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IS THE MINIMUM REALLY GOOD ENOUGH?

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Published cases may unintentionally create a false impression. Affirming the trial court for exercising its discretion is no endorsement of the procedural paradigm or the substantive decision as the preferred method or best outcome. Stated differently, is the minimum standard (not an abuse of discretion) really good enough? The minimum is not always the best. Although sometimes it might be the best choice strategically.

When reviewing trial court rulings, the district court commonly applies a standard for review deciding whether there was an abuse of discretion—meaning is the decision rational, reasonable, and defensible. "Appellate courts do not reweigh evidence or reassess the credibility of witness." [Rutter Group Family Law Practice Guide ¶16:203]. When a trial court is affirmed, the appellate court is not endorsing the decision, it is simply affirming this resolution as one reasonable option. As recounted in the Rutter Family Law Practice Guide on Appeals:

"The generally accepted test of abuse of discretion is 'whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered.'" [Marriage of Connolly (1979) 23 C3d 590, 598, 153 CR 423, 427; see also Heidi S. v. David H. (2016) 1 CA5th 1150, 1163, 205 CR3d 335, 344 (even if appellate court disagrees with trial court's determination, it upholds same "so long as it is reasonable"); Rutter Group Family Law Practice Guide ¶16:206].

Here, we explore proposed best practices designed to advance the interest of justice in the areas of giving adequate notice of the relief requested, presentation of declarations in RFO practice, and planning for an evidentiary hearing under Family Code section 217.

Attorney's Fees & Sanctions under Family Code section 271

In *Burkle v. Burkle* (2006) 144 Cal.App.4th 387 (*Burkle*),[2] Ron sought sanctions against Jan in the dissolution proceeding because she would not voluntarily dismiss a separate civil action she filed against Ron and the accounting firm who represented him. After prevailing in his demurrer, Ron was awarded $32,950 in sanctions under Family Code section 271 and Code of Civil Procedure section 128.7. The panel concluded, "no authority supported [Jan's] filing of a civil action against [Ron] over matters within the purview of the family law court, and the trial court properly dismissed her claims." [*Burkle*, at p. 444.]

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ACFLS MISSION STATEMENT

It is the mission of ACFLS to promote and preserve the Family Law Specialty. To that end, the Association will seek to:

1. Advance the knowledge of Family Law Specialists;
2. Monitor legislation and proposals affecting the field of family law;
3. Promote and encourage ethical practice among members of the bar and their clients; and
4. Promote the specialty to the public and the family law bar.

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An award of sanctions under Family Code section 271 is properly made where the conduct of a party or attorney frustrates the policy of the law to promote settlement of litigation. The award is like a sanction against only a party for his/her conduct or the conduct of their counsel. As a separate legal basis, sanctions under Code of Civil Procedure section 128.7 creates a mechanism to allow courts to regulate the conduct of parties and lawyers who appear before them. Section 128.5 or 128.7 sanctions are governed by the Code of Civil Procedure, not the Family Code. The panel rejected all of Jan's arguments including her claim that sanctions could not be properly awarded because Ron filed no income and expense declaration. The panel acknowledged that an income and expense declaration is a mandatory form as provided by the California Rules of Court.[3]

When making an order for attorney's fees and costs, Family Code section 270 mandates that "the court shall first determine that the party has or is reasonably likely to have the ability to pay." Family Code section 271 requires the court to "take into consideration all evidence concerning the parties' incomes, assets, and liabilities." However, the "party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award." California Rule of Court 5.2(c) provides that the rules of court "apply to every action and proceeding to which the Family Code applies . . . ." California Rule of Court 5.7(a) provides that all adopted forms "are adopted as rules of court under the authority of Family Code section 211." California Rule of Court 5.427 mandates the filing and service of an income and expense declaration (FL-150) where a party seeks attorney's fees and costs based on financial need. To support an award of fees counsel must file and serve the permissible form FL-319 for attorney's fees or a comparable declaration addressing the factors described in the form. [Cal. Rules of Court, rule 5.427(b)(1)(A).]

Sanctions under Code of Civil Procedure sections 128.5 and 128.7 are not need based fee awards. Sections 128.5 and 128.7 sanctions deter judicial mischief and punish the wrongdoer without regard to the need of the moving party for fees. Imposing 128.5 and 128.7 sanctions is not measured by whether the award would impose a financial hardship upon the sanctioned party although deterrence is part of the decision-making process.

In *Marriage of Davenport* (2011) 194 Cal.App.4th 1507 (*Davenport*), Ken was awarded $100,000 in sanctions and $304,387 in attorney's fees against Jill.[4] Ken filed a notice in the dissolution proceeding of his intention to seek section 271 sanctions against Jill. Jill argued Ken's request for sanctions was improper because it was not on the Judicial Council form, failed to give notice of what Ken was seeking, and did not set forth the precise amount he was seeking. [*Davenport*, at p. 1528.] The panel could easily dismiss Jill's argument about the forms because she did not raise the issue at the trial court level. Instead, the panel stated the following in footnote 15:

> "Some cases suggest that under appropriate circumstances, no written notice is required at all, that oral notice can be sufficient. (See In re Marriage of Quinlan, supra, 209 Cal.App.3d at p. 1423, 257 Cal.Rptr. 850; see generally, Hogoboom & King, supra, ¶¶ 14:115 et seq., 14:230 et seq.)." [*Davenport*, at p. 1538.]

Burkle and *Davenport* provide the backdrop for the practice pointers made here. First, while there is no requirement for the FL-300 RFO form, counsel should consider filing an RFO using the mandatory forms and asking the court to determine the section 271 sanctions request at the end, or for conduct that justifies an immediate award of sanctions at the time of the hearing as suggested by *Marriage of Quinlan* (1989) 209 Cal.App.3d 1417 (*Quinlan*). While cited in the Rutter Group Family Law Practice Guide, the language in *Quinlan* is actually dictum, not the holding. While persuasive, dictum does not reflect the actual holding of the court. Central

to the holding in *Burkle* is the decision that no Income and Expense Declaration (FL-150) is required for section 271 sanctions. While true on its face, if counsel checks the box asking for attorney's fees without clearly stating that only section 271 sanctions are being sought, the court would be justified in denying the RFO because of the general term "attorney's fees and costs" from the FL-300. Second, while an FL-150 may not be necessary for the moving party based on *Burkle* a specific fee declaration is required. While sanctions need not be entirely based on the fees incurred, *Marriage of Sagonowsky v. Kekoa* (2016) 6 Cal.App.5th 1142, suggests there must be a nexus between the sanctions imposed and the fees incurred. Third, while *Davenport* suggests that only a notice need be filed indicating a party is seeking sanctions under section 271, a few observations are necessary. If sanctions are sought under sections 128.5 or 128.7 the safe harbor provisions must be satisfied (service of a proposed RFO identifying the basis for sanctions served prior while delaying the actual filing of the RFO during the safe-harbor period). *Davenport* concluded the objection to the notice as the sole basis for sanctions was forfeited. Hence, carefully reading *Davenport* construes the other comments affirming the use of the notice only process and reference to the *Quinlan* are dicta. Perhaps better practice suggests filing the *Davenport* RFO with a request for section 271 sanctions be continued for hearing to a future date with a current FL-150 and fee declaration augmented as necessary.

Most recently the district court in *Marriage of Perow and Uzelac* (2019) 31 Cal.App.5th 984 (*Perow*) affirmed an award of section 271 sanctions for Catherine where Richard sought to modify child custody. Under what circumstances did Catherine seek her section 271 sanctions? Only in her responsive declaration, not in a separately filed RFO. The district court reasoned that a request for section 271 sanctions may be sought affirmatively in a responsive declaration. There was no requirement for a separately filed RFO to seek section 271 sanctions. The panel held, "Is a responding party's request for sanction based attorney fees under section 271 a request for 'affirmative relief'? We conclude that it is not." [*Perow*, at p. 987.] The panel reasoned that the section 271 relief was a form of a wholesale rejection of the relief sought by Richard. Catherine was not seeking affirmative relief outside the scope of Richard's RFO which would require a separate filing because of the limitations of Family Code Section 213(a). Section 213 limits the affirmative relief sought in a response to the issues raised in the underlying RFO. Underlying section 213(a)'s foundation is practical—the parties are here over child custody, so you may seek your own request for a different child custody or visitation order. The alignment of issues determined in one proceeding promotes a single resolution rather than separate RFOs. By allowing a party to seek section 271 sanctions, the panel reasoned that it constituted a wholesale rejection of the underlying requests as meritless, justifying the responding party to seek sanctions. Does this apply if there is no current income and expense declaration on file? In *Perow*, the parties separately litigated child support before the AB 1058 child support commissioner. The trial court awarded nearly $150,000 in sanctions. The court stated:

> "A party seeking attorney fees under section 271 is not seeking affirmative relief within the meaning of section 213 because the request for such fees is an attack on the messenger, not his message. That is because attorney fees under section 271, unlike attorney fees in many other contexts, are wholly 'a sanction for conduct frustrating settlement or increasing the cost of litigation.'" [Sagonowsky v. Kekoa (2016) 6 Cal.App.5th 1142; FC § 271, subd. (a) ("An award of attorney's fees and costs pursuant to this section is in the nature of a sanction."); cf. § 2030 (family court may award attorney fees to "ensure that each party has access to legal representation"); Cal. Rules of Court, rule 5.427 (delineating procedures for seeking fees under section 2030); see also cf. Rader v. Thrasher (1972) 22 Cal.App.3d 883, 888 & fn. 5 (attorney fees may constitute **880 "affirmative relief" when assessing whether the litigation privilege applies); Barak v. The Quisenberry Law Firm (2006) 135 Cal.App.4th 654, 661-662 (same, when assessing whether one party has joined another's anti-SLAPP motion).] What is more, because this sanction is necessarily responsive to the moving party's conduct in litigating his motion, allowing a court to consider the moving party's conduct at the same time as his motion without the need for a separately filed motion for fees also "avoid[s] possible duplicative, repetitious pleadings" (Parsons v. Umansky (1994) 28 Cal.App.4th 867, 872), further serving section 213's goal of "saving time and expense."

The record appears conspicuously silent on whether the parties had on file current income and expense declarations. *Perow* is a strong tool for the responding party. Whether seeking section 271 sanctions in a reply is not determined by *Perow*, although the logic is equally sound—if the response seeks relief that is sanctionable then why not? While permissible, is this the best practice? Is it reversible if the court does not grant sanctions under section 271 when it determines there was not adequate notice? No answer for this one, yet.

Finally, what happens if the court determines there is no basis for sanctions under section 271 or sections 128.5 or 128.7, but there is a sufficient showing justifying need-based fees? If you did not file the FL-150 Income and Expense Declaration you did not comply with the mandates of the Family Code, and its attendant California Rules of Court (especially rule 5.427). The principle argument favoring the exclusion of the FL-150 rests upon the notion the court will then know your client's income and resources. A few observations: First, expect the opposition will bring up this issue so facing it head on is probably wise. Second, there will likely be a need-based fee request so your client will have to file the FL-150. Third, even if you file the FL-150, the court has authority to offset need-based fees against sanctions as provided by *Marriage of Turkanis & Price* (2013) 213 Cal. App.4th 332. Finally, there may be an inherent inconsistency in the California Rules of Court about the necessity for an

Income and Expense Declaration when seeking sanctions under section 271. California Rule of Court 5.92(b)(2) requires an income and expense declaration when a party seeks attorney's fees and costs, "or other orders relating to the parties' property or finances." Are these two rules in conflict? Is an Income and Expense Declaration only required when need-based fees are requested? Is an Income and Expense Declaration required if section 271 sanctions are sought because it constitutes a request for an order relating to the finances of the moving party? No cases consider these issues. Safer practice probably suggests filing the income and expense declaration or risk facing the potential of a trial court being affirmed for denying sanctions because you didn't file it. Not pretty.

RFO Proceedings

Four recent cases dealing with the evidentiary hearing process and requests for affirmative relief necessitate careful practice by trial counsel. Appeals rarely resolve procedural irregularities unless there is a fundamental miscarriage of justice. This section considers the need to clearly protect the record on matters of procedure. Also, counsel must consider the broad discretion of the court as permitted by Code of Civil Procedure section 128.

One of the greatest tools available to the trial court in the procedural arena is section 128 coupled with Evidence Code sections 352 and 765. In *California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12 (*California Crane*), the panel observed: "In addition to ruling on all questions of law and procedure, and sometimes deciding factual issues, they are responsible for ensuring the security of those who appear in court, that attorneys meet certain professional and ethical standards of behavior, that court staff fulfill their responsibilities, that juries are properly cared for and that all court cases assigned to them are fairly and efficiently heard and decided. It is these last two functions that are at issue when a trial judge imposes trial time limits.

Some litigants are of the mistaken opinion that when they are assigned to a court for trial, they have camping rights. This view presumes that the trial judge must defer to the lawyers' time estimates for the conduct of the trial such that, for example, when examining witnesses, unless a valid objection is made by one's opponent, a party is entitled to take whatever time it believes necessary to question each witness. This view is not only contrary to law but undermines a trial judge's obligation to be protective of the court's time and resources as well as the time and interests of trial witnesses, jurors and other litigants waiting in line to have their cases assigned to a courtroom." [*California Crane*, at p. 19.]

Section 128 gives the trial court the inherent authority and responsibility to fairly and efficiently administer the case before it. This authority includes the power to expedite proceedings that are dragging on too long without advancing the substantive rights of the parties.

Parties must be permitted to have his or her day in court including the right to testify or offer evidence [*Marriage of Carlsson* (2008) 163 Cal.App.4th 281.] The question of procedural fairness is measured by the abuse of discretion standard.

In *Marriage of Shimkus* (2016) 244 Cal.App.4th 1262 (*Shimkus*), Kim appealed a post-judgment order granting Jeff's request to terminate spousal support. The panel concluded the trial court did not err when it refused to consider the declarations never offered into evidence [*Shimkus*, at p. 1265.] While reversed on other grounds related to the trial court's failure to consider all the applicable spousal support factors under Family Code section 4320, the trial court did not commit error in failing to receive the declarations into evidence.

Shimkus reveals a disconnect between counsel and the court regarding whether the written declarations would be considered. According to the record in the decision, the court indicated it would take oral testimony. Kim's counsel told the court all the other evidence was in the paperwork [*Shimkus*, at p. 1267.] The case turns on applying rules of court governing RFO proceedings.

California Rule of Court 5.111(c)(1) provides "(1) if a party thinks that a declaration does not meet the requirements of (b)(2) the party must file their objections in writing at least two court days before the time, or any objection will be waived, *and the declaration may be considered as evidence*. Upon a finding of good cause, objections may be made in writing or orally at the time of the hearing." (Italics added).

The *Shimkus* panel discusses the interplay between declarations permissible under Code of Civil Procedure section 2009. California Rule of Court 5.92 provides that the term "request for order" has the same meaning as the terms "motion" or "notice of motion" when they are used in the Code of Civil Procedure. In analyzing the admissibility of declarations the panel observes these opportunities:

- Stipulate the declarations into evidence
- Offer the declarations into evidence
- Ask the court to disallow live testimony and only rely on the declarations

As the panel concludes, "In sum, the declarations were not automatically in evidence nor did the court err in not admitting them under the circumstances of this case." What's a lawyer to do? *Shimkus* shows a disconnect between what the attorney thought was the state of the record measured against what the trial court said. While perhaps ambiguous or thin, the record adequately supported the trial court decision. The trial court was affirmed for not abusing its discretion to not consider the declarations.

Family Code section 217(a) establishes a general rule that a court shall "receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties." Family Code section 217(c) requires a party seeking to present live testimony to "file and serve a witness list with a brief description of the anticipated testimony. If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing."

California Rule of Court 5.113 governs proceedings for evidentiary hearings under Family Code section 217. Rule 5.113 describes the factors a court shall consider in granting or denying the opportunity to present live testimony including the broad category of "any other factor that is just and equitable." [Cal. Rules of Court, rule 5.113(b)(6).]

Shimkus clarifies the need to make a clear, unequivocal record, preferably in writing, asking the court to receive the declarations into evidence after ruling on any evidentiary objections. Such language moving the declarations into evidence is probably best presented in a written pleading filed separately or incorporated into the FL-300. And remember, ask the court to rule on the admissibility or not. Simply filing a pleading without asking the court to rule on the requested relief may be construed as a waiver of the claim, abandonment, or harmless error if not ruled upon.

Marriage of Swain (2018) 21 Cal. App. 5th 830 (*Swain*) broadens our understanding regarding objections to the admissibility of declarations filed in opposition to an RFO where the party is not present and available for cross examination.

Leon sought to terminate his spousal support obligation payable to Sandra based on his retirement and each party receiving his/her share of his retirement benefits. The trial court sustained Leon's objection to Sandra's Income and Expense Declaration being received into evidence because Sandra was not present at the hearing. The trial court lowered the spousal support but did not terminate jurisdiction.

The panel reversed the trial court decision and terminated jurisdiction over spousal support payable to Sandra because she was not present and available for cross examination. In other words, there was no evidence supporting her continued need for spousal support because there was no FL-150 for the court to consider. The panel concluded "We agree that section 217, when considered in light of its legislative history and the case law leading to its adoption, precludes reliance on inadmissible hearsay over a party's objection (subject to the good cause provision of section 217, subdivision (b)), at least where the party has no opportunity for cross-examination. The trial court therefore erred in considering the Declaration over Leon's objection." [*Swain*, p. at 837.]

After a lengthy analysis of the Elkins Task Force and the enactment of section 217, *Swain* concludes, "in this case, we also need not answer the general question whether section 217 makes written declarations submitted in connection with family law motions subject to the hearsay rule in every case. We conclude that, at a minimum, the hearsay exception in Code of Civil Procedure section 2009 does not apply to a motion to modify a family law judgment where, as here, the opposing party seeks to exclude the declaration on the ground that he or she is unable to cross-examine the declarant. In that situation, the opposing party's objection not only seeks to exclude hearsay evidence, but also amounts to an assertion of the party's right under section 217 to 'live, competent testimony that is relevant and within the scope of the hearing.'" (*Id.,* subd. (a).) "The opposing party's live testimony is necessary for cross-examination." [*Swain*, at p. 841]. Did the trial court find a good cause exception to receive Sandra's declaration into evidence? No. Was there an affirmative request for the court to exercise its discretion to permit the declaration? Unclear.

Could the court have defensibly made a finding that Sandra's declaration could be received into evidence? Rule 5.113 describes the factors a court shall consider in granting or denying the opportunity to present live testimony including the broad category of "any other factor that is just and equitable" [Cal. Rules of Court, rule 5.113(b)(6).] Since the trial court did not make the requisite findings, and the trial court ruled that it would not consider her Income and Expense Declaration, the *Swain* panel concluded there was an abuse of discretion.

According to the record, Sandra lived in Texas. If Leon wanted to compel Sandra to appear, other than by objecting to her declaration, he was powerless to force her to appear in person. Sandra was not subject to the subpoena power or a notice in lieu of subpoena under Code of Civil Procedure section 1987. Does *Swain* stand for the proposition that a party may file a demand for a person not subject to subpoena power to appear in court? Has *Swain* by implication superseded the limitations of a court's power to compel attendance by subpoena? What does *Swain* teach? Here are considerations for your tactical consideration:

- Present a *Shimkus* notice asking the court to receive the declarations into evidence if you represent the proponent.
- Articulate a *Swain* objection to consideration of the declaration of any person who is not present in court and available to cross examine.
- Identify the grounds for receiving or not receiving the declarations into evidence under section 217 and California Rule of Court 5.113.

If you want an evidentiary hearing, then ask for it. While the California Rules of Court and section 217 require a witness list, this may not assure an evidentiary hearing with the right to present live testimony. Neither the statute nor the rules require you to specifically state you want a live testimony hearing. Presumably the witness list is all that is required. Recent case law suggests the need for a less ambiguous and clear affirmative request. Remember, whenever the court calls the case, there is a hearing taking place. A hearing is not the same as a hearing where live testimony is presented. Simple enough? Or, not?

Marriage of Binette (2018) 24 Cal.App.5th 1119 (*Binette*) presents a situation similar to *Shimkus,* only worse. In *Binette*, Diane moved to set aside a default judgment incorporating a marital settlement agreement. Over William's objection, the court granted the motion. In affirming the trial court, the *Binette* panel found the trial court did not violate William's rights under section 217. Diane was entitled to "rest on the pleadings" instead of presenting live testimony. The *Binette* panel reminds us family law is subject to the rules of evidence and procedure: "For decades, practitioners have enjoyed the informality and flexibility afforded in marital dissolution proceedings. Nonetheless, these proceedings

are governed by the same statutory rules of evidence and procedure applicable in other civil actions. (Elkins v. Superior Court (2007) 41 Cal.4th 1337, 1354, 63 Cal.Rptr.3d 483, 163 P.3d 160 (Elkins); § 210 ["the rules of practice and procedure applicable to civil actions generally ... apply to, and constitute the rules of practice and procedure in, proceedings under [the Family Code]"].)" [*Binette*, p. at 1125.]

Relying on *Mendoza v. Ramos* (2010) 182 Cal.App.4th 680, the panel stated section 217 does not mandate live testimony when the parties indicate their desire to rely solely on declarations [*Binette*, at p. 1127 ("Rather the right to live testimony may be forfeited").]

Citing Family Code section 210, the *Binette* panel recognized the interplay between civil proceedings under Code of Civil Procedure section 2009. Section 217 requires the court to receive relevant testimony that is within the scope of the hearing, but it must be offered by the parties under section 217(a). The transcript reveals miscommunication on the part of counsel without clearly stating what was being requested. In sum, since counsel didn't ask for a live testimony hearing, there was no abuse of discretion, and the trial court is affirmed. The take away is simple.

If you want to present live testimony affirmatively make a written record stating that you wish to present live testimony. Make an objection to the other party's request to "rest on the paperwork." Remember, if the court does not permit live testimony you must make an offer of proof concerning what you think the testimony will show. Failure to make an offer of proof is likely fatal in the event of an appeal. In light of *Binette* counsel should consider:

- Filing a written request to present live testimony
- Filing a written request to submit on the declarations and argument
- Prepare file and serve a written offer of proof so the record specifies the relevant and admissible evidence you wish to present
- Credibility of the parties is often at issue in family law so indicate to the court in writing why credibility is an important issue [rule 5.133(b)(3)]
- Request the court make a clear record considering the standards under California Rule of Court 5.113
- Don't let leave unchallenged a request by the other side to "rest on their pleadings"

Conclusion

All of the relevant published cases rendered after the Elkins Task Force clarify the rules of evidence and relevant provisions of the Code of Civil Procedure that apply in family law. A muddy record typically favors affirming the trial court because judgments are presumed to be accurate and substantiated under Evidence Code section 639. Error is not presumed based on Code of Civil Procedure section 475. A judgment shall only be reversed if there is a miscarriage of justice under California Constitution Article 6 section 13. The appellate decisions reject any notion of a culture of low expectations where family law practitioners are not expected to follow the procedural mandates embodied in the Code of Civil Procedure. The Elkins Task Force reinforced, and the Legislature has adopted, procedures mandating proper compliance with the rules of procedure. To protect clients, to establish a clear record, and to preserve the integrity of the process we need to follow a simple mandate: If it's not in writing it didn't happen. As simple as it sounds, make a record. Finally, being affirmed is not an endorsement of best practice but only a recitation of the minimum standard. For our families the minimum isn't good enough. They deserve better. We can do better. Let's do it.

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1 This article is for educational purposes only. The opinions expressed are those of the author and do not suggest how a court should rule on a pending or impending matter.

2 As suggested by numerous published cases, first names are used for ease of reference. This convention is followed throughout the article.

3 The *Burkle* panel construed then applicable California Rule of Court 5.128 replaced by California Rule of Court 5.427. The revised California Rule of Court mandates an income and expense declaration only for need based fees without reference to sanctions under Family Code section 271. As discussed above there is a potential inconsistency about whether an income and expense declaration is required when seeking sanctions under section 271.

4 Ironically Jill was seeking section 271 sanctions against Ken in her noticed RFO.

Judge Lewis is the Supervising Judge for the Los Angeles County Family Law Division overseeing the operations of the sixty-eight family law departments in the county. From 2014 to 2016 he served in a long cause family law trial department in Los Angeles; he was Assistant Supervising Judge of the Family Law Division from 2011 to 2014. Judge Lewis became a Certified Family Law Specialist in 1985. In 2014, he became the first emeritus member of the Association of Certified Family Law Specialists. In 2017, he received the San Fernando Valley Bar Association, Stanley Mosk Legacy of Justice Award. In 2018, he received the California Lawyer's Association Family Law Judge of the Year Award.

PRESIDENT'S MESSAGE

DIANNE FETZER, CFLS | ACFLS PRESIDENT | SACRAMENTO COUNTY | DFETZER@FETZERLAW.COM

Our 27th Annual Spring Seminar just concluded at the beautiful Omni Rancho Las Palmas Hotel and Spa in Rancho Mirage. It was a huge success! Family law attorneys and judges arrived at the resort with the opportunity to learn from the best while enjoying some sun and fun with their respective families.

This year's program was dedicated to "When Paths Cross - Mastering The Intersection of Family Law and Other Areas of Practice." The excellent Garrett Dailey was our moderator whose engagement with the panelists, comfort with the audience, and the topics at hand created the best combination for learning—thank you! Mr. Dailey worked tirelessly in preparation for the seminar, participating and ensuring that the seminar ran smoothly. Also, our unending gratitude to the Judicial Responder Panel—the Honorable Sue Alexander, Honorable Mark Juhas, Honorable Thomas Trent Lewis, and the Honorable Michael J. Naughton, for their contribution to this outstanding program. Their unique awareness of the importance of the issues presented provided the insight needed to better appreciate the need for the information and education. Lastly, but certainly not least, we also thank each panel member who provided thought provoking material for our family law legal cross-over issues.

Our spring seminar committee was guided by Sherry Peterson, the chair and her two co-chairs, David Lederman and Avi Levy, who did an amazing job with this complex topic and provided excellent leadership. This year's topic was unusual and brought in various experts from legal cross-overs such as civil, bankruptcy, immigration, and probate; these speakers included at least six judicial officers as well as other specialized experts. I am grateful for all the members of the committee, our executive director, Dee Rolewicz, and our administrative assistant Rachelle Santiago that worked hard to pull this seminar together to make it the success that it was. As imagined, it takes hours of planning and coordination, which requires a great deal of volunteer time away from the practice of law.

We have already started planning for the 28th Annual Spring Seminar, which will be held again at the Omni Rancho Las Palmas Resort and Spa in Rancho Mirage on March 27th through March 29th, 2020—Save The Date! You will not want to miss it! The 2020 Spring Seminar will also be under the leadership of Sherry Peterson, David Lederman, and Avi Levy. We look forward to seeing you at this seminar.

For those of you who were unable to make it to our seminar, we announced the unveiling of our new website. As this is a new project, if you find any glitches on the website please contact us so that we may resolve these issues as soon as they may arise. Our website allows you to obtain participatory MCLE credits and our library expands frequently with new materials from which to choose, even for those difficult credits that you may need. Visit our website at www.acfls.org.

Ms. Fetzer is an Advisor to the Family Law Executive Committee for the State Bar of California, having served as its Secretary for several years. She is on the Sacramento County Judiciary Review Committee and a member of the Family Law Sections of the American Bar Association, the State Bar of California, and the Sacramento County Bar Association, and a member of the National Association of Counsel for Children, the Association of Family and Conciliation Courts, and the AFCC/ACFLS Families in Crisis Joint Task Force. She has acted in various capacities as a volunteer for non-profit community groups and has been a panelist and presenter for CEB, Minor's Counsel seminars, the University of the Pacific, and the McGeorge School of Law.

Another event that took place at our Spring Seminar, in addition to the Friday night welcome dinner and the Saturday happy hour, was the ACFLS Charitable Foundation Dinner & Comedy Show. This event was hosted by our sister organization we refer to as our "ACFLS Foundation," which is a 501(c)(3) charitable organization that gives grants to charities providing services connected to California family law system throughout California. At the dinner, the ACFLS Foundation reported that two grants of $5,000 each were given to Laura's House in Ladera Ranch, California, that provides legal advocacy for domestic violence survivors, and Harmony at Home, in Carmel, California, that provides classes to children and parents transitioning through high-conflict divorces. It was also announced at the dinner that since the ACFLS

Foundation was officially formed in 2016, $50,000 of grants were awarded to seven different worthy causes. Next year the ACFLS Foundation hopes to not only provide more grants to family law organizations, but to also introduce new forms of entertainment (TBD) to raise funds and to show you our appreciation for your donations! I urge all of you to support our sister organization and donate to this worthy cause—even if it is a small token amount per month; all donations are tax deductible. Please visit www.acflsfoundation.org to donate, apply for a grant, and to learn more about this worthy organization. The Foundation is also looking for additional board members. If interested, please contact me, the Foundation President JB Rizzo, or any ACFLS Foundation board member.

This past year, many of our colleagues passed the State Bar of California Legal Specialization examination for family law—Congratulations! We were able to provide to one of the recent members a scholarship to the Spring Seminar. Anthony Albert of Weaverville was awarded the ACFLS Borges Scholarship. Welcome Anthony and the other recent practitioners who have joined ACFLS. We hope that you enjoy all of the benefits that ACFLS has to offer! If you know someone that recently passed the examination, please encourage them to become part of our community and join ACFLS!

EDITOR'S DESK

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It is the mark of an educated mind to be able to entertain a thought without accepting it. Aristotle

Summertime is finally here! With it the relaxing longer days and higher temperatures that are perfect for the backyard barbecues and weekend trips with the family. What a perfect time to enjoy reading your favorite legal newsletter, The Specialist, and consider contributing to our readers much of your experience and know-how!

With our publication, we reach approximately 1,000 readers. Our members consist of some of the top minds in family law. Our members have taken the necessary steps to test themselves further to gain the coveted CFLS title as well as join an organization that dedicates itself to education and legislation throughout the State of California. The goal for this publication is to provide you with quality thought-provoking educational pieces in an attempt to offer distinctive perspectives about the law and the practice of family law. Let me know how we are doing!

I invite each one of you to help in our pursuit to educate and inspire our readers, to be a cause in making our family law practice a better and more enjoyable one, and to contribute to one another by publishing articles on this platform, to create stimulating viewpoints while earning MCLE credits.

Did you know that if you are a published author of an original piece on this platform, per MCLE Rule 2.83(c), a published author of an article on a legal subject can automatically claim one hour of self-study MCLE credit for each hour he/she spends preparing the written material (there are a few limitations). Therefore, this is an added incentive for prospective authors to write for The Specialist and claim self-study credits for their efforts. Not only will you get the recognition, but also earn MCLE credit for your valuable time spent preparing the article.

The rule is provided below for your easy reference:

Writing Published Legal Materials [Rule 2.83(C)] [*Self-Study*]

Preparing (as an author or co-author) written materials published or accepted for publication, which contribute to the legal education of the author member is acceptable (e.g., articles, chapters, books which were not prepared in the ordinary course of the member's practice or employment or to accompany speaking in an approved education activity).

Approval Criteria:

- An article on a legal subject for a non-legal publication may qualify for MCLE credit.
- Written materials prepared by a speaker for an approved education activity cannot be claimed under Rule 2.83(C). They are considered part of preparation for speaking/teaching and are included in the formula for calculating credit hours for speaking/teaching. Credit can be claimed only by the person who actually speaks or teaches the activity. (See Rule 2.81)

Naghmeh Bashar has been practicing law for nearly 25 years. Ms. Bashar, who is bilingual in English-Farsi, is also the 2019 Chair of the San Diego County Regional Liaison for legislation providing review and analysis to the Family Law Executive Committee of the California Lawyer's Association (FLEXCOM). Previously, Ms. Bashar was the Executive Editor to the State Bar of California's Family Law Newsletter (2012-2016).

Calculating Credit:

An attorney may count the self-study credit for the preparation of written materials in the compliance period in which either the materials are published or the attorney received written notice that the materials have been accepted for publication.

An attorney may claim one hour of self-study credit for each hour spent preparing written materials.

The State Bar of California does not provide certificates, but the authors may claim the credits on their own. If authors get audited, they can show the published article as proof.

I look forward to seeing your educational and inspirational articles pour in.

In This Issue:

As evident in this Issue, dedicated legal minds challenge you, your practice and presentation of your cases in court with thought-provoking legal and practical theories. Allow your educated minds to ponder the teachings and consider whether you accept the author's positions or do you want to challenge it with your own article. I'm awaiting your submittals.

Don't just be, be inspired!

SOMEWHERE UNDER THE GUIDELINE

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Okay – So You Have Convinced the Court (or Your Opponent) To Deviate from the Child Support Guideline Formula Under the High Earner Exception – Now What?

A. Introduction

So you represent "Dad" who has some serious income. Dad's net spendable income is $400,000 per month. "Mom" has substantial investment income after the division of community property, which provides her with net spendable income of $100,000 per month. There has been a complete waiver of spousal support. There are three children with Dad having 35% custodial time. These factors produce a guideline child support amount of $73,872.

You have convinced either Mom's lawyer or the court that $73,872 exceeds the amount necessary to meet the reasonable needs of the children while in Mom's care. Everyone agrees there is no disparity in the children's lifestyle in each parent's household. The court (or Mom's lawyer) has accepted that the high earner exception of Family Code section 4057(b)(3) applies and the court will be ordering child support that is less than the guideline amount. This leaves you, as Dad's lawyer, with three significant questions. They are:

1. How much child support should Dad pay to Mom under the circumstances?
2. How can you shield Dad from the general rule that no change in circumstances is required to obtain a modification of a below guideline child support order?
3. What do you want to include in the mandatory Judicial Council form Stipulation to Establish Child Support Order?

The first question is easier to answer when Mom has very minimal income, as the high earner will likely pay the entire amount necessary to meet the reasonable needs of the children while in Mom's care.

This article focuses on those cases where Mom has significant income of her own and those cases where there is a substantial spousal support order that could or should be taken into account in allocating the children's total needs in a high earner case. Hopefully, the approach outlined below will be helpful in negotiating a resolution under these circumstances, or if needed, a practical and perhaps persuasive argument to be made to the court on how the amount of below guideline child support should be decided.

B. Background Regarding the High Earner Exception to the Guideline Formula

In dealing with these issues, it is helpful to focus on some of the provisions of the Family Code addressing guideline child support.

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Section 4053[1] instructs the court on what principles should be followed in setting child support. It provides in pertinent part:

→ **California Family Code section 4053**

In implementing the statewide uniform guideline, the courts shall adhere to the following principles:

(a) A **parent's first and principal obligation** is to support his or her minor children **according to the parent's circumstances** and station in life.

(b) **Both parents are mutually responsible** for the support of their children.

[¶]

(d) **Each parent should pay** for the support of the children **according to his or her ability**.

[¶]

(j) The guideline seeks to **encourage fair and efficient settlements** of conflicts between parents and seeks to **minimize the need for litigation.** (FC, § 4053, emphasis added.)

Keep in mind the statutory requirements for a below guideline child support order under section 4056(a).

→ **California Family Code section 4056(a)**

(a) **To comply with federal law, the court shall state** … the following information whenever the court is ordering an amount for support that differs from the statewide uniform guideline formula amount.…

(1) The amount of support **that would have been ordered** under the guideline formula.

(2) The **reasons the amount of support ordered differs** from the guideline formula amount.

(3) The reasons the amount of support **ordered is consistent with the best interests** of the children.

(FC, § 4056(a), emphasis added.)

When dealing with the high earner exception particular attention needs to be paid to the structure of section 4057. It provides in pertinent part:

→ **California Family Code section 4057**

(a) The amount of child support established by the formula … **is presumed to be the correct amount** of child support to be ordered.

(b) The presumption … is a **rebuttable** presumption affecting the burden of proof and may be rebutted by admissible evidence showing that the **application of the formula would be unjust or inappropriate** … **consistent with the principles set forth in Section 4053 because one or more of the following factors** is found to be applicable by a preponderance of the evidence.…

(1) The parties have stipulated to a different amount of child support under subdivision (a) of section 4065.

[¶]

(3) The parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children.

(FC, § 4057, emphasis added.)

With respect to modifiability and whether a change of circumstances is required, section 4065 provides as follows:

→ **California Family Code section 4065**

(a) **the parties may stipulate to a child support amount subject to the approval of the court**. However, **the court shall not approve a stipulated agreement** for child support **below the guideline formula** amount **unless** the parties declare **all** of the following:

(1) They are fully informed of their rights concerning child support.

(2) The order is being agreed to without coercion or duress.

(3) The agreement is in the best interests of the children involved.

(4) The needs of the children will be adequately met.…

(5) The right to support has not been assigned to the county.…

***

(d) **If the parties to a stipulated agreement stipulate to a child support order below the** amount established by the statewide uniform **guideline, no change of circumstances need be demonstrated to obtain a modification of the child support order** to the applicable guideline level or above.

(FC, § 4065, emphasis added.)

C. An Approach to Arrive at an Appropriate Amount of Below Guideline Child Support

1. The Theory

If we are going below guideline, what would be the below guideline amount? To answer this we need to take a look at the stated principles of section 4053, subdivisions (a), (b), and (d), namely:

(a) [a] parent's first and principal obligation is to support his or her children **according to the parent's circumstances** and station in life [and]

(b) [**b**]**oth parents are mutually responsible** for the support of their children [and]

(d) [**e**]**ach parent should pay** for the support of the children **according to his or her ability.**

(FC, § 4053, emphasis added.)

So how can we find an approach to determine an appropriate below guideline child support order that follows these principles? Well, maybe the answer is right under our noses!

Here, the question is how to apportion the expenses of the children *in both houses* so that *each parent bears responsibility* for the needs of the children *according to his or her ability*. Remember, here none of the children's expenses are going to be covered by a guideline order.

Hasn't the Legislature already devised a formula for paying expenses of the children that are not covered by a guideline order? The answer is "Yes." Is it a formula that takes into account the relative ability to pay of each parent? The answer is again "Yes."

The formula is found in section 4061(b) dealing with "add-on expenses." Proposing to Mom's lawyer or the court that child support should be determined using a formula that has been adopted by the Legislature for "add-on expenses" provides something of a "safe harbor" for the court, and for that matter, Mom's lawyer.

Remember, guideline child support only deals with how much one parent is going to pay to the other parent to assist with the expenses of the children in the recipient parent's house. The task here is to find a way to allocate the total reasonable needs of the children between parents that each have significant, albeit unequal, incomes so that each parent is paying for the support of the children according to his or her ability, recognizing that both parents are mutually responsible for the support of their children.

The suggested approach is to:

1. Determine the total reasonable needs of the children in both households,
2. Compare the relative net spendable incomes of the parties, and
3. Calculate a child support order that proportionally divides the children's needs in proportion to the net income of the parents.

Section 4061(b) does exactly that for children's "add-on expenses" by allocating those expenses based on the relative ability of each parent to pay those expenses.

Section 4062 identifies certain costs to be ordered "as additional child support." By definition, these are expenses the Legislature treats as not being covered by the guideline child support. They include certain child care costs, uninsured health care costs, and other special needs of the children. Section 4061(a) provides a default method for allocating those "add-on expenses" between the parties. The default is to have each party pay one-half of such expenses.

However, where ordering each party to pay one-half of the add-on expenses might not be appropriate, the Legislature provided an alternate formula in subdivision (b), which is *mandatory* if the "add-on expenses" are not to be paid one-half by each parent.

Section 4061 provides in pertinent part as follows:

The amounts in section 4062, if ordered to be paid, shall be considered additional support for the children and **shall be computed in accordance with the following;**

(a) If there needs to be an apportionment … the **expenses shall be divided one-half to each parent, unless either parent requests a different apportionment** pursuant to subdivision (b) and presents documentation which demonstrates that a different apportionment would be more appropriate.

(b) **If requested by either parent, and the court determines it is appropriate to apportion expenses** under 4062 **other than one-half to each parent, the apportionment shall be as follows:**

(1) The basic child support obligation shall first be computed.…

(2) **Any additional child support** … **shall** … be **paid by the parents in proportion to their net disposable incomes as adjusted** pursuant to subdivisions (c) and (d).

(c) **In cases where spousal support is or has been ordered** to be paid by one parent to the other … **the gross income of the parent paying support shall be decreased by the amount of spousal support** paid **and the gross income of the parent receiving the spousal support shall be increased by the amount of spousal support**.…

(d) [T]he net disposable **income of the parent paying child support shall be reduced by the amount of any basic child support order**.… However, the net disposable **income of the parent receiving child support shall not be increased by any amount of child support received.**

(FC, § 4061, emphasis added.)

Since there is no spousal support in this hypo, the spousal support adjustment in section 4061(c) is not applicable here. And because there is not a base child support order as yet, there will not be a child support adjustment under section 4061(d) either.

The next step is to determine the "reasonable needs" of the children in Mom's house and the "reasonable needs" of the children in Dad's house. Presumably, if the children are spending different amounts of time in Dad's house and Mom's house, the expenses necessary for the children's care in each house will, to some extent, reflect the difference in custodial time with each parent.

So we need more facts. Assume the following are the children's "reasonable needs":

Children's needs at Mom's house	**$40,000** per month
Children's needs at Dad's house	**$20,000** per month
Total "reasonable needs"	**$60,000 per month**

2. The Mathematics of this Theory

The mathematics of the section 4061(b) formula would be to compare the net spendable income of each parent and apply those percentages to the total costs necessary to cover the reasonable needs of the children to calculate the amount each parent is to contribute to the total needs of the children.

Once that is done, the amount of Mom's contribution is applied towards the children's needs at Mom's house. The shortfall between Mom's contribution and the needs of the children at Mom's house will be the amount of below guideline child support that should be paid by Dad as part of his contribution to the total needs of the children.

3. Applying the Mathematics of this Theory to the Hypothetical

a. The comparative net disposable income of the parties is:

Dad's net spendable income	$400,000
Mom's net spendable income	$100,000
Total net spendable income	**$500,000**

b. The resulting ratios are:

Dad's proportionate share of the total net spendable income	**80%**
Mom's proportionate share of the total net spendable income	**20%**

c. Applying these percentages to the total needs of the children:

Step 1: Expenses to be covered by Dad

Children's total reasonable needs	$60,000 per month
Dad's proportionate share of the net spendable income	x 80%
Total expenses allocated to Dad	**$48,000 per month**

Step 2: Expenses to be covered by Mom

Children's total reasonable needs	$60,000 per month
Mom's proportionate share of the net spendable income	x 20%
Total expenses allocated to Mom	**$12,000 per month**

Step 3: Allocate the total expenses between parties and households

	Children's Expenses at Mom's House = $40K	Children's Expenses at Dad's House = $20K	Children's Total Expenses = $60K
Mom Pays	$12,000	None	$12,000 (20%) Paid by Mom
Dad Pays	$28,000	$20,000	$48,000 (80%) Paid by Dad
Total Available	$40,000 At Mom's House	$20,000 At Dad's House	$60,000 (100%) Total Needs are Covered

Based upon the allocation formula in section 4061(b), $48,000 of the total needs would be paid by Dad and $12,000 would be paid by Mom. Dad would pay his $48,000 share of the total expenses by paying $20,000 for expenses at his own house ***and paying Mom $28,000 in child support*** to cover that amount of the expenses at Mom's house. Mom would pay her $12,000 share of the total expenses by paying the remaining $12,000 of expenses required at her house. This approach is consistent with the principles in section 4053 because each parent is responsible for a share of the children's expenses based on his or her ability to do so.

4. Applying the Mathematics of this Theory to a Fact Pattern with a Spousal Support Adjustment – Hypo 2

The hypothetical facts for this scenario are:

Dad's net spendable income	$590,000 per month
Mom's net spendable income	$10,000 per month
Net after tax spousal support	$80,000 per month
Child expenses in Mom's house	$40,000 per month
Child expenses in Dad's house	$20,000 per month
Total child expenses	$60,000 per month

a. Family Code Section 4061(c) – Adjusting Net Incomes for Spousal Support

Step 1: Deduct spousal support from Dad's net spendable income

Dad's net spendable income	$590,000
Less net spousal support	- $80,000
Dad's adjusted net spendable income	**$510,000**

Step 2: Add spousal support to Mom's net spendable income

Mom's net spendable income	$10,000
Plus net spendable spousal support	$80,000
Mom's adjusted net spendable income	**$90,000**

Step 3: Determine each parent's percentage of the total adjusted net income:

Dad's adjusted net spendable income	$510,000
Mom's adjusted net spendable income	$90,000
Total net spendable income	**$600,000**
Dad's proportionate share of the adjusted net disposable income ($510,000/$600,000 =)	**85%**
Mom's proportionate share of the adjusted net disposable income ($90,000/$600,000 =)	**15%**

Step 4: Determine each parent's proportionate responsibility for the total expenses for the children

Dad:	
Total children's expenses	$60,000
Dad's percentage share of adjusted net income	x 85%
Dad's proportionate share of the children's total needs	**$51,000**
Mom:	
Total children's expenses	$60,000
Mom's share of the Children's total needs	x 15%
Mom's proportionate share of the children's total needs	**$9,000**

Step 5: Allocating the children's total "Reasonable Needs" between the parties and the two households.

	Children's Expenses at Mom's House = $40K	Children's Expenses at Dad's House = $20K	Children's Total Expenses = $60K
Mom Pays	$9,000	None	$9,000 (15%) Paid by Mom
Dad Pays	$31,000	$20,000	$51,000 (85%) Paid by Dad
Total Available	$40,000 At Mom's House	$20,000 At Dad's House	$60,000 (100%) Total Needs are Covered

D. Preventing the "No Need to Show a Change in Circumstance" Modification in a High Earner Exception Case

In the first hypo you have succeeded in convincing Mom's lawyer that an appropriate resolution of the child support issue is for Dad to pay a below guideline child support order of $28,000 per month. Both parties now agree that amount will adequately meet the children's needs and is consistent with the children's best interest. You are now left with the issue of:

"How can you shield Dad from the general rule that no change in circumstances is required to modify a below guideline child support order?"

So let's look at where this rule comes from and consider whether it actually applies to below guideline child support orders that result from the application of the high earner exception?

The "no change in circumstances rule" is found in section 4065(d). That subdivision states:

"(d) If the parties to a stipulated agreement stipulate to a child support order below the amount established by the statewide uniform guideline, no change of circumstances need be demonstrated to obtain a modification of the child support to the applicable guideline level or above."

Subdivision (a) of the same section 4065 describes a stipulation of the parties to below guideline support without anyone having to establish any other statutory basis for the below guideline amount. Section 4065(a) allows for a "We just felt like agreeing to below guideline child support order."

Section 4065(a) states:

"(a) Unless prohibited by applicable federal law, **the parties may stipulate to a child support <u>amount</u> subject to the approval of the court.** However, the court shall not approve a stipulated agreement for child support below the guideline formula amount unless the parties declare all of the following:

(1) They are fully informed of their rights concerning child support.
(2) The order is being agreed to without coercion or duress.
(3) The agreement is in the best interests of the children involved.
(4) The needs of the children will be adequately met by the stipulated amount.
(5) [The right to support has not been assigned to the county.]"

The placement of the "no change in circumstances" rule only in section 4065 might signal it was only intended to apply to agreements where parties are simply stipulating to a below guideline "amount" under section 4065(a), as opposed to agreements to a below guideline amount based on the "high earner exception" under section 4057(b)(3).

Section 4057 lends support to the argument that the "no change in circumstances rule" of section 4065(d) was not intended to apply to orders—even stipulated orders—to below guideline amounts in high earner exception cases. Section 4057 begins by stating in subdivision (a) that the guideline amount "is presumed to be the correct amount of child support to be ordered." It goes on in subdivision (b) to state that the presumption is a rebuttable presumption affecting the burden of proof that may be rebutted by admissible evidence:

"showing that the application of the formula would be unjust or inappropriate in a particular case **consistent with the principles set forth in Section 4053, <u>because one or more</u> of the following factors is found to be applicable by a preponderance of the evidence,** and the court states in writing or on the record the information required in subdivision (a) of Section 4056:

(1) The parties have stipulated to a different amount of child support **<u>under subdivision (a) of Section 4065.</u>**
(2) [Not applicable to this issue]
(3) The parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children.
(4) [Not applicable to this issue.]
(5) [Not applicable to this issue."

As can be seen from the above, section 4057 allows the guideline formula to be rebutted in two separate and distinct ways. The first is just "because (1) the parties have stipulated to a different amount **under subdivision (a) of 4065**" and the second is found in a separate subsection (3) because "The parent being ordered to pay child support has extraordinarily high income…."

In subdivision 4057(b)(1) there is a specific reference to section 4065(a)—the "no change in circumstances rule." By contrast, section 4057(b)(3) allows for a deviation from the guideline under the high earner exception with absolutely no reference to section 4065—the section containing the no change in circumstances rule.

Under section 4057(b)(3), once the presumption that the guideline is the correct amount is rebutted by evidence showing that the application of the formula would be unjust or inappropriate because the parent being ordered to pay child support has extraordinarily high income, *the court need only state* in writing or on the record the information required in subdivision (a) of section 4056, which states:

(1) The amount of support that would have been ordered under the guideline formula;
(2) The reasons the amount of support ordered differs from the guideline formula amount; and
(3) The reasons the amount of support is consistent with the best interests of the children.

To conclude that a stipulation to a below guideline child support order based on the high earner exception would be subject to the "no change in circumstances rule" would prevent the parties from being able to resolve the issue of child support in a high earner case by settlement because the recipient could always walk into court the very next day and ask for a modification to a guideline order. That would be contrary to one of the section 4053 principles namely:

(j) The guideline seeks to **encourage fair and efficient settlements** of conflicts between parents and seeks to **minimize the need for litigation.**

If the "no change in circumstances rule" applies to a stipulation for a below guideline amount in a high earner case, then the only way the parties could avoid "the no change in circumstances rule" would be to never settle and always seek a judicial determination as to the appropriate below guideline

amount. Imagine the "contested hearing" where both sides are trying to get the court to make the same child support order—without "stipulating" or "agreeing" to the order!

It seems nonsensical that if the court finds in a "contested" proceeding that the high earner exception applies and that the amount of $28,000 meets the children's needs and is consistent with their best interests, no modification could be obtained unless there has been a material change in circumstances. But, if the parties stipulate that those same facts exist and wish to settle the child support issue by agreeing to the exact same order, no binding resolution will result because the "no change in circumstances rule" would apply.

While there is not yet a clear answer to this issue, the foregoing provides an argument that may be persuasive.

E. What to Include in the Stipulation to Establish Child Support

If representing Dad, as high earner, care should be taken in preparing the Stipulation to Establish Child Support and Order. There are specific "findings" that the court must make when deviating from the guideline. They are set forth in section 4065(a). They include:

1. The amount of support that would have been ordered under the guideline formula;
2. The reasons the amount of support ordered differs from the guideline formula amount; and
3. The reasons the amount of spousal support ordered is consistent with the best interests of the children.

The third finding is not what many people think. It does not say that the amount of support "is in the children's best interest." It says "the amount of support ordered is consistent with the best interests of the children." This distinction should dispel the argument sometimes made by support recipients of: "How can providing the children with less child support ever be in the children's best interest?"

It is worth remembering that the Judicial Council form FL-350 "Stipulation to Establish or Modify Child Support Order" was adopted by the Judicial Council for mandatory use. It provides a helpful checklist of those findings the court must make when ordering a below guideline child support amount.

In completing the Judicial Council form the following comments may be of assistance:

Item 1. Net Disposable Income – Our hypo provides the net disposable income amounts. They are reflected at the top of the center column of a DissoMaster printout. However, if these amounts are disputed it would be perfectly acceptable to note they are disputed and explain the dispute on an Attachment 1.

Item 2. Percentage of Time with Each Parent – Normally this won't be a contested issue, but if disputed, again, each party's position can be set forth on an Attachment 2.

Item 4. The Amount of Child Support Calculated Under the Guideline – In our hypo, the amount is determined as $78,872. However, if the parties have a dispute over net disposable income there is no reason that item 4 could not indicate that the amount of guideline support is disputed and the parties' respective positions are set forth and explained on an Attachment 4.

Item 6(a). Why the Guideline Amount Should be Rebutted – Item 6(a) provides a space for the agreed amount of child support. In our hypothetical it would be $28,000 per month. The form goes on to state "the agreement is in the best interests of the children, the needs of the children will be adequately met by the agreed amount; and the application of the guideline would be unjust or inappropriate in this case." This parrots the provisions of section 4057(b)(3).

Item 6(b). "Other rebutting factors (specify)" – Here, an Attachment 6(b) should be included to state something like "The parent paying support has extraordinarily high income, and the amount determined under the guideline would exceed the needs of the child." (Section 4057(b)(3)).

Item 7. The Actual Support Order - Since the amount of support for each child has to be set forth, it is best to allocate the support from oldest to youngest the same way it would be allocated if it was a guideline support order. This can be done by taking the DissoMaster used to calculate the guideline amount and adjusting the amount of Dad's income until the total guideline support equals the agreed upon below guideline amount (here $28,000 per month).

The program will then allocate the $28,000 proportionally between the children according to age. It is probably best to set forth that allocation in an Attachment 7(a) and then explain in a note how the allocation of child support between the children was determined by saying something like "The allocation of the agreed upon child support of $28,000 is done in the same proportions as the allocation would be in a guideline child support payment of $28,000."

Item 7(b) & 8(c). Add On Expenses and Uncovered Medical Expenses – The percentage allocation should be determined with section 4061 by using the parties' net disposable incomes and adjusting the incomes for any spousal support and then *adjusting it again for the agreed upon amount of child support.*

Item 13. Other - Here, if you have reached a pre-judgment agreement for below guideline child support based on a high earner exception, it is useful to include "this is the trial determination of child support and is not a temporary order." This way you are not faced with having "hashed this out" at the pendente lite stage where the parties have already exchanged all information reasonably necessary for both parties to be satisfied they are using the correct income and expense figures and then having to deal with re-litigating every single issue at the time of trial.

The Notice Provision – The Judicial Council form contains the following notice above the signature provision:

> "Notice: If the amount agreed to is less than the guideline amount, no change of circumstances need be shown to obtain a change in the support order to a higher amount. If the order is above the guideline, a change of circumstances will be required to modify

this order. This form must be signed by the court to be effective."

In order to deal with the no change in circumstances modification rule in section 4065(d) the following should be added to this notice: ***"– subject to Attachment 18."*** Attachment 18 should then state something like the following:

"Attachment 18 – Change of Circumstances are Required to Modify This Order.

Notwithstanding anything in this stipulation and order to the contrary, the parties agree that in order to modify this less than guideline amount of child support the party seeking a modification of the amount of child support must establish (1) that there has been a material change in circumstances wherein the financial needs of the children have materially changed from those in existence as of (date) and/or (2) there has been a material reduction in Mother's disposable income that materially impacts her ability to contribute to the children's economic needs. The parties expressly agree that because this order for child support adequately meets the needs of the children, an increase in the net disposable income of Father shall not constitute a change in circumstances and shall not be a basis for an increase in the amount of child support provided for in this stipulation. Nothing in this stipulation precludes Mother from seeking an increase in this below guideline child support order based on a decrease in her net disposable income or precludes Father from seeking a decrease in this below guideline child support order in the event that his net disposable income decreases to a level where the $28,000 in basic child support would be above the amount that would then be calculated under the guideline formula. The parties agree that the following facts are true:

1. Father has an extraordinarily high income and the amount determined under the guideline formula would exceed the needs of the children.
2. Because the amount determined under the guideline amount exceeds the reasonable needs of the children the application of the guideline formula would be unjust and inappropriate in this case.
3. The needs of the children will be adequately met by the stipulated amount of child support.
4. The agreement to base child support in the amount of $28,000 is consistent with the best interests of the children.
5. If the matter were submitted to the court for a determination, these facts would be found by the court to exist, having been established by a preponderance of the evidence.
6. The only circumstances under which the agreed upon basic child support would not meet the needs of the children would be if there was a material increase in the amount required to meet the needs of the children or a material decrease in the recipient's net disposable income."

Each practitioner should consider whether it would be appropriate to attach, as part of the factors upon which the parties' stipulation is based, a schedule of each party's expenses that include the allocation of those expenses to reflect the needs of the children and whether to include an explanation that the parties arrived at the agreed upon amount of base child support by adopting the formula utilized for add-on expenses in section 4061(b) and include an example of the mathematics applied to arrive at the agreed upon amount of support.

F. How Has the Recent *Macilwaine* Decision Impacted How to Handle These Issues?

1. How to determine the needs of the children.

Macilwaine criticizes the trial court in apparently just deducting Mom's needs from the total household expenses and assuming the balance represents the reasonable needs of the children. The Court of Appeal held that the children's expenses need to be determined "independently." (*In re Marriage of Macilwaine* (2018) 26 Cal.App.5th 514.)

Perhaps, where Dad is capable of testifying about the percentage costs allocated to children's needs during the parties' marriage (or when the parents were living together) and can apply those percentages to the detailed categories of expenses in Mom's household based on his experience with those expenses, that may meet the *Macilwaine* "independent" determination of the children's expenses.

If not, the more cautious approach would be to have the friendly forensic accountant put together the costs list for each of the children's needs, including clothing, food, educational costs, extracurricular activities, and the like. Hopefully the *Macilwaine* decision won't become the "CPA's full employment act."

2. The "consistent with the best interests of the children" requirement of section 4056.

Macilwaine provides definitive guidance on how the requirement that the below guideline child support in a high earner case is to be determined to be "consistent with the best interests of children."

In *Macilwaine,* Patricia claimed the court erred by failing to explain why the lower amount (or capping income for child support) was "in the best interests of the children." The Court of Appeal stated that Patricia was interpreting this phase to require the court to find guideline support would *harm* the children. The Court of Appeal noted that such an interpretation was not supported by the authority Patricia cited or the plain language of the applicable code sections. The court noted: "Section 4056 only requires a finding that 'the amount of support ordered is **consistent** with the best interests of the children.'" (*In re Marriage of Macilwaine*, *supra*, 26 Cal.App.5th 514, emphasis added) (citing FC, § 4056(a)(3)).

The court went on to note that section 4057 requires the court find that guideline support "would be unjust or inappropriate in a particular case, consistent with the principles set forth in Section 4053, ***because*** one or more of the following factors is found to be applicable by a preponderance of the evidence."

The court stated:

> "The word 'because' suggests that **when a lower level of support has been shown to meet the children's needs it is consistent with their best interests.** Thus ***on remand, John need only show and the court need only explain why guideline support exceeds the needs of the children*** – **not that guideline support would be detrimental to their interest.**"

(*In re Marriage of Macilwaine*, *supra*, 26 Cal.App.5th 514, emphasis added.)

It appears the *Macilwaine* has stated the rule as follows: "So long as the amount of child support that is being ordered meets the needs of the children it is consistent with their best interests."

G. Conclusion

The amount of child support determined under the statewide guideline is presumptively correct in all cases. It is a rebuttable presumption affecting the burden of proof. Putting together the proof necessary to establish the elements under the high earner exception is challenging. But once you get there the question becomes, "Now what?"

How do the parties—or how does the court—determine the appropriate amount of below guideline support that should be ordered. If the issue is to be resolved by settlement, the next challenge is how to prepare a stipulated child support order that will be approved by the court and will not be subject to the "no change in circumstances rule." Hopefully the approach discussed above will be of assistance in these cases.

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1 All references are to the Family Code unless otherwise indicated.

Volunteer for the ACFLS Outreach Committee

ACFLS is seeking volunteers for its Outreach Committee, tasked with helping to bring high-quality family law continuing education programs to remote and underserved counties in the state. These programs are presented to all family law attorneys, and are not limited to certified specialists or members of ACFLS.

We are looking for volunteers to join the committee. If you would like to join or can help introduce people who might have an interest, please contact:

Outreach Director/Outreach Committee Co-Chair **Rick Cohen** at rick.cohen@familylawlitigators.com; or

Outreach Committee Co-Chair **Linda Seinturier** at L4linda@aol.com.

ONLY YOU can help present regular CLE programs to counties that need it most!

ACFLS CHARITABLE FOUNDATION, INC. PRESENTS GRANT AWARDS AT SPRING SEMINAR

DEBRA S. FRANK, CFLS | LOS ANGELES COUNTY | DFRANK@DEBRAFRANKLAW.COM

Julianne Leavy, LFMT, Executive Director of the Harmony at Home program

At the ACFLS Charitable Foundation dinner held on Saturday night, March 23, 2019, during the ACFLS Spring Seminar, the Foundation was pleased to award two $5,000 grants to Laura's House (Orange County) and Harmony at Home (Monterey). Laura's House provides services to the victims of domestic violence and their families. Harmony at Home's grant was for their program offering classes year-round for children and parents to help them transition through separation and divorce. The dinner was attended by 72 people and the Foundation is grateful for their support.

Following Judge Lewis's opening remarks, Foundation President J.B. Rizzo presented the grant award to Harmony at Home and described the programs and services of the other awardee, Laura's House. Julianne Leavy, LFMT, the Executive Director of the Harmony at Home program, accepted the grant and described the services of Harmony at Home.

Laura's House was unable to attend, but expressed their appreciation: "We cannot thank the ACFLS enough for their support, ensuring that we are able to continue to meet our legal department's mission statement—That no domestic violence survivor in Orange County should be alone or unprepared at their restraining order hearing. Our team of dedicated legal advocates supported nearly 1,200 clients in restraining order cases last year. Just five years ago, we supported 240 clients. We can attribute this growth to the generous support of the ACFLS, an organization that recognizes that legal support for domestic violence survivors and their children is a critical need in our county. We will make every dollar count, and continue to stand with and empower survivors in court to live lives free of violence."

After the grant presentation, Richard Weiss, who has won awards for his comedy, entertained attendees at the dinner.

The ACFLS Charitable Foundation had an exhibit table at the Spring Seminar. Volunteers successfully sought additional donations to the Foundation for future grants and boosted dinner ticket sales.

The Foundation's mission is "to solicit donations and to raise funds for the purpose of making monetary grants to persons and/or entities who are working to enhance access to justice, to provide family law-related education, and/or to improve the California family law process for affected persons, families, or groups in need, and to carry on other charitable activities associated with these goals as determined by the Board of Directors and allowed by law."

Debra S. Frank, former Editor and Associate Journal Editor of the Family Law Specialist and current ACFLS Foundation Board member, on the ACFLS Amicus and Leg Committees. She is past Chair of the Family Law Sections of the Beverly Hills and Los Angeles County Bar Associations and the Family Law American Inn of Court. She served on the Board of Legal Specialization, Family Law Advisory Commission and on Flexcom. Rated AV Preeminent by Martindale-Hubbell, Ms. Frank was named by Super Lawyers magazine as one of the top attorneys in Southern California for 2009-2019.

Since inception, the Foundation has granted awards totaling $50,000. Past grants include:

$5,000 Grant – Sacramento Children's Fund (2016)

$10,000 Grant – Helping Hands Nurturing Center (2017)

$5,000 Grant – Harriet Buhai Center for Family Law (2017)

$10,000 Grant – LACBA Domestic Violence Legal Services Project (2018)

$10,000 Grant – Sonoma County Legal Services for Supervised Visitation Project (2018)

The Board of Directors is starting to plan for the next round of grant applications. The current directors are: JB Rizzo, President; Abbas Hadjian, Vice-President; Joseph J. Bell, Secretary; Tom Collins, Chief Financial Officer; Tracy Duell-Cazes; Dianne Fetzer; Kendall Evans; Debra Frank; Mary Molinaro; Wendy Sheinkopf; and Michael Winestone; plus Judge Thomas Trent Lewis as adviser. The board is in the process of filling the five vacancies. Volunteers are welcome!

TEN TIPS FOR CROSS-EXAMINATION – AN UPDATED APPROACH FOR TODAY'S TRIALS

MATTHEW DODD | DODD BLACKFORD & CARLS, P.C. | MATT@DBCLAWFIRM.COM

Family lawyers have many opportunities for cross-examination. We have temporary hearings. We have depositions. We have mediations (yes, you can cross-examine during mediations). And we have trials. But many family lawyers fail to make the most of their opportunities for cross-examination throughout the trial process.

To maximize outcomes for our clients, we must enhance our ability to cross-examine, a tool that remains one of our most useful and adaptable. Because managing our client (on the stand and off) is often the most challenging aspect of managing our case, cross-examination is a tool that can be used even when we do not have favorable facts, witnesses, or other evidence. Particularly when our opponent faces the same client-management challenges, we have an opportunity to use cross-examination as a way to present our most favorable facts without relying on our own client.

The following tips are the core foundational skills that underpin every good cross-examination and provide an overview of more advanced skills that can make our good cross-examinations great.

1. Embrace the Narrative Approach – Long before we walk into the courtroom, we must understand our client's narrative and be prepared to communicate it to the judge. Our client's narrative is his or her story, but it is our telling of the facts that will ultimately lead the judge to our desired outcome. Our client's narrative is "the why that helps explain the what," and it is our job to present "the why" in a way that is both relatable and persuasive.

It is our job to organize the disjointed facts lifted from our client interview, the financial disclosures, and the other discovery into a narrative theory that is understandable and provides answers to the following questions:

- Why should the judge care about our client's case?
- Why should the judge side with our client?
- How can the judge help our client?

To aid us in providing these answers and to present our client's narrative most efficiently, we must develop a theory of the case and related themes.

A "theory of the case" is the one-sentence version of our client's narrative. It is the elevator pitch—a short, easily understood statement of our client's position that justifies our client's desired outcome. It is the thread that unifies the case from opening statement to direct, cross, and closing argument. Though it is not a legal statement, the theory of the case takes into consideration the legally admissible facts and we use those facts to support our legal arguments. In a custody case, our theory of the case almost always begins in the same way—"Your Honor, it is in the best interests of the children for Mr. Marshall to be the primary parent because…."

Matt Dodd comes from a family of lawyers and has been in the courtroom as long as he can remember. After attending school at the University of Utah and clerking for Utah Supreme Court Justice Jill Parrish, Matt moved to southwest Montana where he opened offices in Bozeman and Big Sky. In addition to his duties as a partner in Dodd Blackford & Carls, P.C., Matt travels nationwide to lecture and teach trial skills to other lawyers in criminal, civil, and family law. He has authored a number of articles on trial tactics for criminal, civil, and family law cases, and most recently, co-authored the book, Cross-Examination for Depositions.

Themes support our theory of the case and help regularly remind the judge of our client's narrative. A "theme" is a recurring thought, idea, or catch-phrase that summarizes and reinforces our theory of the case. While a single case may have more than one theme, each theme should be simple, easily remembered, and "bite-sized." It should embrace both our theory of the case and the word selections we have chosen to communicate our client's narrative.

For instance, I used the theme "It takes a village…." to argue the court should grant additional time to dad (my client) when mom started a job that was going to keep her out of the home more than in the past. In another example, a good friend used the theme "Runaway Mom," to set the tone on a case in which the mom had taken the children, without authorization, and left the state. His opening began, "Your Honor, this is a case about a Runaway Mom…." It was so powerful that his opponent began his opening with the response, "Your Honor, this case is NOT about a Runaway Mom…."

Once we develop our themes, we must incorporate the words and phrases of those themes into opening, closing,

and cross-examination. By using themes early and often, we reinforce our theory of the case and provide the judge with a narrative framework in which to integrate the facts we develop on cross-examination.

2. Establish Facts that Support our Narrative – An intimate knowledge of the particular facts of each case is the foundation upon which every good cross-examination is built. We use facts, as opposed to assertions or conclusions, to persuade. We use our presentation of the facts to lead our judge to the conclusion we desire.

Because we use facts as the basis of our cross-examinations, we must begin collecting and organizing the facts from the start of our representation. As soon as our client walks into our office, we begin gathering the facts to develop our client's theory of the case and themes—both of which may evolve as we learn more facts. We cross-examine our client and every witness to whom we can gain access through temporary hearings and depositions (both of which allow us multiple opportunities to cross-examine adverse witnesses). As we learn the facts, we sort the relevant from the irrelevant and organize the facts into categories that will eventually become our cross-examination chapters (more on "chapters" later).

Where trial is a battle of competing facts, we must remember each fact has a value. To assess the value of any fact, we must determine whether the fact helps our case or undermines our opponent's case. If a fact is helpful to our case, it can be used in Constructive Cross-Examination, which helps us build our own case. If a fact undermines our opponent's case, the fact can be used in Destructive Cross-Examination, which helps us to damage our opponent's case. If a fact does neither, it likely does not have a place in our narrative.

In addition to sorting relevant facts from the irrelevant, we must decide which witnesses will best present which facts. While many lawyers look to their own witnesses to present facts, the best facts can often come in through adverse witnesses. Despite our best efforts, we cannot always count on our own witnesses to be prepared, to testify as they have prepared, and/or to testify with credibility. We can, however, count on the perception that when the same fact is elicited through an adverse witness, the fact comes in with less skepticism and more credibility.

3. Determine the Purpose of our Cross-Examination – The goals for our cross-examination are not one-size-fits-all. Even though our goals in family cases are usually similar—securing custody for our client and making sure our client's side of the ledger is a higher value—the goals for individual cross-examinations can be quite varied. We may be seeking to conduct discovery, to lock in the witness's story, and/or to mine for admissions. We must therefore determine the purpose of each cross-examination even before we begin drafting questions.

Because we often have the opportunity to depose adverse witnesses prior to trial, the purpose of cross-examination at the deposition (or for certain parts of the deposition) may well be different than at trial. For instance, at a deposition or a temporary hearing, we may not yet know the facts that are needed to support our client's narrative. In such settings, we can use cross-examination to discover facts that cannot be disputed, or "facts beyond change."

Once we have discovered the facts beyond change that support our client's narrative, the goal of our cross-examination may shift to locking in the witness's story. Locking in the witness's story creates detail and specificity that prevents later amendment, explanation, or recantation. While a witness may be able to explain away one inconsistent statement, the witness cannot likely explain away detailed testimony gained from diligent and factual cross-examination.

Collecting facts beyond change also allows the attorney to elicit admissions from the witness. Eliciting admissions can be viewed as "mining for admissions" because the goal is not to seek just one admission. We must seek as many admissions as are necessary to establish the factual detail that will persuade a judge. We do not ask only one question, collect one admission, and move on. While we do not belabor a particular factual issue, we mine for multiple admissions to create enough detail so that the mental image is embedded in the listener's mind.

4. Start with Bedrock Principles – While we each come to the courtroom with a different look, a different personality, and a different voice, there are bedrock cross-examination principles that enable each of us to make the most of our time at the podium. Espoused as the "Three Rules" by Roger Dodd and Larry Pozner in their book, Cross-Examination: Science and Techniques,[1] these fundamentals provide a method to structure our cross-examination for maximum impact.

Leading Questions Only – Leading questions allow us to present our facts and teach our client's theory of the case through adverse witnesses.

An example of the prototypical open-ended question is, "How would you describe my client's parenting style?" This open-ended question does not present any information to the judge and gives us no control over what information the witness will convey. We do not get to control the witness's word choice, the facts he or she chooses to speak about, or the sequencing through which those facts are presented.

Leading questions allow us to choose the words and sequencing to present our client's narrative most effectively. In contrast to open-ended questions that give an adverse witness an opportunity to explain his or her own narrative, leading questions provide control, structure, and proper sequencing. Where we want to show that our client put the children first, we may use the following series of leading questions:

- Dad (our client) woke up early every day?
- He woke up early to make the children's lunch?
- He woke up early to make the children's breakfast?
- He woke up early to make sure the children had all they needed for school?

- He woke up early to get his work done so he could drive the children to school?

Because we are presenting our questions as factual statements with a question mark, we control the flow of information and we get to set the scene in the mind eye of the judge. We do not rely on the witness to provide information; we rely on the witness only to confirm the narrative we present.

One New Fact Per Question – Because we are teaching our client's narrative on cross-examination, we must teach in a way that allows our judge to retain the information we present. We cannot hope or expect our multi-tasking judges to absorb multiple new facts presented in a single question. And multiple new facts in each question also allow the witness to wiggle, run, and confuse.

As a teacher, we do not want confusion. We structure our questions to provide new facts one bite at a time, much like the way children learn at school.

- Sue threw the ball?
- The ball was red?
- Sue threw the red ball to Tom?

We provide new facts in a way that allows our judge to integrate each new piece of information into the structure of our client's narrative. Adding only one new fact per question also teaches the witness how to answer; it teaches the witness that his or her only job is to confirm each new fact we present. By taking one bite at a time, we can show the judge how all the individual facts fit together.

Logical progression to a specific goal – By using leading questions that follow a logical progression to a specific goal, we reinforce the structure of our client's narrative. To form this structure, we use the "Chapter Method." We break our cross-examination into a series of "chapters," each telling a portion of the client's narrative.

In the context of cross-examination, a "chapter" is a group of leading questions that progress in a logical sequence, start generally, and become increasingly specific to establish a mental image in the listener. In the same way adding only one new fact per question allows the judge to absorb the facts we present during cross-examination, the use of chapters breaks down a daunting cross-examination into a series of memorable images. Using chapters also keeps us organized, allows us to sequence our cross-examination, and allows us to fluidly move from one part of our client's narrative to the next.

5. Listen – Many lawyers believe our professional worth is measured by how much we talk. These folks believe if we are always talking, we are controlling the courtroom. But, this belief ignores that we must listen if we are to make the most of information presented by every other participant in the trial.

Listening allows us to selectively adopt language from the judge, opposing counsel, and witnesses that aligns with our client's narrative. It allows us to adopt new facts, or facts presented in a different way, that are consistent with our client's theory of the case. We cannot be so married to our own approach that we ignore gifts from other trial participants that more persuasively draw the judge to our client's narrative.

During direct examination, we must listen with two filters in mind. We listen for facts that can be integrated into our client's theory of the case through Constructive Cross-Examination. We also listen for facts that undermine the witness's testimony or our opponent's theory of the case; these facts can be used in Destructive Cross-Examination.

During cross-examination, we must actually listen to the witness's answers. When an adverse witness is answering, we cannot be loading our next question, digging for impeachment material, or focusing on anything else. We must be actively listening; if we are not, we will miss opportunities presented by the witness's testimony. Answers that are anything other than "yes" or "no" present opportunities to use spontaneous loops.

A spontaneous loop is a technique in which we intentionally reuse a witness's words / phrasing to control the witness's testimony and/or advance our client's narrative. To utilize the technique:

- Listen – any answer other than "yes" or "no" may offer opportunities
- Lift – extract any useful word or phrase
- Loop to Safety – use the word / phrase in subsequent question(s) by connecting the looped fact / phrase to undisputed fact

Using spontaneous loops will enhance our cross-examinations and provide opportunities to use the witness's own testimony against him or her to devastating effect.

During a deposition in a custody trial, the opposing party commented that Jane (my client) was a "good mom … a great mom." While, to him, it may have been a throwaway comment, I took this as an opportunity to force the opposing party to bolster all the ways in which Jane was a "great mom." I followed with this series of spontaneous loops:

- Jane was a great mom when she chaperoned the children's field trips?
- She was a great mom when she participated in the children's classrooms?
- She was a great mom when she helped the children with their school projects?
- She was a great mom when she sewed the children's costumes for their plays?
- And on and on and on…

When we actively listen and use spontaneous loops when appropriate, we can make adverse witnesses our best witnesses.

6. Don't Cross Crossly – Destructive Cross-Examination is the traditional approach to questioning an adversarial witness and the style with which most are familiar. Its purpose is to attack the opposing theory or the opposing witness. The downside to such an approach is that, as with a Coke advertisement that includes references to Pepsi,

Destructive Cross-Examination keeps the focus on our opponent's theory of the case. Even when we are scoring points in a Destructive Cross-Examination, we are focusing the judge's attention on the narrative constructed by our opponent.

On the other hand, Constructive Cross-Examination allows us to structure our cross-examination in a way that highlights our client's story and advances our client's narrative. By eliciting facts that support our client's narrative through adverse witnesses, we teach the judge in a way that gives more worth to each fact, presents the material in a more efficient manner, and keeps the judge focused on our client's narrative.

For instance, there are times when the opposing party has to admit certain facts that are favorable to our client. If it is undisputed that mom (our client) always took the children to soccer, we can use dad to establish those facts.

- Sir, your children played soccer?
- They had practice four days a week?
- The practice field was forty-five minutes across town?
- Mom took them to those practices?
- She drove them both ways?
- She made sure they had their gear?
- She made sure they ate before practice?
- She made sure they got their homework done on the way there?

By using Constructive Cross-Examination, we do not have to rely on our client to bring in those facts. We do not have to worry that mom will feel that she is bragging and minimize her role. We do not have to worry that the judge will believe mom is exaggerating and not give her credit for all those hours in the car. By using Constructive Cross-Examination, we control the words, emphasis, and sequencing that communicates our client's story.

Our approach will further benefit from the use of Constructive Cross-Examination because we can question in a manner that is more comfortable for today's judges. Constructive Cross-Examination allows us to use a more neutral tone with the witness. In place of aggressive body language or an aggressive tone, we substitute an aggressive, but fair, choice of words. Since we are asking leading questions, we choose words that are specific, vivid, and create the imagery that progresses our client's narrative. Today's judges do not want to see the cross-examiner abuse the witness. Today's judges are not as comfortable watching an adversarial affair as they once were and they will not tolerate it from younger lawyers. Today's judges are more comfortable watching a conversation than an argument.

7. Don't Chase the Direct – All too often, inexperienced lawyers structure cross-examination in a way that mirrors their opponent's direct examination. The urge to do so is even stronger when we are faced with many bad facts. These lawyers challenge every fact presented by their opponent and often do so in the same sequential order. This approach does our clients no favors and simply reinforces the opponent's narrative.

Rather than mirroring our opponent's direct examination, we can use the Chapter Method to sequence our cross-examination in a way that supports our client's narrative. To do this, we focus on the facts and details that convey our client's narrative and reinforce our themes. Our cross-examination should continue the narrative we first set out in our opening statement. We start and finish with power chapters—destructive chapters that impeach the credibility of the adverse witness or constructive chapters that focus on favorable facts beyond change. We control the flow of information on cross-examination because we control the sequencing of the chapters and the facts within each chapter.

We must tell our story and present the judge with a competing narrative. We cannot simply assume we will undermine our opponent's narrative without presenting a narrative of our own.

8. Conclusions are for Closing – Once we have worked during our cross-examination to lock in the witness's story, mine for admissions, and advance our client's narrative, we must be careful not to undo that work by asking conclusory questions. Particularly after getting admission after admission, it is tempting to ask that one final question that inevitably begins, "So that means…."

In spite of all the admissions we have elicited to support this conclusory question, the witness almost always responds, "No, your conclusion is exactly wrong … and let me tell you why." When we ask that conclusory or summary question, we allow the witness to explain away all his or her admissions and remind the judge why our opponent's theory of the case is a better fit for the facts.

The opposing party is never going to admit that, yes, it is in the children's best interests for our client to be the primary parent. Our opponent's expert is never going to admit that, yes, our opponent is the crazier parent. We must remember we would not be at trial if our opponent's witnesses agreed with our conclusions. And expert witnesses who agree with our conclusions typically do not work as expert witnesses for very long.

On the other hand, we can force our opponent's expert witnesses to agree with our factual questions. These witnesses must agree with fair factual questions (even if those facts conflict with their conclusions) or they risk losing their credibility. The mental health expert will admit she was not actually present for our client's parenting. She will admit there are no reports of abuse against our client. She will admit the children love and respect our client. But, she will not admit our client should be the primary parent.

The conclusion that our client should be the primary parent is best left for closing. During closing argument, we have the floor. Witnesses do not get to interrupt us and they do not get to explain. It is a safe time in which we can "add up" all the factual admissions we collected during cross-examination. Cross-examination is for collecting facts and admissions; closing is for presenting our conclusions.

9. Practice (all the time) – We should practice our cross-examination skills every time we ask questions. We should practice during every client interview, every witness preparation session, every hearing, and at every trial. We can even practice at home.

Looping, in particular, is a skill that can be practiced whenever we talk to someone else. It can be used for good—spontaneously looping an acquaintance to show that we are paying attention to their story (i.e. "After the waiter made the rude comment, what did you do?"). And it can be used for bad—spontaneously looping our partner, spouse, or child to show that we are paying attention to the actual words that they are using (i.e. "If you are too full to eat another bite, you are too full for dessert."). Just remember to have an exit plan if you loop a loved one!

10. Keep Learning – Like all of our tools, our cross-examination skills will get rusty if they are not maintained. This article provides a brief overview of a topic that can take a lifetime of study. Read a book (Cross Examination, Science and Techniques and Cross-Examination for Depositions[2] are two of my favorites), attend a CLE, or participate in a trial skills workshop. Whether you are a new lawyer preparing for your first trial or a grizzled veteran with decades of trial experience, the desire to continue learning keeps us at the top of our game. And that is something we owe not only to ourselves, but to each of our clients.

1 For more information on the Three Rules, see Dodd and Pozner, Cross-Examination: Science and Techniques, Lexis-Nexis (1993) <http://www.lexisnexis.com/shop/poznerdodd/default.page>.

2 Dodd, M. and Dodd, R., Cross Examination for Depositions, Lexis-Nexis (2016) <https://store.lexisnexis.com/products/crossexamination-for-depositions-skuusSku5602389>.

UPCOMING CHAPTER PROGRAMS

Bay Area

September 10th – Oakland

John McCall

October 8th – Walnut Creek

Untangling Pre-Marital Jointly Owned Property– The Family Code 2650 Solution – How to Apply 2650 and the Tactical Considerations

Robert Blevans and Vanessa Wills

Orange County

The Orange County Chapter of ACFLS is pleased to announce its 2019 Speakers Series: *"Learn from the Masters: Custody and Support Litigation."*

The 2019 Speakers Series will feature a comprehensive four-part practicum that will discuss preparing for, and litigating, the custody or support issue, with tips for success from the different perspectives of the panel. Each seminar panel will include a forensic expert, a skilled litigator, and a judicial officer.

Part One will be held at Sofia University (formerly Whittier Law School) in Costa Mesa. Each two-hour presentation will begin at 6:00 p.m. and end at 8:00 p.m., with dinner available to attendees starting at 5:00 p.m. The topics and presentation dates are as follows:

September 16, 2019

"Permanent Custody – We Just Disagree"

Judge Mark A. Juhas, Laura A. Wasser, Esq., Anne C. Kiley, CFLS, and Jay-Jo Portanova, MD

November 18, 2019

"Permanent Support – The Price of Love"

Commissioner David S. Weinberg (Ret.), Michael A. Morris, CFLS, Saul M. Gelbart, CFLS, and Andrew L. Hunt, CPA, ASA

Sacramento Chapter

ACFLS – Sacramento's 2019 continuing education program: "Family Law Trials: An Advanced Course."

August 28, 2019

Cross-Examination of an Expert Witness

Stephen J. Wagner, CFLS

September 25, 2019

Closing Arguments, CCP 631.8 Motions, and Protecting Your Case for Appeal

John O'Malley, CFLS, Brendan Begley, CALS, and Hon. Jaime R. Roman

October 23, 2019

19 Ways to Change a Judge's Mind Without an Appeal

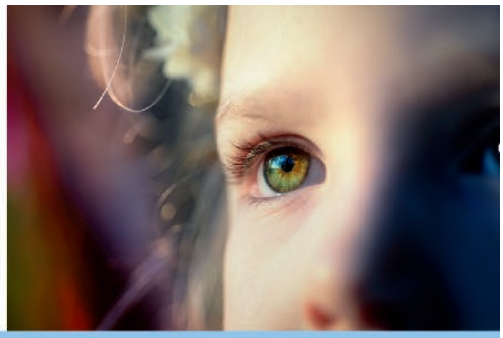
E. Stephen Temko, CALS, CFLS and Hon. Frances Kearney (Ret.) Placer

Each program will be at 12:00 p.m. on the fourth Tuesday of each month at the Zinfandel Grille on Fair Oaks Boulevard (lunch is included with the course fee.)

Courses will be every month except June, July, November, and December. (1.0 Specialization Credit)

Annual Custody Seminar

Information to help professionals understand the developmental, emotional and behavioral impacts of early exposure to parental conflict and neglect on children. Trauma informed practice seeks to strengthen legal advocacy and ensure appropriate treatment for children in these difficult situations.



Trauma Informed Child Custody Practice

Friday, September 27, 2019

Arden Hills Spa & Club Sacramento, California

No refunds will be made for cancellation after 9/13/2019. For further registration materials and continuing education information, contact Lindie Newlin at (916) 455-5200 or e-mail Lindie@DivorceWithRespect.com.

Program Outline

7:15 - 7:45 a.m. **Registration**

7:45 - 8:00 a.m. **Introduction and Announcements**

Diane E. Wasznicky, JD, CFLS

8:00 - 10:00 a.m. **Taking Childhood Trauma Out of Divorce**

This workshop will focus on the Adverse Childhood Experiences Survey (ACES), which includes divorce and the lasting effect on all family members. Intervention and assessment of children and family members is key to breaking the cycle of trauma. We will introduce creative assessment and treatment ideas and end with discussion regarding what attorneys, judges and mental health professionals can do to help. Content will be delivered through lecture, examples from child therapy sessions and discussion, including case studies.

Presenters: Lyla Tyler, LMFT; Mary Kelly Persyn, JD

10:00 - 10:15 a.m. **Break**

10:15 - 11:30 a.m. **Continuing ACES**

11:30 - 11:45 a.m. **Break**

11:45 - 12:30 p.m. **Video Presentation and Working Lunch**

12:30 - 12:45 p.m. **Break**

12:45 - 2:45 p.m. **Not Your Momma's Pot - Cannabis 2019: An Evolving Issue in Family Law**

Three experts with diverse experience will examine "the good, the bad and the ugly" of the growing Cannabis dilemma for families and children. Panelists will discuss what the differences in "pot" today really are and what that means with

Cannabis 2019, continued

regard to use, abuse and even just exposure for children. The panelists will also incorporate recent available research in their focus on the neurobiological effects on adult users; the detrimental developmental issues for children who are exposed in various ways; and the impact on the parenting capacity of adults charged with their children's safety.

Presenters: Fallynn C. Cox, Psy.D; Donelle Anderson, LMFT; and Francine Ferrell, MS, LMFT, CADC-II

2:45 - 3:00 p.m. **Break**

3:00 - 4.00 p.m. **Domestic Violence Considerations in Custody and Visitation**

This panel will address Family Code Section 3044's applications in a judicial setting, with perspectives from the Bench and Family Court Services.

Presenters: The Hon. Bunmi Awoniyi; Jaya Badiga, JD; and Cynthia Gonzalez, Manager-Sacramento FCS

4:00 - 5:00 p.m. **Minor's Counsel: An Effective Tool for the Court in Trauma Related Cases**

This panel will provide a basic understanding of the role, limits and responsibilities of Minor's Counsel. The presenters will also discuss some of the potential issues related to testimony of minors in the existing "Sanchez" environment.

Presenters: Comm. John H. Paulsen, Placer County Superior Court; Diane E. Wasznicky, JD, CFLS

Sponsored by the Association of Family and Conciliation Courts - California Chapter (AFCC - CA); Association of Certified Family Law Specialists (ACFLS); and Bartholomew & Wasznicky LLP

SPACE IS LIMITED, SO REGISTER EARLY!

Early Registration: $200 per person

Registration after 9/13/2019: $250 per person

*** No refunds will be made for cancellations after 9/13/2019 ***

Make Checks Payable to:
Bartholomew & Wasznicky LLP

Mail Check and Registration To:
2019 Fall Custody Seminar
ATTN: Lindie Newlin
4740 Folsom Boulevard, Sacramento, CA 95819

Trauma Informed Child Custody Practice

Friday, September 27, 2019

Arden Hills Spa and Club 1220 Arden Hills Lane Sacramento, California

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2019 ACFLS EDUCATIONAL LIBRARY ADDITIONS

Trial Briefs
Judge Garen Horst (Placer County); Commissioner Glenn P. Oleon (Ret.) (Alameda County) (1/22/19) 1.5 Hours

Mortgage Financing Strategies In Divorce
Ross Garcia, CDLP; Jason Crowley, CFA, CFP, CDFA (2/12/19) 1 Hour

Opening Statements and Motions in Limine
Hon. Thomas Warriner (Ret.) Yolo County; Hon. James Mize, Sacramento County; & Stephanie Williams, CFLS (2/27/19) 1 Hour

27th Spring Seminar 2019
When Paths Cross – Mastering the Intersection of Family Law and Other Areas of Practice
March 22 - March 24, 2019

Session 1 - Torts, Suits and Disputes: All is Fair in Divorce and Civil Litigation
Stephen D. Hamilton, CFLS, & Elizabeth M. Pappy, Esq. (3/22/19) 2 Hours

Session 2 – What You Say Can and Will Be Used Against you: The Competing and Comparable Interests Between Family and Criminal Law
Hon. Tara M. Flanagan & Hon. Christopher R. Bowen (3/22/19) 1 Hour

Session 3 – Chapter 7, Chapter 13 and the Stay – Oh My! Do Not Fear – the Bankruptcy Experts Are Here
Hon. Victoria S. Kaufman, Mark Johathan Hayes, Jeffrey I. Golden & Susan J. Luong (3/23/19) 1.5 Hours

Session 4 – When Family Law Crosses Borders
Hon. Ashley Tabaddor & Hon. Laura A. Seigle (3/23/19) 1.5 Hours

Session 5 – What You Don't Know WILL Hurt You: Avoiding Tax Landmines In Family Law Matters
Marie Edersbacher & Kelly J. Shindell DeLacey (3/23/19) 1.5 Hours

Session 6 – Ensuring those who may not be present of heard: Red Flags for the Family Law Attorney In Trusts & Estates, Conservatorships and Guardianships
Hon. Mitchell L. Beckloff & Hon. David J. Cowan (3/24/19) 1.5 Hours

Session 7 – "Ask the Judges" – the Last Word
Hon. Sue Alexander (Ret.), Hon. Mark A. Juhas, Hon. Thomas Trent Lewis, Hon. Michael K. Naughton (Ret.), & Garrett C. Dailey, CFLS (Moderator) (3/24/19) 1.5 Hours

Evidentiary Foundation for Exhibits and Hearsay Made Simple
Professor Jay Leach (McGeorge School of Law) & Commr. Danny Haukedalen (Sacramento County) (3/27/19) 1 Hour

2019 Speaker Series:
"Learn from the Master: Custody & Support Litigation"

Part 1 – Temporary Custody – Be Careful what you Ask For
Commr. Renee E. Wilson, Gary S. Gorczyca, Esq., Marc S. Tovstein, CFLS & W. Russell Johnson, PhD. (4/8/19) 2 Hour

Direct Cross examination of Lay Witness
Hon. Thomas Warriner (Ret.) Yolo County, Joseph Winn, CFLS, Victoria Linder, CFLS & Stephanie Williams, CFLS Moderator (4/24/19) 1 Hour

Representing the Business Owner Spouse
Larry Moskowitz, J.D., CFLS (5/14/19) 1 Hour

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