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NEVADA FAMILY LAW REPORT

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KOGOD CONTRADICTIONS, PRACTICAL PROBLEMS, AND REQUIRED STATUTORY FIXES: PART 1

By Marshal Willick, Esq.

I. Background and Summary

Kogod v. Cioffi-Kogod, 135 Nev. ___, 439 P.3d 397 (Adv. Opn. No. 9, Apr. 25, 2019) raised several issues that deserve discussion.

While the opinion made some advances in alimony theory in Nevada, some unfortunate phrasing might cause practitioners to stop short of presenting everything they should when facing alimony issues.

The court was apparently not informed that its holding as to the termination of the community contradicted several of its own prior pronouncements, nor was it informed of the resulting problems for district court judges; if this cannot be rectified by case law, a statutory correction is warranted.

Similarly, the opinion made conflicting analyses on the issue of waste that are likely to lead to divergent results in future cases.

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This is the first of a multi-part series of articles on the *Kogod* holding; this article addresses the alimony portion of the opinion. The series will explore what the case means, and how the relevant law touched by the opinion might and should develop going forward.

II. Available Alimony Theories in and Beyond *Kogod*

The *Kogod* divorce divided an estate valued at some $47 million; most of the opinion dealt with the degree, and rationale, for how or why that estate might be unequally divided. Most of those holdings, and theories, are explored in the other sections of this multi-part article.

Relevant here is that the former spouse would leave the marriage with assets, primarily in cash, worth no less than $24 million or so, and the impact that fact had on the alimony analysis.

A. *Kogod*, Need, and Loss

The *Kogod* opinion expounded on alimony at some length, ultimately deciding that even though alimony may be awarded on a basis other than need, no alimony was warranted here, where income-producing assets would produce passive income sufficient to maintain the marital standard of living.

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A LETTER FROM THE EDITORS AND THE FAMILY LAW EXECUTIVE COUNCIL

Dear Section Members:

First of all, we look forward to seeing everyone at the 2020 Annual Family Law Conference in Bishop, California. This year's conference will offer unique courses on a wide variety of topics, including an intensive "Paralegal Boot Camp" track for staff. The entertainment this year will also be a change of pace from prior years and worth the experience.

Second, the Eighth Judicial District Family Division EDCR 5 Committee continues the process of revising the Eighth Judicial District Court Rules (EDCRs) enacted in 2016. Phase One of the revisions dealt primarily with ensuring that timing provisions in the rules conform with the revised Nevada Rules of Civil Procedure (NRCP). This process was completed and the changes are in effect. Phase Two is addressing observed conflicts, contradictions and problems in Part 5, as well importing the relevant provisions in Parts 2 and 7 into Part 5, thereby consolidating the local rules related to the practice of family law into one easy to access section.

The EDCR 5 Committee will continue to post to the Family Law ListServ proposed revisions as they are completed, for commentary and response. Further, if anyone practicing in the Eighth Judicial District Court has identified problems with the revised EDCR 5—divergent interpretations, practical problems with following them, or anything that should be modified—please contact the attorney members of the committee: Jennifer Abrams, Michael Carmen, Vincent Mayo and Marshal Willick.

Third, the Supreme Court of Nevada has announced the release of the final report for the Nevada District Courts, Family Division Assessment. The goal of the assessment was to determine whether the family courts are meeting the expectations of families and lawmakers, following state and local courts rules, and resolving legal disputes timely and effectively. The report is very informative and can be downloaded at https://nvcourts.link/FamilyDivisionAssessment.

Fourth, we welcome writers for the *Nevada Family Law Report*. Please contact Lauren Berkich at lauren@berkichluceylaw.com, Vincent Mayo at vmayo@theabramslawfirm.com, or Brian Blackham at brian@ghandilaw.com. We are targeting articles between 350 words and 1,500 words, but we are flexible if you require more space.

2020 Family Law Conference
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The court produced a binary analysis for alimony. The first is "when necessary to support the economic needs of a spouse" and the second is "to compensate for a spouse's economic losses from the marriage and divorce, including to equalize post-divorce earnings or help maintain the marital standard of living."[i]

Along the way, the court stated that where alimony is intended to achieve parity in income, it ***also*** must "further some underlying rationale," suggesting three such: economic need, the recipient's inability to maintain the marital standard of living, or the recipient's decreased income-earning potential as a result of the marriage. The court stated that without finding such an "underlying rationale," there is no discretion to award alimony "solely" to achieve income parity.

After reciting the historical underpinnings of alimony, world-wide and in Nevada, the Court listed the current statutory alimony factors, noting the subjectivity of what "need" might be, and for the first time citing the seminal analysis by the American Law Institute ("ALI") into alimony theory.[ii]

Without much explanation, the *Kogod* opinion noted the ALI's significant re-framing of the alimony analysis from one of "need" to one of "loss." But the *Kogod* court's embrace of the ALI analysis was a half-measure. The ALI framework *requires* an entire rejection of any kind of "need" analysis, substituting in its place analysis solely framed in terms of "loss" and compensation for that loss.

Kogod, however, added a "loss" analysis to its perception of potential alimony bases, and then ascribed the Nevada statutory factors to either a "need" or "loss" analysis.

Certainly, the court should be applauded for taking the time to delve into alimony theory in the context of resolving a case, as opposed to the "result-driven" opinions of prior years that are difficult to apply prospectively. Arguably, however, the combination of need and loss analyses more confused than clarified the law; treating "need" and "loss" analyses as *alternative* lenses invites some duplication, contradiction, and confusion.[iii]

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For all the reasons detailed in the Universal Approach article, the ALI reframing was great as a matter of theory, but has proven to be a dead end in application. In nearly two decades there has been apparently only one other court that has adopted alimony guidelines purportedly based on the *Principles*' recommendations—a regional family court in Arizona.[iv]

In 2008, commentators surveying the effects of the *Principles* found it to be of primary interest to academics and theoreticians, labeling its impact in the "real world" as "anemic," "slight," "mixed" and "paltry."[v] Apparently, very few courts anywhere cite the research, reasoning, or analysis set out in the *Principles* as anything more than general support for conclusions they have reached by other methods. The *Kogod* opinion could be read as another such instance.

Actually, the Nevada statutory factors are so broad that they embrace not *two* analyses, as stated in the *Kogod* opinion, but touch on each potential theoretical basis for an alimony award: Reimbursement Award; Rehabilitative Award; Career Asset Compensation; Loss or Waste Compensation[vi]; Loss of Earning Capacity Compensation; Divergence in Future Living Standards; and Residual Equity.[vii] One or more of each Nevada statutory factor fits within each of those potential bases. As explained in the Universal Approach article:

> Any analysis that attempts to boil down all the history, policies, and considerations making up the law of alimony to just a couple of factors – no matter how common or "universal" – suffers from a "blind men and the elephant" fallacy – trying to explain the whole of a complex concept consisting of several very different parts by focusing on only one of them.[viii]

In short, practitioners can and should use *Kogod* in arguing future cases, but it is problematic as a template for presentation of those cases because its binary analysis muddles two very different theoretical constructs. An alimony argument, or ruling, should be internally consistent.

B. The Alimony Bell Curve

The actual basis of the *Kogod* court's reversal of alimony to the wife was the simple conclusion that "the nature and value of the community property [the wife] received in the divorce obviated any basis for awarding alimony."

The court did not expressly label this conclusion, but recited cases from inside and outside Nevada in reaching it, including a South Dakota case speaking to the "symbiotic relationship" between property and alimony awards, and finding that when the property award is so large that the receiving spouse is capable of self-support, able to maintain the marital standard of living without assistance, and "not economically disadvantaged" in earning power as a result of the marriage, no alimony is warranted.

The Universal Approach article calls this reasoning the "alimony bell curve," explaining that at each end of the curve (lots of need and no ability to pay on one end, and no need and lots of ability to pay on the other) alimony is not really at issue, [ix] and noting:

> Usually, alimony comes up in "the middle" – the bulk of cases between the very poor and the very rich, for whom there are some assets to divide, but post-divorce payments from one spouse to the other will have an effect on the quality of life for one party, the other, or both.

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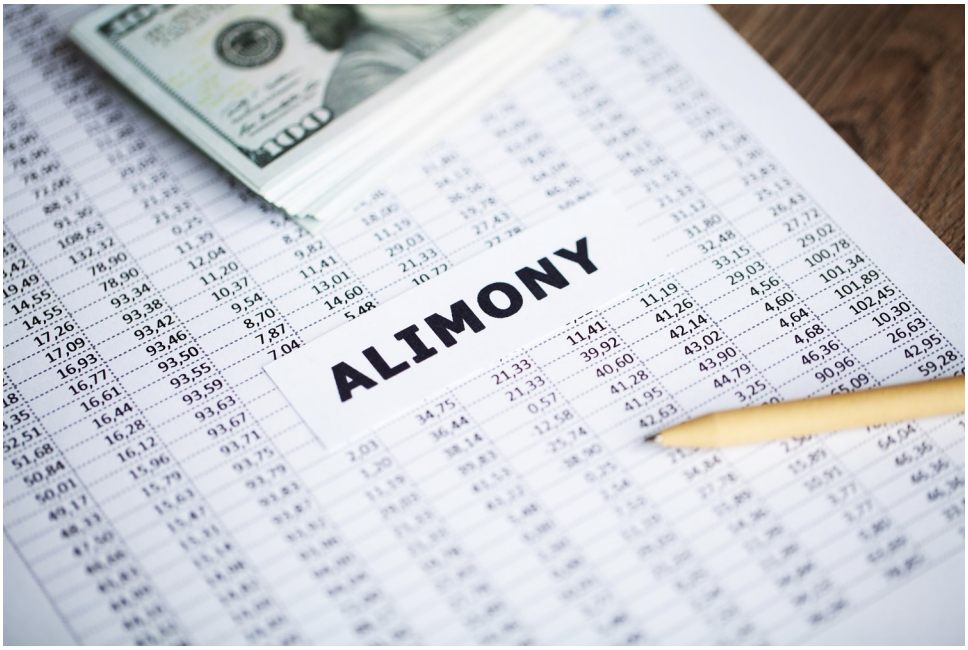
Cases clearly outside the bell curve are relatively rare. Unless the underlying facts support the argument, it is not worth arguing, so no further time is spent on it here.

C. A Proposed Presentation Outline for Alimony Claims

Practitioners should not read the *Kogod* opinion as limiting the arguments they can and should make; as noted, the



Nevada statutory factors actually encompass a wider variety of theoretical bases for alimony awards than are discussed in the opinion.

What follows is a more comprehensive presentation outline, correlating to the implicated factors from the Nevada statutory factors list, which should suffice to capture relevant facts in virtually every case. The details on how to calculate awards under each theory are detailed in the worksheets posted with the flowchart.

1. Is this an alimony case? (a, b, c, j)

This question should always be asked. The worksheet gives questions to ask to answer the threshold issue.

2. Are reimbursement awards called for? (a, b, c)

This category generally only applies to very short-term marriages after which the court's focus is attempting to restore the parties to their pre-marital standards of living.

3. Is rehabilitative alimony appropriate? (g, h, i, k)

This category follows the statute and case law to determine whether it applies to the facts of a particular case.

4. What, if any, alimony is called for based on a career asset? (d, e, h, i, k)

The "career asset" theory is present in several Nevada cases and often provides the primary rationale for an alimony award, as detailed in the worksheets.

5. Is compensation owed for loss or waste? (a, j)

This category is touched upon by two factors in the Nevada statutory list, but under current law may be separately dealt with in Nevada under a property analysis, as detailed in the Universal Approach article.

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6. Is compensation owed for loss of earning capacity? (b, d, e, f, g, h, i, k)

This category applies if one of the parties was involuntarily removed from the work-force and a career path in order to provide the majority of the care for the parties' child or another person.

7. Is alimony called for based on divergence in future living standards? (b, d e, f, k)

This factor is designed for the situation where the parties' respective future living standards are expected to diverge because of a disparate ability to provide for themselves in the future. It is sometimes called "general alimony."

The Universal Approach includes the AAML "shorthand" calculation used to produce an actual proposed number and duration for this factor, which was part of the work of Prof. Kristhardt that was positively cited in *Kogod*.[x]

8. Notwithstanding the above, is alimony called for or inappropriate based on the facts of this case? (e, j, k)

This is sometimes called "just 'cuz alimony"— alimony allocated when a judge has exhausted the categories of alimony but is still convinced that despite the failure to analytically fit within one of those categories, the totality of the circumstances require one party to pay, and the other to receive, an alimony award.

And, in reliance on Nevada case law, every alimony analysis should at least stop to consider whether lump-sum alimony is a more appropriate order than periodic payments would be.[xi]

The more comprehensive lawyers' filings are as to the bases for requested awards, the more orders should be in keeping with the law as applied to the facts.

III. Conclusions

Courts can only be expected to issue orders and opinions consistent with community property and alimony theory if the appropriate legal theories are cogently presented by counsel in their filings and argument.

Kogod was an outlier of a case on its facts, and while it was a useful advance in expanding the published Nevada authority on family law issues, and may have well reached proper conclusions on the facts of the case at hand, it fell unfortunately short in several areas of logic, theory, and public policy that will require either further cases or legislation to make right.

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Endnotes

[i] The court emphasized its approach in footnote 2, where it said "These were the only two possible bases for alimony...." The phrasing is unfortunate. Lawyers should probably read into the text an implied "under the circumstances of this case."

[ii] *Principles of the Law of Family Dissolution: Analysis and Recommendations* ("*Principles*") (Am. Law Inst. 2002) (consisting of 1,187 pages of single-spaced exposition, explanations, theoretical bases, and citations, the *Principles* considered many of the foundational questions in family law surrounding divorce, cohabitation, same-sex relationships, and parentage).

[iii] For a detailed explanation of the ALI analysis, its reasoning, and its limitations, see Marshal Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. Am. Acad. Matrim. Law. 153 (2015) ("Universal Approach"), posted at https://www.willicklawgroup.com/spousal-support-alimony/.

[iv] *See* Mark Hansen, *A Family Law Fight: ALI Report Stirs Hot Debate Over Rights of Unmarried Couples.* 89 A.B.A. J. 20 (June 2003).

[v] Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 Fam. L.Q. 573 (2008) at 576.

[vi] As explained in Universal Approach, waste analyses are far better dealt with in an alimony analysis than in a property analysis, and the Nevada case law on the subject has essentially painted itself into a theoretical corner on this topic; this issue requires a lot more explanation, and will have to wait for a separate article.

[vii] *See* the flowchart and worksheets posted in, and separately from the Universal Approach article, providing a full explanation, at https://www.willicklawgroup.com/spousal-support-alimony/.

[viii] *See* http://en.wikipedia.org/wiki/Blind_men_and_an_elephant. The parable, originating in the Indian subcontinent, illustrates the relativism of "truth" and the behavior of experts in fields where there is a deficit or inaccessibility of information.

[ix] " Experience and logic suggest that, in reality, there is something of an 'alimony versus property' bell curve in play, whether or not consciously acknowledged or referenced by the bench and bar. Specifically, there are relatively few cases where parties have high incomes but no assets; more frequently, there is a correspondence such that those with low incomes have relatively few assets, those with moderate incomes have more, and those with very high incomes have a significant amount of property. In a low-income, low-asset case, there is plenty of need, but very little ability to pay support. At the other end of the spectrum, there comes a point at which any award of alimony is simply irrelevant to the standard of living of the recipient – in other words, while there is ability, there is no demonstrable need."

[x] Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61 (2008). The AAML Commission found, after surveying "approaches used in many jurisdictions," that the most universal components of formulas in actual use were "income of the parties" and "length of the marriage."

The AAML formula is in two parts—amount and duration. For amount: 30% of the payor's gross income minus 20% of the payee's gross income. "Gross Income" is defined by a state's definition of gross income under its child support guidelines, including actual and imputed income, and is calculated ***before*** child support is determined.

For duration, the length of the marriage is multiplied by:

0-3 years: (.3)
3-10 years: (.5)
10-20 years: (.75)
More than 20 years: permanent alimony

The formula outputs for length and duration are then subject to "deviation factors" as detailed in the Universal Approach article.

[xi] *See Schwartz v. Schwartz*, 126 Nev. 87, 225 P.3d 1273 (2010) (when a potential alimony obligor is old, rich, and sick, courts must explicitly determine whether lump sum alimony is appropriate).

Double Dipping and the *Rouhani* Decision

By Vincent Mayo, Esq.

After years of uncertainty and considerable debate, the permissibility of double dipping when adjudicating the division of business interests and alimony has been addressed in *Rouhani v. Rouhani*.[i] While the Nevada Court of Appeals analysis on such a hotly discussed topic is surprisingly brief and relegated to an unpublished decision, its holding is sure to have a wide-ranging effect on Nevada divorce cases.

The *Rouhani* case involved a 29-year marriage. Husband, who was 58 years old, owned and operated two businesses during the marriage while Wife was 56 years old, a homemaker during the marriage and had little earning capacity. The two community businesses had a combined value of $496,000. Husband had gross yearly income of $371,204 at the time of divorce and evidence was presented that Husband's reasonable compensation from running the businesses was $250,000.

The case went to trial and district court awarded Wife half of the value of the two businesses. It also awarded Wife $10,000 per month in lifetime alimony, basing the award on Husband's total income, not just his reasonable compensation. Husband appealed, asserting that the district court's decision to base alimony on all of his income after Wife had already received one-half of the value of the businesses the income was derived from constituted an impermissible benefit to Wife (what is called "double dipping").

Double dipping addresses the double counting of marital property, first in the division of the asset and second in the award of alimony. Specifically, this occurs in a divorce when a court awards the alimony recipient spouse an interest in a marital business and then concurrently bases the business owner's alimony obligation on the same cash flows.[ii] Hence, the historical argument has been that doing so places the owner spouse and alimony obligor in the inequitable position of having to pay the alimony recipient twice from the same property.[iii]

In *Rouhani*, the Nevada Court of Appeals rejected this argument, relying on three principles in holding that all of Husband's income had to be taken into consideration by the district court when it made a determination of alimony. First, the *Rouhani* court recognized that NRS 125.150(9)(e) does not limit the income or assets alimony is based on. Rather, the statute only references "income," thereby leaving the term broadly defined and encompassing almost all sources of income.[iv] Such an interpretation is supported by Nevada law, such as *Rodriguez v. Rodriguez*,[v] the holding in *Buchanan v. Buchanan*[vi] (wherein the district courts were admonished to review a party's income without limitation as to the source of the income) and even NRS 125.150(5), which authorizes an obligor's separate property to be set aside if necessary in order to permit a "just and equitable" award of alimony. As a result, an analysis of alimony would not be limited to Husband's reasonable compensation but instead include all of Husband's income, not least of which are his net business profits.

Second, the *Rouhani* court, citing *Shydler v. Shydler*, held that "[a]s property and alimony awards differ in purpose and effect, the post-divorce property equalization payments payable to [the spouse] in this case do not serve as a substitute for any necessary spousal support."[vii] This position is also in line with the reasoning set forth in *Steneken v. Steneken*,[viii]—a seminal case in rejection of double dipping.[ix] In *Steneken*, the New Jersey Supreme Court focused on the fact that under New Jersey law, the considerations for dividing property are not the same as those for determining an award of alimony: One seeks an equitable division of property, the other to maintain the lifestyle of the recipient spouse.[x]

Third, the *Rouhani* court gave considerable weight to the financial condition in which the parties would be left by the divorce in making its holding.[xi] Specifically, the Court of Appeals, in citing to *Kogod v. Cioffi-Kogod*, held that it would be an abuse of discretion for the district court "not to consider income-producing assets when awarding alimony."[xii] The *Rouhani* opinion points out that Wife was not awarded income-producing assets, like the two businesses. Instead, she was awarded a one-time payment for her interest in the businesses[xiii] while Husband retained the businesses and their ability to produce income in the future.[xiv]

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Opponents of double dipping will argue that when a business is valued solely on net cash flows (i.e. the income the business will produce for the owner, which excludes reasonable compensation),[xv] as was the case in *Rouhani*, the equalization payment to the alimony recipient constitutes that spouse's share of the income generated by the business.[xvi] Such a position, however, ignores the practical considerations behind the Court of Appeals' ruling.

An analysis of the condition the parties will be left in post-divorce would include the actual disparity in income each party would receive long-term from the division of assets, despite the fact a party has already been "awarded" their interest in a business.[xvii] This is supported by NRS 125.150(9)(j), as well as the holding in *Shydler* that alimony should "be set at a fair rate based on the individual circumstances of the parties."[xviii] By way of example, most attorneys agree that a non-owner spouse's interest in the value of the business at the time of divorce, which is based on future profit, is not in reality proportionate to the income actually retained by the owner spouse in the future. Take the case of a marital business that has a value at the time of divorce of $400,000, making the alimony recipient's one-half interest $200,000. The total yearly profit to the spouse retaining the business post-divorce, including reasonable compensation, is predicted to be at least $150,000 for years to come. Is there any dispute that in such a scenario the spouse keeping the business is better off income wise in the long-term? By the same token, is it realistic to believe any investment income from the alimony recipient's $200,000, should he or she invest it, would come anywhere close to generating $150,000 per year?

However, while business income in excess of reasonable compensation cannot be excluded from consideration in determining alimony, the Court of Appeals in *Rouhani* reiterated that the amount of alimony to be awarded remains within the discretion of the district courts depending on what is just and equitable.[xix] For example, alimony cannot merely be established on the existence of a large gap in the parties' incomes[xx] nor are the courts required to equalize the parties' incomes post-divorce.[xxi] "Justice and equity only require alimony to achieve more parity in post-divorce income levels when there is economic need, the marriage and subsequent divorce contributed to the disparate income levels, or one spouse cannot maintain the marital standard of living while the other spouse maintains or exceeds the marital standard of living."[xxii]

The *Kogod* court cited to the factual scenarios in *Sprenger* and *Shydler* as samples where an aspect in the marriage resulted in the recipient spouse's inability to maintain the standard of living or suffered an economic loss.[xxiii] In *Sprenger*, the husband built a successful business during the 22-year marriage while the wife gave up her career as a nurse to raise their children.[xxiv] Meanwhile, *Shydler* involved a 17-year marriage during which both parties ran their own businesses.[xxv] However, the wife's business shrank and her husband's drinking problems interfered with her work.

Contrast the grounds for alimony in *Sprenger* and *Shydler* to a hypothetical one where the parties had similar incomes during a 10-year marriage and the disparity in their incomes only changed when one spouse started a profitable business in the last year of marriage. In such a factual scenario, it is arguable the district court would not need to base alimony on income in excess of the obligor's reasonable compensation in order to maintain the recipient spouse's marital standard of living or even award alimony at all under a need and ability to pay analysis. Hence, the facts of each case will continue to have a significant effect on how double dipping comes into play.

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Endnotes

[i] *Rouhani v. Rouhani*, No. 75124-COA (Nev. App. Nov. 25, 2019); 2019 Nev. App. Unpub. Lexus 971. It should be noted that while the *Rouhani* decision deals with a number of other issues as well, this article is limited to the Court of Appeals analysis on double dipping.

[ii] Shannon Pratt, *The Lawyer's Business Valuation Handbook: Understanding Financial Statements, Appraisal Reports and Expert Testimony*, 348 (2000); *See also Steneken v. Steneken*, 367 N.J. Super. 427, 843 A.2d 344 (App. Div. 2004).

[iii] *Murphy v. Murphy*, 775 N.Y.S.2d 370, 6 A.D..3d 678 (2004); *Grunfield v. Grunfield*, 94 N.Y.2d 486 (2000).

[iv] As Ms. Rouhani argued in her Answering Brief, "Nowhere in either Nevada's statutory construct regarding alimony, or the case law interpreting it, does one find a limitation on the income or property that a district court may consider for purposes of alimony."

[v] *Rodriguez v. Rodriguez,* 116 Nev. 993, 13 P.3d 415 (2000).

[vi] *Buchanan v. Buchanan,* 90 Nev. 209, 523 P.2d 1 (1974).

[vii] *Shydler v. Shydler*, 114 Nev. 192, 198, 954 P.2d 37, 40 (1998).

[viii] 367 N.J. Super. at 435.

[ix] While not referenced in the *Rouhani* decision, it was given considerable attention by Ms. Rouhani in her Answering Brief.

[x] 367 N.J. Super. at 436.

[xi] *Rouhani*, No. 75124-COA at 6; *citing Sprenger v. Sprenger*, 110 Nev. 855, 859, 878 P.2d 284, 287 (1994).

[xii] *Rouhani*, No. 75124-COA, 5, *citing Kogod v. Cioffi-Kogod*, 135 Nev. Adv. Op. 9, 5, 439 P.3d 397, 406 (2019).

[xiii] Ms. Rouhani was awarded other assets but none of them generated income.

[xiv] *Rouhani*, No. 75124-COA, 6.

[xv] William J. Morrison and Jay E. Fishman, *The Business Valuation Handbook*, 114 (2017).

[xvi] *Grunfield v. Grunfield*, 94 N.Y.2d 696 (2000).

[xvii] 114 Nev. at 199, 954 P.2d at 41.

[xviii] 114 Nev. at 199.

[xix] *Rouhani*, No. 75124-COA at 5-6.

[xx] 439 P.3d at 404.

[xxi] 114 Nev. at 199.

[xxii] 439 P.3d at 404-405.

[xxiii] *Id.* at 405.

[xxiv] *Id.*

[xxv] *Id.*

Establishing and Developing a New Family Law Practice

Part 6: Fees and Billing

By Bruce I. Shapiro, Esq. and Shann D. Winesett, Esq.

In Part 6 of "Establishing and Developing a New Family Law Practice," we discuss the concept of fees and billing. Prompt and fair billing practices are vital to the operation and financial success of any business. Unfortunately, we do not "learn" how to bill in law school and there are few continuing legal education classes that focus on this important aspect of private practice.

The Fee Agreement

While the initial consultation could be considered the conception of the attorney-client relationship, the fee agreement should be considered the birth of the relationship. It is essential.

A lawyer's fee agreement should be simple and in plain language. Nevada Rules of Professional Conduct, Rule 1.5(a) provides that the scope of the attorneys' representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably* in writing, before or within a reasonable time after commencing the representation. We disagree with this rule in one respect. For your own protection, the fee agreement should ***always*** be in writing. The agreement should be written in clear, common language. It should be thorough but should not be so long or complex that the client cannot understand the agreement without seeking the advice of independent counsel.

The Fee

Although flat fee and other alternative means of billing are becoming more prevalent, most lawyers still bill for their time by the hour. NRCP 1.5 provides that your fee and the expenses you charge must be reasonable. Determining your hourly rate may be based on what other lawyers, at other firms, with comparable experience and practicing in a similar area of law charge. As your experience, reputation and abilities increase, your hourly rate can and should go up.

Your agreement should address not only your fee but the fees of your associate attorneys and staff as well. The amount of the initial retainer and your expectation regarding its replenishment should be clearly stated.

NRPC 1.5(a) also requires the expenses you charge to be reasonable. In our practice, we do not charge for ordinary copies, postage, telephone, office supplies or other incidental expenses. We have found that the cost of tracking such expenses is not worth the reimbursement. Instead, we treat such expenses as a cost of doing business subsumed within our attorneys' hourly rates. (Note that ethical rules prohibit attorneys from charging a pro rata administrative fee for these expenses).

While we do not bill for copying and postage, our fee agreement clearly addresses special costs such as court fees, investigator/expert witness/consultant fees, transcripts and other significant non-recurring expenses.

No Contingency Fees in Family Law Cases

Most lawyers know that it is impermissible to charge a contingency fee in a family law case. *See* NRPC 1.5(d). For those that don't know, now you know.

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Establishing and Developing a New Family Law Practice
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Scope of Employment: Make sure that the scope of your employment is clearly defined in your fee agreement. Our agreement clearly states that our representation is limited to the matter identified in the agreement and for proceedings in the trial court only. It excludes appellate proceedings unless further fee and retainer arrangements are made. The fee agreement also excludes the preparation of a qualified domestic relations order and post-divorce enforcement issues.

Attorney's Fees: Your fee agreement should also address your right to attorney's fees, should you be required to enforce the agreement against your client.

Billing: Early and Often

Time sheets and bills are the bane of the private practice attorney. No matter the experience level or position in the firm, no attorney is immune from the aggravation of tracking time, translating that time into a bill, and submitting the bill to the client. Although billing is one of the most annoying aspects of law practice administration, it also is the most essential. Without bills and collection, your office will not survive.

Because billing is so essential to law practice survival, you should bill no less than once per month. In fact, you should consider billing bimonthly on cases in active litigation. Nothing is more distressing and frustrating for a client than to receive a huge bill that they never expected.

Billing Programs: You Don't Necessarily Get What You Pay For

After many years of experience, we have concluded that it is not necessary to purchase an expensive or complex billing program, especially for a sole practitioner or small group. Cloud-based programs that charge a modest fee per user, such as Clio, MyCase, or Rocket Matter should be considered. Also, before you pay for expensive law office management software, make sure you will use the bells and whistles of the product you are purchasing. You must also consider availability of support and costs to support your software.

Collections: The Risks of Being a Lien Machine

If billing is the life blood of the private practice, then failure to collect is bloodletting. As Abraham Lincoln famously stated: "A lawyer's advice and time is his stock in trade." Accounts receivable, therefore, represent your stock in trade, unpaid for, in the hands of your customers. Carrying high accounts receivable is simply not a good business model. The longer a receivable goes unpaid, the more likely it is that it will never be paid.

If you would rather not work than work for free, then you must closely monitor your accounts receivable. When a client is falling into arrears, communicate the client's need to timely pay the bill or withdraw from the case. Do not wait for the client's bill to get out of control before acting.

Of course, the practice of law is a profession as much as it is a business. Attorneys have ethical obligations to clients and the administration of justice that retailers and other businesses don't have. Because we are sometimes not at leisure to immediately abandon our clients for lack of payment, outstanding accounts receivable are, at times, unavoidable.

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Establishing and Developing a New Family Law Practice Part 6: Fees and Billing

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The legislature has provided attorneys with a couple of devices in the form of retaining and charging liens to help in our collection efforts. The nuances and mechanics of such liens are not the topic of this article. Suffice it to say, a charging lien is a lien against the judgment the attorney has obtained on behalf of the client. A retaining lien, on the other hand, is a lien that allows the attorney to withhold the client's file and other property until the outstanding fee is resolved. When properly perfected, these liens can streamline the process of collecting outstanding fees or, at least, obtaining a collectible judgment against the client.

Given the prevalence of electronic filing systems and the relative ease in recreating the court docket, the retaining lien is not nearly as effective as it once might have been. Even so, it has never been our practice to assert a retaining lien. As a practical matter, retaining a client's file during ongoing litigation could very well prevent a client from preparing for subsequent proceedings and harm the client's case. That harm will certainly be blamed upon the prior attorney.

While liens can assist the attorney in collecting against former clients, the attorney should give consideration as to whether to utilize a lien or any other formal process in getting paid. Suing a client for fees will very often result in counterclaims for malpractice or lack of diligence. While these claims are often bogus, they must nonetheless be reported to your malpractice carrier. The practitioner should consider other avenues of collection such as negotiating the outstanding balance and/or putting the client on a payment plan. If the attorney-client relationship has remained amicable, the client might even be willing to confess judgment in a mutually agreed amount.

Closing Thoughts

Collecting fees and billing are the most aggravating part of private practice; they are also the most essential to your office's existence. A good billing system begins with a thorough fee agreement and ends with fair collection procedures. To avoid high accounts receivable and client dissatisfaction, stay on top of your bills and ensure they go out regularly. To the extent possible, do not let your fees on any case get out of control. Finally, when active debt collection is necessary, consider negotiating your fee and/or a fair payment plan before resorting to the more formal machinery of liens and lawsuits.

BRUCE I. SHAPIRO attended the University of Nevada, Las Vegas, and received his bachelor's degree in 1984 and his master's degree in 1986. He graduated from Whittier College School of Law in 1990, magna cum laude. He has practiced in family law since 1990 and has served as a Domestic Violence Commissioner, pro tempore; URESA/Paternity Hearing Master, Alternate; Municipal Court Judge, Alternate; and Judicial Referee, Las Vegas Justice Court, Small Claims. Shapiro has written several articles in the area of family law and has served on the Nevada Children's Justice Task Force; Clark County Family Court Bench-Bar Committee; the State Bar of Nevada, Child Support Review Committee; the State Bar of Nevada, Southern Nevada Disciplinary Board; the State Bar of Nevada, Standing Committee on Judicial Ethics and Election Practices; and the Continuing Legal Education Committee. Shapiro also served on the Board of Governors for the State Bar of Nevada from 2003-2005 and 2008-2010.

SHANN D. WINESETT represents clients in all forms of domestic relations matters, including divorce, complex custody disputes, relocation litigation, paternity, adoptions, post-divorce modifications of custody, visitation, child support and alimony, guardianships, personal injury and business litigation. Mr. Winesett completed his undergraduate studies locally at the University of Nevada Las Vegas where he graduated magna cum laude with a bachelor's degree in English literature in 1988. After completing his undergraduate studies, Mr. Winesett spent two years in Germany studying philosophy and law at the Ludwig -Maximilians University in Munich. Mr. Winesett returned to the United States in 1990 to attend Loyola Law School in Los Angeles, California, where he earned his juris doctor degree in 1993. Mr. Winesett successfully completed the American Bar Association's Family Advocacy Institute in 1998. Mr. Winesett is a contributing editor to the Nevada Family Law Practice Manual and is a member of the State Bar of Nevada's fee dispute and attorney disciplinary committees.

Spotlight: Pro Bono Children's Attorneys Project

By Noah Malgri, Esq. and Hearing Master Margaret Pickard

The Legal Aid Center of Southern Nevada's Children's Attorneys Project (CAP) is in need of attorneys to represent children who are in foster care. CAP attorneys have the opportunity to work with children in foster care and represent their interests in court hearings, providing the child a voice on issues including the child's wishes on placement, sibling visitation, medical and mental health needs, travel requests, and/or educational decision-making.

Every CAP attorney makes a difference in a dependency court proceeding. If a sibling group is separated, it is imperative that the children have someone to bring the matter before the court. If a child's physical, mental or emotional needs are not being met in foster care, a CAP attorney can raise the issue before the court. When a child is falling behind in school, an all too common problem with children in foster care, the CAP attorney can request that the court appoint an educational decision-maker for the child when the parents are unable or unwilling to address the child's educational challenges.

Serving as a Pro Bono CAP attorney requires only a few hours of time each month. Pro Bono CAP attorneys generally see their children once a month and attend the court's six-month review hearings to speak to the court about the child's daily life, academic progress, general well-being, and wishes regarding the court's permanency goals for placement of the child.

There are currently more than 100 children waiting for a Pro Bono CAP attorney. Many of the children who come into foster care each week are traumatized and bring only the clothing they are wearing when they pass through the doors of Child Haven. All of these children deserve guidance and legal advocacy during this difficult time in their lives, when they have been removed from their home and possibly separated from siblings.

If you are an attorney and you wish to help, please contact Noah Malgeri, Esq., Pro Bono Project Director at 702-386-1429 or complete the online enrollment form: http://www.lacsnprobono.org/volunteer-today/pro-bono-project-volunteer-enrollment-form/.