priority. Turning down a case that is beyond the lawyer's skill level or ethical comfort zone may be wise. A client who has buried assets in shell corporations in multiple tax havens may not be able to comply with the state's disclosure rules. If that is the case, the best course of action may be not to pursue the case in that jurisdiction.<sup>2</sup>

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<sup>1</sup> For example, F. Lee Bailey was disbarred in by the Supreme Court of Florida for "multiple counts of egregious misconduct, including offering false testimony, engaging in ex parte communications, violating a client's confidences, violating two federal court orders, and trust account violations, including commingling and misappropriation. *Bar v. Bailey*, 803 So.2d 683, 694 (Fla. 2001). Subsequently the Massachusetts bar association disbarred him. , *In re Bailey*, 439 Mass 134 (2003) As discussed later in this article, famed entertainment attorney Terry Christensen was disbarred for his involvement with wire-tapping the opposing party. *See infra* note 23. Marvin Mitchelson, who was a pioneer in family law litigation, was suspended from the practice of law for four years because he was convicted of filing false tax returns, and while on interim suspension, he requested the bank change the client trust account to a personal account, he failed to return a client's files after the client's request, and he exceeded the scope of his paralegal duties while on suspension. *Attorney Discipline*, CAL. ST. B.J., May 2000, available at <http://archive.calbar.ca.gov/calbar/2cbj/00may/attdisc.htm>.

<sup>2</sup> *See generally* *In re Marriage of Dick*, 15 Cal. App. 4th 144 (1993).

## II. Ethical Restraints

Celebrity cases impose a greater pressure to win precisely because they are in the spotlight. The client has power and presence that cannot easily be ignored. To fulfill the client's expectations and get an edge, the lawyer needs evidence. Social media, electronic communication, digital cameras, smartphones, and computers are repositories of evidence that can make or break a case. These hives of potentially damning evidence are replete with the risks of misfeasance and malfeasance. The attorney must also address invasion of privacy, pretexting,<sup>3</sup> violation of federal and state wiretapping laws, and ethical violations which are all potential risks when this sort of evidence is gathered and, perhaps, used. Whether it is the attorney's staff, a private investigator, or the client doing the sleuthing, there is potential liability. An attorney may be personally liable for condoning, even if by acquiescence, a scheme to obtain illegal evidence. In the New York case *Marriage of Schreiber*, the court highlighted this principle when it stated "[a]s it pertains to matrimonial matters, 'electronic discovery may be crucial [in the proper cases] to determine and confirm the existence of vital information. In others, it may be a weapon of abuse which will further clog a system that is already in dire need of relief.'"<sup>4</sup>

The interception and disclosure of information obtained through illicit means violates federal law. Chapter 119 of Title 18 of the United States Code governs the interception of wire,<sup>5</sup> elec-

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<sup>3</sup> A person who engages in "pretexting" creates a false scenario or impersonates someone with the intent to persuade them to release information or perform some act. Its origin is from the word "pretext" which means "[a] reason given in justification of a course of action that is not the real reason." Oxford English Dictionary, <http://www.oxforddictionaries.com/definition/english/pretext?q=pretext> (last visited March 13, 2014); Wikipedia, [http://en.wikipedia.org/wiki/Social\\_engineering\\_%28security%29](http://en.wikipedia.org/wiki/Social_engineering_%28security%29) (last visited Jan. 24, 2014).

<sup>4</sup> *Schreiber v. Schrieber*, 29 Misc.3d 171, 175 (N.Y. S. Ct. 2010).

<sup>5</sup> "Wire communication" is defined in 18 U.S.C. § 2510(1) (West 2012). It means "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce."

tronic,<sup>6</sup> and oral<sup>7</sup> communications. Not only can the information be barred from use at a proceeding,<sup>8</sup> the person who engaged in the act and individuals who aided or assented to it can face both criminal and civil penalties.<sup>9</sup> Federal law permits sentencing the guilty party to both a fine and up to five years in prison.<sup>10</sup> An attorney who participates in the interception of private information may also be criminally liable.<sup>11</sup> The mere use of the contents of an intercepted communication is a violation of federal law<sup>12</sup> and is a class D felony.<sup>13</sup>

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<sup>6</sup> “Electronic communication” is defined in 18 U.S.C. § 2510(12) (West 2012). It means “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include any wire or oral communication, any communication made through a tone-only paging device, any communication from a tracking device, or electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.”

<sup>7</sup> “Oral communication” is defined in 18 U.S.C. § 2510(2) (West 2012). It means “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.”

<sup>8</sup> Section 2515 states that “[w]henver any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.” 18 U.S.C. § 2515 (West 2012).

<sup>9</sup> Section 2520(a) provides that “any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.” *Id.* § 2520(a). Relief includes, amongst other things, damages. Also, 42 U.S.C. § 1983 (West 2012) permits civil action for the deprivation of rights under the Constitution.

<sup>10</sup> 18 U.S.C. § 2510(4)(a) (West 2012).

<sup>11</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3 (c) (1-2) (2005).

<sup>12</sup> 18 U.S.C. § 2511(1)(d) (West 2012).

<sup>13</sup> H. MARSHALL JARRETT ET AL., PROSECUTING COMPUTER CRIMES (2d ed. 2010), <http://www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf>.

Anyone who engages in this activity can be charged with: 1) being an accessory after the fact,<sup>14</sup> 2) attempt and conspiracy,<sup>15</sup> 3) deprivation of rights,<sup>16</sup> 4) aiding and abetting the interception,<sup>17</sup> 5) fraud in connection with computers,<sup>18</sup> and 6) unlawful access to stored communications.<sup>19</sup> A conviction for any of the above offenses would likely be considered a crime of moral turpitude and subject an attorney to suspension or disbarment.<sup>20</sup> It is permissible to obtain information on publicly accessible social media websites. However, a client crosses the line when she uses illegal means to obtain information. For instance, a party cannot “hack” into his spouse’s computer or social media account.<sup>21</sup> Counsel should make the court aware of any unauthorized breach of data belonging to the client. If the breach is sufficiently serious, and especially if it is habitual, the party should consider filing a domestic violence restraining order to prohibit such conduct.<sup>22</sup>

Courts have applied these federal statutes to lawyers who have condoned interceptions of communications regarding cases they are litigating. Attorney, Terry Christiansen, who represented billionaire Kirk Kerkorian during his 2002 child support dispute, employed private investigator Anthony Pellicano.<sup>23</sup>

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<sup>14</sup> 18 U.S.C. § 3 (West 2012).

<sup>15</sup> *Id.* § 1349.

<sup>16</sup> *Id.* § 242.

<sup>17</sup> *Id.* § 2511(1).

<sup>18</sup> *Id.* § 1030.

<sup>19</sup> *Id.* § 2701.

<sup>20</sup> The aiding and abetting intercepted communications statute, 18 U.S.C. § 2511(1) (West 2012), was used to prosecute the Watergate burglaries in *United States v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974).

<sup>21</sup> Camille Calman, *Spy v. Spouse: Regulating Surveillance Software on Shared Marital Computers*, 105 COLUM. L. REV. 2097, 2098 (2005); Laura W. Morgan & Lewis B. Reich, *The Individual’s Right of Privacy in a Marriage*, 23 J. AM. ACAD. MATRIM. LAW. 111, 127 (2010).

<sup>22</sup> *In re Marriage of Nadkarni*, 173 Cal. App. 4th 1483, 1498-99 (2009) (holding that the plain meaning of “disturbing the peace” in California Family Code § 6320 may include, as abuse under the Domestic Violence Protection Act, an ex-husband destroying mental or emotional calm of an ex-wife by accessing, reading and publicly disclosing her confidential emails).

<sup>23</sup> In May 2008, Anthony Pellicano was convicted of 76 counts, including violation of the Racketeer Influenced and Corrupt Organization (RICO) Act, committing “honest services” mail fraud by paying a police officer for confidential information, identity theft, and wiretapping. In August 2008, Anthony Pel-

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During the dispute, Christiansen was alleged to have paid Anthony Pellicano more than \$100,000 to wiretap Kerkorian's wife's telephone calls, including calls with her attorney.<sup>24</sup> In 2008, Christiansen was federally convicted of conspiracy to intercept wire communications and aiding and abetting the interception of wire communications.<sup>25</sup> He was suspended from the practice of law by the State Bar of California<sup>26</sup> and as of February 2014, he was still not eligible to practice law.<sup>27</sup> He was also sentenced to three years of prison and ordered to pay a \$250,000 fine.<sup>28</sup>

The conviction of Anthony Pellicano and the publicity surrounding the criminal case generated a cascade of other lawsuits.<sup>29</sup> For instance, actor Keith Carradine<sup>30</sup> sued his wife, Sandra Will, for conspiracy to illegally listen in on his phone calls when she hired and allegedly became romantically involved with

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licano was found guilty of federal conspiracy and wiretapping charges. During its investigation, the FBI discovered Anthony Pellicano possessed C-4 explosives, hand grenades, and numerous computer files that contained the written equivalent of nearly two billion double spaced pages of text. United States Attorney's Office, Central District of California, *Terry Christensen, Anthony Pellicano Convicted of Federal Conspiracy and Wiretapping Charges*, Release No. 08-123, Aug. 29, 2008, <http://www.justice.gov/usao/cac/Pressroom/pr2008/123.html>; David Rosenzweig, *Pellicano to Offer Plea Deal in Hearing*, L.A. TIMES (Sept. 20, 2003), <http://articles.latimes.com/2003/sep/20/local/me-pellicano20>.

<sup>24</sup> United States Attorney's Office, *supra* note 23.

<sup>25</sup> Joanna Lin, *Lawyer Gets 3 Years in Wiretap Case*, L.A. TIMES, Nov. 25, 2008, <http://articles.latimes.com/2008/nov/25/local/me-christensen25>.

<sup>26</sup> In the Matter of Terry Christensen, No. 06-C-10695, <http://members.calbar.ca.gov/courtDocs/06-C-10695.pdf> (last visited Jan. 23, 2014).

<sup>27</sup> Lin, *supra* note 25; *In the Matter of Terry Christensen*, No. 06-C-10695.

<sup>28</sup> Nikki Finke, *Terry Christensen Gets 3 Year Sentence; Judge Calls House Detention "Ludicrous,"* Deadline, (Nov. 24, 2008), <http://www.deadline.com/2008/11/terry-christensen-gets-3-year-sentence-judge-calls-house-detention-request-ludicrous/>.

<sup>29</sup> Eriq Gardner, *The Pellicano Verdict: Cue the Civil Suits*, HOLLYWOOD REP. (May 16, 2008), <http://www.hollywoodreporter.com/blogs/thr-esq/pellicano-verdict-cue-civil-suits-62557>; Eriq Gardner, *Keith Carradine Settles Anthony Pellicano Lawsuit*, HOLLYWOOD REP., Oct. 28, 2013, <http://www.hollywoodreporter.com/thr-esq/keith-carradine-settles-anthony-pellicano-651172>.

<sup>30</sup> Internet Movie Database, <http://www.imdb.com/name/nm0001018/> (last visited Jan. 24, 2014).

Anthony Pellicano.<sup>31</sup> She pled guilty to two counts of perjury for lying to a grand jury about her involvement with Pellicano. Similarly, Donna Dubrow sued her husband, famed director of *Die Hard*, John McTiernan.<sup>32</sup> McTiernan made false statements to the FBI when they questioned him about paying Anthony Pellicano \$50,000 to wiretap the personal phone line of producer Charles Roven. McTiernan then perjured himself before the federal judge when he withdrew his guilty plea.<sup>33</sup> McTiernan was convicted in 2010 and began serving his twelve-month sentence in minimum security federal prison in April of 2013.<sup>34</sup> He was released from Yankton Federal Prison Camp<sup>35</sup> on February 24, 2014, and served the remainder of his sentence under house arrest.<sup>36</sup>

In 2013, actress Ashley Judd discovered an electronic GPS tracking device on her vehicle which was being driven by her seventeen year old niece, Grace.<sup>37</sup> Ashley and her sister, Wynona Judd, were entrenched in a Tennessee custody dispute over

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<sup>31</sup> Joyce Wadler, *Keith Carradine's Long Road to 'Dirty Rotten Scoundrels'*, N.Y. TIMES, July 23, 2006, [http://www.nytimes.com/2006/07/23/theater/23wadl.html?\\_r=0](http://www.nytimes.com/2006/07/23/theater/23wadl.html?_r=0); Richard Verrier, *Keith Carradine Sues Pellicano*, L.A. TIMES, Mar. 25, 2006, available at <http://articles.latimes.com/2006/mar/25/local/me-carradine25>.

<sup>32</sup> John McTiernan directed several well known films, including *Die Hard*, *The Hunt for Red October*, *The Thomas Crown Affair*, *Predator*, *Rollerball*, and *Last Action Hero*. McTiernan appealed his case to the U.S. Supreme Court, which denied that petition. He is due to be released in April 2014. (IMBD, [http://www.imdb.com/name/nm0001532/?ref\\_=fn\\_al\\_nm\\_1](http://www.imdb.com/name/nm0001532/?ref_=fn_al_nm_1) (last visited Jan. 23, 2014); Wikipedia, [http://en.wikipedia.org/wiki/John\\_McTiernan](http://en.wikipedia.org/wiki/John_McTiernan) (last visited Jan. 8, 2014)).

<sup>33</sup> Finke, *supra* note 28.

<sup>34</sup> Ewen MacAskill, *Hollywood Director Jailed for Perjury 'Disintegrating' in Prison, Admits Wife*, GUARDIAN (June 4, 2013), <http://www.theguardian.com/film/2013/jun/04/hollywood-director-john-mctiernan-prison>.

<sup>35</sup> Yankton Federal Prison Camp is a minimum security prison in South Dakota. It currently houses 840 Male inmates. Federal Bureau of Prisons, <http://www.bop.gov/locations/institutions/yan/> (last visited March 12, 2014).

<sup>36</sup> LUKE REILLY, *Die Hard Director John McTiernan Released from Jail*, IGN (Feb. 25, 2014), <http://www.ign.com/articles/2014/02/26/die-hard-director-john-mctiernan-released-from-jail>

<sup>37</sup> Cavan Sieczowski, *Ashley Judd Says Sister Wynonna Judd Put Tracking Device on Her Car to Spy on Her*, HUFFINGTON POST (Dec. 17, 2013), [http://www.huffingtonpost.com/2013/12/17/ashley-judd-wynonna-judd\\_n\\_4458585.html](http://www.huffingtonpost.com/2013/12/17/ashley-judd-wynonna-judd_n_4458585.html).

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Grace. Grace took the car to a mechanic who found the GPS tracker.<sup>38</sup> In Tennessee, it is against the law to surreptitiously monitor a person's movements by installing an electronic tracking device in a car.<sup>39</sup> Doing so is a class C misdemeanor<sup>40</sup> and the penalty is jail time and a fine.<sup>41</sup> Additionally, one may be civilly liable for invasion of privacy<sup>42</sup> and intrusion of solitude and seclusion.<sup>43</sup> Wynona hired investigator Janice Diane Swafford-Holt who allegedly placed the tracking device on Ashley's car.<sup>44</sup>

The press reported that Wynona was spying on Ashley.<sup>45</sup> In an effort to spin the story, Wynona's attorney publically called the incident a "misunderstanding" and stated that Wynona was trying to track Grace, not Ashley.<sup>46</sup> Although Tennessee law permits the electronic tracking of minor children by a parent, the car being tracked must belong to that parent.<sup>47</sup> Here, the car belonged to Ashley.<sup>48</sup> No charges have been filed against Wynona or her private investigator.<sup>49</sup>

Normally, there would be civil and criminal penalties for engaging in the covert tracking of an individual. Although the U.S. Constitution does not explicitly create a right to privacy, several

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<sup>38</sup> *Id.*

<sup>39</sup> TENN. CODE ANN. § 39-13-606 (2012); Hollie McKay, *Report: Ashley Judd Files Police Report Accusing Sister Wynonna of Tracking her Car with GPS*, FOX NEWS (Dec. 17, 2013), <http://www.foxnews.com/entertainment/2013/12/17/report-ashley-judd-files-police-report-accusing-sister-wynonna-tracking-her-car/>.

<sup>40</sup> TENN. CODE ANN. § 39-13-606 (2012).

<sup>41</sup> McKay, *supra* note 39.

<sup>42</sup> TENN. CODE ANN. § 39-13-606 (2012); McKay, *supra* note 39.

<sup>43</sup> Intrusion of solitude and seclusion was historically associated with "peeping toms," but more modernly associated with "illegally intercepting private phone calls, or snooping through someone's private records." (FindLaw, <http://injury.findlaw.com/torts-and-personal-injuries/invasion-of-privacy.html> (last visited Feb. 3, 2014)).

<sup>44</sup> Classicalite, <http://www.classicalite.com/articles/4904/20140103/ashley-wynonna-judd-family-feud-custody-battle-ex-husband-rumors-update.htm#> (last visited Jan. 28, 2014).

<sup>45</sup> Siczowski, *supra* note 37.

<sup>46</sup> *Id.*

<sup>47</sup> TENN. CODE ANN. § 39-13-606 (2012); McKay, *supra* note 39.

<sup>48</sup> McKay, *supra* note 39.

<sup>49</sup> *Id.*; Siczowski, *supra* note 37.



states provide this right in their state constitutions.<sup>50</sup> Additionally, Congress passed the Electronic Communications Privacy Act of 1986 to supplement the protection afforded by the Fourth Amendment to the U.S. Constitution.<sup>51</sup> Although the means of electronic communication in 1986 were far more limited, the privacy protection codified in this Act still apply—namely that individuals have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility.<sup>52</sup>

It is crucial to advise clients in writing at the commencement of the representation what is permitted under state and federal law as well as how they can protect themselves. This advice should be included in either the retainer letter (which the client signs), or a letter that accompanies the retainer agreement and is referenced therein. The lawyer will have to continue to remind the client of these boundaries as the case progresses and there is increased pressure to use any means necessary to “win.”

As further discussed in the section below on *Maintaining Confidentiality*, it is important to advise clients to protect themselves from electronic invasion by securing their smartphones and other devices. Clients must be careful about how they communicate with their spouse, their children, their friends, and staff, all of which may lead to discoverable information. They must also be reminded to change their passwords and not to use a company email address to communicate with their attorney because doing so has been construed as a waiver of the attorney-client privilege.<sup>53</sup>

Although high profile clients want a zealous advocate, it is crucial that attorneys do not engage in acts that are ethically questionable. The lawyer’s reputation is on the line. One foolish, illegal, or unethical act can both damage the client and destroy the attorney’s reputation and legal career.

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<sup>50</sup> Article 1, § 1 of the California Constitution includes privacy as an inalienable right; Article II, § 10 of the Montana Constitution states that the right to privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

<sup>51</sup> Juror Number One v. Superior Ct., 206 Cal. App. 4th 854, 860 (2012).

<sup>52</sup> *Id.*

<sup>53</sup> Gina M. Holmes v. Petrovich Dev. Co., 191 Cal. App. 4th 1047, 1051-52 (2011).

### III. Public relations

#### A. Considerations Regarding Information Leaks

Because the public is fascinated with the rich and famous, gossip sites such as TMZ and Radaronline, have quickly, and profitably, replaced traditional print media as the primary source of breaking celebrity gossip.<sup>54</sup> When news breaks, it is released faster than ever, reaching the internet long before the 6 o'clock news. If a judge reads in the press about a case pending before him or her as a result of a comment by an attorney, it invites scrutiny that could affect the case and any subsequent case tried before that judge.

In a high profile matter, it is not uncommon to have the press waiting outside the courthouse or reporters in the courtroom listening to the proceedings. It is not unheard of for matters to be transferred to larger courtrooms or have an overflow room where journalists can watch court proceedings on a monitor.<sup>55</sup> Reporters will go to extraordinary lengths to obtain information, including interviewing the parties, their children, their nannies, household workers, the client's employees, the attorney's employees, and even the judges' family. They will go through the lawyers' trash, the clients' trash, their employee's trash, or even a witness' trash.<sup>56</sup>

Technology has both increased the amount of data available to collect and made it simpler than ever to obtain sensitive information. Attorneys store volumes of confidential and privileged information and they have a duty to make sure this information

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<sup>54</sup> Jim Rutenberg, *The Gossip Machine, Churning Out Cash*, N.Y. TIMES, May 21, 2011, <http://www.nytimes.com/2011/05/22/us/22gossip.html?pagewanted=all>.

<sup>55</sup> An over-flow room for journalists was set up in *United States v. McGregor*, 838 F.Supp.2d 1256, 1259 (2012).

<sup>56</sup> *Steve Bing Files \$1 Billion Privacy Suit*, FOX NEWS (May 17, 2002), <http://www.foxnews.com/story/2002/05/17/steve-bing-files-1-billion-privacy-suit/>. Used dental floss was retrieved from producer Steve Bing's trash to obtain a DNA sample that could be used to prove paternity; *California v. Greenwood*, 486 U.S. 35, 41-42 (1988). Approving a warrantless search of garbage left for collection outside a home and finding that there is no reasonable expectation of privacy in trash discarded outside the home and the curtilage.

remains private.<sup>57</sup> Various states have implemented laws that require the holder of personal information to ensure it is securely stored.<sup>58</sup> California Civil Code § 1798.81.5 requires that businesses that save and use personal customer information ensure that this information is protected from unauthorized access, destruction, use, modification, or disclosure.<sup>59</sup>

There is a growing trend requiring states to encrypt certain sensitive personal information when transmitting it over the internet. Many states now have statutes that restrict the display of social security numbers if they are being transmitted by way of the internet or postal mail.<sup>60</sup> Some state laws now require that the transmission of a social security number over the internet utilizes a secure connection or encryption.<sup>61</sup>

There are severe consequences for disclosure of information to the media that damages a celebrity's reputation. The statements may become admissible in divorce proceedings<sup>62</sup> or cause embarrassment and harm by impairing the client's reputation and earning capacity. It is critical that potentially harmful information be handled with the utmost care. To accomplish this, upon retaining the client, as set forth in the *Interactions with the Media* section below, a media plan should first be developed that addresses how to deal with a negative public disclosure.

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<sup>57</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2013); American Bar Association. [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html) (last visited Jan. 24, 2014).

<sup>58</sup> CONN. GEN. STAT. § 42-471 (2012); MASS. GEN. LAWS ch. 93H, § 2(a) (West 2013); NEV. REV. STAT. § 603A.210 (2013); TEX. BUS. & COM. CODE ANN. § 521.052 (West 2013); UTAH CODE ANN. § 13-44-201 (West 2013).

<sup>59</sup> CAL. CIV. CODE § 1798.81.5 (West 2013).

<sup>60</sup> Kathleen S. Swendiman, *The Social Security Number: Legal Developments Affecting Its Collection, Disclosure, and Confidentiality*, CRS Report for Congress CRS-12, updated Feb. 21, 2008, <http://www.fas.org/sgp/crs/misc/RL30318.pdf>.

<sup>61</sup> ARIZ. REV. STAT. ANN. § 44-1373 (West 2013); CAL. CIV. CODE § 1798.85(a)(3) (West 2013); CONN. GEN. STAT. § 42-470(a)(3) (2013).

<sup>62</sup> FED R. EVID. R. 801 (d), 803 (6). The statements may be admissible as a party admission, depending on the nature of the information, they may be an admissible business record, or if the fact becomes common knowledge that is not subject to dispute and capable of immediate and accurate determination by sources of undisputed accuracy it can conceivably be judicially noticed.

### B. *Maintaining Confidentiality*

It is a challenge to ensure that information stays confidential and secure from tampering, yet is still readily accessible to the user. There are several relatively simple counter-measures that attorneys can implement that are both secure and easy to access. An expert in electronic security can be hired to determine weaknesses in the law office's security and prepare a plan to help ensure that the office is secure. Such an expert may look at the characteristics of the computer network used by the office, which includes the physical arrangement of the computers, the rules each system uses to pass data to the other, where the data is stored, how it is accessed, whether the data is encrypted, and the extent that information is stored on mobile devices (including laptops, phones, and tablet computers). Experts will also consider how employees accessing the network are authenticated, how physical documents are disposed of, how electronic files are deleted, the use of and access to third-party storage (such as cloud based services), and the extent to which software used in the office stores or scrubs descriptive metadata.<sup>63</sup> The security expert may also want to know which third parties have access to the office and documents, including cleaning crews, book-keepers, and forensic accountants. Software and hardware should be examined for their vulnerability to malicious applications and devices used to eavesdrop on private communications. All laptops, tablets, or smartphones that access case data should be secured.

After the weaknesses in your computer security are identified, an appropriate plan should be created and implemented to minimize the risks and safeguard the data. Malicious software (software used to disrupt computer operation, gather sensitive information, or gain access to private computer systems) may be on computers, tablets, and smartphones. In a Cisco Systems study, 100% of the organizations that they examined had traffic on their networks that revealed contact with websites that host malware.<sup>64</sup> Below is a list of specific security policies that should always be followed:

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<sup>63</sup> Sharon D. Nelson et al., *Law Firms Data Breach Nightmares and How to Prevent Them*, 42 BRIEF 16 (Spring 2013).

<sup>64</sup> Cisco, *2014 Annual Report*, p. 48, available at <http://www.cisco.com/web/offers/lp/2014-annual-security-report/index.html>.

1. Unsecure smartphones should not have access to the computer network.<sup>65</sup> Security risks arise when unsecure mobile devices have access to the firm's computer network because they can contain malicious software that can open a public gateway to the network or destroy data. Users of Google's Android mobile operating system are far more likely to be hacked than users of Apple's iOS.<sup>66</sup>
2. Create strong passwords. Do not write them down and store them in obvious places. The most secure passwords employ a mix of capital and lower case letters with numbers or symbols.
3. Make sure Java is up-to-date on all devices. The Java platform is a software environment that is used run programs on a device.<sup>67</sup> It is now ubiquitous. According to Cisco Systems' 2014 Annual Security Report, Java accounted for 91% of web exploits.<sup>68</sup>
4. Install virus protection software and keep it up-to-date. Virus protection software will protect against some of the most common and prevalent intrusions on devices or networks.
5. Scrub hard drives of machines or other storage devices that are being disposed of, including flash drives.<sup>69</sup> The computer's delete key is a misnomer. The data remains on the device, even after deleted and emptied from the trash or recycle bin and can be recovered by a computer forensics specialist. Deleting a file really is no different than taking a label off of a folder; the information in the folder is still there. Scrubbing a hard drive overwrites

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<sup>65</sup> It is a relatively common practice to "jailbreak" iPhones or "root" Android phones which allows users to access options on the device that the cell-phone carrier or manufacturer has restricted by default. Doing so bypasses security provisions on the device.

<sup>66</sup> 99% of all mobile malware targeted Android devices; Cisco, *supra* note 64, at 3.

<sup>67</sup> Oracle, <http://docs.oracle.com/javase/tutorial/getStarted/intro/definition.html> (last visited March 13, 2014).

<sup>68</sup> InfoWorld, <http://www.infoworld.com/t/java-programming/javas-security-dilemma-old-vulnerable-versions-wont-go-away-234554> (last visited Jan. 26, 2014); Cisco, *supra* note 64, at 29.

<sup>69</sup> *Infra* note 75.

the data on the drive with useless data, typically a single digit number that does not have any context.

6. An IT consultant should construct firewalls on the law firm's network.<sup>70</sup> A firewall is like a locked door that will prevent people from accessing the firm's local computer network. Having a qualified IT consultant that understands the principles behind the security they employ is crucial to setting up a secure network—without that understanding, there will be holes in the security.
7. Encrypt<sup>71</sup> data when sending files to another user – whether it is in response to a discovery request or to the firm's own accountant. Although lawyers have no control over the security of opposing counsel, encrypting the data will secure it in transit and until they de-encrypt it.
8. Do not use public WiFi hotspots because communications can be easily intercepted. Under federal law, intercepting and procuring electronic communication from a public network is not against the law because the system is configured to make communication readily accessible to the general public.<sup>72</sup>
9. If a lawyer absolutely needs to use public WiFi, he or she should set-up a Virtual Private Network.<sup>73</sup> A virtual private network creates a private tunnel between the lawyer and the data being accessed. This can be done in the

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<sup>70</sup> David Mandell & Karla Schaffer, *The New Law Firm Challenge: Confronting the Rise of Cyber Attacks and Preventing Enhanced Liability*, ABA Law Practice Today, available at [http://www.americanbar.org/publications/law\\_practice\\_today\\_home/law\\_practice\\_today\\_archive/march12/the-new-law-firm-challenge-confronting-the-rise-of-cyber-attacks-and-preventing-enhanced-liability.html](http://www.americanbar.org/publications/law_practice_today_home/law_practice_today_archive/march12/the-new-law-firm-challenge-confronting-the-rise-of-cyber-attacks-and-preventing-enhanced-liability.html) (last visited Mar. 9 2014).

<sup>71</sup> OXFORD ENGLISH DICTIONARY, available at [http://www.oxforddictionaries.com/us/definition/american\\_english/encrypt?q=encrypt](http://www.oxforddictionaries.com/us/definition/american_english/encrypt?q=encrypt) (last visited March 13, 2014). Convert (information or data) into a cipher or code, especially to prevent unauthorized access.

<sup>72</sup> 18 U.S.C. § 2511(g)(i) (West 2012).

<sup>73</sup> Paul Ferguson and Jeff Huston, *What is a VPN? – Part I*, 1 THE INTERNET PROTOCOL JOURNAL 1, available at [http://www.cisco.com/web/about/ac123/ac147/archived\\_issues/ipj\\_1-1/what\\_is\\_a\\_vpn.html](http://www.cisco.com/web/about/ac123/ac147/archived_issues/ipj_1-1/what_is_a_vpn.html), (last visited March 13, 2014). The idea is to create a private network via tunneling and/or encryption over the public Internet.

network settings of the operating system and an IT professional should enable this on the firm's devices.

10. If an office must use WiFi, enable encryption on the network router. Not only can the wireless network data be encrypted, but the router can be configured to allow only specific devices access to it. If guests in the office need wireless internet access, a supplementary and independent connection can be maintained for their use. A guest should not be allowed access to the private office network where the data is stored. This would be akin to giving them *carte blanche* access to law firm files.

If the lawyer or the client discovers a bug or wiretap, it is important that the device not be tampered with for two primary reasons. First, for the offense to be prosecuted, the chain of custody must be maintained to avoid a claim that the actual device has been tampered with and is inadmissible evidence. The police department should be contacted so there is an official report of the wrongdoing.<sup>74</sup> Second, the investigator will likely want to determine the source of the tap. There are a few mechanisms typically employed to determine the source of a leak. The simplest and most inexpensive method is to leak false information and see who uses that information.

The physical security of the attorney's office should also be evaluated. Access to the files in the office should be monitored and limited to personnel. Hard copies of documents should not be disposed of in an unsecured trash bin. Instead they should be stored in a locked trash can, the contents of which are regularly shredded. Hard drives or solid-state-drives in copy machines or fax machines should be regularly purged.<sup>75</sup> Files should be kept in a locked room. The files should be labeled by a client number

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<sup>74</sup> It is critical that a conversation about the discovery of the device not take place in the location of the device. Otherwise the person who is doing the bugging may know it has been discovered.

<sup>75</sup> Securely purging data from solid-state-drives is more difficult than traditional hard drives due to the radically different way that each stores and accesses data. Traditional hard drives store data in a physical location whereas solid-state-drives may store the same data in multiple locations and update the map of data to reflect the new location. The digital remnant of the old data is left behind. Michael Wei, Laura M. Grupp, Frederick E. Spada, and Steven Swanson, *Reliably Erasing Data from Flash-Based Solid State Drives*, Department of Computer Science and Engineering, University of California, San Di-

and not recognized by name. At a minimum, high profile clients should be referred to by a pseudonym. Finally, because security is only as good as its weakest link, the staff should be educated on the best practices to maintain confidentiality.

Many attorneys install video recording systems that run 24 hours a day, 7 days a week. While having such a system can be a deterrent and create a record of access to sensitive materials in the office, it can also be vulnerable to intrusion if not secured. Because most modern systems are configured for remote viewing over the internet, an outsider may gain access to it and view (or in some instances listen to) everything in the office if proper security measures are not taken.

Aside from the security measures above, there are simple things that can be done to deter leaks of information. Third parties who work on the case, such as accountants, and public relations personnel should sign a non-disclosure agreement. This creates a disincentive for them to breach their duty of confidentiality because if a leak is traced back to them, they may be civilly liable. To the extent possible, they should abide by the same security plan for all confidential materials that are in their possession. The attorney may have little control over the security protections that a third party implements, but the client can insist that they maintain a reasonable level of security. It may be important to include in the legal retainer agreement that the client is required to pay for any recommended special security measures.

In some jurisdictions, private judges are employed to adjudicate cases outside of the courtroom.<sup>76</sup> In other jurisdictions, the arbitration of matrimonial cases is common practice. There are several advantages to these options, some of which go beyond confidentiality. First, the parties agree on how the private trial or arbitration will be handled procedurally.<sup>77</sup> For instance, the par-

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ego, Center for Magnetic Recording and Research, available at [https://www.usenix.org/legacy/events/fast11/tech/full\\_papers/Wei.pdf](https://www.usenix.org/legacy/events/fast11/tech/full_papers/Wei.pdf).

<sup>76</sup> Fiona Furlan et al., *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes When Acting as Mediators?*, 14 J. AM. ACAD. MATRIM. LAW. 267, 268 (1995).

<sup>77</sup> Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIM. LAW. 353, 355 (1995).



ties can agree on the manner of discovery and even if the decision will be binding.<sup>78</sup> Second, the parties can mutually select from a pool of private judges or arbitrators that specialize in family law and have experience with high profile cases. Third, there may be a better chance of avoiding media attention if the parties use a privately retained judge or arbitrator.<sup>79</sup> Fourth, in most cases the matter can be heard and resolved more expeditiously with a private judge or arbitrator than in a public courtroom.<sup>80</sup> Fifth, a private trier of fact has the flexibility to craft creative solutions.<sup>81</sup> Sixth, the judicial officer's decision on an issue is not part of the public record and a settlement agreement can be kept confidential.<sup>82</sup>

Public trials pose challenges for judges as well as lawyers. There is the potential for the trial to become a media circus which interferes with the interests of justice. Media attention has the potential to influence how the bench officer acts. In the O.J. Simpson murder trial, the media was permitted to film the trial, which became known as the trial of the century. This created several obstacles, including keeping the jurors sequestered and maintaining confidentiality. There were instances where the press recorded footage of alternate jurors and they even filmed notes O.J. Simpson wrote on his notepad while at counsel table during the closing arguments.<sup>83</sup> Prosecutor Marcia Clark criticized Judge Ito saying he "was overly sensitive to his press notices."<sup>84</sup> Her co-counsel, Christopher Darden asserted that Judge Ito was "too impressed with visiting celebrities."<sup>85</sup>

<sup>78</sup> Furlan, *supra* note 76, at 311.

<sup>79</sup> *Id.*

<sup>80</sup> Kisthardt, *supra* note 77, at 368. Depending upon how busy the court will be, retaining a private judge may result in cost savings because the matter will be heard in larger blocks of time and by appointment. Counsel will not use time waiting for the matter to be called by the court.

<sup>81</sup> *Id.* at 379.

<sup>82</sup> Furlan, *supra* note 76, at 311.

<sup>83</sup> S.L. ALEXANDER, MEDIA AND THE AMERICAN COURTS: A REFERENCE HANDBOOK 97-98 (2004), [http://books.google.com/books?id=7Stx8ydEGvUC&pg=PA97&lpg=PA97&dq=Lance+Ito+media+issue&source=bl&ots=\\_zkJeod-rX&sig=8\\_jpNVrIRLO1Ep\\_Rck2y4Rv0wW0&hl=en&sa=X&ei=XE\\_oUsq4D8emqQGRo4CAAw&ved=0CFEQ6AEwBw#v=onepage&q=Lance%20Ito%20media%20issue&f=false](http://books.google.com/books?id=7Stx8ydEGvUC&pg=PA97&lpg=PA97&dq=Lance+Ito+media+issue&source=bl&ots=_zkJeod-rX&sig=8_jpNVrIRLO1Ep_Rck2y4Rv0wW0&hl=en&sa=X&ei=XE_oUsq4D8emqQGRo4CAAw&ved=0CFEQ6AEwBw#v=onepage&q=Lance%20Ito%20media%20issue&f=false).

<sup>84</sup> *Id.* at 98.

<sup>85</sup> *Id.*

In the preliminary stages of the *Hollinger v. Perry* case, the U.S. Supreme Court considered whether cameras should be permitted to broadcast a trial. The Supreme Court concluded that because witnesses might refuse to testify due to the sensitivity of the issues and the media attention, on balance, the potential harm in broadcasting the trial outweighed the harm that might result if the trial was not broadcasted.<sup>86</sup> The issues in family law matters are similarly sensitive. If a witness would not be willing to testify because of the publicity, it may be in the best interest of the parties to do all they can to ensure their divorce is kept private.

In a high profile matter, it is important to have a judge who is well versed in the issues that will arise with a public trial by avoiding controversy, maintaining security, and preserving the dignity of the judicial process. Los Angeles Superior Court Supervising Judge Scott Gordon has capably presided over several high profile trials, including pop-star Brittany Spears' divorce from Kevin Federline, celebutante Kim Kardashian's divorce from basketball player Kris Humphries, former owner of the Los Angeles Dodgers Frank McCourt's divorce from Jamie McCourt, actor Mel Gibson's paternity case with Oksana Grigorieva, and actress Demi Moore's divorce from actor Ashton Kutcher. He has been known to issue gag orders when appropriate. He is particularly sensitive to security issues – both in regard to the parties and the judiciary.

A client may also request a confidential court proceeding where witnesses are excluded from the courtroom and to have the court seal its records.<sup>87</sup> The ability to do so varies from state to state.<sup>88</sup> Some states will allow the sealing of a file only if the matter involves children.<sup>89</sup> Because there is a public interest in the proceedings, absent special circumstances, the court is unlikely to do so.<sup>90</sup> The First Amendment to the U.S. Constitution provides a right of access to court records, even in divorce pro-

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<sup>86</sup> *Hollinger v. Perry*, No. 12-144, slip op. 4 (U.S. 2013).

<sup>87</sup> CAL. R. CT. 2.551 (West 2013); N.Y. COMP. CODES R. & REGS. tit. 22 § 216 (1) (2013).

<sup>88</sup> Compare CAL. R. CT. 2.551 with N.Y. COMP. CODES R. & REGS. tit. 22 § 216 (1).

<sup>89</sup> *Copeland v. Copeland*, 966 So.2d 1040, 1045 (La. 2007).

<sup>90</sup> *Burkle v. Burkle*, 135 Cal. App. 4th 1045, 1052 (2006).

ceedings.<sup>91</sup> Unless confidentiality is required by law, court records are presumed to be open.<sup>92</sup> Thus, sealing orders are presumptively invalid and legislative attempts to shield records containing parties' personal financial data have been held unconstitutional. A court may order that a record be filed under seal only if "[t]here exists an overriding interest that overcomes the right of public access to the record."<sup>93</sup> Even if the parties agree to seal documents, the court does not have an obligation to abide by this kind of agreement.

The client (and attorney) must be careful what they post on social media sites such as Facebook, Twitter, LinkedIn, Tumblr, and Instagram. Further, clients should protect their email and texts. Do not instruct a client to remove posts on social media websites or delete texts or emails because removing the "post" or deleting a website may be construed as spoliation of evidence.<sup>94</sup> Clients should be instructed at the beginning of the case to make their sites "private." Both lawyers and their clients have a duty to preserve potentially relevant evidence.<sup>95</sup> Courts are permitted to infer that the destroyed evidence would have a negative impact on the destroying party's case.<sup>96</sup> The court also has the power to sanction the party who destroyed the evidence and hold that party in contempt.<sup>97</sup>

Additionally, since there is no true delete key for internet posts, removing them from the public page does not mean they will not be discoverable. Narrowly tailored requests for a party's postings to social media websites are generally discoverable.<sup>98</sup> Therefore, even if the posts are removed from the website and a

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<sup>91</sup> *Id.* at 1048.

<sup>92</sup> CAL. R. CT. 2.550(c) (West 2013).

<sup>93</sup> *Burkle*, 135 Cal. App. 4th at 1052.

<sup>94</sup> Carol S. Gailor, *In-depth Examination of the Law Regarding Spoliation in State and Federal Courts*, 23 J. AM. ACAD. MATRIM. LAW. 71, 71. (2010). Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.

<sup>95</sup> *Id.* at 85-86.

<sup>96</sup> *Id.* at 80.

<sup>97</sup> *Id.* at 81-82, 89.

<sup>98</sup> See *Davenport v. State Farm Mutual Auto Ins. Co.*, WL 555759 (M.D. Fla. Feb. 21, 2012); *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010).

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subpoena for documents is successfully quashed, the judge can order the party to consent to the website's disclosure of the information.<sup>99</sup>

Voicemails, emails, and text messages are a common source of damaging admissions. In 2007, during his custody battle with actress Kim Basinger, a voicemail in which Alec Baldwin screamed at his daughter for not taking his calls and called her a "pig" was leaked to the media.<sup>100</sup> The message went viral and is available on the web for anyone to listen to. Similarly, actor Mel Gibson repeatedly had angry and accusatory voicemails leaked to the media during his paternity matter with Oksana Grigorieva.<sup>101</sup> The public, and probably the court, first became aware of the voicemails through the media and not in the court process.

In any event, because a leak of sensitive information may be damaging to a high profile person's reputation and livelihood, it may be in the interest of both parties to maintain discretion and counsel for both sides should work together to ensure that information is kept private. Regardless, some parties will still litigate in public because they do not believe they will get a fair trial in private or they think that they can use the public forum to force a settlement because of the expense, delay, and/or public embarrassment to the celebrity.

### *C. Interactions with the Media*

In addition to the security measures that should be undertaken to ensure confidentiality, a law firm must have a plan to control media access to the parties, witnesses, and other sources of information. Part of the media plan should include what to do if information becomes public. One person in the office should be designated as the media contact for the firm. Just as the White House has a press secretary who controls information, so

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<sup>99</sup> *Juror Number One*, 206 Cal. App. 4th at 868.

<sup>100</sup> *Ireland Baldwin Talks About Father Alec Baldwin's Infamous 'Pig' Voicemail*, HUFFINGTON POST (Sept. 6 2012), [http://www.huffingtonpost.com/2012/09/06/ireland-baldwin-alec-baldwin-pig-call\\_n\\_1861892.html](http://www.huffingtonpost.com/2012/09/06/ireland-baldwin-alec-baldwin-pig-call_n_1861892.html).

<sup>101</sup> *Exclusive New Audio: Mel Gibson's 30 "Terrorizing" Telephone Calls to Oksana In 24 Hours*, Radaronline (July 28, 2010), <http://radaronline.com/exclusives/2010/07/exclusive-new-audio-mel-gibsons-30-terrorizing-telephone-calls-oksana-24-hours/>.

should the attorney for the high profile client. The spokesperson should be credible, presentable, and offer a clear and succinct message on behalf of the firm and the client. Any press release or statements the party makes on social media about the matter should be reviewed by counsel and the public relations expert in advance of its publication. This will ensure that the message is appropriate and does not reveal litigation strategy. Sometimes the contact will be called on to mitigate damage from adverse media coverage, inappropriate statements, or bad results in some part of the case. Prior to any statement to the media, the representative should prepare answers to the tough questions that will inevitably be asked. When caught off-guard, a succinct “we are looking into that” may suffice. An uninformed comment may cause more problems for the client than the damage that the lawyer is trying to mitigate.

Whether or not the attorney is the primary media contact, he or she should always be prepared to address questions. Attorneys’ statements to the media are covered by states’ Rules of Professional Conduct and Responsibility.<sup>102</sup> Attorneys must have their client’s consent prior to making a statement.<sup>103</sup> The appointed media contact could be construed as an agent of the attorney and be held to the same standard of care. Most states’ regulations relating to a lawyer’s contact with the media are reflected in the ABA Model Rules of Professional Conduct which prohibit a lawyer from making extrajudicial statements that the lawyer knows or reasonably should know will be disseminated and have a substantial likelihood of materially prejudicing an adjudicative proceeding.<sup>104</sup> A lawyer may state: 1) the nature of the claim; 2) information that is already public record; 3) that an

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<sup>102</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 (2005).

<sup>103</sup> ABA Model Rule 1.6(a) requires that an attorney maintain confidentiality. Absent specifically set forth special circumstances or informed or implied consent, an attorney cannot reveal information relating to the representation of a client.

<sup>104</sup> MODEL RULES OF PROF’L CONDUCT R. 3.6 (2005). This rule has been adopted verbatim or with slight variations by more than 30 states. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1068 (1991). All fifty states and the District of Columbia have adopted some form of the ABA Model Rules of Professional Responsibility ([http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html)). In dicta, the U.S. Supreme Court noted that a substantial

investigation into the claim is in progress; 4) a request for assistance in obtaining evidence; and 5) where there is reason to believe there is a likelihood of substantial harm to an individual or a public interest, an attorney may warn of danger to a person involved.<sup>105</sup>

There are instances when the client is pre-tried in the media. In these circumstances, a lawyer may defend a case in the media to counter adverse publicity. A “no comment” response may be deemed by the public as an admission if it is the type of allegation a person would normally deny. While it may be an appropriate statement in limited circumstances (such as when there is no public record and an attorney does not have consent to respond), responding in such a manner may be a lost opportunity to mitigate damage caused by a harmful leak. If the lawyer does not have the client’s consent to comment, a reasonable strategy is to present the facts that are already in the public record and inform the reporter that the lawyer cannot elaborate at this time.

Whenever possible, any statements to the press should be discussed in advance with the media team. The timing of statements to the media is critical. If a public statement is made, it should not be made on the eve of a proceeding—otherwise it could be argued that it was done with the intent to prejudice the issue before the court. A court can require an attorney to cooperate to an extent beyond nonparticipants.<sup>106</sup> If the speech results in harm to the proceedings or causes a burden on the court, there may be a governmental interest in regulating the speech.<sup>107</sup>

The ABA Model Rules permit a lawyer to make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity that was not initiated by the client or lawyer.<sup>108</sup> Such statements should be limited to the extent necessary to mitigate the recent adverse publicity. The attorney should not reveal information specially obtained by the nature of his representation or divulge information that is subject to a confidentiality agreement

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likelihood of material prejudice standard is the linguistic equivalent of clear and present danger (citing to *In re Hinds*, 90 N.J. 604, 622 (1982)).

<sup>105</sup> MODEL RULES OF PROF’L CONDUCT R. 3.6 (b) (2005).

<sup>106</sup> *Gentile*, 501 U.S. at 1057.

<sup>107</sup> *Id.*

<sup>108</sup> MODEL RULES OF PROF’L CONDUCT R. 3.6 (c) (2005).

due to attorney-client privilege. The goal is to mitigate the damage done from the statement, not to tip off the other side to litigation strategy, try a case in public, or inadvertently waive the attorney client privilege.

In *Gentile v. State Bar of Nevada*, the U.S. Supreme Court addressed the ethical parameters of attorney statements to the press. Attorney Gentile held a press conference a few hours after his client's indictment and accused the state of indicting his client as a "scapegoat" to avoid an indictment of the police department, which, he said, was the real culprit.<sup>109</sup> The attorney asserted that he acted with considerable deliberation and sought to "stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community."<sup>110</sup> Much of the information Gentile reported to the media was already in media reports.<sup>111</sup>

Justice Kennedy noted that

[A]n attorney's duties do not begin inside the courtroom door . . . an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment. . . . Because attorneys participate in the [court] system and are trained in its complexities, they hold unique qualifications as a source of information about pending cases. 'Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion [*Chicago Counsel of Lawyers v. Bauer*, 522 F.2d 242, 250 (CA7 1975)].' Lawyers are believed to be credible sources of information related to pending matters of which they are engaged and in fact in one of the most knowledgeable positions. To the extent the press and public rely upon attorneys for information because they are well informed, this may prove to be the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent.<sup>112</sup>

In *Gentile*, the court ultimately held that the appropriate standard for discipline for an attorney who comments to the

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<sup>109</sup> *Gentile*, 501 U.S. at 1030.

<sup>110</sup> *Id.* at 1042-43.

<sup>111</sup> *Id.* at 1053.

<sup>112</sup> *Id.* at 1056-57.

press was whether the statement presented a “substantial likelihood of material prejudice.”<sup>113</sup> Any order restraining counsel’s speech must also be narrowly tailored.<sup>114</sup>

The mere fact that one is the attorney of record does not prevent that attorney from making statements to the press so long as those statements comply with the standards set forth in the ABA Rules of Professional Responsibility.<sup>115</sup> It is crucial that attorneys refrain from public aggrandizement and maintain discretion.<sup>116</sup>

The media should be carefully monitored for information that may affect the client or the case. A professional media monitoring service, such as a clipping agency, should be retained to review information published in newspapers, magazines, blogs, news agencies, television, radio, and on social media websites. The monitoring service or the attorney’s staff should periodically search for additional information online. If private information is revealed in the comments to a blog or article online, it may reveal the source of the information.

It is important to bring damaging information that is intentionally disclosed to the judge’s attention so the court can fashion an appropriate remedy. If a party releases information that frustrates the court or results in a delay or burden, the judge can take steps to obtain compliance of the attorney.<sup>117</sup>

In extreme cases, where the welfare of a child may be placed at risk as a result of the disclosure of confidential information, the judge may be able to issue a gag order.<sup>118</sup> However, a gag

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<sup>113</sup> *Id.* at 1048.

<sup>114</sup> *Id.* at 1075-76.

<sup>115</sup> MODEL RULES OF PROF’L CONDUCT R. 3.6 (b) (2005).

<sup>116</sup> MODEL RULES OF PROF’L CONDUCT R. 3.6 cmt. (2005).

<sup>117</sup> *Gentile*, 501 U.S. at 1057.

<sup>118</sup> A gag order is a prior restraint on speech and, as such, is “the most serious and least tolerable infringement on First Amendment rights. . . . a prior restraint not only ‘chills’ speech, it ‘freezes’ it at least for the time.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). A system of prior restraints “bear[s] a heavy presumption against its constitutional validity.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). Gag orders are more common when a party’s Sixth Amendment Right to due process is implicated. Despite the presumption against gag orders, they are not unprecedented. *See, e.g., United States v. Brown*, 218 F.3d. 415, 415 (5th Cir. 2000) (upholding a gag order against the trial participants).



order would not be permitted to limit the speech regarding information that was obtained by a party outside of the discovery process.<sup>119</sup> The government has a “compelling interest in protecting the physical and psychological well-being of minors.”<sup>120</sup> Courts have the power to restrict speech if doing so promotes the welfare of the children,<sup>121</sup> but this power is limited to disclosures from the parties. In custody cases, courts often order a parent to refrain from disparaging the other parent in front of the children. This order generally does not include restraining the party from making comments to third parties.<sup>122</sup>

A judge would likely be reluctant to issue a gag order because it might be construed as a prior restraint on protected speech.<sup>123</sup> Courts have found that the same First Amendment rights applicable in a civil case also apply in a divorce proceeding.<sup>124</sup> Prior restraints on speech are the most serious and least tolerable infringement on First Amendment rights.<sup>125</sup> They are presumed to be constitutionally invalid.<sup>126</sup> The “presumption of invalidity can be overcome if the restriction . . . serves a compelling government interest, is necessary to serve the asserted [compelling] interest, is narrowly tailored. Information received from the media that is not a result of a disclosure by a party is constitutionally-protected free speech.<sup>127</sup> An order enjoining such speech is too attenuated and will likely be deemed a prior restraint on speech.<sup>128</sup>

In *Marriage of Nash*, the Arizona Court of Appeals upheld the trial court order barring both parties from disparaging the other by way of social media because the parties agreed not to do so in their custody agreement.<sup>129</sup> Alejandra Nash, the wife of basketball player, Steve Nash, claimed that the trial court’s order to enjoin her from making remarks about her husband on social

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<sup>119</sup> *In re Marriage of Candiotti*, 34 Cal. App. 4th 718, 726 (1995).

<sup>120</sup> *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>121</sup> *Candiotti*, 34 Cal. App. 4th at 725.

<sup>122</sup> *In re K.D.*, 929 N.E.2d 863, 874-75 (Ind. Ct. App. 2010).

<sup>123</sup> *Id.* at 726.

<sup>124</sup> *Burkle v. Burkle* 135 Cal. App. 4th 1045, 1052-54 (2006).

<sup>125</sup> *Neb. Press Ass’n*, 427 U.S. at 559.

<sup>126</sup> *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*; CAL. CONST. art. I, § 2 (a).

<sup>129</sup> *Nash v. Nash*, 307 P.3d 40, 49-50 (Ariz. Ct. App. 2013).

media violated her First Amendment right to free speech despite the fact that the parties' entered into a joint custody agreement which included a provision that stated:

All communications between the parents shall be respectful. The parents agree that neither parent shall disparage the other party to the children, and that each parent shall model respect for the other parent in their interactions with the children. Neither parent shall do or say anything to the children that would negatively impact the child's opinion or respect for the other parent.<sup>130</sup>

The very same day the decree issued, Alejandra tweeted a "biting criticism of Father's integrity."<sup>131</sup> Thereafter, the court issued an order that prohibited the parties from posting "disparaging comments" about one another in social media.<sup>132</sup>

The court acknowledged that orders which bar a parent from disparaging the other in the children's presence are common in dissolution matters, but the rationale that the order is necessary to promote the best interests of the children will not allow a court to broadly restrain a parent from making such comments to third parties.<sup>133</sup> However, since the Nash's agreed to restrict their speech in their custody agreement, and Alejandra's posts on social media about her husband might be viewed by their children, the Court of Appeals rejected Alejandra's free speech argument.<sup>134</sup> The court stated "to the extent that the order prohibits Mother and Father from disparaging the other by way of public remarks that are likely to make their way to the children, the order is true to the spirit of the parties' agreement."<sup>135</sup> The decision was upheld because the order restraining the parties' speech was consistent with the intent of the parties express agreement.

Actress Melissa Gilbert sued her ex-husband for defamation after he made negative remarks about her in an interview with the *National Enquirer*. Gilbert obtained an ex-parte restraining order which prohibited her husband from "revealing any information relating to [her], whenever obtained, to anyone other

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<sup>130</sup> *Id.* at 48.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 49.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

than his attorney.”<sup>136</sup> Thereafter, the court issued a preliminary injunction barring such speech. The California Court of Appeals held that the preliminary injunction was an unconstitutional prior restraint on First Amendment rights.<sup>137</sup>

#### IV. Legal Issues That Are Germane to the High Profile Client

##### A. Tactics — Personal Jurisdiction

High profile and wealthy clients engage in business and pay taxes in various states and countries. They may have homes in different parts of the world. Athletes travel for away games. Actors and directors reside in other states or even countries for extended periods while filming in remote locations. Business people may work all over the country or in different countries. Because of the variety of possible contacts in multiple jurisdictions, high profile individuals may be subject to personal jurisdiction in many forums. Under the doctrine of divisible divorce,<sup>138</sup> matters relating to support, children, and property each have their own jurisdictional requirements and are treated as different actions as far jurisdiction is concerned.<sup>139</sup> One state may have subject-matter jurisdiction to dissolve a marriage, but lack personal jurisdiction to make other orders.<sup>140</sup>

If the respondent does not have “minimum contacts” with the state, that party may be lured into the state or otherwise served with process so the court may acquire jurisdiction over the individual. In *Burnham v. Superior Court*, Dennis and Francie Burnham were married in West Virginia and moved to New Jersey where they had two children.<sup>141</sup> The parties decided to divorce and agreed that Francie would take the children with her

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<sup>136</sup> *Gilbert v. National Enquirer, Inc.*, 43 Cal. App. 4th 1135, 1140-41 (1996).

<sup>137</sup> *Id.* at 1144-48.

<sup>138</sup> *Estin v. Estin*, 334 U.S. 541, 549 (1948).

<sup>139</sup> Peter M. Walzer & Laurel Brauer, *The Long Arm of Family Law: Making Foreign Divorce Judgments, Orders, and Decrees Valid and Enforceable California Court Orders*, 20 FAIR SHARE7, (Mar. 2000), <http://www.aaml.org/sites/default/files/foreign%20support%20orders-jurisdiction.pdf>

<sup>140</sup> Peter M. Walzer, *Maneuvering Through Complex Rules*, 12 A.B.A. J. FAM. ADVOC. 16 (Winter 1990).

<sup>141</sup> *Burnham v. Superior Ct.*, 495 U.S. 604, 607 (1990).

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to California.<sup>142</sup> When Dennis did not serve her with process from New Jersey, Francie filed for divorce in California.<sup>143</sup> Francie served Dennis with the petition when he was in California both on business and to visit his children.<sup>144</sup> Dennis made a special appearance to quash the service of process, arguing that the court lacked personal jurisdiction over him.<sup>145</sup> The U.S. Supreme Court held that “jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of ‘traditional norms of fair play and substantial justice’”<sup>146</sup> Accordingly, parties may unwillingly submit themselves to personal jurisdiction in a state where they are visiting for personal or business reasons.<sup>147</sup> Their attorney should advise them of the risks entailed in travelling to that state and how the law of the state will impact them. In order to resolve issues without either party gaining a jurisdictional advantage, the attorney may be able to arrange a meeting of the parties and their counsel to discuss

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 608.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 619.

<sup>147</sup> The most obvious concern is the chilling effect this decision will have on visitation of children by out-of-state parents. *See Kulko v. Superior Ct.*, 436 U.S. 84 (1978). This runs counter to California’s strong policy of encouraging visitation of children with their parents. *See, e.g., Judd v. Superior Ct.*, 60 Cal. App. 3d 38 (1976); *Titus v. Superior Ct.*, 23 Cal. App. 3d 792 (1972). It has been suggested that *Burnham* is so offensive to this policy that these cases provide independent state grounds which create an exception to personal jurisdiction based on personal service in the forum, when the primary (or perhaps sole) reason for presence in California is the exercise of visitation. The cases in which this policy has been enunciated, however, have done so within a minimum contacts framework. After *Burnham*, however, that analysis only occurs if the defendant has been served out-of-state. Moreover, the state’s Code of Civil Procedure § 410.10 permits California to exercise jurisdiction on any basis not inconsistent with the state or federal constitutions, and, after *Burnham*, this includes service in the forum, even if there are absolutely no other contacts with the state. The one exception might be a situation similar to *Kumar v. Superior Ct.*, 32 Cal. 3d 689 (1982), where the custodial parent refuses to comply with an out-of-state visitation order, thereby forcing the other parent to come to California to enforce it. *Kumar* said that it would be unfair to permit the custodial parent to thereby establish jurisdiction; however, the analysis was in a minimum contacts framework.

settlement of some or all of the case in a state where neither party has contacts.

Some courts have stretched the notion of long-arm jurisdiction and found that it exists when a party has caused a foreseeable effect in the forum state. When Lynn and Brenda McGlothen met, Brenda was a California resident and Lynn was a professional baseball player for the Boston Red Sox visiting California.<sup>148</sup> Lynn lived in Brenda's San Francisco apartment during his off seasons and was eventually traded to the San Francisco Giants.<sup>149</sup> The couple married, had a child, and continued living in California until Lynn was traded to the Chicago Cubs.<sup>150</sup> Lynn moved to Chicago, while Brenda (who was pregnant) and their child moved to Louisiana to live with Lynn's family. Meanwhile Lynn looked for a place for the family to live in Chicago.<sup>151</sup> While in Louisiana, Lynn became abusive and closed the couple's joint checking accounts, causing Brenda to return to San Francisco with the children to live with her parents.<sup>152</sup> Although he was paid handsomely by the Chicago Cubs, Lynn did not give Brenda any financial support, forcing her to apply for government assistance in California.<sup>153</sup> The court found that Lynn's refusal to support his family caused an effect in the state of California and held that they had personal jurisdiction over Lynn to order a judgment in favor of child support and spousal support.<sup>154</sup>

#### B. *Forum Non-Conveniens*

In some situations, while there may be jurisdiction over a party to an action in a particular state, it may not be the best place to litigate the case. Forum non-conveniens is an equitable common law doctrine that permits a court to refuse jurisdiction over a matter when it finds the interests of justice are better met by adjudicating the matter in another tribunal.<sup>155</sup> The principle of

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<sup>148</sup> McGlothen v. Superior Ct., 121 Cal. App. 3d 106, 110 (1981).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 111.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 113.

<sup>155</sup> CAL. CIV. PROC. CODE § 410.30(a) (West 2013).

inconvenient forum tempers the exercise of long-arm jurisdiction by authorizing the court to dismiss or stay an action if it possesses no substantial connection with the defendant's activities in the forum.<sup>156</sup> Even if the court has subject matter and personal jurisdiction, it may stay or dismiss the action on the ground of inconvenient forum.<sup>157</sup> In doing so, it will analyze the factors set forth by the United States Supreme Court in both *Gulf Corp v. Gilbert*<sup>158</sup> and later in *Piper Aircraft Co. v. Reyno*.<sup>159</sup>

In *Piper Aircraft Co. v. Reyno*, the Supreme Court held that a federal court considering a motion to dismiss based on forum non conveniens is required to engage in a two-prong analysis: first, the court considers whether there is an adequate alternative forum to the one chosen by the plaintiff;<sup>160</sup> second, if the court is convinced that an adequate alternative forum exists, the court then considers and weighs a number of "public interest" and "private interest" factors."<sup>161</sup> The Supreme Court in *Piper* listed the following "private interest factors": 1) relative ease to sources of proof; 2) availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; 3) the possibility to view the premises if appropriate; and 4) all other practical problems that make trial of a case easy, expeditious, and inexpensive.<sup>162</sup>

The "public interest factors" listed by *Piper* include: 1) the administrative difficulties flowing from court congestion; 2) the local interest in having localized controversies decided at home; 3) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; 4) the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and 5) the unfairness of burdening citizens in an unrelated forum with jury duty.<sup>163</sup> As the party seek-

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<sup>156</sup> Henderson v. Superior Ct., 77 Cal. App. 3d 583, 588 (1978).

<sup>157</sup> CAL. CIV. PROC. CODE § 410.30(a) (West 2013); CIVIL PROCEDURE BEFORE TRIAL § 3:407 (The Rutter Group 2013).

<sup>158</sup> Gulf Corp v. Gilbert, 330 U.S. 501, 508-509 (1947).

<sup>159</sup> Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250-51 (1981).

<sup>160</sup> *Id.* at 254.

<sup>161</sup> Eric S. Sherby, *Forum Non Conveniens Dismissal: The Quieter Side of Section 1782*, 26 A.B.A. INT'L LITIG. Q. 1, 3 (2008) (citing *Gulf Corp v. Gilbert* and *Piper Aircraft v. Reyno*).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

ing to have the court decline to exercise jurisdiction, the responding party bears the burden of proof<sup>164</sup> and must show that the forum is a “*seriously inconvenient* forum.”<sup>165</sup> The inconvenience pled must be more than merely shifting the inconvenience from one party to the other. The courts’ balancing of forum non-conveniens factors must begin with the “presumption that plaintiff’s chosen forum is convenient.”<sup>166</sup> If the moving party is a resident of the forum where the action was filed, “the choice of forum will rarely be disturbed unless the balance is strongly in favor of the defendant.”<sup>167</sup>

Because of the U.S. Supreme Court precedent set in *Piper*, when determining whether a forum is convenient, a court must weigh both private and public interest factors. If a suitable alternate forum exists, the court then considers the private interests of the parties and the public interest of keeping the matter in the forum.<sup>168</sup> In California, “the private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses.”<sup>169</sup> There are several public interest factors the court looks at in determining forum non-conveniens.<sup>170</sup> The ones most relevant to a family law proceeding include the avoidance of overburdening the courts and weighing competing ties to both jurisdictions.<sup>171</sup>

In California, the trial court has independent statutory authority to stay or dismiss the action on its own motion when it determines “that in the interest of substantial justice, [the] action

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<sup>164</sup> *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 751 (1991).

<sup>165</sup> *Ford Motor Co. v. Insurance Co. of North Am.*, 35 Cal. App. 4th 604, 611 (1995) (emphasis in original).

<sup>166</sup> *Id.* at 618.

<sup>167</sup> *Id.*

<sup>168</sup> *National Football League v. Fireman’s Fund Ins. Co.*, 216 Cal. App. 4th 902, 917 (2013).

<sup>169</sup> *Id.*

<sup>170</sup> *Jagger v. Superior Ct.*, 96 Cal. App. 3d 579, 587 (1979).

<sup>171</sup> *National Football League*, 157 Cal. App. 4th at 917; *Great Northern Ry. Co. v. Superior Ct.*, 12 Cal. App. 3d 105, 113-16 (1970) (listing 25 factors courts in California may weigh); *see also Henderson*, 77 Cal. App. 3d at 595-97.

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should be heard in a forum outside this state.”<sup>172</sup> A motion to dismiss based on inconvenient forum should be brought at the earliest possible opportunity (usually filed as a companion to a motion to quash for lack of jurisdiction). Otherwise, the moving party increases the risk that a judge may find that a party consented to jurisdiction or a party would be unduly prejudiced by the delay.<sup>173</sup>

In *Jagger v. Superior Court*, Bianca Jagger<sup>174</sup> filed for dissolution in London, claiming that she and her husband Mick Jagger<sup>175</sup> had lived in England together for the preceding year.<sup>176</sup> Mick and Bianca had entered into a premarital agreement in France<sup>177</sup> and resided there for a period of time,<sup>178</sup> but also resided in London<sup>179</sup> (amongst other places) where their daughter attended school.<sup>180</sup> She later filed an action in Los Angeles and Mick filed a motion to quash due to their lack of connections to California.<sup>181</sup> They owned no real property and had no bank accounts in California.<sup>182</sup> They were not U.S. citizens and visited California infrequently.<sup>183</sup> Although Bianca argued that she intended to move to California to further her acting career, she stayed in California only long enough to file her petition for dissolution.<sup>184</sup>

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<sup>172</sup> Weil & Brown, FAMILY LAW PRACTICE GUIDE (The Rutter Group 2013) CIVIL PROCEDURE BEFORE TRIAL at § 3:415.5; *supra* note 155

<sup>173</sup> *Id.* at § 3:417.4a.

<sup>174</sup> Bianca Jagger married famed Rolling Stones musician, Mick Jagger, in 1972, when she was four months pregnant. They have one daughter together, Jade. She is both a British and Nicaraguan citizen. (Wikipedia, [http://en.wikipedia.org/wiki/Bianca\\_Jagger](http://en.wikipedia.org/wiki/Bianca_Jagger) (last visited Jan. 16, 2014)).

<sup>175</sup> Mick Jagger is the lead singer and founding member of the Rolling Stones. In 1989, he was inducted into the Rock and Roll Hall of Fame. In 2003, he was knighted for his contribution to music. His 1990 marriage to Jerry Hall was annulled in 1999. Mick Jagger has seven children from four relationships, four grand-children, and is expecting a great grand-child in 2014. (Wikipedia, [http://en.wikipedia.org/wiki/Mick\\_Jagger](http://en.wikipedia.org/wiki/Mick_Jagger) (last visited Jan. 16, 2014)).

<sup>176</sup> *Jagger*, 96 Cal. App. 3d at 587.

<sup>177</sup> *Id.* at 583.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 583-84, 587.

<sup>180</sup> *Id.* at 583, 589.

<sup>181</sup> *Id.* at 583-84.

<sup>182</sup> *Id.* at 583.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 584.



The court dismissed the California proceedings upon a determination that the sources of proof, witnesses, and events related to the matter were more accessible to the tribunal in England and found that California was an inconvenient forum.<sup>185</sup> The court stated:

The Superior Court of Los Angeles County does not need another case in which the parties were married, executed a premarital agreement and live in one country and subsequently lived together, own property, and maintain a child who lives and goes to school in another, and in which there have been only few martial contacts with California. On the other hand the English forum, regardless of the condition of its calendar, is ready to proceed on Bianca’s petition; it offers relative ease of access to sources of proof, witnesses, events and relevant documents in England and France. Witnesses available for attendance in the English court cannot be compelled to attend court in California . . . California has no substantial interest in retaining the proceeding . . . Moreover, it appears that any judgment rendered in California would require a further judgment in England. Finally, the injustice to and burden upon the court and the taxpayers of a jurisdiction (California) having little relation to the subject of the litigation are substantial.<sup>186</sup>

When the court finds that the forum is inconvenient, dismissal is an exceptional remedy.<sup>187</sup> Usually courts will issue a stay so that if they encounter an obstacle in the convenient forum, they may proceed.<sup>188</sup> The laws that apply in different forums can offer a strategic advantage to a party. However, before a claim of forum non-conveniens is made, the party should consult with counsel in both jurisdictions to determine which forum will be most advantageous to them. To the extent possible, this decision should be outcome driven.

C. Custody Litigation

Because of the financial ability to litigate, the lawyer may be pressured to “pull out all stops” and over litigate the case.<sup>189</sup> This pressure may be impelled by a desire to “fight back,” a de-

<sup>185</sup> *Id.* at 588-89.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 589.

<sup>188</sup> *Id.*

<sup>189</sup> Stuart B. Walzer & Jan C. Gabrielson, *The Pressure to Overrepresent and to Underrepresent: What Should You Do and Refuse to Do for Your Client?*, 26 FAM. L. NEWS, ST. BAR OF CAL. 2 (Fall 2004).

sire to have “their own way.” In some cases, the desire may be legitimately based on the best interests of the child. When an attorney fights to win at all costs for financial gain, there is a price to be paid. These cases take time away from other matters and can clog the courts. The fight can cost the parties time and money. There may be a toll on one or both parties’ reputation. When children are the issue, they can be damaged. The attorney should think twice about a handling a matter where the children are simply being used as a tool of the parents. Granted it is often impossible to know when a client has a legitimate goal. Is the claim of abuse generated from an actual event or simply from a desire to gain an advantage? Is the requested move-away genuinely in the best interests of the child? Sometimes it is best to just say no to an impassioned request, particularly when a client is fighting for the sake of principle.

It is difficult to answer these questions in the “ordinary” case, but when the matter involves the wealthy, the powerful, and celebrities, it is more difficult to say no to a demand for aggressive litigation. In the following highly publicized cases, one of the parties elected to litigate in public. At the end of the day it is difficult to say that the child was the winner. Halle Berry was involved in a four year custody battle with model Gabriel Aubry. Stories about their contentious treatment of each other constantly appeared in the media. Eventually, in 2012 they reached a confidential settlement.<sup>190</sup> During the proceedings, a court denied Berry her request to move with her daughter to Paris to be closer to her current fiancé, Oliver Martinez.<sup>191</sup>

Similarly, when Kelly Rutherford’s ex-husband, Daniel Giersch, was granted his request to move their two children (both American citizens) to France when his visa was revoked, it received heavy media attention.<sup>192</sup> The judge issuing the order stated that although Giersch was not a French citizen, this was

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<sup>190</sup> Holly McKay, *Halle Berry and Gabriel Aubry Strike Custody Deal Due to Looming Court Appointed Psych Tests*, FOX NEWS (Dec. 5, 2012), <http://www.foxnews.com/entertainment/2012/12/05/source-halle-berry-and-gabriel-aubry-strike-custody-deal-due-to-looming-court/>.

<sup>191</sup> *Id.*

<sup>192</sup> Dan Abrams, *Two American Kids Shipped to France in One of the Worst Custody Decisions. Ever*, ABC NEWS (Sept. 1, 2012), <http://abcnews.go.com/blogs/entertainment/2012/09/two-american-kids-shipped-to-france-in-one-of-the-worst-custody-decisions-ever/>.

the best way to ensure equal parenting because Rutherford could fly to France, but Giersch could not legally enter the United States.<sup>193</sup>

In one of the most publicized custody battles of 2011, a trial court in Chicago awarded Miami Heat basketball player Dwayne Wade sole custody of his two sons.<sup>194</sup> The court awarded the boys' mother regular visitation.<sup>195</sup> Usher won a bitter and highly publicized battle with ex-wife Tameka Foster for primary custody of their sons in 2012.<sup>196</sup> In 2007, a court ordered Britney Spears to surrender custody of her two young sons due to her unusual behavior and alcohol and drug abuse.<sup>197</sup> In 2008, Spears' father was given conservatorship of her estate and she agreed to let her ex-husband, Kevin Federline, maintain sole physical and legal custody of their children in exchange for increased visitation.<sup>198</sup> It goes without saying that a custody dispute may not be in the best interests of the children, but also may not be in the best interests of the rich and powerful.

#### D. Child Support

In addition to having ties to several jurisdictions, high earners have expenses that are associated with a lavish and opulent lifestyle. They may travel frequently, fly in private planes, vacation on yachts, and maintain several households. The federally mandated guideline formulas<sup>199</sup> were not written for high earners and may not apply in these cases. They yield unreasonably high support orders that may exceed the child's needs. Even so, the

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<sup>193</sup> *Id.*

<sup>194</sup> Associated Press, *Dwayne Wade Wins Custody of Sons*, ESPN (Mar. 15, 2011), <http://sports.espn.go.com/nba/truehoop/miamiheat/news/story?id=6212517>

<sup>195</sup> *Id.*

<sup>196</sup> Luchina Fisher, *Nasty Celebrity Custody Battles: Usher v. Tameka Foster*, ABC NEWS (Sept. 18, 2012), <http://abcnews.go.com/Entertainment/celebrity-moms-lose-custody-kids-usher-tameka-foster/story?id=17255477>.

<sup>197</sup> Associated Press, *Britney Spears Temporarily Loses Custody of Children*, FOX NEWS (Oct. 2, 2012), <http://www.foxnews.com/story/2007/10/02/britney-spears-temporarily-loses-custody-children/>

<sup>198</sup> *Id.*

<sup>199</sup> U.S. Dept of Justice, Child Support Enforcement, available at [http://www.justice.gov/criminal/ceos/subjectareas/child\\_support.html](http://www.justice.gov/criminal/ceos/subjectareas/child_support.html) (last visited Dec. 19, 2013).

court may decide that it is in the child's interest to enjoy the benefit of the parent's lifestyle and fashion a support order accordingly. In these situations, the court may look beyond the "basic necessities of survival" because the children are entitled to share reasonably in their parents' economic good fortune.<sup>200</sup>

In compliance with federal mandate, each state has enacted a statutory guideline to calculate child support orders,<sup>201</sup> but when a party has an extraordinarily high income, the guideline support calculation may exceed a child's reasonable needs. This is also referred to as "good fortune" child support, where the petitioning party benefits by collecting the difference between what is necessary to support the child's actual needs and what the guideline amount mandates.<sup>202</sup> A child support order should give deference to a parent's right to participate in the development of an appropriate system of values for the children.<sup>203</sup> Some states have adopted and enforced varying methods to preclude parties from collecting good fortune support.<sup>204</sup>

In California, child support is presumptively dictated by a fixed guideline calculation which may be rebutted when a parent is found to have an extraordinarily high income and application of the guideline would exceed the needs of the child.<sup>205</sup>

The supporting parent who seeks to rebut the statutory formula and gain protection from disclosure of detailed financial information as an "extraordinarily high earner" must show: (1) he or she has an extraordinarily high income, and (2) the guideline support amount exceeds the child's needs. When the extraordinarily high earning supporting parent seeks a downward adjustment from a presumptively correct guideline amount, it is that parent's "burden to establish application of the formula would be unjust or inappropriate," and the lower award would be consistent with the child's best interests.<sup>206</sup>

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<sup>200</sup> *Miller v. Schou*, 616 So.2d 436, 438-439 (Fla. 1993); *Hansel v. Hansel*, 802 So.2d 875, 882-883 (La. Ct. App. 2001); *Issacson v. Issacson*, 792 A.2d 525, 537, 539 (N.J. Super. Ct. App. Div. 2002); *Montgomery v. Montgomery*, 481 N.W.2d 234, 236 (N.D. 1992); *Branch v. Jackson*, 629 A.2d 170, 171 (Pa. 1993); *Harris v. Harris*, 714 A.2d 626, 633 (Vt. 1998).

<sup>201</sup> U.S. Dept of Justice, *supra* note 199.

<sup>202</sup> CAL. FAM. CODE § 4057(b)(3) (West 2013); *Boyt v. Romanow*, 664 So.2d 995, 996 (Fla. Dist. Ct. App. 1995).

<sup>203</sup> *Issacson*, 792 A.2d at 538-539.

<sup>204</sup> *Lori W. Nelson, High-Income Child Support*, 45 FAM. L.Q. 206 (2011).

<sup>205</sup> *Johnson v. Superior Ct.*, 66 Cal. App. 4th 68, 70 (1998).

<sup>206</sup> *In re Marriage of Hubner*, 94 Cal. App. 4th 175, 183 (2001).

Although the court may deviate from the guideline, the child support award must comport with the high earner's standard of living.<sup>207</sup>

The appellate court in Emilio Estevez's child support case held that high earners in the state of California may stipulate that they have the ability to pay any reasonable amount of child support, thus avoiding the financial disclosures necessary to calculate the guideline.<sup>208</sup> At the time of the ruling, Estevez provided Carey Salley, the mother of his children, with payments and benefits with a value of more than \$14,000 per month for their two children that included \$3,500 per month as well as "child care, a housekeeper, food, transportation, private schooling and a four-bedroom house in Malibu with a beach and tennis facilities."<sup>209</sup> Although Salley believed that the amount of the package was adequate, she wanted it dispensed to her in a manner that would allow more individual autonomy and also requested that Estevez be ordered to maintain a life insurance policy of \$1 million dollars for each of his children as beneficiaries.<sup>210</sup> Included in Salley's filing was an extensive request for production of Estevez's financial documents, which Estevez argued was unnecessary due to the fact that the parties agreed that his income was approximately \$1.4 million per year and he had stipulated to his ability to pay any reasonable amount of support.<sup>211</sup> The court agreed with Estevez, finding that discovery was unwarranted in cases where the parties stipulate to income and furthering the legislative interest of avoiding unnecessary discovery.<sup>212</sup>

Four years after the decision in *Estevez*, Larry Johnson's child support case reached the California Court of Appeals on the issue of asset disclosure in child support cases with extraordinarily high incomes.<sup>213</sup> Johnson played for the New York Knicks and fathered a child while visiting Los Angeles.<sup>214</sup> When the child's mother petitioned for support and asked for production of

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<sup>207</sup> *McGinley v. Herman*, 50 Cal. App. 4th 936, 945 (1996).

<sup>208</sup> *Estevez v. Superior Ct.*, 22 Cal. App. 4th 423, 431 (1994).

<sup>209</sup> *Id.* at 425-26.

<sup>210</sup> *Id.* at 426.

<sup>211</sup> *Id.* at 427.

<sup>212</sup> *Id.* at 431.

<sup>213</sup> *Johnson*, 66 Cal. App. 4th at 70.

<sup>214</sup> *Id.*

comprehensive financial records, Johnson cited the ruling in *Estevez* to shield himself from discovery.<sup>215</sup> The court upheld *Estevez*, but stated that in cases where a parent has an extraordinarily high income and where the parties cannot agree on the amount of income earned, the trial court must make assumptions least beneficial to the high earner.<sup>216</sup> If the court requires additional information to make these assumptions, some form of discovery pertaining to the standard of living attainable by the supporting parent's income will be permitted.<sup>217</sup> In 2001, this was reiterated by the California Court of Appeals in *Marriage of Hubner*, stating that trial courts may conduct discovery to accurately determine the income and lifestyle of the high earner parent to comply with the least favorable assumptions.<sup>218</sup>

When Jon Cryer and his wife, Sarah, divorced in 2004, the parties agreed that Sarah would have custody of their son for 65% of the time and receive \$10,000 per month in child support.<sup>219</sup> In May of 2009, an action was initiated in dependency court after Sarah's youngest son was injured.<sup>220</sup> Both of Sarah's sons were immediately placed with their fathers by the Los Angeles County Department of Children and Family Services.<sup>221</sup> While the dependency action was pending, Jon petitioned to have his monthly child support payments reduced.<sup>222</sup> The court ruled in Sarah's favor due to the fact that Jon was an extraordinarily high earner and the lack of changed circumstances as the outcome of the dependency action was unknown.<sup>223</sup> Jon then filed a separate order seeking an accounting of how Sarah used the child support funds or, alternatively, an order to dispense the funds into a trust account.<sup>224</sup> The court held that there was no legal authority to merit an accounting or mandate that the funds be kept in a trust account.<sup>225</sup> The California Court of Appeals up-

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<sup>215</sup> *Id.* at 71.

<sup>216</sup> *Id.* at 74.

<sup>217</sup> *Id.* at 76.

<sup>218</sup> *Hubner*, 94 Cal. App. 4th at 187.

<sup>219</sup> *In re Marriage of Cryer*, 198 Cal. App. 4th 1039, 1043 (2011).

<sup>220</sup> *Id.* at 1044.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 1045-46.

<sup>224</sup> *Id.* at 1045.

<sup>225</sup> *Id.*

held the trial court's decision,<sup>226</sup> highlighting the fact that this was a case that embodied special economic circumstances and that lack of child support payments would result in Sarah losing her home, which would not be in the child's best interest.<sup>227</sup>

California orders for child support are likely to be higher than those from states such as New York and Florida where the requirement is simply that the child's needs must be met. When Sean "Diddy" Combs' and Misa Brim litigated their child support case, New York clarified the law on child support calculations for parties with extraordinarily high incomes.<sup>228</sup> The appellate court reduced the trial court's monthly award of \$35,000 to \$19,148.74, stating that in cases where annual income exceeds \$80,000 "child support should be based on the child's actual needs and the amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties."<sup>229</sup> The appellate court reiterated this rule in 2009 when they upheld the trial court's child support calculation for Curtis "50 Cent" Jackson after the mother of his child appealed to receive a higher award.<sup>230</sup>

Arizona takes a different approach than that of California and New York. In Arizona, children of affluent families should be permitted to "enjoy the reasonable benefits they had while their parents were married."<sup>231</sup> In the divorce of Steve Nash and his wife Alejandra, the court held that in "determining child support, the superior court must consider the reasonable needs of the children in light of the parents' resources."<sup>232</sup> In deciding reasonable needs, the court should consider those beyond basic needs and recognize that children are entitled to share in their parents' economic good fortune.<sup>233</sup> The exact amount of child support owed to Alejandra was remanded to the trial court and has yet to be determined.<sup>234</sup>

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<sup>226</sup> *Id.* at 1057.

<sup>227</sup> *Id.* at 1049.

<sup>228</sup> *Brim v. Combs*, 808 N.Y.S.2d 735, 736 (N.Y. App. Div. 2006).

<sup>229</sup> *Id.* at 737.

<sup>230</sup> *Jackson v. Tompkins*, 885 N.Y.S.2d 228, 228 (N.Y. App. Div. 2009).

<sup>231</sup> *Nash*, 232 P.3d 40.

<sup>232</sup> *Id.* at 54.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

New Jersey case law also holds that children of affluent families are entitled to share in the benefits of their parents' achievement.<sup>235</sup> When a parent has an annual income of \$150,800 or more, that parent is considered a high income earner.<sup>236</sup> High income earners often exceed the maximum child support guidelines and in these cases, "the maximum amount provided for in the guidelines should be 'supplemented' by an additional award through application of the statutory factors," including the needs of the children, the standard of living, and the financial state of both parents, and all sources of income and assets.<sup>237</sup> Under New Jersey law, a court ordered Martin Brodeur, goalie for the Devils National Hockey League team, to pay Melanie DuBois \$132,000 in annual child support for their four children in their 2009 divorce.<sup>238</sup> Ohio also requires the court to make a case-by-case determination centered on the child's needs when the combined income of the parties exceeds \$150,000 per year.<sup>239</sup>

Alabama allows wide discretion when the amount of combined income exceeds the guideline formula, instructing their courts only that child support must be consistent with the needs of the child and the obligor's ability to pay.<sup>240</sup> Similarly, when the combined income surpasses the \$10,000 per month guideline in Maryland, the courts may use their discretion in child support awards to assure that the child's standard of living is altered as little as possible by dissolution.<sup>241</sup> In Maine, once the parties combined annual gross income exceeds \$400,000 per year, the

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<sup>235</sup> *Isaacson*, 792 A.2d at 537.

<sup>236</sup> *Id.* There is no statute or case in California that sets forth the exact amount that defines a high earner like New Jersey does, one could surmise that it is a lot higher than \$150,000 per year. The high earner amount varies from county to county and is known by word of mouth. It increases annually. In Los Angeles it is said that in 2013 a high earner is someone who earns \$1,666,666 per month. In Ventura County some say the amount is half that.

<sup>237</sup> *Id.* at 538.

<sup>238</sup> Associated Press, *Devils' Brodeur Dealt Alimony Setback*, ESPN (Mar. 19, 2009), <http://sports.espn.go.com/nhl/news/story?id=3997788>.

<sup>239</sup> OHIO REV. CODE. ANN. § 3119.04(b).

<sup>240</sup> ALA. R. JUD. ADMIN. R. 32 (c)(1); *Dyas v. Dyas*, 683 So.2d 971, 973 (Ala. Civ. App. 1995).

<sup>241</sup> MD. CODE. ANN. FAM. § 12-204(d); *Chimes v. Michael*, 748 A.2d 1065, 1082 (Md. Ct. Spec. App. 2008).



guideline is no longer applicable, except for the maximum amount setting the baseline award.<sup>242</sup>

The Florida Supreme Court holds that children have the right to share in the good fortune of his or her parents, tempered only by the needs of the specific child.<sup>243</sup> The court stated “we do not mean to imply that the child of a multimillionaire should be awarded enough to be driven to school each day in a chauffeured limousine . . . the child is only entitled to share in the good fortune of his parents consistent with an appropriate lifestyle.”<sup>244</sup> Due to Florida’s high earner child support laws, Chris Bosh, a basketball player for the Miami Heat, challenged a Florida trial court’s ruling regarding child support on jurisdictional grounds.<sup>245</sup> The appellate court held that the trial court’s ruling violated Bosh’s due process rights in terms of both personal and subject matter jurisdiction and issued an order allowing Bosh to present evidence that Texas should assume jurisdiction.<sup>246</sup>

Under Texas law, if a party’s net income exceeds \$6,000 per month, the presumptive award for a single child is \$1,200 per month and additional amounts may only be awarded after proof that the child’s needs are unmet.<sup>247</sup> Tennessee also makes it difficult to award child support exceeding the highest end of the guideline by requiring that when the monthly income of the obligor is more than \$10,000, the custodial parent must prove by a preponderance of the evidence that an amount above the maximum guideline is necessary to meet the needs of the child.<sup>248</sup> Further,

a deviation will not be granted to the remaining spouse when that spouse has demonstrated a history of violence to the abandoning spouse, the child’s caretaker or the child; if the child is a product of rape or incest; the abandoning spouse has a reasonable fear of the remaining spouse, or the remaining spouse has neglected the child.<sup>249</sup>

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<sup>242</sup> ME. REV. STAT. ANN. tit. 19-A §2006 (5)(b).

<sup>243</sup> *Miller*, 616 So.2d at 437-38.

<sup>244</sup> *Id.* at 438-39.

<sup>245</sup> *Bosh v. Mathis*, 99 So.3d 631, 631 (Fla. Dist. Ct. App. 2012).

<sup>246</sup> *Id.* at 632.

<sup>247</sup> *Scott v. Younts*, 926 S.W.2d 415, 419 (Tex. Ct. App. 1996).

<sup>248</sup> TENN. CODE. ANN. § 36-5-101(e)(1)(b); Nelson, *supra* note 204, at 206.

<sup>249</sup> TENN. CODE. ANN. § 36-5-101(e)(1)(e)-(i)(iv); Nelson, *supra* note 204, at 206.

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Washington requires trial courts to issue written findings explaining why an amount above the maximum guideline is appropriate based upon the parent's standard of living and the child's special needs (such as educational or medical).<sup>250</sup> The award also may not exceed 45% of the obligor's income without a showing of good cause.<sup>251</sup>

As evidenced by the disparate award amounts reached by different states, child support payers with extraordinarily high incomes will prefer to have cases litigated in some states rather than others. It comes as no surprise that high earners tend to favor states like Texas and Tennessee with lower support, whereas the receiving parent will favor California.

E. *Alimony*

Another key issue affecting earners with an extraordinarily high income is the amount of alimony they will be ordered to pay their ex-spouses. In Massachusetts, the factors determining an award of permanent alimony are the receiving spouse's need for support and ability to maintain the marital standard of living.<sup>252</sup> In many states, the marital standard of living is determined by considering: (1) the length of the marriage; (2) the conduct of the parties during the marriage; (3) the age and health of the parties; (4) the occupation of the parties; (5) the amount and sources of income; (6) vocational skills and employability of the parties; (7) the estate liabilities and needs of each of the parties and the opportunity of each for future acquisitions of capital assets and income.<sup>253</sup> In long-term marriages, absent special circumstances, "there is no justification for the life-style of one spouse to go down while the other stays high."<sup>254</sup> The Massachusetts legislature restricted alimony awards significantly in 2012 by passing the sweeping Alimony Reform Act.<sup>255</sup> The Act limits the amount of alimony awards in marriages lasting less than twenty years and

<sup>250</sup> WASH. REV. CODE § 26.19.065(3) (2009).

<sup>251</sup> Nelson, *supra* note 204, at 207.

<sup>252</sup> Goldman v. Goldman, 554 N.E.2d 860, 868 (Mass. App. Ct. 1990).

<sup>253</sup> MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2013).

<sup>254</sup> Goldman, 554 N.E.2d at 868.

<sup>255</sup> MASS. GEN. LAWS ANN. ch. 208, § 49 (West 2013); Wendy Murphy, *New Alimony Law Is Bad for Women*, CNN (Mar. 9, 2012), <http://www.cnn.com/2012/03/09/opinion/murphy-alimony-overhaul-con/>.

terminates support once the paying party reaches retirement age or the receiving spouse cohabits with a new partner.<sup>256</sup> Other states, such as Florida, New Jersey, and Connecticut, are also considering legislation that would limit the impact that permanent alimony awards have on upon the paying spouse.<sup>257</sup>

Rhode Island, along with the majority of other states, utilizes a formula similar to that of Massachusetts and mandates that the trial court judge consider the conduct of the parties during the marriage, as well as the services of either party as a homemaker and the contribution by one party to the increased earning power of another.<sup>258</sup> Connecticut courts also consider the same factors as Massachusetts, but replace “conduct of the parties during the marriage” with “causes for the termination of the marriage.”<sup>259</sup> In 2009, a Connecticut judge awarded CBS sportscaster Jim Nantz’s ex-wife, Lorraine, \$72,000 a month in alimony at the conclusion of their divorce proceedings.<sup>260</sup> The judge found that neither spouse was at fault in the divorce and set the alimony award based upon the other factors.<sup>261</sup> When actor Brendan Fraser divorced in 2007, the Connecticut trial court awarded his wife \$50,000 per month in alimony.<sup>262</sup> Although Fraser is a celebrity who earns significant income, he claimed he could not afford to pay the amount awarded and has since petitioned to have the amount reduced.<sup>263</sup>

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<sup>256</sup> MASS. GEN. LAWS ANN. ch. 208, § 49 (West 2013).

<sup>257</sup> Deborah S. Chames, *Alimony Reform Laws Focus on the Exception to the Rule and to the Detriment of the Family*, HUFFINGTON POST (Oct. 17, 2013), [http://www.huffingtonpost.com/deborah-s-chames/alimony-reform-laws-focus\\_b\\_4111290.html](http://www.huffingtonpost.com/deborah-s-chames/alimony-reform-laws-focus_b_4111290.html); Connecticut Alimony Reform, <http://ctalimonyreform.com/> (last visited Feb. 12, 2014); Florida Alimony Reform, <http://www.floridaalimonyreform.com/> (last visited Feb. 12, 2014); New Jersey Alimony Reform, <http://njalimonyreform.org/> (last visited Feb. 12, 2014).

<sup>258</sup> R.I. GEN. LAWS § 15-5-16.1 (West 2013).

<sup>259</sup> CONN. GEN. STAT. § 46 (b)-82 (a) (2013).

<sup>260</sup> Martha Neil, *Monthly Divorce Bill for Sportscaster Jim Nantz: \$72K Alimony, \$4K Child Support*, ABA J., Nov. 3, 2009, available at [http://www.abajournal.com/news/article/monthly\\_divorce\\_bill\\_for\\_sportscaster\\_jim\\_nantz\\_72k\\_alimony\\_4k\\_child\\_support/](http://www.abajournal.com/news/article/monthly_divorce_bill_for_sportscaster_jim_nantz_72k_alimony_4k_child_support/)

<sup>261</sup> *Id.*

<sup>262</sup> Aly Weisman, *The Ridiculous Amount Brendan Fraser Spends Each Month on Agent Fees and Alimony*, BUS. INSIDER (Mar. 4, 2013), <http://www.businessinsider.com/brendan-fraser-finances-2013-3>.

<sup>263</sup> *Id.*

In California, the court may award spousal support for a reasonable period of time based on the standard of living during the marriage.<sup>264</sup> Except in the case of a marriage of long duration as described in California Family Code Section 4336, a reasonable period of time for purposes of that section is generally half the length of the marriage.<sup>265</sup> However, nothing in that section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on the circumstances of the parties.<sup>266</sup> When obligors have extraordinarily high incomes, California courts have indicated that if the supporting party has the necessary means, the award should allow the supported spouse to continue to live at the level to which that party became accustomed during the marriage.<sup>267</sup>

In issuing spousal support orders, the court also takes into account other factors, including the length of the marriage, the financial needs of the spouse requesting support, the ability of the paying party to make spousal support payments, the earning capacity of both parties, the age and health of both parties, minor children residing in the home, and the marital obligations and assets.<sup>268</sup> Although the trial court has broad discretion in setting an amount of spousal support, it must consider all of the statutory factors that are applicable to the case at bar.<sup>269</sup> California also has a rebuttable presumption against awarding spousal support to a party who has been convicted of domestic violence against the spouse within five years of filing for divorce, but otherwise the conduct of the parties during the marriage is not considered.<sup>270</sup>

One of the challenges in dealing with an entertainer's income is its irregular nature. One year the income may be high and the next year non-existent. The courts may average the income over several years or they may make an order based on last year's tax return forcing the party to come back to court to modify the support soon after the order is made. The attorney must

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<sup>264</sup> CAL. FAM. CODE § 4330(a) (West 2013).

<sup>265</sup> *Id.* § 4336.

<sup>266</sup> *Id.*

<sup>267</sup> *In re Marriage of Weinstein*, 4 Cal. App. 4th 555, 561-62 (1991).

<sup>268</sup> CAL. FAM. CODE § 4320(a) (West 2013).

<sup>269</sup> *In re Marriage of Cheriton*, 92 Cal. App. 4th 269, 302-03 (2001).

<sup>270</sup> CAL. FAM. CODE § 4325(a) (West 2013).

be ready to file a request for modification as soon as he or she has evidence that the income will decline or that the contract is over. In his highly publicized divorce, recording artist Nas was ordered by a California trial court to pay ex-wife, singer Kelis, \$51,101 per month in spousal support in 2009.<sup>271</sup> In 2010, Nas' income suffered a rapid decline.<sup>272</sup> He filed a request for a modification of his support and the court reduced it to \$25,000 per month.<sup>273</sup> In California an award of temporary spousal support "is utilized to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and obligations."<sup>274</sup> California courts usually use a guideline formula to determine temporary spousal support which is based on the parties' respective net incomes.<sup>275</sup> Frank McCourt, former owner of the Los Angeles Dodgers was ordered to pay \$225,000 per month in temporary spousal support until a settlement agreement was reached that allowed his ex-wife Jamie to collect a lump sum of \$131 million.<sup>276</sup>

Courts in Florida and Nebraska also strive to ensure that the former spouse is able to maintain the marital standard of living.<sup>277</sup> Florida promotes permanent spouse support awards in cases where one spouse has made personal or career sacrifices made to help the other spouse become economically successful.<sup>278</sup> In one of the largest divorce settlements in U.S. history, Bettie Siegel walked away with \$200 million dollars (\$300 million including taxes) after nine years of litigation when she reached a

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<sup>271</sup> Gil Kaufman, *Nas To Pay Kelis \$51,000 a Month in Support*, MTV NEWS (Dec. 10, 2009), <http://www.mtv.com/news/articles/1627969/nas-pay-kelis-51000-month-support.jhtml>

<sup>272</sup> Mawuse Ziegbe, *Nas' Child, Spousal Support to Kelis Slashed In Half*, MTV NEWS (Jan. 7, 2011), <http://www.mtv.com/news/articles/1655548/nas-child-spousal-support-kelis-slashed-half.jhtml>

<sup>273</sup> *Id.*

<sup>274</sup> *In re Marriage of MacManus*, 182 Cal. App. 4th 330, 337 (2010).

<sup>275</sup> *In re Marriage of Winter*, 7 Cal. App. 4th 1926, 1932 (1992).

<sup>276</sup> Associated Press, *Frank McCourt to Pay Ex-wife \$131M*, ESPN (Nov. 4, 2011), [http://espn.go.com/los-angeles/mlb/story/\\_/id/7187451/frank-mccourt-pay-131m-divorce-settlement](http://espn.go.com/los-angeles/mlb/story/_/id/7187451/frank-mccourt-pay-131m-divorce-settlement)

<sup>277</sup> *Young v. Young*, 677 So.2d 1301, 1305-1306 (Fla. Dist. Ct. App. 1996); *Titus v. Titus*, 811 N.W.2d 318, 323-324 (Neb. Ct. App. 2012).

<sup>278</sup> *Young*, 667 So.2d at 1306.

settlement in her divorce from Florida real estate tycoon David Siegel.<sup>279</sup> Siegel and his third wife, Jackie, famously went on to begin construction of a 90,000 square foot mansion (the largest house in the United States), which is referred to as the American Versailles and is featured in a movie of the same name.<sup>280</sup>

In *Mascaro v. Mascaro*, the Supreme Court of Pennsylvania held that the guideline formula taking into account the net income of the parties and the paying spouse's other support obligations should be applied in any spousal support case, including cases of extraordinarily high earners.<sup>281</sup> Although this could result in astronomical amounts of spousal support, the decision aspired to prompt uniformity throughout the state, while assuring that parties collect in accordance to actual income and assets as opposed to the marital standard of living that the earning spouse may have decided to impose.<sup>282</sup> Deviation from the amount mandated by the guideline requires a written explanation by the trial court judge and must be due to one of the reasons specifically laid out by statute for consideration.<sup>283</sup>

In stark contrast to Pennsylvania (and many other states), Texas allows spousal support only under limited circumstances.<sup>284</sup> Spousal support is awarded if (1) the paying spouse has been convicted of domestic violence within the last two years of the marriage, or (2) the duration of the marriage was ten years or longer and the spouse seeking support is unable to sustain him or herself due to incapacity, custodial duties related to a disabled child of the marriage, or clearly lacks the earning ability to support their own basic needs.<sup>285</sup> If these requirements are met, the court then sets the amount and duration of spousal support by considering the age, work history, earning ability, and physical

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<sup>279</sup> Mike Boslet & Jim Leusner, *Mr. Big*, ORLANDO MAG., (June 2009), available at <http://www.orlandomagazine.com/Orlando-Magazine/June-2009/Mr-Big/>

<sup>280</sup> ABC News, *Versailles in Florida: Construction Resumes on Biggest House in US*, ABC NEWS (Oct. 1, 2013), <http://abcnews.go.com/blogs/lifestyle/2013/10/versailles-in-florida-construction-resumes-on-biggest-house-in-us/>

<sup>281</sup> *Mascaro v. Mascaro*, 803 A.2d 1186, 1193 (Pa. 2002).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 1195.

<sup>284</sup> TEX. FAM. CODE. ANN. § 8.051 (West 2012).

<sup>285</sup> *Id.* § 8.0511(2)

and mental condition of the asking party.<sup>286</sup> Further, spousal support is only warranted if the spouse receiving support is looking for work or developing the skills necessary to become employable during the dissolution process.<sup>287</sup> Texas also limits the amount of alimony that a spouse may receive to \$5,000 per month or 20% of the paying spouse's monthly income, whichever is less.<sup>288</sup> Georgia sets strict limits on spousal support by mandating that proof of adultery or desertion on the part of the asking party serves as a bar to alimony.<sup>289</sup>

Extraordinarily high income earners may encounter marked differences in the amount of spousal support they are ordered to pay depending upon where they divorce. If the parties have homes in different states, they may be able to elect where they file for divorce. It would not be unusual for the high earner to file in Texas to avoid a high alimony award and the spouse file in California and request an order for temporary spousal support. A California case provides that where two states both have subject matter jurisdiction, the "first to serve" the petition has priority over the other state and the other state must abate its action.<sup>290</sup> Abatement actions are very seldom brought and, practically speaking, it would be unlikely that one state court would defer to another if that court has an interest in the matter. Further, it is more likely that the two states would proceed concurrently in matters relating to property and support if there is concurrent personal and/or subject matter jurisdiction. It would not be unusual for Texas to address the property issues and California to address spousal support issues – particularly where California has adequate spousal support and Texas does not. Another interesting proposition seldom tested is that a later judgment between two parties will supersede an earlier judgment.<sup>291</sup>

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<sup>286</sup> *Id.* § 8.0512(4) (West 2012); *Novick v. Shervin*, No. 05-12-01270-CV, slip op. (Tex. Ct. App. 2013).

<sup>287</sup> TEX. FAM. CODE. ANN. § 8.053(a) (West 2012); *Diaz v. Diaz*, 350 S.W.3d 251, 254 (Tex. Ct. App. 2011).

<sup>288</sup> TEX. FAM. CODE. ANN. § 8.0555(a) (West 2012).

<sup>289</sup> GA. CODE § 16-6-1 (West 2013).

<sup>290</sup> *In re Marriage of Hanley*, 199 Cal. App. 3d 1109, 1116 (1988); *but see Leadford v. Leadford*, 6 Cal. App. 4th 571, 574 (1992).

<sup>291</sup> "A judgment rendered in a State of the United States will not be recognized or enforced in sister States if an inconsistent, but valid, judgment is subse-

The attorney addressing the issues of high earners must anticipate the end of the career of the athlete or entertainer by being proactive in filing modification actions. Attorneys must address the issues of fluctuating income so that the client can afford to pay the support ordered. In dividing assets, the attorney should attempt to divide and allocate the income generating assets to the lower earning spouse to ameliorate high support awards and to avoid a “double dip” or “two bites of the apple.”

#### F. *Intellectual Property and Royalties*

The idea that you can divide, allocate, award, or distribute intellectual property is not novel. At one time, courts wrestled with this idea, but not today.<sup>292</sup> Intellectual property is both constitutionally and statutorily protected via copyrights, patents, and trademarks.<sup>293</sup> Literary works, musical works, dramatic works, choreographic works, pictorial works, motion pictures, sounds recordings, and architectural works are all covered by copyright.<sup>294</sup> The Copyright Act states that “a work protected under this title vests initially in the author or authors of the work.”<sup>295</sup> Courts have harmonized this federal grant of ownership with state family law concepts of divisible property by holding that the creating spouse maintains exclusive managerial control over the copyrighted work, while the economic benefits may be divisible by the community.<sup>296</sup>

When the writer or inventor works on a project during the marriage a claim can be made for a share of the royalties gener-

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quently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the local law of the State where the latter judgment was rendered.” RESTATEMENT (SECOND) OF CONFLICTS § 114 (1971). Moreover, “[w]hen in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of res judicata.’ . . . This is the case even where the court which rendered the later judgment denied full faith and credit to the first judgment or made other errors of fact or law.” *Hanley*, Cal. App. 3d at 1117-18.

<sup>292</sup> *In re Marriage of Worth*, 195 Cal. App. 3d 768, 775 (1987).

<sup>293</sup> U.S. CONST. art. 1, § 8, cl. 8; 17 U.S.C.A. § 102(a).

<sup>294</sup> 17 U.S.C.A. § 102(a).

<sup>295</sup> 17 U.S.C.A. § 201(a).

<sup>296</sup> *Rodrigue v. Rodrigue*, 218 F.3d.432, 442-43 (5th Cir); *Worth*, 195 Cal. App. 3d at 777.



ated from the sale of the work.<sup>297</sup> Rather than divide the copyright, trademark, or patent itself (which are not divisible entities) courts have jurisdiction to divide the royalties.<sup>298</sup> Under the assignment of income rules, the non-owner spouse will be taxed on his or her share of the royalties.<sup>299</sup> Accordingly, an interest by the non-creating spouse in the creating spouse's intellectual property rights and royalties is acquired when the composition is created, not necessarily when a contract involving those rights or royalties is entered into.<sup>300</sup>

Celebrities sometimes convey their life story rights to a production company so that their personal stories may be used in various media.<sup>301</sup> Included in the bundle of rights conveyed in life story rights is often the right to publicity: the right to use the name and likeness of the involved celebrity for commercial gain.<sup>302</sup> A party's right to publicity is a property right that has value and is devisable.<sup>303</sup>

Depending on the circumstances, the court may classify the right to publicity as non-marital property, marital property, or both depending on the state that has jurisdiction over the matter. Many equitable division states, including Alaska, Florida, Georgia, Iowa, Mississippi, and Tennessee, allow division of the amount the property appreciated only if the appreciation was due to substantial efforts of the spouses as opposed to exterior

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<sup>297</sup> BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* 433-34 (2d ed. 1994).

<sup>298</sup> *Id.*

<sup>299</sup> Internal Revenue Service, <http://www.irs.gov/pub/irs-tege/eotopicj90.pdf> (last visited Feb. 13, 2014).

<sup>300</sup> TURNER, *supra* note 297, at 433-34.

<sup>301</sup> Roger L. Armstrong & Mark S. Lee, *Documentaries, Docudramas and Dramatic License: Crossing the Legal Minefield*, 8 SW. J.L. & TRADE IN AMERICAS 21, 22-23 (2001).

<sup>302</sup> *Id.* at 37.

<sup>303</sup> The right to publicity is the individual's exclusive right to license their identity and likeness for commercial gain. This is a property right that can survive the death of the person. Some jurisdictions provide this right as a component to the right to privacy. Other states provide a similar right under the law protecting unfair competition. Section 1125 of the Lanham Act also protects against using another's identity for false advertising. According to the *Restatement of Torts* § 652(c), the invasion of the right of publicity is most similar to the unauthorized appropriation of one's name or likeness.

market forces.<sup>304</sup> In California, the doctrines set forth in the *Van Camp v. Van Camp*<sup>305</sup> and *Pereira v. Pereira*<sup>306</sup> cases may be applied to the equitable apportionment of these royalties.<sup>307</sup> The court may allocate premarital and marital efforts if work on a movie (or similar artistic venture) begins prior to marriage, but is also worked on during marriage. In that case, the court would have to equitably apportion the marital versus non-marital efforts.<sup>308</sup>

In *Marriage of Golub*, the New York court determined that the increase in value of the wife's celebrity that occurred during the marriage was marital property due to the fact that her husband's efforts had increased her celebrity status, which the court equated with her right of publicity.<sup>309</sup> Although the term "publicity" was not used, the court in *Marriage of Elkus* also found that the appreciation in the wife's celebrity status constituted marital property subject to division.<sup>310</sup>

Saul Zaentz was a producer of the Academy Award winning movie "Amadeus."<sup>311</sup> While married, Saul spent significant time and personal effort ensuring that the film was completed.<sup>312</sup> The trial court held that the community was entitled to a \$600,000 reimbursement for Saul's contributions to the film, both as a producer and a financier.<sup>313</sup> On appeal, the court recognized that the community was eligible to an equitable portion of the increase in

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<sup>304</sup> *Lowdermilk v. Lowdermilk*, 825 P.2d 874, 877-78 (Alaska 1992); *Oldham v. Oldham*, 683 So.2d 579, 580 (Fla. Dist. Ct. App. 1996); *Avera v. Avera*, 485 S.E.2d 731, 732 (Ga. 1987); *In re Marriage of Hass*, 538 N.W.2d 889, 893 (Iowa Ct. App. 1995); *Sandoval v. Sandoval*, 89 So.3d 77, 80-81 (Miss. Ct. App. 2011); *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 745 (Tenn. 2002).

<sup>305</sup> 53 Cal. App. 17, 28 (1921). Community property interest in services of owner in capital intensive business equal to reasonable compensation; the balance is separate property.

<sup>306</sup> 156 Cal. 1, 8 (1909). Separate property invested in business prior to marriage entitled to return in allocating increase in value during marriage; the balance is community property

<sup>307</sup> *Zaentz*, 218 Cal. App. 3d at 166; *In re Marriage of Dekker*, 17 Cal. App. 4th 842, 853-853 (1993).

<sup>308</sup> *In re Marriage of Zaentz*, 218 Cal. App. 3d 154, 166 (1990).

<sup>309</sup> *In re Marriage of Golub*, 139 Misc. 2d 440, 527 (N.Y. App. Div. 1988).

<sup>310</sup> *Elkus v. Elkus*, 169 A.D.2d 134, 140 (N.Y. App. Div. 1991).

<sup>311</sup> *Zaentz*, 218 Cal. App. 3d at 158.

<sup>312</sup> *Id.* at 161.

<sup>313</sup> *Id.*

value of Saul's separate property investment in the film due to his personal efforts as a producer during the marriage.<sup>314</sup> The court stated that although the film was completed after separation, Saul brought "unique value" to the film for two years during the marriage and his spouse Lynda, was correctly awarded half of the community reimbursement.<sup>315</sup> The appellate court considered the *Van Camp* and *Pereira* doctrines and found that the trial court correctly applied *Pereira* to apportion the increase in value of Saul's separate property.<sup>316</sup>

In *Roddenberry v. Roddenberry*, Gene and Eileen Roddenberry divorced after the production of the first Star Trek television series.<sup>317</sup> In their divorce settlement, Eileen was awarded a one-half interest in all future profit participation income from that series.<sup>318</sup> After the divorce was finalized, Star Trek expanded to include a second and third television series, an animated series, six films, and substantial merchandise.<sup>319</sup> Once the financial success of the enterprise was realized, Eileen petitioned the court to award her half an interest in these later projects as well.<sup>320</sup> The court denied her request and held that under the theory of contractual intent, Eileen was entitled only to the one-half profit for participation income generated by the first Star Trek television series.<sup>321</sup>

In its analysis of Eileen's claim, the court examined the burden of proof and noted that the party who seeks to recover additional compensation under a contract bears the burden of pleading the contract.<sup>322</sup> Further, "the failure to expressly exclude unanticipated and nonexistent projects is immaterial. The burden is on the first Ms. Roddenberry to establish money she now demands was included in her contractual rights."<sup>323</sup> The court also highlighted the fact that "community property law does not give one spouse a continuing post-divorce interest in

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<sup>314</sup> *Id.* at 162-63.

<sup>315</sup> *Id.* at 161.

<sup>316</sup> *Id.*

<sup>317</sup> 44 Cal. App. 4th 634, 641 (1996).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 642.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 667.

<sup>322</sup> *Id.* at 654.

<sup>323</sup> *Id.* at 665.

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property allocated to the other spouse in a divorce settlement.”<sup>324</sup> The court rejected Eileen’s assertions that she should stand to collect additional compensation under the theory that the later television series were continuations of the first, as was her argument that she maintained a literary property right in the later series.<sup>325</sup>

As held in *Roddenberry*, contractual intent and community property law dictate the distribution of royalties and other rights in divorce judgments.<sup>326</sup> Eileen was awarded only the one-half interest in future profit participation income from the first *Star Trek* series as dictated by the divorce judgment and was denied the right to collect in any of the profits stemming from later television series, films, animation series, or merchandising.<sup>327</sup> *Roddenberry* is instructive on how important it is to include all future known and unknown works in the judgment language. It would help to bring in an entertainment lawyer to advise the attorneys on drafting language that would include all possible future works that may derive from the existing concept. These “new version” works can include musical arrangements, motion pictures, art reproductions, sound recordings, or translations. They can also include dramatizations and fictionalizations, such as a movie based on a play. The attorney should draft language that includes web based spin-offs and products that use the theme of the original project.

Illinois defines marital property as any property that was acquired by either spouse during the marriage.<sup>328</sup> In *Heinze v. Heinze*, the Illinois appellate court held that four books written during the marriage by the author spouse were considered marital property.<sup>329</sup> The court further stated that the royalty contracts concerning the four books entered into during the marriage were also marital property and, analogizing royalties to pension payments, that all future royalties collected were consid-

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<sup>324</sup> *Id.* at 660-61.

<sup>325</sup> *Id.* at 667.

<sup>326</sup> *Id.* at 664.

<sup>327</sup> *Id.* at 657.

<sup>328</sup> 40 ILL. COMP. STAT. 503(a) (West 1991).

<sup>329</sup> *Heinze v. Heinze*, 631 N.E.2d 728, 731 (Ill. App. Ct. 1994).

ered marital property of which the non-author spouse had a marital interest.<sup>330</sup>

The majority of composers and songwriters transfer their copyrights to music licensing companies<sup>331</sup> such as Broadcast Music, Inc. (BMI), the American Federation of Television and Radio Artists (AFTRA), and the American Society of Composers, Authors, and Publishers (ASCAP). These publishing companies manage licenses to third parties to use, distribute, or duplicate copyrighted material and issue royalties from these licenses directly to the artists.<sup>332</sup> In some cases it is beneficial to contact the music licensing company directly. In the royalty policies section of the BMI website, the organization specifically outlines the fee and procedure for separately accounting royalties to the artist and the ex-spouse once a divorce decree has been obtained.<sup>333</sup> Clients may need to retain an accountant to track their share of the royalties and to calculate any taxes thereon.

In an instructive case, Jerry Lynn William attempted to transfer his royalties to his wife to avoid his creditors. While married, songwriter Jerry entered into a publishing agreement with the Hamstein Group.<sup>334</sup> Years later, the Hamstein Group sued Jerry for breach of contract and obtained a default judgment against him.<sup>335</sup> Jerry moved to St. Maarten in the Caribbean, apparently never intending to return to the United States.<sup>336</sup> Once there, Jerry assigned 83 songs to a company in the United Kingdom for \$1.4 million and attempted to set up his

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<sup>330</sup> *Id.*

<sup>331</sup> Lea C. Noelke et. al, *Intellectual Property Issues in Divorce*, 5, available at <http://www.nems-law.com/UserFiles/file/IP%20Paper%20w%20contents.pdf> (last visited Jan. 18, 2014).

<sup>332</sup> *Id.*

<sup>333</sup> Broadcast Music, Inc., *Royalty Policy Manual*, (Dec. 17, 2013), [http://www.bmi.com/creators/royalty\\_print/detail#id-533123](http://www.bmi.com/creators/royalty_print/detail#id-533123) .

<sup>334</sup> *Hamstein Cumberland Music Group v. Williams*, 532 Fed. Appx. 538 (5th Cir. 2013).

<sup>335</sup> *Id.*

<sup>336</sup> Jay Adkisson, *The Sad Last Ballad of Jerry Lynn Williams: Divorce Decree Fails to Defeat Fraudulent Transfer Action*, FORBES, (Oct. 13, 2011), available at <http://www.forbes.com/sites/jayadkisson/2011/10/13/the-sad-last-ballad-of-jerry-lynn-williams-divorce-decree-fails-to-defeat-fraudulent-transfer-action/>.

own corporation in Anguilla to accept the funds and protect them from creditors.<sup>337</sup>

In an attempt to shield himself from a \$500,000 judgment in favor of the Hamstein Group, Jerry assigned his wife Lorelei all rights from BMI and ASCAP.<sup>338</sup> Once the divorce settlement was finalized, Jerry became insolvent and the Hamstein Group was unable to collect on its default judgment.<sup>339</sup> In an e-mail to a friend, Jerry stated that Lorelei had agreed to allow the royalties to be paid to Jerry's corporation in Anguilla, which he named the Platinum Parrot Corp.<sup>340</sup> Jerry died five months after a judgment was entered against him for \$1.15 million.<sup>341</sup> The Hamstein Group filed an action against Jerry's estate and Lorelei asserting that the royalties had been fraudulently transferred.<sup>342</sup> The court set aside the rights transfers in the divorce decree, allowing the Hamstein Group to attempt to collect against Platinum Parrot Corp.<sup>343</sup>

### G. Goodwill

Most jurisdictions recognize goodwill as an asset to be valued and allocated in a divorce.<sup>344</sup> However, some jurisdictions view goodwill as personal to the individual and not a divisible asset.<sup>345</sup> A few courts may recognize celebrity goodwill. Some of these states use it as a factor in determining support.<sup>346</sup> A minority of jurisdictions will consider celebrity goodwill, but do so on a case-by-case basis.<sup>347</sup> Celebrity goodwill is an unsettled area of

<sup>337</sup> *Hamstein*, 532 Fed. Appx.; Adkisson, *supra* note 336.

<sup>338</sup> Adkisson, *supra* note 336.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> Laurence J. Cutler & Robin C. Brogan, *Celebrity Goodwill: The Nature of the Beast from Horses to Hedge Funds*, 25 A.B.A. J. FAM. ADVOC. 20, 21 (Feb. 2005).

<sup>345</sup> Honey Kessler Amado, *To Have and Have Not*, L.A. LAW., Apr. 1995, at 34.

<sup>346</sup> *Id.*

<sup>347</sup> Sanford K. Ain & Anne Marie Jackson, *Professional, Personal & Celebrity Goodwill Valuation: Forecasting an Uncertain Future*, *American Academy of Matrimonial Lawyers* presentation, 10 (1998), available at [http://www.ainbanklaw.com/pdf/Celebrity\\_Goodwill\\_Valuation.pdf](http://www.ainbanklaw.com/pdf/Celebrity_Goodwill_Valuation.pdf)

the law.<sup>348</sup> There is arguably an intangible value to fame because it may enhance earning capacity (or harm it if the person is infamous). However, because fame cannot be bought and sold, its value is speculative.<sup>349</sup> Celebrities, artists, writers, or actors cannot divest themselves of a skill and sell it to another person (although this has not been an impediment to treating a professional's goodwill as an asset). Furthermore, attributing a value to fame may result in a windfall to the other spouse because of the so-called "double-dip." The other spouse is awarded both more property and a higher support order as a result of the high earner's enhanced earnings that result from the party's fame.<sup>350</sup>

Goodwill has been categorized into professional goodwill and reputation goodwill.<sup>351</sup> Professional goodwill is a business asset with value and is severable from the reputation of individual.<sup>352</sup> Most states will divide professional goodwill at the time of dissolution.<sup>353</sup> Celebrity goodwill is a form of reputation goodwill that is based upon the famous party's personal celebrity status.<sup>354</sup> It is a personal asset that results from fame or notoriety and is not transferable. Celebrity goodwill merely enhances the celebrity's earning capacity<sup>355</sup> and is highly volatile because celebrity status can change quickly. Its value is highly subjective and is difficult to discern because it is not based on any quantifiable criteria, such as licensing.<sup>356</sup> Many jurisdictions such as California (where numerous celebrities reside) do not recognize celebrity goodwill; however, New York and New Jersey (both equitable distribution states) have held that there is a potentially assignable value.<sup>357</sup>

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<sup>348</sup> *Id.* at 17.

<sup>349</sup> *Id.* at 21.

<sup>350</sup> *Id.* at 27.

<sup>351</sup> *Id.* at 10.

<sup>352</sup> Amado, note 345.

<sup>353</sup> Stuart B. Walzer & Jan C. Gabrielson, *Celebrity Goodwill and Its Valuation in Divorce*, 2 J. AM. ACAD. MATRIM. LAW. 35, 44 (1986).

<sup>354</sup> Joseph Montes, *Celebrity Goodwill: Nailing Jello to the Wall*, 13 LOX. L.A. ENT. L. REV. 615, 618 (1993).

<sup>355</sup> Ain & Jackson, *supra* note 347, at 19.

<sup>356</sup> *Id.* at 30.

<sup>357</sup> Amado, *supra* note 345, at 34.

In 1988, New York recognized the existence of celebrity goodwill in the *Marriage of Golub*.<sup>358</sup> In that case, the parties married in 1982 and sought a divorce four years later.<sup>359</sup> The wife, Marissa Berenson,<sup>360</sup> was an actress and model.<sup>361</sup> The husband, Richard Golub, was a successful attorney.<sup>362</sup> Both parties had successful careers when they married, but Marissa's income increased during the marriage.<sup>363</sup> Golub requested an equitable distribution of the value of the enhancement of Berenson's career during the marriage.<sup>364</sup> The court found that Golub's legal skills and business acumen were a contributing factor to Berenson's celebrity.<sup>365</sup> Berenson argued that her celebrity status was neither "professional" nor a "license" and thus was not "an investment in human capital subject to equitable distribution."<sup>366</sup> She also argued that her celebrity was subject to substantial fluctuation.<sup>367</sup> The court disagreed and reasoned that there was no reason to differentiate between an entertainer and a licensed professional.<sup>368</sup> The court found that "the skills of an artisan, actor, professional athlete or any person whose expertise 'in his or her career has enabled him or her to become an exceptional

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<sup>358</sup> *Golub*, 139 Misc.2d at 445.

<sup>359</sup> *Id.* at 441.

<sup>360</sup> Marissa Berenson's career as a model came to prominence in the early 1960s. She has appeared on the cover of *Vogue* and *Time* magazines. Yves Saint Laurent dubbed her "The girl of the seventies." She appeared in several films for which she received critical acclaim, including two Golden Globe nominations, a BAFTA nomination, and an award from the National Board of Review. Internet Movie Database, [http://www.imdb.com/name/nm0001943/bio?ref\\_=nm\\_dyk\\_trv\\_sm#trivia](http://www.imdb.com/name/nm0001943/bio?ref_=nm_dyk_trv_sm#trivia) (last visited Feb. 3, 2014).

<sup>361</sup> *Golub*, 139 Misc.2d at 441.

<sup>362</sup> *Id.* At the time of his divorce, Richard Golub was a well known trial attorney, whose clients included Donald Trump and Christie Brinkley. Lee Wohlfert, *In the Case of Bum Rap Song, Richard Golub Courts Justice for Fellow Lawyers*, PEOPLE, (Feb. 2, 1987), available at <http://www.people.com/people/archive/article/0,,20095557,00.html>. He practices entertainment and commercial litigation in New York and has published two novels. Amazon, [http://www.amazon.com/Feisengrad-Aaron-Richard-Golub/dp/1439270554/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1383853824&sr=1-1](http://www.amazon.com/Feisengrad-Aaron-Richard-Golub/dp/1439270554/ref=sr_1_1?s=books&ie=UTF8&qid=1383853824&sr=1-1) (last visited Jan. 22, 2014).

<sup>363</sup> *Golub*, 139 Misc.2d at 443.

<sup>364</sup> *Id.* at 444.

<sup>365</sup> *Id.* at 443.

<sup>366</sup> *Id.* at 444.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 445.



wage earner should be valued as marital property subject to equitable distribution.”<sup>369</sup> As a result, the family court in New York may consider any skill obtained during marriage that enhances earning capacity to be a marital asset.<sup>370</sup> This outcome may result in a double payment to the recipient of support because not only would the skill presumably have a divisible value, the supporting party would also pay support on his enhanced earnings that result from the skill.<sup>371</sup>

Approximately one year after *Golub*, the New Jersey court addressed a similar issue in the *Marriage of Piscopo*.<sup>372</sup> Joe Piscopo is a successful and well-known comedian.<sup>373</sup> His wife, Nancy Jones, was a producer for the show “Wheel of Fortune.”<sup>374</sup> They married in 1973 and divorced in 1988.<sup>375</sup> While the appeal

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<sup>369</sup> *Id.* at 447. This holding relied on *O'Brien v. O'Brien*, 66 N.Y.2d 576 (N.Y. 1985), and its progeny, which determined that a professional license is marital property because the holder of the license has an enhanced earning capacity. The court noted that “when a person’s expertise in a field has allowed him or her to be an exceptional wage earner, this generates a value similar to that of the goodwill of a business.” *Golub*, 139 Misc.2d at 950.

<sup>370</sup> *Id.* at 447.

<sup>371</sup> Of note is the fact that two subsequent New York Superior Court cases did not divide marital goodwill. In the *Marriage of Getz*, the court found that whatever enhanced earning capacity jazz saxophonist, Stan Getz, once had no longer existed because of his health issues and the value of his celebrity was reflected in his royalties, which were marital property. N.Y.L.J., Mar. 2, 1989 (N.Y. Sup.Ct. Westchester Cty). Also, in *Marriage of Mann*, jazz flutist Herbie Mann’s celebrity status declined over the course of his marriage and thus was not subject to equitable division. N.Y.L.J., Jan. 10, 1995, at 26 (N.Y. Sup. Ct. N.Y. Cty); see also, Ain & Jackson, *supra* note 342, at 17.

<sup>372</sup> *Piscopo v. Piscopo*, 557 A.2d 1040, 1041 (N.J. Super. Ct. App. Div. 1989).

<sup>373</sup> Joe Piscopo rose to fame as a cast member on Saturday Night Live from 1980 to 1985. At the time of his divorce in 1988, he had starring roles in large Hollywood productions including *Dead Heat* (1988), *Wise Guys* (1986), and *Johnny Dangerously* (1984). Internet Movie Database, [http://www.imdb.com/name/nm0685472/?ref\\_=nv\\_sr\\_1](http://www.imdb.com/name/nm0685472/?ref_=nv_sr_1) (last visited on Jan. 8, 2014). Joe Piscopo still has cameos on television shows and according to his schedule on his website, makes appearances at various benefits and award ceremonies. Joe Piscopo, <http://www.joepiscopo.com/jpschedule.html> (last visited on Jan. 8, 2014).

<sup>374</sup> Nancy Jones was a producer of *Wheel of Fortune* from 1976 to 1995. During her career, she was nominated for 13 Daytime Emmys. Wikia, [http://wheeloffortunehistory.wikia.com/wiki/Nancy\\_Jones](http://wheeloffortunehistory.wikia.com/wiki/Nancy_Jones) (last visited on Jan. 8, 2014).

<sup>375</sup> Ain & Jackson, *supra* note 347, at 20.

was pending, Piscopo conceded that his celebrity goodwill could be an asset, but argued that it should not be considered in predicting his future earnings because those are subject to uncertainty.<sup>376</sup> That court held that a non-celebrity spouse should be entitled to a share of the celebrity spouse's fame, limited to the degree to which the fame is attributable to the non-celebrity spouse.<sup>377</sup> The source of the fame must thus be traceable to the marital efforts.<sup>378</sup> The court stated that the valuation of goodwill is not measured by future earnings, but by past earning capacity and the probability that it will continue.<sup>379</sup>

The Appellate Court in New York again addressed this issue in 1991 in *Marriage of Elkus*.<sup>380</sup> Frederica von Stade was a well known opera singer.<sup>381</sup> Her husband Peter Elkus was a voice teacher, who trained his wife and cared for their children.<sup>382</sup> During their marriage, Frederica's annual income increased from \$2,250 to \$621,878.<sup>383</sup> Peter argued that he sacrificed his career to support his wife's career.<sup>384</sup> The Appellate Court in New York determined that the appreciation was due to marital efforts and the nature and extent of contribution during marriage should determine the character of the goodwill.<sup>385</sup> That court reasoned

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<sup>376</sup> *Piscopo*, 557 A.2d at 1040.

<sup>377</sup> *Id.* at 1045-46.

<sup>378</sup> *Id.* at 1044.

<sup>379</sup> *Id.* at 1042.

<sup>380</sup> *Elkus*, 169 A.D.2d at 135.

<sup>381</sup> *Id.* Frederica von Stade is a world renowned opera singer. She debuted at the Metropolitan Opera House in 1970 and since has toured all over the world and made over seventy recordings. She holds honorary doctorates from Yale University, Boston University, the San Francisco Conservatory of Music, the Georgetown University School of Medicine, and the Mannes School of Music, where she attended and received training from Sebastian Engelberg. Frederica von Stade received one Grammy and has been nominated for eleven Grammys. Frederica von Stade, <http://www.fredericavonstade.com/biography.html> (last visited Jan. 8, 2014); Wikipedia, [http://en.wikipedia.org/wiki/Peter\\_Elkus](http://en.wikipedia.org/wiki/Peter_Elkus) (last visited Jan. 8, 2014).

<sup>382</sup> *Elkus*, 169 A.D.2d at 135. Peter Elkus replaced Sebastian Engelberg at the Mannes School of Music and continued his wife's training from 1975-1985. As a teacher, he has presented in ten countries and authored *The Telling of Our Truths – The Magic in Great Musical Performance*. Wikipedia, [http://en.wikipedia.org/wiki/Peter\\_Elkus](http://en.wikipedia.org/wiki/Peter_Elkus) (last visited on Jan. 8, 2014).

<sup>383</sup> *Elkus*, 169 A.D.2d at 135.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at 140.

that “things of value acquired during marriage are marital property even though they may fall outside the scope of traditional property concepts.”<sup>386</sup> The statutory definition of marital property “does not mandate that it be an asset with an exchange value or be salable, assignable, or transferable; the property may be tangible or intangible.”<sup>387</sup> The court stated that there was no basis to distinguish between a degree, license, or any other special skill that generates income.<sup>388</sup>

Even though there are numerous celebrity divorces in California, there have been no California Supreme Court cases addressing the issue of goodwill and California does not recognize celebrity goodwill.<sup>389</sup> The closest (and most recent) California case addressing the issue of personal and entity goodwill is *In re Marriage of McTiernan and Dubrow*.<sup>390</sup> In that case, John McTiernan<sup>391</sup> was a very successful film director who commanded a six to seven-figure compensation per film.<sup>392</sup> His wife, Donna Dubrow, was an executive at a production company and had also produced several films.<sup>393</sup> The trial court determined that McTiernan possessed goodwill because his earning capacity and reputation greatly exceeded that of most people in his profession and that he “commands a premium for his services.”<sup>394</sup> The court also held that he could reasonably expect to continue to enjoy that premium because “he has expectation of continued

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<sup>386</sup> *Id.* at 136.

<sup>387</sup> *Id.* at 137.

<sup>388</sup> *Id.* at 138.

<sup>389</sup> Amado, *supra* note 345, at 34.

<sup>390</sup> *In re Marriage of McTiernan and Dubrow*, 133 Cal. App. 4th 1090, 1091 (2005).

<sup>391</sup> Of note is that Donna Dubrow filed a civil action against John McTiernan for invasion of privacy related to his hiring of Anthony Pelicano. John McTiernan was incarcerated due to misrepresentations he made to the FBI with regard to its investigation into Anthony Pelicano. He was released from Yankton Federal Prison Camp in February of 2014 and is serving the remainder of his sentence under house arrest. John McTiernan has appealed his case to the U.S. Supreme Court, who denied that Petition. He is due to be released in April of 2014. Wikipedia, [http://en.wikipedia.org/wiki/John\\_McTiernan](http://en.wikipedia.org/wiki/John_McTiernan) (last visited on Jan. 8, 2014); *supra* note 36.

<sup>392</sup> *McTiernan v. Dubrow*, 133 Cal. App. 4th 1090, 1094 (2005).

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 1100.

patronage at his prior level of compensation.”<sup>395</sup> The decision was based in part on the reasoning that the term “a business” includes “a person doing business.”<sup>396</sup>

McTiernan appealed, arguing that skill, reputation, and experience are not community property.<sup>397</sup> The California Court of Appeals reasoned that the benchmark of personal goodwill is its absence of transferability and that talent is not property that can be sold.<sup>398</sup> Goodwill of a business, on the other hand, is transferable.<sup>399</sup> The Court of Appeal held that the services of a “natural person” as opposed to a business or profession cannot have goodwill.<sup>400</sup> The mere fact that the husband had the expectation of continued personal patronage did not equate to a finding that he had goodwill.<sup>401</sup> The existence of personal goodwill would create an asset predicated on nothing other than estimations about earning capacity.<sup>402</sup> Because McTiernan “could not sell or transfer his “elite professional standing,” it was not divisible goodwill.<sup>403</sup> In the few jurisdictions that recognize celebrity goodwill, its value is highly subjective.<sup>404</sup> In attempting to determine the value, an expert will need to review the extent and duration of the person’s career, review the nature of the earnings as well as trends in the industry.

## V. Closing Thoughts

When representing high profile personalities, preparing staff to handle the unique legal issues and challenges that come with high profile clients is important. It is critical to have an adequate budget to address the demands of the case. Retain co-counsel that can weigh in on corporate, trust, and estate planning issues. Hire experts that value unique assets and address forensic accounting issues. Remind staff of the importance of confidential-

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<sup>395</sup> *Id.* at 1095.

<sup>396</sup> *Id.* at 1096.

<sup>397</sup> *Id.* at 1095.

<sup>398</sup> *Id.* at 1100.

<sup>399</sup> *Id.* at 1101.

<sup>400</sup> *Id.* at 1102.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 1099.

<sup>403</sup> *Id.* at 1100-01.

<sup>404</sup> Ain & Jackson, *supra* note 347, at 17-18.

ity and security. Be prepared to deal with the onslaught of the media. Take stock of how far to go for the client and take measure of ethical boundaries. In other words, don't get star struck. Enjoy the limelight while it lasts and remember you are a divorce lawyer – nothing more, nothing less.

