

Chapter 22

FAMILY LAW

Kimberly R. Willoughby, Esq.
Willoughby & Eckelberry, LLC

Laura J. Koupal, Esq.
Willoughby & Eckelberry, LLC

SYNOPSIS

§ 22.1 INTRODUCTION

- § 22.1.1—Introduction To Family Law Professional Responsibility Issues
- § 22.1.2—2008 Revisions To The Colorado Rules of Professional Conduct

§ 22.2 COMMUNICATION WITH CLIENTS

- § 22.2.1—Good Communication Practices
- § 22.2.2—Telephone
- § 22.2.3—E-Mail
- § 22.2.4—Voicemail
- § 22.2.5—Written Correspondence
- § 22.2.6—Facsimile
- § 22.2.7—Fee Agreements And Disengagement Letters

§ 22.3 CASE MANAGEMENT

- § 22.3.1—Domestic Relations Timeline
- § 22.3.2—Sworn Financial Statements
- § 22.3.3—Initial Status Conferences
- § 22.3.4—Disclosure
- § 22.3.5—Discovery
- § 22.3.6—Non-Expert Witnesses
- § 22.3.7—Expert Witnesses
- § 22.3.8—Child And Family Investigators And Parenting Evaluators
- § 22.3.9—Alternative Dispute Resolution

§ 22.4 TRIALS

§ 22.4.1—Trial Management Certificates

§ 22.4.2—Preparing The Client

§ 22.4.3—Witnesses

§ 22.4.4—Exhibits

§ 22.4.5—Opening And Closing

§ 22.4.6—Lawyer Preparation

§ 22.4.7—Limited Hearing Time

§ 22.4.8—Continuances

§ 22.4.9—Appeals

§ 22.5 OTHER AREAS

§ 22.5.1—Marital Agreements

§ 22.5.2—Qualified Domestic Relations Orders And Domestic Relations Orders

§ 22.5.3—Maintenance Terms

§ 22.5.4—Bankruptcy

§ 22.5.5—Taxes

§ 22.5.6—Death And Divorce

§ 22.5.7—Criminal Law And Divorce

§ 22.5.8—Competency Of Clients

§ 22.5.9—Collaborative Law

§ 22.1 • INTRODUCTION**§ 22.1.1—Introduction To Family Law Professional Responsibility Issues**

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

The court system is different for family law matters than for other civil matters. First, the process expects and assumes some amount of cooperation between lawyers and parties. Family members stand in a special relationship to one another and to the court system.¹ When children are involved, it is hoped that parties and their lawyers will keep their best interests in mind even while litigating. Joint experts are often used.² Judges have a limited amount of time to move dissolution cases through their dockets.³

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

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

§ 22.1.2—2008 Revisions To The Colorado Rules of Professional Conduct

On January 1, 2008, the Colorado Rules of Professional Conduct were revised. The revisions are extensive. Information presented here is meant to outline the most important revisions for family lawyers.

Colorado Rule of Professional Conduct (Colo. RPC) 1.0(b) states that client informed consent in most cases will require written client consent.

Colo. RPC 1.0(e) provides lawyers with more guidance regarding what kind of advice must be given to clients in order to obtain informed consent from the client. It further instructs that lawyers may not assume client consent from client silence.

Colo. RPC 1.6 has been considerably changed with respect to permissive disclosures. If a lawyer can establish that a disclosure was permissible either as a result of client consent or as a result of the list of exceptions within the Rule, the lawyer cannot be subject to discipline for disclosing client information.

Colo. RPC 1.7 has been changed to require a written document be provided to the client regarding the known and foreseeable risks and advantages, if any, of representation burdened by a conflict of interest. Alternatives should also be given. The informed consent must be confirmed in writing by the client.

Colo. RPC 1.8 now expressly states that lawyers may not enter into sexual relationships with clients during the course of representation.

Colo. RPC 1.18 is a new Rule. It imposes a duty of confidentiality for a lawyer toward a potential client even where the lawyer does not ultimately represent the potential client. The lawyer must take steps to address a conflict with a potential client as soon as the conflict becomes apparent to the lawyer.

Colo. RPC 3.3 imposes a duty on a lawyer to correct any false statement previously provided to the tribunal. Lawyers must take remedial measures if they learn of false material evidence offered to the tribunal, incorrect law given to the tribunal, or if a client intends to engage in criminal or fraudulent conduct related to an adjudicative proceeding.

In general, by virtue of changes to Colo. RPC 3.3, Comments to Colo. RPC 4.1, and the changes to the Preamble, lawyers have been given a greater duty and right to correct fraudulent conduct they have been duped into facilitating. The definitions of fraud and false statements have been broadened.

Colo. RPC 5.5 clarifies the role of disbarred, suspended, or disabled lawyers. They may work in the legal field if given appropriate supervision by a licensed lawyer and work under restrictions. They may not handle client funds; they cannot give legal advice to clients, nor appear on behalf of a client before a judicial officer, mediator, or arbitrator, or negotiate with third parties on behalf of the client; and their name may not appear in the firm's name.

Colo. RPC 2.2 has been eliminated. It is no longer possible for a lawyer to serve as an intermediary, scrivener, or a lawyer "representing the deal." Colo. RPC 2.4 has been added, and allows lawyers to serve as third-party neutrals, such as a mediator or arbitrator. The lawyer must make clear to unrepresented parties that the lawyer is not representing them.

Finally, § 20 of the Preamble states that while violations of the Rules should not give rise to a cause of action against a lawyer, in appropriate cases a lawyer's violation of a Rule can be evidence of a breach of the applicable standard of conduct in a malpractice case.

§ 22.2 • COMMUNICATION WITH CLIENTS

§ 22.2.1—Good Communication Practices

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

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

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

Lawyers in family law cases need to train themselves to listen well. This can be difficult for lawyers. Family law clients will tell their lawyers all manner of things, relevant to the matter and otherwise. Because the client is not necessarily knowledgeable about what is relevant and what is not, lawyers need to listen to a lot of information to sift out what is relevant. And, impor-

tantly, family law clients need to be heard, and are much more satisfied with services if they believe someone has genuinely listened to them.

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

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

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

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

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

§ 22.2.2—Telephone

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

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

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

§ 22.2.3—E-Mail

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

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

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

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

Assuming that a communication is protected by the lawyer-client privilege, that privilege, as a matter of federal law, is not lost if the communication occurs via e-mail and the e-mail is "intercepted." The ECPA defines "intercept" to mean "acquisition of the contents of "any wire or electronic communication." Thus, the ECPA privilege clause encompasses both intentional and inadvertent acquisitions of e-mail. In short, if a communication is protected by the lawyer-client privilege, the fact that the communication was transmitted via unencrypted e-mail would not affect a waiver of the privileged character of the communication.⁴

E-mailing has become widely used for a variety of purposes in the family law arena. First and foremost, most lawyers frequently use e-mail to communicate with their clients and opposing counsel. E-mail is effective for communication especially when documents are sent as attachments for opposing counsel to “red-line,” or for a client’s approval. Lawyers should be cognizant of the fact that when e-mailing attached documents the documents could contain “metadata.” Metadata is information about the document that is hidden or, “data about data.” The hidden information, or metadata, includes information such as when the document was modified, who modified it, and in some cases, it even can include previous changes to the text.⁵ Through Microsoft Word™, the risk of metadata transmittal can be eliminated by simply configuring your program to “remove hidden data.” The Microsoft website can provide additional, detailed, information about minimizing metadata.⁶

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

Lawyers should maintain a professional tone and demeanor in e-mail correspondence. Because e-mails can be exchanged almost instantaneously between lawyers and their clients and the other lawyer, some lawyers treat e-mails differently than they would treat other written correspondence, both in tone and content. Lawyers are well-served to remember that e-mail is no different than formal correspondence. In other words, think about what you have written before you hit the “send” button, as the e-mail may very well become an exhibit.

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

§ 22.2.4—Voicemail

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

Voicemail can also be used to put relevant information in the outgoing messages. Many lawyers change their outgoing message every morning with a detailed description of when they

will be available to receive calls and return messages. This is especially convenient for lawyers who have a small or no staff. Also, outgoing messages are useful for informing callers if the lawyer is going to be on vacation or out of the office for a significant period of time. When a lawyer is going to be out of the office for an extended period, the message should refer the client to a person whom they can contact during the lawyer's absence.

Return voicemail messages promptly.

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

§ 22.2.5—Written Correspondence

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

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

§ 22.2.6—Facsimile

Facsimile (fax) is another method of communicating with the client that is quick and efficient. All facsimiles sent or received by the lawyer's office should be copied to the client. All also should be maintained in the client's file.

Because the client may not have a home fax available to them, lawyers should be sensitive when faxing documents to clients. Because of the delicate nature of family law matters, it is typically not appropriate to fax a client a document pertaining to their family law case while they are at work. If a client does give permission to the lawyer to fax him or her at work, the client should be informed each time before a document is faxed to the client's place of employment.

§ 22.2.7—Fee Agreements And Disengagement Letters

Fee agreements and disengagement agreements should always be reduced to writing. Fee agreements should be extremely thorough and be signed by both the lawyer and the client.⁷

Under the Colorado Rules of Professional Conduct, lawyers must advise new clients of the basis or rate of the fee in writing, and must respond, preferably in writing, to reasonable requests from all clients about the amount of fees and costs incurred.⁸ Whenever the fee arrangement is changed, the lawyer should have the client sign an agreement regarding the fee change.

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

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

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

When writing a disengagement letter, lawyers should be mindful of Colo. RPC 1.16(d), which states, in relevant part: “Upon termination of representation, a lawyer shall take steps to the extent reasonable or practicable to protect a client’s interests. . . .”⁹ Under Colo. RPC 1.16(d), the lawyer must take all steps necessary to protect the client’s interest. For example, in a dissolution of marriage matter, it is prudent for a lawyer to consider all items that may remain undone to complete the dissolution. Some questions to consider are:

- Whether all of the assets have been transferred and if all documents have been signed for the transference of assets;
- Whether all debts have been paid, or a plan for debt payment or refinancing has been made;

- Whether a Qualified Domestic Relations Order (QDRO) or Domestic Relations Order (DRO) has been completed, made an order of the court, and sent to the Plan Administrator or Colorado Public Employees' Retirement Association (PERA);
- Whether the beneficiaries of life insurance benefits and retirement accounts have been changed;
- Whether new life insurance has been purchased, where ordered;
- Whether estate planning has been modified;
- Whether the client understands that his or her health insurance may be terminated and whether he or she has been notified of Consolidated Omnibus Budget Reconciliation Act (COBRA) rights;
- Whether the client has copies of the completed file, including the decree, support order, and separation agreement; and
- Whether the client is aware of his or her appellate rights and deadlines.

§ 22.3 • CASE MANAGEMENT

§ 22.3.1—Domestic Relations Timeline

The timeline for a domestic relations case revolves around three things: the statute requiring at least 90 days to elapse from the time of service of the Petition for Dissolution of Marriage and the issuance of the Decree of Dissolution of Marriage,¹⁰ C.R.C.P. 16.2, and the court's Case Management Order. It would be almost impossible to apply C.R.C.P. 16.2 deadlines to a dissolution of marriage that took only 90 days to complete. However, there are some judges who strive to put cases on a 90-day schedule. Others districts require cases to be resolved or set for trial within 120 days of the filing of the petition. The chief justice of the Colorado Supreme Court has mandated that family law matters be resolved within one year of the filing of process. When there is a conflict between C.R.C.P. 16.2 deadlines and the Case Management Order, the latter should prevail.

Once a Petition for Dissolution of Marriage is filed, a respondent has 20 days to file a response. After the filing of the petition, the court will serve upon parties a Case Management Order, which will order parties to set the matter for an Initial Status Conference, file a Sworn Financial Statement, exchange mandatory disclosures, and take a parenting class. In general, all of the foregoing is to be completed, to the extent possible, at the time of the Initial Status Conference,¹¹ which under the rules is to be set no more than 40 days after the filing of the petition.¹² Some Case Management Orders set a quicker time frame for the Initial Status Conference to be set.

Each court may have its own Case Management Order, and judges expect lawyers to abide by it. Thus, lawyers should read the Case Management Order in each and every case.

The next set of deadlines is keyed off of the permanent orders hearing date. Witnesses must be disclosed no fewer than 60 days before the permanent orders hearing.¹³ Expert reports must be tendered no fewer than 60 days before the permanent orders hearing.¹⁴ Discovery must

be completed no fewer than 30 days before the permanent orders hearing.¹⁵ Finally, a Trial Management Certificate must be prepared and filed no fewer than 10 days before a permanent orders hearing.¹⁶

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

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

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

§ 22.3.2—Sworn Financial Statements

The single most crucial document in a dissolution of marriage matter is the Sworn Financial Statement. The court will always review this document before hearings. When issuing orders, the court will refer back to this document. Sometimes, the Sworn Financial Statement may be the only evidence on a given financial issue. The opposing party and opposing counsel will focus on this document. If there are mistakes in the document, the opposing party will focus in on the error within a "sworn document." The dissolution of marriage process assumes full and fair disclosure of assets, debts, and income. Failure to fully disclose leaves parties open to cases being reopened after the Decree is issued.¹⁷

Oftentimes, clients are not experienced in producing financial statements. Even more often, they are unfamiliar with the legal concepts of "separate" versus "marital" property or debt. They may not understand how often they are paid or what amount is deducted for taxes. Small business owners may not know what their "income" is. Clients may not know how assets are titled, or how debts are held. Many times, clients do not know what they own and do not know a fair value for their assets. Clients may have no idea what the family spends on a monthly basis.

The importance of correct preparation of a Sworn Financial Statement cannot be over emphasized.

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

§ 22.3.3—Initial Status Conferences

The Initial Status Conference is an informal conference between the court and parties and their counsel. It is to be held no more than 40 days after the petition has been filed.¹⁸

In theory, the Initial Status Conference is a time when the court determines if the parties have any agreements that can be made orders of the court, sets a discovery schedule, and sets the next court event. In practice, the Initial Status Conference is where temporary orders are made, either by strong-arming, by agreement, or by default. The court may also enter interim orders to address emergency circumstances at an Initial Status Conference.¹⁹ For some magistrates, setting interim child support and maintenance amounts is an emergency issue. Additionally, discovery discussions begin and often end at this conference. The Initial Status Conference also sets the tone of the case, both for the court and between parties and their counsel.

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

§ 22.3.4—Disclosure

C.R.C.P. 16.2(e)(1) mandates that parties to family law cases owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interest and those of the children involved in the case.²⁰ A party must disclose such information without awaiting inquiry from the other party.²¹ When considering what facts are deemed “material,” the Colorado Supreme Court has stated that it is “simply a fact that will affect the outcome of the case.”²² To ascertain the facts that are likely to affect the outcome, lawyers should ask themselves and their clients questions such as: “If I am on the other side of this case, would I want to know this fact?” and “If the positions were reversed and your spouse withheld this information, would it seem unfair to you?”²³

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

- Current Sworn Financial Statement;
- Most recent three years of income tax returns;
- Last three years of personal financial statements;
- Last three years of business financial statements;
- Real estate documents reflecting the title documents and all documents stating value of all real property;
- All documents creating debt, and the most recent debt statements showing the balance and payment terms;
- All documents identifying any investment, and stating the current value;
- Documents identifying each employment benefit, and stating the current value;
- Documents identifying each retirement plan and stating the current value, and all plan summary descriptions;

- Documents identifying each account at banks and other financial institutions, and stating the current value;
- Documents verifying each income source in the current and prior calendar year, including income from employment investment, government programs, gifts, trust distributions, prizes, and income from every other source;
- Each self-employed party shall provide a sworn statement of gross income, business expenses necessary to produce income, and net income for the three months before filing of the petition or post-decree motion;
- Documents that show average monthly employment-related child care expense;
- Documentation of life, health, and property insurance policies; and
- Documents that show average monthly expense for all recurring extraordinary children's expenses.

Because this list is comprehensive, it can be time consuming for the client to collect all of the necessary documentation and it can be difficult for the lawyer to track and organize the client's information. One of the best ways to initiate the disclosure process with the client is to send a letter detailing all of the requirements. Once the client has had the opportunity to review the letter, the lawyer must discuss with the client the importance of providing full, honest, and complete disclosures, as it can be extremely harmful to the client if the court finds that there was any attempt to conceal or hide facts.²⁴ Clients should be told that a failure to fully disclose can lead to a case being re-opened and re-litigated years later.²⁵

Once the client has completed the disclosures, the lawyer must submit a Certificate of Compliance stating that all mandatory disclosures have been provided to the other party. With the exception of the Sworn Financial Statement and the child support worksheet, the actual disclosure documents themselves are not filed with the court. Under C.R.C.P. 26(g), a party who signs the Certificate of Compliance certifies to the best of his or her knowledge that the disclosures are complete and accurate.²⁶ The client remains under a continuing obligation to update the initial disclosures for the duration of the case.

§ 22.3.5—Discovery

C.R.C.P. 16.2(f) governs the type of discovery that may be permitted in a family law case. Under the Rule, lawyers are permitted to take depositions of parties, experts, and non-parties for purposes of authentication of documents. Lawyers may serve pattern interrogatories and requests for production of documents and a limited number of non-pattern interrogatories and requests for production of documents after the Initial Status Conference. At the Initial Status Conference, parties and their lawyers may request other discovery, such as appraisals and valuations.

Under the Rule, no additional formal discovery is permitted unless ordered or authorized by the court. Lawyers are well advised to identify all discovery issues before the Initial Status Conference. However, the Rule does provide that the court "shall grant all reasonable requests for additional discovery for good cause defined in C.R.C.P. 26(b)(2)(F)."²⁷ Before a lawyer requests any discovery beyond what is mandated, the lawyer should discuss the request with the client, as there can be pros and cons to requesting additional discovery, including the expenses incurred in

both obtaining and responding to formal discovery requests. The client should be aware that any request made to the opposing party likely will be returned in kind.

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

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

§ 22.3.6—Non-Expert Witnesses

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

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

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

§ 22.3.7—Expert Witnesses

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

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

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

Parties may also use their own experts for issues.²⁸ However, the court always has the authority and mandate to control the management of a case, and can potentially bar a party from having his or her own expert on an issue.²⁹ In practice, the non-joint expert will really be a rebuttal expert where the issue has also been the subject of a report by a joint expert.³⁰

Careful attention should also be paid to the choice of experts who are not joint experts. Again, it is the lawyer who is likely to be blamed for the choice of an expert if an opinion is not what the client wanted. Most often, the clients are not in a position to choose an expert, and rely on the lawyer's choice. Clients also may not understand that just because they have hired and paid for the expert does not mean that they dictate the expert's opinion. Clients should be advised of the likely cost of the expert.

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

Lawyers must also disclose experts, and tender expert reports within the deadlines set for such disclosures.³¹ Failure to do so will lead to the expert and his or her report being excluded at trial.

Finally, before hiring and paying for a non-joint expert, the lawyer should satisfy him- or herself that the expert will be admissible under C.R.C.P. 16.2(b) and 16.2(f), CRE 702,³² and, when applicable, *People v. Shreck*.³³ Clients who find their experts rejected at trial by the court will consider malpractice claims, especially if the lawyer never advised the client of the possibility of such exclusion of evidence.

§ 22.3.8—Child And Family Investigators And Parenting Evaluators

When divorcing parents cannot agree upon parenting issues, a Child and Family Investigator (CFI) is often appointed by the court to investigate the family and file a written report and recommendations with the court regarding parenting time and decision-making authority.

CFIs may be lawyers or may be mental health professionals. Their authority derives from C.R.S. § 14-10-116.5. They are governed by Chief Justice Directive 04-08. CFIs are not experts, but they do have to abide by certain standards.

CFIs carry a significant amount of weight in any family law matter. In preparing their reports, they address a client's psychological profile, family history, dynamic within the marriage, parenting ability, and general personal shortcomings. The written report of a CFI is extremely personal to the client, and deals with those things most near and dear to him or her. The CFI's report can literally have an impact on a family that lasts years. The report can also result in a psychic injury to a client.

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

Parenting evaluators may also be appointed in a matter, pursuant to C.R.S. § 14-10-127. A parenting evaluator is an expert witness. Generally, parenting evaluators are appointed upon motion of a party after a CFI has issued a report and recommendations that the party was unsatisfied with. As an initial matter, a parenting evaluator is paid 100 percent by the party requesting the appointment.

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

§ 22.3.9—Alternative Dispute Resolution

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

There are some situations where mediation will not be possible, will not be at all effective, or will serve as a medium for continued abuse of one party by the other. In general, these

instances are few and far between, but the practitioner should be cognizant enough of the dynamics between the parties to gauge whether mediation should be avoided.

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

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

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

§ 22.4 • TRIALS

§ 22.4.1—Trial Management Certificates

Trial Management Certificates are required to be filed with the court no less than 10 days before any hearing.³⁴ The importance of Trial Management Certificates cannot be over-emphasized. The court will look to the Trial Management Certificate before the hearing, and often, after the hearing while preparing orders. More and more often, judges are dispensing with opening statements and closing arguments. As a result, a party's position needs to be clearly and fully set forth in the Trial Management Certificate. Points of law that the court needs to be aware of must also be found in the Trial Management Certificate.

Generally, courts will deem admissible all exhibits that are not objected to in the Trial Management Certificate. Courts will also allow the testimony of any witnesses disclosed on the Trial Management Certificate, and not objected to, and will not allow testimony from witnesses not on the Trial Management Certificate.

§ 22.4.2—Preparing The Client

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

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

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

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

§ 22.4.3—Witnesses

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

§ 22.4.4—Exhibits

All exhibits should be exchanged with the opposing party at least 10 days before hearing. Any objections to exhibits should be noted in the Trial Management Certificate, or in a pre-trial conference.

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

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

§ 22.4.5—Opening And Closing

The opening statement and closing argument are becoming rare in many courtrooms. Often times, judges rely on the Trial Management Certificate for a summary of what will be presented, a recitation of what relief each party is seeking, and relevant law. Judges will then use the limited court time parties are given to hear testimony only, and dispense with the opening statements and closing arguments. Lawyers need to present their evidence in a way that makes the client's position and the relief requested very clear. Lawyers should not rely on a closing argument to "connect the dots," as they may not be able to make them. And finally, the Trial Management Certificate should be clear and complete.

§ 22.4.6—Lawyer Preparation

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

§ 22.4.7—Limited Hearing Time

Courts are giving parties and their counsel less and less time for hearings. The court must give parties enough time during a hearing to afford them due process of law.³⁵ However, lawyers must object when given too little opportunity to be fully heard.

§ 22.4.8—Continuances

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

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

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

§ 22.4.9—Appeals

Clients who have gone to trial should be advised in writing that they have 45 days to appeal final district court rulings,³⁶ and 15 days to appeal a magistrate's final ruling to the district court.³⁷

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

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

§ 22.5 • OTHER AREAS

§ 22.5.1—Marital Agreements

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

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

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

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

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

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

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

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

§ 22.5.2—Qualified Domestic Relations Orders And Domestic Relations Orders

There are five distinct tasks involved with Qualified Domestic Relations Orders (QDRO) and Domestic Relations Orders (DRO)³⁸:

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

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

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

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

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

Errors concerning QDROs and DROs are very difficult to correct. QDROs are governed by the Employee Retirement Income Security Act (ERISA). When there are issues that arise which would require the plan administrator to be made party to a case, the case must be removed to federal district court. DROs are governed by Colorado statute, but the district courts have no authority to enter orders contrary to PERA statutes.

Lawyers are well advised to continue their engagement with the client until the court approved QDRO or DRO is formally submitted to the plan participant. It is not a good idea to simply tell clients the QDRO or DRO must be completed and submitted to the plan administrator, and then terminate representation. Many lawyers choose to have a lawyer who specializes in division of retirement assets handle the QDRO or DRO drafting process. If so, the lawyer should

Speak with the person to be drafting the QDRO or DRO before a separation agreement is signed in order to ensure that all necessary terms of division have been discussed and agreements reach on the same.

§ 22.5.3—Maintenance Terms

Maintenance terms in separation agreements should be clear. Agreements regarding maintenance should state the date that the obligation begins and, where applicable, when the obligation ends. If maintenance is to be non-modifiable, that fact should be stated very clearly in the agreement.³⁹ The agreement should clearly state if maintenance is to continue after the death of either party, or continue after the remarriage of the obligee.⁴⁰ The separation agreement should state that maintenance is to be taxable as income to the obligee, and tax deductible to the obligor.

§ 22.5.4—Bankruptcy

Bankruptcy is a specialized area of federal law that should not be dabbled in. If your practice does not include a significant amount of bankruptcy work, and a client indicates that he or she or his or her spouse may be filing for bankruptcy protection either before, during, or after a dissolution of marriage, refer that client to a competent bankruptcy lawyer.⁴¹

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

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

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

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

Further, debtors who make a property payment to an ex-spouse pursuant to court order within the look-back period (one year from the time of the filing of the bankruptcy petition for “insiders,” 90 days for all others) may be deemed to have made a preferential payment if all necessary factors are present. A bankruptcy trustee in certain circumstances could demand that pay-

ment made to an ex-spouse pursuant to the property distribution orders be returned to the bankruptcy trustee.

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

§ 22.5.5—Taxes

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

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

- It will sometimes be advantageous for a client and his or her spouse to file joint income tax returns for the year that they are divorcing. However, tax returns are to be filed based upon the parties' marital status as of December 31. If parties are reaching a settlement near the end of a year, the option of requesting that the decree be entered after January 1 of the next year should be extended to the client. This request might not be granted by the court, however.
- If parties will not be filing an income tax return together during the divorce process, the separation agreement or court orders should address which party is to claim which deductions, such as the mortgage interest deduction and property tax deductions, for the tax year. Parties should also discuss which party will be claiming the interest or dividend income on jointly held assets, such as jointly held brokerage accounts. If a solely titled asset has been liquidated and there are income tax consequences, such as with the liquidation of a retirement asset, parties should address which party will be declaring the resulting income and how that liability will be equalized, if at all. Parties should reach agreements on dividing carry over loss from prior years.
- Head of household filing status is quite advantageous for most taxpayers. If parties are dividing parenting time equally, there should be a discussion about which parent can file as head of household during a given year, when applicable.
- Child support is not taxed to the obligee, and is not tax deductible to the obligor.
- Parents of minor dependent children may agree upon who claims the children as exemptions on their income tax returns annually. Parties should make that agreement as part of a separation agreement, or request that the court resolve the issue at permanent orders. If both parties claim the same children as exemptions on their income tax returns, their risk for audit increases.
- Only the parent who claims the child as a dependent on the income tax return may receive the child tax credit.

- The child care deduction can only be claimed by a parent who is entitled to file as head of household, who has the child in his or her care for 50 percent of the year or more, and who has actually paid child and dependent care expenses.
- Maintenance is taxed as income to the obligee, and is tax deductible to the obligor. For maintenance to be deductible, it must meet IRS rules. Just calling a payment maintenance does not automatically make it so.
- Each party must list the same amount of maintenance paid/received during a year in their income tax returns. If parties declare differing amounts, their risk for audit increases. If the parties have a maintenance agreement whereby maintenance owed is triggered by some contingency, parties should agree to a process whereby they can come to an agreement on the amount of maintenance paid each year.
- Parties should be cognizant of recapture rules if they intend to have a large amount of maintenance paid over a short amount of time.
- For property that increases in value, lawyers should determine the client's basis in the property, estimate what capital gains taxes would be due if the property was sold, and account for tax liability in the valuation of the property.
- Early distribution of retirement assets will trigger income taxes and sometimes penalties.
- It is generally not advisable for a party enter into an agreement regarding how a certain year's income tax liability will be divided if the parties are not completely certain of the amount of that liability. For instance, sometimes spouses divorcing in February will agree to equally divide the income tax liability for the prior year. However, it may come to pass in September that parties realize that their liability is much higher than they believed in February, and one or both parties are not able to pay the liability. If one party is a self-employed person, the income tax liability may be very hard to determine until some time into the next year. If the self-employed person failed to pay estimated taxes, the liability can be quite large, and the spouse may not have the information to gauge the liability.
- It is always advisable to enter into agreements that address both liabilities and refunds. Although parties may believe they have a liability for a certain year, by the time returns are prepared, it may be discovered that actually a refund is due.
- It is generally not advisable for a party to enter into an agreement regarding how a certain year's income tax refund will be divided unless the parties are certain of the refund amount.
- Lawyers should draft separation agreements to include a provision for how audits of income tax returns filed during marriage will be handled, to include paying amounts due to the taxing authority, dividing refunds, and handling the costs of the audit.
- Lawyers should advise clients that it is not simply employment that creates income for child support (and sometimes maintenance) purposes. Parties with minor children, and parties with modifiable maintenance terms, may be required to exchange financial information with the other party, including income tax returns. Clients should be advised that events like the sale of property that creates capital gains, receiving money from a retirement fund, winnings income, inheritances, and some personal injury settlements create income for support purposes. Modifiable support payments may be modified based upon those types of income.

- Corporate stock redemption may trigger income to the spouse whose stock was redeemed, or to the business owner, if the business owner had an obligation to redeem the stock. The forgiveness of certain loans by a corporation can be income to the shareholder obligor. A self-employed person who has used corporate funds for personal expenses may receive a W-2 for the value of the corporation paying those personal expenses.
- Clients can deduct lawyer fees for advice related to federal, state, and local taxes on their income tax returns.

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

§ 22.5.6—Death And Divorce

A party may die during the divorce process. Clients should be advised that they may change their estate planning documents during divorce, to include nominating persons to make medical decisions for them if they become unable to do so, and nominating a conservator and guardian. Parties may also change the titling on joint tenancy with right of survivorship property to a tenancy in common.⁴² Clients may petition the court to allow a modification of life insurance policies, including the beneficiaries thereof.⁴³ Clients who are ill should be advised that they may request a preferential hearing date for the permanent orders.⁴⁴

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

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

Colorado has a statute that automatically revokes probate and non-probate transfers between divorced spouses.⁴⁵ Additionally, separation agreements routinely state that each spouse will no longer be a beneficiary of the estate, death benefits, or retirement benefits of an ex-spouse. However, life insurance companies will only pay death benefits to the listed beneficiary. If an ex-spouse is inadvertently still listed as a beneficiary at the time of death, the ex-spouse will receive the benefit. It will be up to the contingent beneficiary, or the beneficiary noted in a separation agreement or court order, to recoup the benefits from the ex-spouse.

Benefits governed by ERISA will be paid only to the designated beneficiary. If that beneficiary inadvertently remains the ex-spouse, the ex-spouse will be paid the benefits.⁴⁶ Because ERISA is federal law, it pre-empts the state revocation law. Benefits governed by PERA will be

paid according to C.R.S. §§ 24-51-101, *et seq.*, notwithstanding the revocation statute or language in a separation agreement. Whereas an ex-spouse who receives benefits because of the mistake of failing to remove the ex-spouse as a beneficiary after divorce will likely have a claim brought against him or her to return the benefits, there is often significant cost associated with such an action.

§ 22.5.7—Criminal Law And Divorce

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

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

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

§ 22.5.8—Competency Of Clients

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

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

If a lawyer is representing a client whose mental health status is impeding the ability of the client to effectively participate in the family law matter, the lawyer may wish to have the court appoint a guardian *ad litem* for the client, as suggested by Colo. RPC 1.14 (client under a disability) and C.R.C.P. 17(c). If the client objects, this could very well lead to the client terminating the services of the lawyer. If the client then goes on to hire subsequent counsel, that lawyer should require that a hearing on the competency of the client is held before the court.⁴⁷

A client shall be appointed a guardian *ad litem* for a dissolution of marriage action if the client (1) is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding; (2) is incapable of making critical decisions; (3) lacks the intellectual capacity to communicate with counsel; or (4) is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue his or her own interests.⁴⁸

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

§ 22.5.9—Collaborative Law

Collaborative law is a mode of representation that focuses on resolving divorce issues without going to court. Parties and their counsel enter into a four-way contract agreeing to proceed with negotiations and committing to not litigate. Parties and counsel agree to work cooperatively to reach settlement, to fully disclose all information, and to keep the needs of both parties as well as the children as the focus of the process. Generally, the collaborative law agreement includes a requirement that, if the process breaks down, the lawyers will withdraw from representing their respective clients, and will not handle any subsequent court proceedings.

Colorado Ethics Opinion 115⁴⁹ concludes that a non-consentable conflict arises in the collaborative law context when the lawyers and parties come to an agreement that the lawyers will not represent the clients if the matter ultimately goes to court. The Opinion states that this is a conflict of interest under Colo. RPC 1.7(a)(2), as it creates a responsibility to a third party (the opposing party) that limits the lawyer’s ability to represent his or her client.

Colorado appears to be the only state that holds this view of collaborative law. The American Bar Association recently issued a Formal Opinion concluding that all aspects of collaborative law are consistent with the rules of professional conduct as a species of limited representation.⁵⁰ However, the ABA Opinion warns that clients must be fully advised of the terms of the collaborative procedure.

At this time, Colorado practitioners should practice collaborative law without an agreement to disqualify themselves from litigation should the dissolution issues need to be resolved by the court. Alternatively, the parties can sign an agreement between themselves that they will terminate their lawyers' services should the dissolution issues fail to resolve, but the lawyers may not be a part of that agreement.⁵¹ Clients should be very thoroughly advised about the collaborative law model so that they can meaningfully consent to this kind of limited representation. Clients should also be advised that the collaborative law process is not necessarily less expensive than a case that proceeds along a litigation model.

Lawyers who practice collaborative law are also well advised to be aware they are held to all of the rules of professional conduct. The collaborative law model can stretch such responsibilities as those of unfettered advocacy, confidentiality, and competence.

NOTES

1. C.R.C.P. 16.2(a).
2. C.R.C.P. 16.2(g).
3. The chief justice of the Colorado Supreme Court has mandated that matters be resolved and off of the court's docket in no more than one year.
4. Stephen Masciocchi, "Internet, E-Mail and Encryption: Privilege, Confidentiality and Malpractice Risks," 27 *Colo. Law.* 10, p. 21 (Oct. 1998).
5. Reba J. Nance, "Law Practice Management Tips," 34 *Colo. Law.* 43 (April 2005).
6. See www.microsoft.com/downloads/details.aspx?FamilyID=144e54ed-d43e-42ca-bc7b-5446d34e5360&displaylang=en to remove metadata from Microsoft programs.
7. Colo. RPC 1.0(b) and (e), and Cmt. 1.
8. Colo. RPC 1.4 and 1.5. *See also* John Lebsack, "Confirm Lawyer Fees in Writing: Court Changes Colo. RPC 1.4, 1.5," 29 *Colo. Law.* 6 (2000).
9. E. Michael Canges and Jerre Dixon, "Whoops! Disengagement," 33 *Colo. Law.* 55 (May 2004).
10. C.R.S. § 14-10-106.
11. C.R.C.P. 16.2(e)(2).
12. C.R.C.P. 16.2(c)(1)(E).
13. C.R.C.P. 16.2(e)(3).
14. C.R.C.P. 26(a)(2)(B); C.R.C.P. 16.2(g)(5).
15. C.R.C.P. 16.2(f)(5).
16. C.R.C.P. 16.2(h)(1).
17. C.R.C.P. 16.2(e)(10).
18. C.R.C.P. 16.2(c)(1)(E).
19. C.R.C.P. 16.2 (c)(2)(D).
20. C.R.C.P. 16.2 (e)(1).
21. C.R.C.P. 16.2(e)(2).
22. *See* David Johnson, *et al.*, "New Rule 16.2: A Brave New World," 24 *Colo. Law.* 101 (Jan. 2005), *quoting Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791, 795 (Colo. 1993).
23. *Id.*
24. *Id.*
25. C.R.C.P. 16.2(e)(10).

26. *Id.*
27. *Id.* See also C.R.C.P. 16.2(f)(5).
28. C.R.C.P. 16.2(g)(3).
29. C.R.C.P. 16.2(b); C.R.C.P. 16.21(f).
30. C.R.C.P. 16.2(g)(3).
31. C.R.C.P. 16.2(g)(5).
32. See also *Tri-State Generation and Transmission Co. v. City of Thornton*, 647 P.2d 670, n. 12 (Colo. 1982); *Zick v. Krob*, 872 P.2d 1290 (Colo. App. 1993).
33. *People v. Shreck*, 22 P.3d 68 (Colo. 2001).
34. C.R.C.P. 16.2(h).
35. *In re Marriage of Goellner*, 770 P.2d 1387 (Colo. App. 1989).
36. C.A.R. 4(a).
37. Colorado Rules for Magistrates 7(a).
38. A DRO is used to divide a Colorado Public Employees' Retirement Association (PERA) Defined Benefit plan, Defined Contribution Plan, and 401(k) defined contribution plan. PERA is governed by C.R.S. §§ 24-51-101, *et seq.*
39. *Sinn v. Sinn*, 696 P.2d 333 (Colo. 1985) (only where parties have expressly agreed to preclude modification should maintenance be incapable of modification).
40. See C.R.S. § 14-10-122(2) (unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated up the death of either party or upon the remarriage of the person receiving maintenance). See also *In re Parsons*, 30 P.3d 868 (Colo. App. 2001) (to overcome the statutory termination upon remarriage, an explicit reference to the continuation of maintenance after the recipient's remarriage is necessary).
41. The authors, for example, consulted with Bruce Bernstein regarding this section of the Chapter. Any errors or omissions in this section, however, are ours.
42. *Taylor v. Canterbury*, 92 P.3d 961 (Colo. 2004).
43. No petition is needed if the life insurance beneficiary was not the spouse or the children of the marriage when the petition was filed.
44. C.R.S. § 13-1-129.
45. C.R.S. § 15-11-804.
46. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *In re MacAnally*, 20 P.3d 1197 (Colo. App. 2000).
47. *In re Sorensen*, 05CA0542 (Colo. App. 5/31/2007).
48. *Id.*
49. CBA Ethics Op. 115 (Feb. 24, 2007).
50. American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Op. 07-447, Ethical Considerations in Collaborative Law Practice, Aug. 9, 2007.
51. See Scott R. Peppet, "Colorado Ethics Opinion 115: The Next Steps for Colorado's Collaborative Lawyers," 36 *Colo. Law.* 37 (Sep. 2007).

