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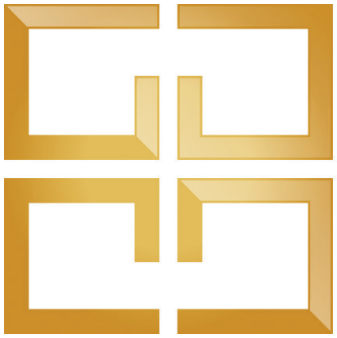

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Summer Meeting 2019

Family Law Section

July 11 – 14, 2019

The Saratoga Hilton
Saratoga Springs, NY

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Program Title: **Family Law Section Summer Meeting 2019**
Date/s: July 11-14, 2019 Location: Saratoga Spring, NY

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Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

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☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Family Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

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Law school _____

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Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ Ad Hoc Committee on Domestic Violence (FAM6600)
___ Ad Hoc Committee on Senior Family Lawyers (FAM6100)
___ Adoption (FAM1100)
___ Alternative Dispute Resolution (FAM4000)
___ Amicus (FAM4400)
___ Annual Meeting (Jan) & Summer Meetings (FAM5600)
___ Bylaws (FAM4600)
___ Child Custody (FAM1600)
___ Continuing Legal Education (FAM1020)
___ Ethics (FAM3900)
___ Family Court (FAM2100)
___ *Family Law Review* & Publications (FAM5700)
___ Fellowship/Scholarship (FAM6300)
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___ Lawyers for Children (FAM5900)
___ Legislation (FAM1030)
___ LGBT (FAM5500)
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ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2011 and prior	$275
Attorneys admitted 2012-2013	185
Attorneys admitted 2014-2015	125
Attorneys admitted 2016 - 3.31.2018	60

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Attorneys admitted 2011 and prior	$180
Attorneys admitted 2012-2013	150
Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60

OTHER

Sustaining Member	$400
Affiliate Member	185
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Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2018

NYSBA

TABLE OF CONTENTS

Forensic Puzzles: Deeper Drive into Hidden Income and Assets, Lifestyle Analysis And Forensic Accounting

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Forensic Puzzles

Family Law Section
New York State Bar Association

Summer Meeting July 12, 2019

Stacy Preston Collins, CPA/ABV/CFF
Michael J. Raymond, CPA/ABV/CFF

Agenda

Hidden Income
Lifestyle Analyses
Hidden Assets
Cash Businesses

- Clues
- Means
- Procedures
- Case studies

Hidden Income

Clues

- Standard of living appears to exceed income.
  - **Could also be funded by debt**

- The level of asset purchases are higher than expected, given reported income.
  - **Expensive cars, homes**

- Substantial cash accumulation or spending by either party.

- Operates business inherently susceptible to cash
  - **Landscaper**
  - **Contractor**
  - **Restaurant**

- Less common:
  - **Compensation through goods or services.**

Hidden Income – How It Can be Carried Out

By Non Business Owners

- Wages
  - **Paid for employment with cash – for ex., nanny**
  - **Payment in kind**

- Deferring receipt of income

- Interest and Dividend / Capital Gain Income
  - **Put savings, brokerage accounts, Certificate of Deposit ("CDs") in another person's name**

- Rental Income
  - **Non disclosure of rental income received in cash**

- Other Cash Flow (not income)
  - **Borrowing on a Home Equity Line of Credit to pay for living expenses**

Hidden Income – How it Can Be Carried Out **By Business Owners**

- Perquisites – personal expenses paid by a business

- Payment in kind – for ex., general contractor or landscaper

- Deferring receipt of income

- Accepting cash from customers and not recording the income

- Shareholder loan receivable on the company's books – may be previously taxed – not on tax return

- Overpaying a vendor and getting a kickback in return

- Creating bogus vendors and expensing the payments (see example)

Forensic Puzzle #1 – the Hidden Bonus

- Lawyer at large law firm
- Income was down leading to divorce
- Divorced commenced in March

Puzzle: Did he have a bad year or was he trying to hide money?

Clues

Timing of prior bonuses – usually paid in February – none this year

Why?

Forensic Puzzle #1 - Solution

- Interviewed CFO of firm
- Inquired about payment of current year bonuses and timing
- Turned out the lawyer voluntarily deferred bonus until April (post DOC)

Next puzzle – where did it go?

- **Reviewed support checks to spouse – new checking account not previously disclosed**
- **Subpoena sent to bank – statements obtained/reviewed**
- **Voila! Missing bonus found!**

Forensic Puzzle #2 – the Consulting Fee Question

- Husband was a successful doctor with a large medical practice
- Wife had concerns about hidden income

Puzzle: Reviewed general ledger – saw large consulting fees paid to an unknown vendor – why?

- **Found the address of the vendor in the public domain**
- **Turned out it was the girlfriend's house**
- **Vendor was a shell company used to divert money to the girlfriend**

Forensic Puzzle #3 – The Back Story

- The husband is a carpenter near the Finger Lakes
- He works 40 hours per week
- He has been working in the carpentry business for the past 20 years
- He receives a W-2 from his employer, Cut A Rug, Inc. reflecting $35,000/year

Forensic Puzzle #3 - Clues

- The family lives in a home with annual property taxes of $5,000

Puzzle: how can they afford this obligation?

According to the wife, the family goes to the town treasurer once per quarter and pays cash for their property taxes

Forensic Puzzle #3 – A Possible Solution

Determine if the industry in which the husband works is known for paying
cash wages to employees

Common industries include: Home repairs, home services, car repair services,
household care services, transportation services, moving services

Review the husband's W-2 to determine his reported income.

Compare this to what he could be expected to earn

https://www.labor.ny.gov/stats/lswage2.asp

Forensic Puzzle #4 – The Back Story

- The wife owns three local Italian restaurants in Buffalo NY near
  Niagara Falls; husband does not work

- The family goes to Lake Como Italy each summer for four months and
  rents a modern six bedroom cottage on the lake

- The husband purchased a Maserati in Canada using Canadian dollars

- He takes his Chow Chow for weekly spa appointments

Forensic Puzzle #4 – The Back Story

- The restaurants accept payment with credit card or cash
  - **Cash can be either US Dollars or Canadian Dollars**

- Husband said that wife keeps Canadian Dollars in a safe

- Sales at the three stores combined total $1.5 million sales and $300,000 of net income

- Reported take home income by wife is $200,000/year (wages of $150,000 + cash distributions of $50,000)

Forensic Puzzle #4 – Clues

- Reported take home income by wife is $200,000/year
  (wages of $150,000 + cash distributions of $50,000)

- The parties' lifestyle appears to exceed their income

- Large purchases made with cash

Forensic Puzzle #4 – Some Possible Solutions

Look for personal expenses paid through the business (Italian trip recorded as a business trip?)

Try to back into the solutions. Determine from review of the bank account statements that the Maserati was not purchased with money from any other source

Compare each the husband's and wife's representation of spending with income

Lifestyle Analysis

Why?

- Disconnect between reported income and lifestyle
- Educate client as to lifestyle relative to post-divorce income
- Establish basis for support
  - **Family money supporting lifestyle**
  - **Support from trust(s)/Separate Property**
  - **Public servants/celebrity**
- Illustrate a (sudden?) change in lifestyle
- Highlight historical items that may not/cannot continue going forward
- Anomolies, Non-recurring events

What is Needed

- Monthly or periodic statements for all accounts
  - **Bank accounts, Debt, Credit Cards, Investment Accounts - Just a starting point**
- Cancelled Checks

    - **Payee, memo entries – not evident from the statements alone**
- Invoices, Receipts, Bills, Wire documentation
    - **Further insight such as the address for which a utility bill was paid, men's or women's wear, source/destination of funds, etc.**
- Complete Statements of Net Worth
- Tax returns, W-2s, wage statements, 1099s
- Business Records?

Forensic Puzzle # 5 - Background

- Client is anxious concerning marital vs. post-divorce lifestyle

- Client has no real understanding of lifestyle in monetary terms

- Assets comprised largely of Husband's separate property

- Will my needs be met considering likely equitable distribution and support?

Process

- Request documents
- Schedule activity

- Classify activity (typically SNW categories to begin with)
- Client input regarding activity and classification
- Remove non-recurring events/Normalize
- Pivot tables to slice and present data in useful form
- Graphic illustration
    - **Spending over time**
    - **Categorical spending**
    - **Income – support and return on assets**

Findings/Results

- Normalized lifestyle trending at roughly $9,000/month

- Estimated after-tax return on investable assets of roughly $450,000 is $1,500/month

- Maintenance of $7,000/month, estimated to yield $5,600/month after tax.

- Anticipated income will not support normalized lifestyle

- Discussion as to what is necessary/what can be eliminated

- Frame maintenance/support discussions

Limitations

- ATM/Cash Withdrawals?????
- Discovery Limitations
  - **Historical statements**
  - **Memory**
- COST! - Obtain electronic records wherever possible
- Which years/number of years
- Pre-marital/post marital
- Non-recurring expenses
- Gifts between the spouses
- Client representations – he said/she said

HIDDEN ASSETS

Hidden Assets - Summary

- Hidden assets are sometimes harder to find than hidden income.
- Income from unknown sources can alert you to hidden assets

- Sometimes personal expenses can be disguised as business assets. Or personal assets can be disguised as business assets
  - **For example, that machinery and equipment on the books is actually spending for the parties' daughter's wedding.**
  - **Personal bank account on books of business**

Hidden Assets - Clues

- Review Schedule B in the parties' personal tax return (interest/dividends)
- Identify banks/brokerage firms and account #s
- Do those accounts still exist?

NOTE – careful – some interest/dividend income may be passed through from an entity and not actually received (phantom)

Other parts of a tax return to review

Income from partnerships and S-corps (Schedule E)
Rental Real Estate (Schedule E)
Sales of assets from accounts (Schedule D).

Loan applications showing assets unknown

Unlike a divorce, when someone is getting a loan, they may want to paint a bright financial picture for the lender

Consider issuing subpoena to bank (also for income)

Credit memos?

Receipts/payments from/to obscure/generic LLC names

Credit cards are being paid, but you cannot tell where they are being paid from.

If you have credit card statements, and cannot tell where they are being paid from, it may be from a hidden asset. Conversely, if you have the bank statements and cannot match up all the credit card payments to the credit card statements, there could be a hidden credit card.

Large expense items (clothes, art, gift cards, jewelry…etc.)

Note these can be converted to cash, and can be a source of hidden assets.

Hidden Assets – How It Can Be Carried Out <u>By Non Business Owners</u>

Over-withholding on taxes to get a large refund after the divorce

This should be fairly simple to detect by an accountant's review of the tax returns, assuming the return was prepared

Interest and Dividend / Capital Gain Income

Put savings, brokerage accounts, Certificate of Deposit ("CDs") in another person's name.

Hidden Assets – How It Can Be Carried Out **By Business Owners**

Ownership changes in a business

Confusing journal entries to move activity from 1 account to another
(more on that later)

Leaving assets or money on the books of the Company. This could be
in the form of not taking distributions

Under-reporting of inventory (overstates expenses and understates
income)

Forensic Puzzle #6 – the Jeweler

- Reported inventory was about $700,000 almost every year
- Obtained average cost of a jewel – did a rough calculation how many jewels would be in inventory
- During site visit, saw many more
- From interview with wife, found alternate manual records of the jewelry and added them up
- Actual inventory = almost $19 million!

Forensic Puzzle #7 – the Hidden Bank Account

- Company's books were audited each year
- Buried in the general ledgers was an account called "Capital One Special" that did not appear in the financials
- Turned out this was an additional bank account to fund the President's personal expenses
- Example of a journal entry for this account:

Forensic Puzzle #8 – The Equipment Manufacturer

- Reported inventory was very low

- Client indicated it was historically under reported in order to depress income
- Took the unusual step of performing an inventory count
- Many large items were not on the Company's inventory compilation
- Next question –how to value it?

Forensic Puzzle #9 – the House

- Husband bought a house for his girlfriend and had 1 of his businesses pay for it
- Because the business tax returns were on extension, it had not previously been identified as a business asset
- He denied buying the home during his EBT
- Ultimately a Private Investigator tracked them down to a home that was unfamiliar
- Subpoena then issued to bank for the Company; statements provided showing the outflow

Forensic Puzzle #10 – Business Assets that were Expensed

- The IRS permits expensing of business assets up to $1MM (in 2019) under Section 179
- This reduces income and will not increase assets

- Review of tax returns and general ledgers can identify asset purchases – may include vehicles, machinery and other assets

Practice Tips

- Consider getting copies of prior tax returns from IRS (Form 4506)
- New York State Form DTF-505 – back to 1990
- Consider issuing subpoena to bank for loan applications and other info
- Account analysis of "in's and out's" can be valuable – identify transfers to unknown accounts or previously undisclosed credit cards
- UCC filings

Cash Businesses

- Restaurants/Bars
- Car Washes
- Grocery/Liquor Stores
- Convenience Stores
- Construction/Landscaping
- Wholesale Produce/Meat
- Anything you saw on Breaking Bad and/or Ozark
    - **Think money laundering**

Clues

- Cash paid for various living expenses
- Lifestyle exceeds reported income
- Knowledge of safe deposit boxes, safe(s), stashes of cash
- Notes to family members, "If anything ever happens to me…"

Forensic Puzzle #11 - Background

Court appointed expert appraised interest in a produce and meat wholesaler. During due diligence and in report Neutral stated:

- **Outside accountants do not test inventory, purchases or cost of goods sold**
- **Internal controls ineffective at tracking inventory**
- **Internal controls ineffective at tracking/recording cash sales**
- **There was a change in accountants two years prior to the valuation date and expenses currently recorded appear to**

be inconsistent with expenses previously reported

- **The company was subject to tax audits in the year it changed accountants**
- **The Neutral was not provided access to prior or current accountant workpapers**
- **Source documentation such as "sales tickets" and "cash ledgers" are destroyed each month and only summary schedules maintained**

We are asked to review and comment on Neutral report, with allegations that Parties always lived off cash, with a lifestyle that exceeded reported income

Documents Requested – Why?

- Tax Returns and Financial Statements for five years prior to and through the valuation date

- Sales Journals, General Ledgers (Quickbooks), Check Registers

- Sales Tickets/Invoices, Purchases Invoices

- Bank Statements with check images/cancelled checks

- All other documents and information the Neutral stated reliance on

Analysis

- Review bank statements and cancelled checks
- Review General Ledger activity – only summary level, no detail
- Review purchase invoices
- Review sales invoices
- Prepare financial spreads and analyze gross margin trends
- Compare with industry standards
- Adjust sales to "right size" margins
- Compare to reported sales
- Difference = unreported cash sales?
- Inquire as to cash paid for certain expenses
- Reconcile reported income with lifestyle

Findings/Conclusions

- Margins are much lower than industry composites

- Suggests unreported revenues in notoriously cash business

- Lifestyle analysis not robust due to late retention

- Pending acquisition – Buyer deposed and corroborated unreported revenues of roughly $2 million annually!

- Unreported assets?

Forensic Puzzle # 12 - Background

- Grocery store chain

- 50% interest

- Retained by wife who thought she held 25% (half of husband's interest)

- There had already been a fraudulent conveyance of assets, leaving wife with 25% of shell company, elevating husband to 50% with one other partner

- Collusion with other 50% partner

Procedures

- Among many other analyses, requested and reviewed cancelled checks

- Identified numerous checks endorsed back to the Company

- Circumstance limited to a handful of recurring suppliers, one of which was a produce supplier

Findings

- Suppliers were endorsing checks back to the business and instead being paid cash at 80% of invoice
  - **Business records expense at higher invoice amount, but actually pays just 80%**
  - **Supplier receives cash in excess of what it would, net after tax if it were to report those cash receipts**
  - **Company deducts expense at invoice amount and supplier walks with cash**
- Estimate of net effect on earnings, coupled with other findings = $3 million annually in underreported income

Forensic Puzzle # 13 - Background

- Court appointed to appraise several meat stores/butchers

- Conducted site visits with owner/husband

- Called back to meet with wife and her brother, who worked at stores for some time

- Allegations that there are suit cases of cash in the parties' attic

- Partner was relative of notorious crime boss

- We want YOU to conduct procedures to uncover amount of unreported cash

Conclusion

"Given the stature and notoriety of your husband's partner, I am sure the IRS has an eye on this – if they haven't found anything, what makes you think we will?"

FURTHERMORE, "I am Court appointed and I would need acquiescence of both parties, or expansion of the scope of the Order to undertake that analysis…"

BUT, “you are free to hire your own expert and we will take into account their findings!”

Technology, Social Media and Ethics in the Courtroom

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NYSBA FAMILY LAW SECTION
ANNUAL SUMMER MEETING

JULY 12, 2019

TECHNOLOGY, SOCIAL MEDIA AND ETHICS IN THE COURTROOM

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Contents

ISSUES WITH SOCIAL MEDIA

I. UBIQUITOUS NATURE OF SOCIAL MEDIA

A. Statistics

1. Facebook has approximately 1.8 billion users worldwide, 214 million in USA.

2. 250 billion photos are uploaded to Facebook every day

3. LinkedIn has some 500 million total users.

4. Twitter, created in March 2006, has 321 million active monthly users, with over 500 million tweets made per day as of late 2018.

5. 2018 Pew Research Center Study of social media reports that 69% of the general public uses some kind of social media.

B. Our daily inadvertent exposure to social media and technology

1. GPS tracker and electronic control modules ("black boxes") in motor vehicles

a. When you leave your house, probably the neighbors exterior camera catches you on film. When you are driving your car, if you have a navigation system, signals are sent to a satellite and stored in the cloud. The information is sold to leasing companies, etc., and can also be deemed a business record.

b. rental car companies, fleet trucking companies

2. Home video doorbells and wireless security devices

C. Hacking

D. Use of Social Media in Litigation

1. It is likely that the modern witness has an electronic trail.

2. Issue of who will testify when you get information on social media in your office

3. Google Glass has been used to create day-in-the-life videos of injured individuals.

II. ATTORNEYS' RESPONSIBILITY

A. Rule 1.1 of the ABA's Model Rules, dealing with the duty of competence.

1. Comment 8: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the *benefits and risks associated with relevant technology,*…"

B. Consistent with Comment 8 – NY Rules of Professional Conduct (RPC) 1.1 states:

1. A New York lawyer should: "keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information".

C. Confidentiality Issue - RPC 1.6

1. As part of preserving client confidences, lawyers need to take reasonable care to ensure that only authorized individuals have access to electronic files.

2. "When transmitting any communication that relates to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer used special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of a lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the information is protected by law or a confidentiality agreement."

3. Responding to Negative Online Review

a. Does not trigger the exception to NY Rules of Professional Conduct 1.6 (Confidentiality of Information) that in other circumstances permits a lawyer to reveal confidential information to establish a defense to a controversy between the lawyer and client, or to respond the allegations relative to the lawyer's representation of the client.

D. ABA Formal Opinion 483 (2018) – Lawyer's Obligations after a Data Breach or Cyberattack

1. Before a breach occurs, it is recommended that lawyers design an "incident response plan" designed to identify and stop a breach, mitigate

any loss or theft of data, restore system security and eventually restore the firm's system itself.

2. It is not a violation of Rule 1.6 of Model Rules (dealing with preserving client confidences) if data is lost or accessed if the lawyer made reasonable efforts to prevent the loss or access.

3. There is a duty to inform a current client of a data breach that impacts their material confidential information.

E. Areas of technological competence:

1. Data security
2. Practice management technology
3. Social media competence
4. Technology used by clients to build products or offer services that lawyers have to defend
5. Electronic discovery
6. Technology used to present information in court[1]

F. Court Rules

1. Rules 202.12 (b) and 202.70 (g) of New York's uniform trial court rules requires all attorneys be sufficiently versed in matters relating to their clients technological systems to be competent to discuss all issues relating to electronic discovery at preliminary conferences.[2]

2. if a lawyer lacks the requisite skills and/or resources, the attorney must try to acquire sufficient learning and skill, or associate with another attorney or expert who possess the skills. RPC 1.1 (b).

III. TALES OF WOE – AVOIDING TROUBLE

A. Judges

1. A Wisconsin appellate court held that a judge's undisclosed

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[1] / See Davis and Pulszis, "An Update on Lawyers' Duty of Technological Competence: Part 1", NYLJ, 3/1/19; Part 2, NYLJ, 5/3/19

[2] / Notice amending Section 202.12(b) of the Uniform Rules as well as Rule 1(b) of section 202.70(g) and requiring that in any case "reasonably likely to include electronic discovery" counsel must come to court "sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery" and may bring a client representative or outside expert to assist in such discussion.

22 NYCRR 202.12(c)(3)(i) – At a preliminary conference, a matter to be considered is "retention of electronic data and implementation of a data preservation plan".

Facebook “friendship” with a litigant amounted to objective bias and violated due process. *In re: The Paternity of B.J.M.; Miller v. Carroll (Wis. App. Ct., Feb. 2018)*

2. The Florida Supreme Court, in *Law Offices of Herssein & Herssein, P.a. v. United Servs. Auto. Ass’n*., 2018 WL 5994243 (Fla. Sup. Ct., 11/15/18), in a 4 – 3 decision, held that a judge’s mere Facebook “friendship” with a lawyer involved in the case before him was not a basis for disqualification. In doing so, the judge has rejected a Florida judicial ethics advisory committee advice that judges should not “friend” lawyers who appear before them.

3. A Colorado Appeals Court judge was forced to resign after her former lover disclosed her emails with demeaning references about her colleagues. She referred to a fellow appeals judge, a Latina, as “the little Mexican.” She referred to her ex-boyfriend’s wife, who is Native American, as “the squaw.”

4. A New Mexico judge was forced to resign because of the sexual nature of the text messages he sent to his wife, a court employee in the same courthouse, while he was conducting a jury trial.

B. Lawyers

1. In what is being called the largest E discovery sanction penalty ever leveled directly against an attorney, a Virginia state judge ordered lawyer Matthew Murray to pay $542,000 for instructing his client to remove photos from his Facebook profile, and for his client to pay an additional $180,000 for following the instructions. *Lester v. Allied Concrete Co.*, 2011 Va. Cir. LEXIS 245 (Va. Cir. Ct. 2011 Sept. 6, 2011)
The wrongful death plaintiff lost his young wife in a tragic accident,

IV. LITIGATION HOLDS FOR ESI; SPOILATION

A. Duty to Preserve Evidence

1. Voom HD Holdings, LLC v. Echostar Satellite, LLC, 93 AD3d 22, 939 NYS2d 321 (1st Dept. 2012)

a. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents, which hold is not limited simply to avoiding affirmative acts of destruction; since

computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, the party facing litigation must take active steps to halt that process.

b. The hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting preserved records so that they might be searched by someone other than the employee.

c. The hold should, with as much specificity as possible, describe the electronically stored information at issue, direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease, and describe the consequences for failure to so preserve electronically stored evidence.

2. Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (SDNY 2013)- "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of routine documents."

3. The duty to preserve is extended to electronically stored information, including email and other electronic documents. *(915 Broadway Associates LLC v. Paul, Hastings, Janofsky & Walker*, 34 M3d 1229(A), 950 NYS2d 724 (S.Ct., N.Y. Co., 2012, Fried, J.)

B. Spoliation

1. Spoliation is the destruction or significant alteration of evidence or the failure to preserve property for another's use as evidence in pending litigation or even before litigation is commenced where that litigation is reasonably foreseeable. *Voom HED Holdings v. EchoStar Satellite LLC, supra.*

C. Sanctions for Spoliation

1. *Pegasus Aviation I, Inc. v. Varig Logistica, S.A.*, 26 NY3d 543, 26 NYS3d 218 (2015) – A party that seeks sanctions for spoliation of evidence must show that:

a. the party having control over the evidence possessed an obligation to preserve it at the time of its destruction,

b. that the evidence was destroyed with a "culpable state of mind" and

c. the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense.

2. Relevancy

a. Where the evidence is determined to have been intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed.

b. On the other hand, if the evidence is determined to have been negligently destroyed, the party who seeks spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense.

c. An adverse inference charge may be appropriate even where the evidence was found to have been negligently destroyed.

3. Striking of Pleadings

a. Defendant's pleadings properly struck where defendant destroyed emails relevant to plaintiff's defamation action. Where a party disposes of evidence without moving for a protective order, a negative inference may be drawn that the destruction was willful. Willfulness may also be inferred from a party's repeated failure to comply with discovery directives. *Chan v. Cheung*, 138 AD3d 484, 30 NYS3d 613 (1st Dept. 2016)

4. Adverse Inference

a. Where the spoliation is the result of plaintiff's intentional destruction or gross negligence, the relevance of the evidence lost or destroyed is presumed. Generally, dismissal of a complaint is warranted only where the spoliated evidence constitutes the sole means by which the defendant can establish its defense or where the defendant was otherwise "fatally compromised" or rendered "prejudicially bereft of its ability to defend as a result of the spoliation. Here, given the massive document production and the key witnesses that are available to testify, an adverse inference charge is an appropriate sanction. *Arbor Realty Funding v. Herrick, Feinstein,* 140 AD3d 607, 36 NYS3d 2 (1st Dept. 2016)

D. Smartphone

1. *Leah F. v. Ephraim F.*, 56 Misc3d 1210(A), 63 NYS3d 305 (Family Co., Kings Co., Vargas, J.)(2017 WL 3185118)(Jul. 24, 2017) – Where wife took possession of Husband's smartphone and "copied" it in violation of a court order, the Husband's motion to hold wife in contempt denied upon finding that no prejudice was created that would infringe on rights of either party notwithstanding a finding that the wife violated a clear and lawful mandate of court. In Family Court proceeding, a finding of civil contempt may be established by the well-settled clear and convincing evidence standard. To sustain finding of civil contempt, the court must find that the alleged contemnor violated a lawful order of the court, clearly expressing an unequivocal mandate, of which the party had knowledge, and that as a result of violation a right of a party to litigation was prejudiced.

Nevertheless, wife/her agents precluded from using any copy of the contents of husband's smartphone in this or any other proceeding in Family Court, and that any data or copies of phone retained by wife and her counsel should be returned to husband and his counsel as husband had reasonable expectation of privacy in phone and any evidence obtained through device without his permission should be excluded. affd., *Fruchthandler v. Fruchthandler*, 161 AD3d 1151, 78 NYS3d 214 (2d Dept. 2018)

E. Spyware

1.Where husband installed spyware on the wife's iPhone and then used that spyware to monitor his wife's communications, including more than 200 privileged emails with her attorney, and then purposefully engaged in spoliation of the evidence while simultaneously asserting his Fifth Amendment right against self-incrimination, the Court struck his pleadings seeking spousal support, equitable distribution and counsel fees. *Crocker C. v. Anne R.*, 58 M3d 1221(A) (Supreme Court, Kings Co., 2018, Sunshine, J.)

V. FACEBOOK POSTS AND PRODUCTION OF FACEBOOK POSTINGS – The Game Changer - *Forman v. Henkin*, 30 NY3d 656, 70 NYS3d 157 (2018)

A. Prior to Forman

1. Factual predicate required – Forman effectively overrules *Tapp v. NYS Urban Dev*., 102 AD3d 620 (1st Dept. 2013) which required defendant seeking disclosure from a plaintiff's Facebook account to establish a factual predicate by identifying information in the account that "contradicts or conflicts with the plaintiff's alleged restrictions, disabilities, and losses, and other claims."

B. Five Takeaways from Forman

1. Material and Necessary Standard

a. There is nothing so novel about Facebook materials that precludes the application of NY's long-standing disclosure rules to resolve disputes, i.e., the "material and necessary" standard enunciated by CPLR 3101(a).

b. In a contested custody action, the husband sought an order directing wife to turn over printouts of all pictures, posts and information posted on her Facebook pages over 4 years, claiming such disclosure would be relevant and material to the issue of the amount of time the wife had

spent with the child since birth. The court held that the time spent by the parties with the child may be relevant and material and thus ordered defendant to produce for an in camera review printouts of her Facebook postings depicting or describing her whereabouts, outside the New York City area, from the time of child's birth to the commencement of the proceeding, and to provide an affidavit describing the printouts in general terms and also requiring defendant to provide an authorization permitting the court to have access to her Facebook postings during the applicable time period. The court also *sua sponte* directed plaintiff, the moving party, to produce all of defendant's postings that he possessed or had access to with an affidavit stating that they represent all such Facebook postings possessed by or available to defendant in their entirety during such time. *A.D. v. C.A.*, 50 M3d 180, 16 NYS3d 126 (Sup. Ct., Westchester Co., 2015, Ecker, J.)

c. In awarding the father custody, the court took into account as part of the mother's inappropriate behavior, her utilization of Facebook to insult and demean the child, who was then 10 years old, by, among other things, calling him and "ass hole." She testified without remorse that she did so because that is what "[h]e is," and she thought it was important for her Facebook friends to know this. [Court: "Charitably stated, her testimony reflected a lack of insight as to the nature of her conduct toward her oldest child."] *Melody M. v. Robert M.,* 103 AD3d 932, 962 NYS2d 364 (3d Dept. 2013)

d. Audit Trail of Electronic Records

(1) Vargas v. Lee, 170 AD3d 1073, 96 NYS3d 567 (2d Dept. 2019) - Plaintiff moved to compel the hospital to produce the audit trail of the plaintiff's electronic medical records from May 1, 2012 (the date of the surgery) until May 17, 2012. In the trail is the metadata that essentially indicates what changes are made to electronic record each time it was accessed. Citing *Forman*, the Appellate Division held that the portion of the audit trail at issue was reasonably likely to yield relevant evidence bearing directly upon the postoperative care. Moreover, the request was limited to the period immediately following the surgery and the disclosure would also assist preparation for trial by enabling counsel to ascertain whether the patient records that were eventually provided to them were complete and unaltered.

e. Material and Necessary Requirement – Not Met

(1) Fawcett v. Altieri, 38 M3d 1022, 960 NYS2d 592 (S.Ct., Richmond Co., 2013) – A court is required to determine whether the content contained on the social media account is material and necessary, and then to balance whether the production of the contents would result in a violation of the account holder's privacy rights.

(2) Subpoenas at issue must be quashed. Not only has the husband failed to establish that the telephonic and internet information sought about the Wife is relevant and material to this action, but no special circumstances permitting a non-party disclosure has been shown. The Husband claims that the Wife's telephone logs and AOL instant messages chat logs would be relevant to the issue of custody and equitable distribution. While the Wife's fitness for custody is certainly in issue herein, this Court is not persuaded that any purpose would be served by permitting disclosure of these telephonic and AOL logs. Indeed, these logs or lists will only show that the Wife was on the phone or online with friends and relatives during certain periods of time; they would not reveal the nature of the conversations or her state of mind. The Court does not believe these telephone and computer records are necessary for a custody determination. *Bill S. v. Marilyn S.*, 8 Misc3d 1013(A), 801 NYS2d 776 (S.Ct., Nassau Co., 2005, Balkin, J.)

2. Rejects Factual Predicate Standard

a. Rejects notion that there is a heightened standard for the production of social media requiring a party to establish "a factual predicate" for their request by *identifying relevant information in the opposing party's* Facebook account.

3. Items Need not Exist

a. Disclosure is not conditioned upon a showing that the items sought actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information.

4. "Privacy" Setting

a. An account holder's so-called "privacy settings do not govern the scope of disclosure on social media materials." Even private materials may be subject to discovery if they are relevant.

b. *Romano v. Steelcase, Inc.*, 30 Misc3d 426, 907 NYS2d 650 (S.Ct., Suffolk Co., Spinner, J. – A plaintiff must give the defendant access to her private postings from two social network sites, Facebook and MySpace, that could contradict claims she has made in a personal injury action. The Court commented that:

> "As the public portions of plaintiff's social networking sites contained material contrary to her claims in deposition testimony, there is a reasonable likelihood that the private portions of sites may contain further such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the offense of this action…."[W]hen plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of the social networking sites or else they would cease to exist…[I]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking."

5. Remedy to Account Holder

a. To the extent an account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court.

b. Balancing test as to whether the production of the content would result in a violation of the account holder's privacy rights. (see, *Peo. v. Harris*, 36 M2d 613, 945 NYS2d 505 (Crim. Ct., NY Co., 2012); *Peo. v. Harris*, 36 M2d 868, 949 NYS2d 590 (Crim. Ct., NY Co., 2012) (Subpoena issued to online social networking service provider, seeking user postings and account information, was proper under the Stored Communications Act (SCA), so long as the material sought was relevant and evidentiary; user had no reasonable expectation of privacy in his postings, since they were made public, and provider would not be unduly burdened by the request. 18 U.S.C.A. § 2703(d).)

VI. POST *FORMAN v. HENKIN*

A. Injunctive Relief

1. Defendants have shown the necessity for a temporary order and

preliminary injunction restraining Plaintiff from directly, or indirectly through other persons, modifying, changing or deleting any information from his social networking accounts relating to this action. Plaintiff originally denied possessing any social media accounts during his deposition. However, medical records relating to Plaintiff's hospitalization related to an alleged suicide attempt and revealed Plaintiff made suicidal statements on his Facebook account. Plaintiff then deleted/deactivated his Facebook account on the alleged advise from his legal counsel to aid him in this action. With Plaintiff's inclination to delete/deactivate his Facebook account (and potentially other social media accounts), Plaintiff must be temporarily retrained from modifying, changing or deleting any statements related to this action made on his social media accounts for the duration of this action. *Paul v. the Witkoff Group* 2018 WL 1697285 (N.Y. Sup. Ct. Apr. 03, 2018, Mendez, J.)

B. Overbroad Demand

1. The Appellate Division rejected a demand for access to social media accounts for 5 years prior to the incident and to cell phone records for 2 years prior to the incident as "overbroad and not reasonably tailored to obtain discovery relevant to the issues in the case and instead approved production for a period of 2 months before the date on which plaintiffs were allegedly attacked on defendant's premises to the present. *Doe v. Bronx Preparatory Charter School,* 160 AD3d 591, 76 NYS3d 126 (1st Dept. 2018)

C. Can precede deposition

1. Nothing in *Forman v Henkin* indicates that a party must wait until after a deposition before demanding disclosure of the private portions of an individual's social media account. Indeed, such a rule has the potential to needlessly delay disclosure of relevant information. *Christian v. 846 6th Ave. Property Owner, LLC*, 2018 WL 2282883 (Supreme Court, NY Co., Freed, J.)

D. Access to plaintiff's accounts and devices

1. In personal injury action, plaintiff's private social media information was discoverable, albeit with some limitations on the time span and subject matter. Access was given to third party data mining company to uncover items on plaintiffs private social media accounts and devices. *Vasquez-Santos v. Mathew*, 168 AD3d 587, 92 NYS3d 243 (1st Dept. 2019)

VII. OTHER SOCIAL MEDIA DISCOVERY

A. E-Mails Directly

1. Defendant was directed to produce hard copies of all e-mail messages relating to designated allegations, including any e-mail messages that have been deleted but may be recovered by a qualified expert appointed by referee supervising disclosure for an in camera inspection and a determination of which documents in fact deal with the designated allegations and only those e-mails will be turned over to plaintiff. *Samide v. Roman Catholic Diocese of Brooklyn,* 5 AD3d 463, 773 NYS 116 (2d Dept. 2004)

2. Authorization to obtain ESI

a. In a family offense proceeding, alleging that respondent sent petitioner numerous vulgar e-mails, respondent was directed to execute authorizations for Yahoo, respondent's Internet e-mail service provider, and to produce e-mails from respondent to petitioner during a given period of time. While the CPLR does not expressly provide for authorizations to obtain Internet, computer or e-mail records, the purpose of pretrial disclosure is to permit parties to discover material and necessary evidence for use at trial. *D.M. v. J.E.M.*, 23 M3d 584, 873 NYS2d 447 (F.Ct., Orange Co., 2009, Kiedaisch, J)

b. Court required plaintiff to deliver "a properly executed consent and authorization" to obtain Facebook and MySpace information. *Romano v. Steelcase, Inc*., 30 Misc3d 426, 907 NYS2d 650 (S.Ct., Suffolk Co., Spinner, J.

B. Effect of Discovery

a. Where plaintiff, and a deposition, was confronted with 13 pages of printouts allegedly from his Facebook account and denied that they were from his accountant, and then sought to depose the individual who obtained the printouts, defendant would be precluded from offering the printouts at trial unless he produce such person for a deposition, as plaintiff would be left with no other means to prove or disprove the authenticity*. Lantigua v. Goldstein*, 149 AD3d 1057, 53 NYS3d 163 (2d Dept. 2017)

C. *cf.* Grounds for Divorce - *Bill S. v. Marilyn S.*, 8 M3d 1013, 801 NYS2d 776 (S.Ct., Nassau Co., Balkin J.) – Court quashed subpoenas duces tecum served by the husband for telephone and chat logs relating to alleged paramours of the wife. Husband was not entitled to pretrial discovery with respect to the issue of grounds for the divorce or marital fault. He failed to establish how the records sought are relevant and material, and failed to show special circumstances permitting non-party disclosure.

VIII. COMPUTERIZED BILLING RECORDS

A. At the trial of an action for unpaid legal fees, plaintiff's managing partner testified that plaintiff's electronic billing records – which identified the attorney or paralegal who rendered services to defendants, the tasks performed, and the time spent on each task – were created contemporaneously with the services performed, in the normal course of plaintiff's business. The Court held that the testimony of the managing partner was sufficient to lay the foundation for the admission of the records under the business record rule, "without the necessity of calling multiple witnesses who would have merely offered cumulative testimony at best". *Finkelstein Newman Ferrara LLP v. Avemm Corp*. 36 Misc3d 144(A), 2012 NY Slip Op 51587 (App. Term, 2012)

IX. JUDICIAL NOTICE; WEB MAPPING SERVICE

A. CPLR Rule 4511(c): When judicial notice shall be taken based on a rebuttable presumption.

> Every court shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented. The presumption established by this subdivision shall be rebutted by credible and reliable evidence that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove. A party intending to offer such image or information at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the request for judicial notice of such image or information, stating the grounds for the objection. Unless objection is made pursuant to this subdivision, or is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for objection otherwise required by this subdivision, the court shall take judicial notice of such image or information.

X. PROHIBITIONS FROM POSTING

A. The family court prohibited the mother from posting on Facebook, Twitter or any other social media site any mention of the child, the father or any members of their household. The mother had a history of disparaging the father and his new family on Facebook, but did not mention the parties own child. The appellate court reversed the prohibition against her posting communications about the child who she had never previously disparaged. *Matter of Driscoll v. Ourster*, 146 AD3d 1179 (3d Dept. 2017)

B. Following a hearing, which lasted over 55 days, the court granted the father's motion for suspension of the mother's parental access to her daughter of any kind and in any form, including telephone, Skype, email, and social media. *S.B.S. v. S.S.,* NYLJ, 4/3/18, Supreme Court, Nassau Co., Bennett, J.

XI. ISSUE OF EXPECTATION OF PRIVACY

A. E-Docs Stored at Work

1. Physician's e-mail communications with his attorney, which e-mails were stored on defendant-hospital's e-mail server, were not confidential, for purposes of attorney-client privilege, where hospital's electronic communications policy, of which the physician had actual and constructive notice, prohibited personal use of hospital's e-mail system and stated that hospital reserved the right to monitor, access, and disclose communications transmitted on hospitals e-mail server at any time without prior notice, though physician's employment contract required hospital to provide him with computer equipment. *Scott v. Beth Israel Med. Ctr*., 17 Misc3d 934, 847 NYS2d 436 (S.Ct., N.Y Co. 2007, Ramos, J.)

2. An employee used a work-issued laptop to e-mail confidential files to her attorney purportedly in contravention of her employers "work only" use policy. As the employee used the work computer to send the e-mails from home through her personal AOL account (and thus, the documents never "assed through" the employer's system), the court found that the privilege was not waived. *Curto v. Medical World Communications Inc.*, 2006 WL 1318387 (EDNY, 5/16/06)

3.In determining whether there has been a waiver of the attorney-client privilege when an office computer is used to communicate with attorney, the court evaluates: (1) whether the employer's policies permit or prohibit personal use; (2) whether the company monitors use of the employee's email; (3) whether third parties have a right of access; and (4) whether the company advised the employee or whether the employee was aware of the use and monitoring policies. *U.S. v. Finazzo*, 543 F. Supp 2d 224, 2008 U.S. Dist. LEXIS 30604 (SDNY Mar. 26, 2008)

B. Cell Phone Tracking

1. Cell Phone Tracking - technique whereby phone calls allegedly made from one's cell phone may be used to determine the approximate location of the cell phone use when making the calls.

2. CSD - cell phone data

3. A cell phone user has no "reasonable" expectation of privacy that the devices built in global positioning technology will not be used by police to locate the phone. Through a person's voluntary utilization of the cell phone, which occurs when the device is powered up, "a person necessarily has no reasonable expectation of privacy with respect to the phone's location." While cell phone users could maintain a reasonable expectation of privacy about the *content* of the conversations, the same does not apply to the process of physically locating the devices. Accordingly, after finding the defendant's cell phone number, the police filled out an "exigency circumstances request" asking for Sprint to "ping" or locate the phone. *People v. Moorer*, 39 Misc3d 603, 959 NYS2d 868 (County Ct., Monroe Co., 2013, DeMarco, J.)

4. The Stored Communications Act, which prohibits accessing without authorization a facility through which electronic communication services provided and thereby obtaining access to electronic communication while it is in electronic storage, does not apply to data stored in a personal cell phone. A personal cell phone is not a "facility" as contemplated by the statute and the information is not in "electronic storage". *Garcia v. City of Laredo*, No. 11-41118 (U.S.C.A., 5th Cir., 2012)

5. A driver who hit a pedestrian can introduce the pedestrians cell phone records into evidence in order to argue that the pedestrian contributed to the accident by talking on the phone. *Miller v. Lewis*, NYLJ, 4/25/13 (S.Ct., Kings Co., Ruchelsman, J.)

C. GPS Devices

1. Civil Case - *Matter of Cunningham v. NYS Department of Labori*, 21 NY3d 515, 974 NYS2d 896 (2013) – Government can attach a GPS tracking device to a public employee's personal vehicle without a warrant. When an employee chooses to use his car during the business day, GPS tracking of the car may be considered a workplace search, and public employees have a diminished right of privacy in the workplace if a search satisfies a standard of reasonableness (*O'Connor v. Ortega*, 480 US 709 [1987])

2. Criminal Case - *People v. Weaver,* 12 NY3d 422 (2009) - the state Constitution bars the government from placing a GPS device on a criminal suspects vehicle without a warrant; *United States v. Jones,* 132 S.Ct. 945 (2012) – the Fourth amendment bars the warrantless installation of a GPS device on a criminal suspects vehicle.

D. Email Signatures

1. Although a typed name on an email is the equivalent of a signature, the same is not true for an attachment to an email, which can easily be signed by the sender. Thus, plaintiff's breach of contract theory depended upon an attachment to an email sent by the defendant to plaintiff. Because the attachment was not signed, there was no contract. *Solartech Renewables, LLC v. Vitti*, 156 AD3d 995, 66 NYS3d 704 (3d Dept. 2017)

2. An email message may be considered "subscribed" as required by CPLR 2104, and, therefore, capable of enforcement, where it "contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature" (*Forcelli v. Gelco Corp.,* 109 AD3d at 251, 972 NYS2d 570). Here, the email confirming the settlement agreement was sent by counsel for the party seeking to enforce the agreement, LICO. There is no email subscribed by the plaintiff, who is the party to be charged, or by her former attorney. In the absence of a writing subscribed by the plaintiff or her attorney, the settlement agreement is unenforceable against the plaintiff (*see id.* at 248, 972 NYS2d 570; *see also* CPLR 2104). *Kataldo v. Atl. Chevrolet Cadillac*, 2018 N.Y. Slip Op. 03669 (2d Dept. 2018)

E. Family Court did not err in admitting messages obtained by father on mother's Facebook account where the account was available on son's Ipod without password protection. *Rutland v. O'Brien*, 143 AD3d 1060, 41 NYS3d 292 (3d Dept. 2016)

XII. INADVERTENT DISCLOSURE OF PRIVILEGED E-MAIL

A. Statute – CPLR 4548. "No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.

B. Inadvertent disclosure of a document protected by the attorney-client privilege, will not constitute a waiver of the privilege. An intent to waive the privilege by disclosure of the document must be shown, in order to have a valid waiver. *Manufacturers and Traders Trust Co. v. Servotronics, Inc.,* 132 AD2d 392, 398, 522 NYS2d 999 (4th Dept. 1987).

C. Defendant's counsel, in motion papers, inadvertently had attached as

an exhibit pages of documents that were protected by the attorney-client privilege. **"**Here, it is clear that the disclosure was inadvertent and unintentional. Upon finding that the e-mail had been turned over to plaintiffs' counsel, Grossman immediately took steps to demand its return." *Galison v. Greenberg*, 5 Misc.3d 1025(A) (S.Ct., NY Co., 2004, Cahn, J.)

D. Ethics Opinion

1. N.Y. Rules of Professional Conduct Rule 4.4(b) – "[a] lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

2. Cautionary Note to Rule 4.4, Comment 2: "a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion."

E. Waiver of Privilege

1. *AFA Protective Systems, Inc. v. City of New York*, 13 AD3d 564, 788 NYS2d 128 (2d Dept. 2004): "disclosure of a privileged document results in waiver of the privilege unless the party asserting the privilege meets its burden in proving that (1) it intended to maintain confidentiality and took reasonable steps to prevent its disclosure, (2) it promptly sought to remedy the situation after learning of the disclosure, and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted. Here, defendant waived the privilege by failing to exercise due diligence where defendant knew for approximately 4 years that the memo in question was in the possession of third parties who could make copies of it, use it and disseminate information contained therein and defendant took no action to retrieve the document for four years. (See also, *John Blair Communications, Inc. v. Reliance Capital Group, L.P.*, 182 AD2d 578, 582 NYS2d 720 [1st Dept. 1992])

2. While an inadvertent production of a privileged work product document generally does not waive the applicable privilege, there is an exception to that rule if the producing party's conduct "was so careless as to suggest that it was not concerned with the protection of the asserted privilege" (*Securities & Exch. Commn. v Cassano*, 189 FRD 83, 85 [SD NY 1999]; *Scott v Beth Israel Med. Ctr. Inc.*, 17 Misc 3d 934, 943, 847 NYS2d 436 [Sup Ct 2007]

F. Improperly Obtained Discovery

1. Recusal - In a trust accounting proceeding, a law firm which covertly issued subpoenas and employed deceitful and unprincipled means to secure discovery of confidential and privileged material from the adverse party's former law firm without notifying that party, must be disqualified from further participation in the proceeding since there is no other way of assuring that the tainted knowledge improperly obtained will not subtly influence the firm's conduct of the litigation. *Matter of Beiny*, 129 AD2d 126, 517 NYS2d 474 (1st Dept. 1987)

2. If, during pre-trial disclosure, confidential communications between an adversary and counsel are improperly obtained, the information thus acquired may be suppressed pursuant to CPLR 3103 (see), and the lawyer who, or law firm which, obtained the information may be disqualified from continuing as counsel in the action.

3. Dismissal of Action - Plaintiff's complaint dismissed as a remedy for her misconduct that involved the taking and use of her adversary's privileged documents. *Lipin v Bender*, 84 NY2d 562, 620 NYS2d 744 [1994]

XIII. USE OF POWER POINT PRESENTATIONS AT TRIAL

A. *People v. Williams*, 29 NY3d 84, 52 NYS3d 286 (2017)

1. There is no inherent problem with the use of a PowerPoint presentation as a visual aid in connection with closing arguments.

2. The PowerPoint materials must be limited to characterizations of facts that are “within the four corners of the evidence” and not allow jurors to draw conclusions which are not fairly inferable from the evidence.

3. If counsel is going to superimpose commentary to images of tri al exhibits, the annotations must accurately represent the trial evidence.

B. *People v. Anderson*, 29 NY3d 69, 52 NYS3d 256 (2017)

1. PowerPoint slides depicting an already admitted photograph with captions accurately tracking prior testimony might reasonably be argued as relevant and fair commentary on the evidence.

XIV. EMAIL AS BASIS FOR ORDER OF PROTECTION

A. For the Court to issue an order of protection, there must be a family offense as described in FCA §812, DRL §252. The selected statutes follow the Penal Law wording, except to the extent that "disorderly conduct" (PL §240.20) includes disorderly conduct not in a public place. Plaintiff asserts defendant's emails constitute a form of harassment. To the extent defendant admits authorship and sending the emails, the order of protection could be issued without a hearing. Defendant concedes that emails can be the basis of a family offense. *L.T. v. K.T.*, 47 M3d 1211(A), 15 NYS3d 712 (S.Ct., Putnam Co., 2015, Grossman, J.)

B. In connection with Aggravated Harassment in the Second Degree, and email falls within a "mechanical or electronic means". The email in question which formed the basis of a finding that with intent to threaten or alarm the petitioner, respondent initiated a mechanical or electronic communication in written form in a manner that did, in fact, cause annoyance or alarm, stated as follows: "You stand accused of having a sexual predatory relationship with my son [name deleted]. You also picked up the body at a [name deleted] morgue last summer. It was used. You received a fat check for your activities. I am putting you on notice." *M.G. v. C.G.*, 19 M3d 1125, 862 NYS2d 815 (Singer, J.)

C. Evidence established that father committed family offense of harassment in the second degree, where mother testified that 294 e-mails which father sent her during approximately eight-month period made her feel disgusted and physically ill, and that she repeatedly asked him to stop sending her e-mails not directly related to visitation. Father acknowledged sending e-mails, and text of e-mail messages showed that most served no legitimate purpose, but were harassing, annoying, insulting, or abusive. *Julie G. v. Yu-Jen G.*, 81 AD3d 1079, 917 NYS2d 355, (3d Dept. 2011)

D. Violations of Order of Protection

1. Where TOP directed father to refrain from communication or any other conduct by mail, telephone, voicemail or other electronic or any other means with the mother, and not to call her at work, but may contact the mother, other than at work, in the event of an emergency regarding the child for visitation arrangements, father's email to mother regarding custody dispute over child were not sent with the intention of harassing, annoying or alarming mother, and his one phone call to mother's work because she had been unresponsive to his efforts to facilitate custody order was made for a legitimate purpose. However, father's email accusing mother of child abuse and sending her a communication that did not relate to an emergency

regarding the child for visitation arrangements was a violation of the TOP. *Lisa T. v. K.T.*, 49 M3d 847 14 NYS3d 883 (Fam. Ct., Bronx Co., 2015, Kelley, J.)

2. The order of protection prohibited defendant from contacting the victim by "electronic or any other means." Defendant was charged with criminal contempt in the second degree upon the ground that she allegedly "tag" the protected party in two Facebook posts, stating ""Stupid" and "You and your family are sad…" , You guys have to come stronger than that!! I'm way over you guys but I guess not in ya agenda." The victim alleged in her supporting deposition that she had received a Facebook notification stating that the defendant attacked her in the above post. Defendant's motion to dismiss the accusatory instrument as facially insufficient was denied, the court finding the allegations to be "sufficient for pleading purposes to establish a violation of the order protection. *People v. Gonzalez*, N.Y.L.J., 1/15/16 (S.Ct., Westchester Co., Capeci, A.J.)

3. Indirect Transmission - While the record supports Family Court's determination that the father willfully violated the February 2009 temporary order of protection, a violation of the July 2009 order is not sufficiently established. The February 2009 order prohibited, as relevant here, the father from communicating with the mother by e-mail and ordered that he "avoid all contact, direct or indirect" with her. The mother's sister—who stated that she had a "very close" relationship with the mother and had not communicated with the father in a "very long time"—received an e-mail from the father shortly after the order of protection was issued. The e-mail, which ostensibly was initially directed to the sister's husband, contained scurrilous accusations about the mother and her family. The sister promptly forwarded the e-mail to the mother. Under the circumstances, the evidence was sufficient to support the Family Court's conclusion that the father knew or intended that, by sending the e-mail to the mother's family, it would reach the mother (*see Matter of Duane H. v. Tina J.,* 66 AD3d 1148, 1149, 887 NYS2d 345 [2009]). *Jennifer G. v. Benjamin H.,* 84 AD3d 1433, 1435, 923 NYS2d 249, 252-53 (3d Dept. 2011)

4. Violation petition of a "refrain from" order of protection not sustained, upon motion to dismiss, by allegations that respondent called and emailed petitioner, and sent her text messages demanding that she let him move back into the party's house and demanding his belongings. The petitioner failed to adequately allege that the respondent, acting with the requisite intent that is inferable from the alleged circumstances, engaged in the offense of aggregated harassment in the second degree or harassment in the second degree. *Cote v. Berger*, 112 AD3d 821, 978 NYS2d 54 (2d Dept. 2013)

XV. ACCESS TO HOME OR SPOUSE'S COMPUTER

A. Access Granted

1. Information stored by husband on laptop computer, albeit password protected, subject to disclosure in matrimonial action where wife sought access on grounds that husband stored information thereon concerning his finances and personal business records. As the laptop was in the marital residence, it was akin to a filing cabinet to which the wife clearly would have had access. *Byrne v. Byrne*, 168 M3d 321, 650 NYS2d 499 (S.Ct., Kings Co., 1996, Rigler, J.)

2. Information stored on the husband's computer was not subject to suppression, and wife's access to the information was not without authorization as the husband had consented to the wife's access to his computer. *White v. White*, 781 A.2d 85 (N.J. Super. Ct. 2001)

3. Husband moved to suppress data obtained by wife from the hard drive of a computer she found in the trunk of husband's car, the Wife claiming it was a shared family computer and the husband claiming it was his personal computer issued to him by his employer. The Court refused to grant the suppression motion. *Moore v.* Moore, NYLJ, 8/14/08, p.26 col.1 (S.Ct., NY Co., Evans, J.) –

4. In a matrimonial action, the wife was entitled to have her computer expert copy data from the hard drives of husband's personal and business computers, and to examine hard copies of non-privileged business records identified by referee from hard drives. *Etzion v. Etzion*, 19 M3d 1102(A), 859 NYS2d 902 (S.Ct., Nassau Co., 2005, Stack, J.)

B. Access Denied

1. Access to law firm's computer for electronic discovery of billing records and documents related to spouses' estate planning properly was denied by firm, since records had no bearing on validity of prenuptial agreement, in executors' suit to determine widow's right of election renounced by each spouse in prenuptial agreement, and widow had already been provided with hard copies of estate planning file. (*In re Maura*, 17 M3d 237, 842 NYS2d 851 [Surr. Ct., Nassau Co., 2007]]

2. *R.C. v. B.W.,* NYLJ, 4/23/08, p.26 col.1 (S.Ct., Kings Co., 2008) – denied "fishing expedition" into wife's computer where information sought was not limited and "particularly" did "not seek financial documents, records, billing statements or bank statements".

3. *Melcher v. Apollo Med. Fund Mgmt.*, 52 AD3d 244, 859 NSY2d 160 (1st Dept. 2008 -- In addressing the issue of "cloning" a computer hard drive, the court held that: "In view of the absence of proof that plaintiff intentionally destroyed or withheld evidence, his assistant's testimony that she searched his computers, and the adequate explanation for the nonproduction of two items of correspondence, the court improperly directed the cloning of plaintiff's computer hard drives."

C. Safeguards

1. The party from whom electronic discovery is sought should be required to produce material stored on a computer so long as the party being asked to produce the material is protected from undue burden and expense and privileged material is protected. *Lipco Electrical Corp. V. ASG Consulting Corp.*, 4 M3d 1019 (S.Ct., Nassau Co., 2004, Austin, J.)

D. Authentication

1. Where wife found on a family computer a file entitled "MY LIST", which depicted the husband's sexual encounters with numerous women, and testified that it was similar to a notebook she had discovered in the husband's handwriting giving similar accounts, which notebook disappeared, court held that "Plaintiff's testimony of the source of the document as a file in the family computer was sufficient to identify what it was." *Stafford v. Stafford*, 641 A.2d 348 (Vt. 1993)

XVI. TELEPHONE CONVERSATION RECORDINGS IN COURTROOM

A. CPLR 4506 – Eavesdropping statute

B. Vicarious Consent on behalf of minor

1. Peo. v. Badalamenti, 27 NY3d 423, 34 NYS3d 360 (2016)

a. Vicarious Consent Doctrine applied to NY's Eavesdropping Statute (Penal Law §202.05)

b. If a parent or guardian has a good faith, objectively reasonable basis to believe that it is necessary, in order to serve the best interests of his or her minor child, to create an audio or video recording of a conversation to which the child is a party, the parent or guardian may vicariously consent on behalf of the child to the recording. A parent or guardian who is acting in bad faith or is merely curious about his or her

minor child's conversations cannot give lawful vicarious consent to their recording, for purposes of the eavesdropping statute. A trial court should consider all objections to the relevance of portions of the recording, and if possible, it should do so before a recording is played to the jury, so that parts that have no relevance do not become public by inclusion in a trial.

c. The Court followed the federal case of *Pollack v. Pollack* (6th Cir.) and the New York case of *Peo. v. Clark*, 19 Misc3d 6). In *Clark*, an autistic child got off the bus with bruises so the mother put a tape recorder in the child's backpack, leading to the arrest of the bus matron.

d. As to the criticism that the ruling will impair the autonomy of a child, the court quoted a Supreme Court of the United States case, stating that: "traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination… They are subject, even as to their physical freedom, to the control of their parents or guardians."

XVII. EVIDENTIARY HURDLE – PREJUDICE

Is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or should otherwise be excluded under Federal Rule 403.

XVIII. COMPUTER INSPECTION PROTOCOL

Schreiber v. Schreiber, NYLJ, 7/19/2010 NYLJ 17, (col. 1), S.Ct., Kings Co., Thomas, J. 904 NYS2d 886 - Where plaintiff wife moved for an order directing the hard drive disk of defendant husband's office computer be confiscated and/or permitted to be copied in its entirety, alleging that defendant concealed his income and assets to avoid paying the fair share of marital income and assets earned and acquired during the couples' 30 year marriage, the court found that plaintiff was not entitled to an unrestricted turnover of the computer hard drive disk. It found the request was overbroad as it sought general, and unlimited in time, access to the entirety of defendant's business and personal data stored on his office computer. Thus, it denied plaintiff's motion to compel production of the hard drive, with leave to renew provided the renewal application contained a detailed discovery protocol that would protect privileged and private material. The court further provided a proposed list of items such protocol should contain, including:

1. Discovery Referee: The parties will have until the renewal deadline to agree on an *attorney referee, preferably someone with some technical expertise in computer science,* to be appointed pursuant to CPLR 3104 (b) to

supervise discovery (the referee).[FN10] If the parties fail to agree on a referee before the renewal deadline, they will submit two names each to the court (along with a summary of the proposed referee's qualifications, not to exceed one page, and hourly rate), and the court will select a referee from among the candidates submitted.

2. Forensic Computer Expert: The parties will have until the renewal deadline to agree on a forensic computer expert who will inspect and analyze the clone (the expert). If the parties fail to agree on an expert before the renewal deadline, they will submit two names each to the court (along with a summary of the proposed expert's qualifications, not to exceed one page, and the expert's fee structure), and the court will select an expert from among the candidates submitted. The expert will execute a *confidentiality agreemen*t (to be agreed upon by the parties) governing non-disclosure of the contents of the clone and its re-delivery to defendant's counsel after completion of electronic discovery.

3. File Analysis: *The expert will analyze the clone for evidence of any download, installation, and/or utilization of any software program, application, or utility which has the capability of deleting or altering files so that they are not recoverable (a drivewiping utility). The expert will then (i) extract from the clone all live files and file fragments, and (ii) if the files on the clone have been deleted or altered using a drive-wiping utility, will also recover all deleted files and file fragments*.

4. Scope of Discovery: Plaintiff will list the keywords and other searches she proposes to have the expert run on the files and file fragments, subject to a reasonably short time frame (to be agreed upon by the parties) in which such files or file fragments were created or modified. Plaintiff is cautioned that she should narrowly tailor her search queries so as to expedite discovery and reduce the costs of litigation to the parties. To illustrate, a search query for all documents with an.xls (Microsoft Excel) extension, created or modified within a three-year period preceding the commencement of this matrimonial action, will not be permitted.

5. First-Level Review: The expert will run the keywords or other searches on all of the extracted files and file fragments. After performing searches, the expert will export to CDs or DVDs a copy of the native files and file fragments which were hit by such searches, and will deliver such media to defendant's counsel to conduct a privilege review. An exact copy of the media delivered to defendant's counsel will be contemporaneously delivered by the expert to the referee. The expert will also concurrently deliver to the referee and to counsel for both parties a report (i) detailing the results of its searches, (ii) listing the file types for all files hit by the searches, with the file extensions and number of files for each, and (iii) stating whether or not it found evidence of the use of a drive-wiping utility.

6. Second-Level Review: Within twenty days after delivery of the media containing the extracted files and file fragments, defendant's counsel will

deliver to plaintiff's counsel in electronic format (to be agreed upon by the parties) all non-privileged documents and information included in the extracted files and file fragments, together with a privilege log which identifies each document for which defendant claims privilege and describes the nature of the documents withheld (but without revealing information which is itself privileged), so as to enable plaintiff to assess the applicability of privilege.

7. Discovery Disputes: The referee will resolve any disputes concerning relevancy and privilege. Subject to the parties' agreement, the referee's determination will be final.

8. Cost Sharing: All costs for the expert will be borne by plaintiff, subject to any possible reallocation of costs at the conclusion of this action. Plaintiff will indicate if she is willing to bear any other discovery-related costs and, if so, specify her proposed share.

9. Discovery Deadline: The parties should agree to a fast-track discovery schedule, subject to an outside ninety-day deadline within which discovery should be completed.

10. Retention of Clone: The discovery referee will keep the clone until the action is concluded, at which time the clone will be returned to defendant's counsel for disposal.

11. Counsel for parties should discuss and seek to memorialize protocols before engaging in motion practice.

XIX. ISSUE OF TRANSMISSION; USE OF ADVERSE PARTY'S E-MAILS

A. *Gurevich v. Gurevich*, 24 M3d 808, 886 NYS2d 558 (S.Ct.,, Kings Co., 2009, Sunshine, J.) -- A party to a matrimonial action has the right to access and utilize the email account of the estranged spouse whom she no longer resides with and obtain copies of emails in his email account. Such action does not constitute illegal "eavesdropping" pursuant to Penal Law §250.00 which requires unlawfully intercepting or accessing electronic mail. That section prohibits individuals from intercepting communications going from one person to another. Here, the emails were not "in transit" but was stored in an email account, and thus there was no interception, and the emails could not be suppressed pursuant to CPLR §4506[1]. Wife was using husband's emails to show a scheme by husband to hide his income. See also, *Peo. v. Thompson*, 51 M3d 693, 28 NYS3d 237 (2016)

B. 18 USC §§ 2511 and 2520 prohibit only intercepts that are contemporaneous with transmission, i.e., the intercepted communication must be in transit, not in storage (*see, Wesley Coll. v Pitts,* 974 F Supp 375, 385-386 [D Del], *affd* 172 F3d 861 [3d Cir]). *Hudson v Goldman Sachs & Co., Inc.*, 283 AD2d 246, 247, 725 NYS2d 318 (1st Dept. 2001)

XX. SERVICE BY E-MAIL

A. Where service of summons and complaint impractical by conventional means, an alternative method of service pursuant to CPLR 308(5) is, under the facts of the case, by e-mail which was reasonably calculated to give defendant notice of the action. *Synder v. Alternate Energy Inc.,* 19 M3d 954, 857 NYS2d 442 (Civ. Ct., NY Co., 2008)

B. A wife was permitted to serve her husband with a summons with notice by sending it to him through Facebook private messenger after she made good faith attempts to find out where he was, and she submitted an affidavit with copies of exchanges attached that she had with the husband through Facebook. However, since litigants are not permitted to serve each other, wife's attorney was authorized to log into the wife's Facebook account and send the husband a message, first identifying himself as a lawyer, and then sending a copy of the summons with notice. *Baidoo v. Blood-Dzraku*, 48 Misc3d 309 (NY Co., 2015, Cooper, J.)

C. The court denied wife's request for permission to personally serve her husband with a summons for divorce by Facebook where the wife did not show that her husband actually used this Facebook paid for communicating. There was no sworn statement from the wife saying that she had communicated with the husband through this Facebook page, nor did she submit a copy of the exchanges she told her lawyer she had had with defendant through Facebook. *Qaza v. Alschalabi*, 54 Misc3d 69 (Kings Co., 2016, Sunshine, J.) -

XXI. HEARSAY (OR EXCEPTION)

A. Admitted for truth? - When proffering emails as evidence, parties have to confront the hearsay rule, just as they would with hard-written correspondence. If the email is being admitted for its truth, it is barred by the hearsay rule unless an exception is present; and if it is not being offered for the truth, the hearsay rule is inapplicable.

B. Computer Stored Records v. Computer Generated Records

1. Computer stored records – input of humans kept in electronic form

2. Computer generated records – output of a program that processes input following a defined algorithm; does not contain human statements. Hearsay inapplicable as not dependent upon statement or observation of a human declarant.

3. *People v Stultz*, 284 AD2d 350, 351, 726 NYS2d 437 (2d Dept. 2001) - A detective's testimony that he ascertained the telephone number of the telephone in the park where the crime occurred by dialing “953”, generating a recorded response, was properly admitted, and was not inadmissible hearsay since it was not the repetition of a human observation.

C. Some Hearsay Exceptions to Consider

1. Admission of party-opponent - An e-mail forwarded by a party-opponent may be deemed an adoptive admission of the e-mail contents. (See, *Sea-Land Serv. Inc. v. Lozen Int’l. LLC*, 285 F3d 808 [9th Cir. 2002]

2. State of Mind

a. E-mails introduced in libel action in order to establish their effect upon plaintiff, as opposed to the truth of their content, did not constitute inadmissible hearsay. *Rombom v Weberman*, 2002 NY Slip Op 50245(U), 2002 WL 1461890 [Sup Ct June 13, 2002] affd, 309 AD2d 844, 766 NYS2d 88 [2d Dept. 2003]; see also, *Arch-Bilt Corp. v. Interboro Mut. Indem. Ins. Co.*, 119 AD2d 713, 501 NYS2d 127 [2d Dept. 1986])

3. Business Record Rule (CPLR 4518)

a. *Secretary of the Dept. of Housing and Urban Dev. v. Torres,* 2 M2d 53, 774 NYS2d 245 (App. Term, 2d Dept. 2003) – DSS computer printout showing the issuance of rent subsidy checks were admissible under the business records exception.

b. Business record exception is sufficiently broad to admit *computer printouts*. (*Ed Guth Realty, Inc.* v. *Gingold*, 34 NY2d 440, 358 NYS2d 367 (1974); see also, *Briar Hill Apts Co.* v. *Teperman*, 568 NYS2d 50 (1st Dept., 1991); *Peo. v. Weinberg*, 183 AD2d 932, 586 NYS2d 132 (2d Dept., 1992) (Computer tapes made in regular course of business where data is entered into the computer at the time of each transaction qualified as an admissible business record); *F.K. Gailey Co., Inc. v. Wahl*, 262 AD2d 985, 692 NYS2d 563 (4th Dept., 1999) (Computer printouts of outstanding amounts due plaintiff was properly admitted as a business record as the data was stored in the regular course of business); *Federal Express v. Federal Jeans*, 14 AD3d 424, 788 NYS2d 113 (1st Dept. 2005) (Computer generated records admissible upon showing that information was entered in regular course of business)

c. Introduction of computer printouts of electronic business records if the underlying data were stored in the regular course of business. See, e.g., *F.K. Gailey Co. v. Wahl*, 1999, 262 AD2d 985, 692 NYS2d 563 (4th Dep't); *In re Thomma*, 1996, 232 AD2d 422, 648 NYS2d 453 (2d

Dep't), as they are "summaries" of voluminous records, an exception to the best evidence rule. (*Ed Guth Realty, Inc. v. Gingold*, 1974, 34 N.Y.2d 440, 451-52, 358 NYS2d 367, 374, 315 N.E.2d 441, 446)

d. cf. *American Express Bank, FSB v. Zweigenhaft*, 38 M3d 1218(A), 2013 N.Y. slip Op. 50137(U) – Credit card statements not deemed to fall within the business records exception absent sufficient proof that everyone in the chain of information – from the vendor all the way through the generator of the statements – must be acting within the course of regular business conduct.

4. Present Sense Impression; Excited Utterance

a. Emails admitted into evidence where they explain the event in question shortly after it occurred. The key issue on admissibility is whether the statement was substantially contemporaneous with the event in question. Fed. Rules of Evidence 803(1).

5. NY's common law public records exception - *Miriam Osborn Memorial Home Assn., v. Assessor of the City of Rye*, 9 Misc.3d 1019, 800 NYS2d 909 [S.Ct., Westchester Co., 2005] (Printout from webpage of government website containing real property sales data admissible). Under the common law public documents hearsay exception, "when a public officer is required or authorized by statute or nature of the duty of the office, to keep records or to make reports of acts or transactions occurring in the course of the official duty, the records or reports are admissible in evidence." [Richard T. Farrell, Prince, Richardson on Evidence § 8-1101 (11th ed. 1995); See also: *People v. Hudson,* 237 AD2d 943, 655 NYS2d 219 (4th Dept.1997)

XXII. E-MAILS; STATUTE OF FRAUDS

A. *Al-Bawaba.com Inc. v. Nstein Technologies Corp.,* 19 M3d 1125(A), 862 NYS2d 912 (S.Ct., Kings co., 2008, Demarest, J.) – The note or memorandum requirement of the Statute of Frauds may be pieced together out of separate writings, some signed, and some unsigned, provided that they clearly referred to the same subject matter or transaction. The signature of the party on the e-mail constituted a "signed writing" under the Statute of Frauds and the sender manifested his intention to authenticate the e-mail for the purpose of the statute of frauds by typing his name at the conclusion of the e-mail referencing the parties' contractual agreement.

B. The e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds (*see Stevens v Publicis S.A.*, 50 AD3d 253,

255-256 [2008], *lv dismissed* 10 NY3d 930 [2008]), and entitle plaintiff to judgment (CPLR 5003-a [e]). *Williamson v Delsener*, 59 AD3d 291, 874 NYS2d 41 [1st Dept. 2009]; *Jimenez v. Yanne*, 152 AD3d 434, 55 NYS3d 652 (1st Dept. 2017)

C. While e-mails may satisfy the Statute of Frauds, in case at bar, right of first refusal proposed in an e-mail was not enforceable under Statute of Frauds, where there was no meeting of the minds, as plaintiff never accepted the offer, and the parties' subsequent oral agreement was based on different price term. *Naldi v Grunberg*, 80 AD3d 1, 908 NYS2d 639 (1st Dept.2010)

XXIII. WEBSITE STATEMENT AS NON-HEARSAY – VERBAL ACT

A. Example: in a breach of warranty case, customer relies upon assurance posted on defendant's website in purchasing a product; the assurance is a warranty (has legal significance).

XXIV. PRIVILEDGED COMMUNICATIONS AND ELECTRONIC COMMUNICATIONS

A. CPLR §4548. Privileged communications; electronic communication thereof.

1. "No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."

XXV. THIRD PARTY TRANSMISSION

A. *Green v. Beer,* NYLJ, 9/16/10, p.44 col.1, SDNY, Wood, J. - Plaintiffs did not waive the attorney client privilege as to e-mails their lawyer sent to their son, who served as agents for his parents and whose technological assistance helped his parents receive timely e-mail communications. Plaintiffs had a reasonable expectation that the e-mail communications would remain confidential, and the son served as a necessary conduit in delivering the attorney's confidential e-mails to plaintiff. The involvement of a person who plays a necessary role in the delivery of an electronic communication does not constitute a waiver of privilege.

XXVI. PRIVILEGE LOG

A. *Rosewell Park Cancer Institute Corporation v. Sodexo America*, 68 AD3d 1720, 891 NYS2d 827 (4th Dept. 2009) – A claim of protection from discovery because of attorney-client privilege, work product privilege or as material prepared for litigation is necessarily a fact-specific determination, often requiring in camera review. A privilege log should be submitted to court setting forth the author of each e-mail document and attachment, the person to whom each document was sent, the date of transmittal and a description of each document, with an affidavit explaining the claim of privilege. There is nothing in the law governing attorney-client privilege that precludes the privilege from attaching to client communications made in response to oral requests by attorneys and the same reasoning applies when counsel asks high level corporate officers to have lower level officers or assistants gather facts and information incident to the provision of legal advice.

B. CPLR 3122(b) - "[w]henever a person is required ... to produce documents for inspection, and where such person withholds one or more documents that appear to be within the category of the documents required ... to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document".

C. Federal Rules of Civil Procedure 26(b)(5) – A party resisting disclosure based upon privilege must provide complete identifying information, date, type of document, and subject matter in a privilege log at the time the party responds to discovery. To overcome privilege log challenges, the party withholding the documents must ensure that each corresponding log entry contains enough information to satisfy every element of the privilege designation.

SOCIAL MEDIA AND ETHICAL CONSIDERATIONS

I. CLIENT READING SPOUSE'S EMAIL

A. NYSBA Comm. on Professional Ethics, Op. 945, 11/7/12 – A divorce attorney should not generally reveal the client's admission that the client has been reading his or her spouse's e-mail messages with opposing counsel, unless the lawyer knows that such conduct is criminal or fraudulent. While the lawyer should admonish the client to refrain from this conduct, disclosure should not be made of what the client is doing absent an exception to the general duty to preserve a client's confidential information.

B. cf. New York Rule of Professional Conduct Rule 3.3(b) – A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

II. ADVICE TO "TAKE DOWN" A POSTING

A. N.Y. County Lawyers' Assn., Ethics Opinion 745 – "…an attorney may properly review a client's social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes. In advising a client, attorneys should be mindful of their ethical responsibilities under RPC 3.4. that rule provides that a lawyer shall not "(a)(1) suppress any evidence that the lawyer or the client has a legal obligation to produce...[nor] (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."…"[p]rovided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on "private" social medical pages, and what may be 'taken down" or removed."

1. Can have content taken down but it must be preserved so if asked for in discovery, it can be produced. Otherwise social media content can't be deleted.

2. There may be a duty to preserve "potential evidence" in advance of any request for its discovery. *Voom HD Holdings LLC v. EchoStar Satellite LLC*, 93 AD3d 33 (1st Dept. 2012) ("Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data.")

3. Permissible for an attorney to review what a client plans to publish on a social media page in advance of publication, to guide the client appropriately, including formulating a corporate policy on social media usage. An attorney may not erect or facilitate the client's publishing of false or misleading information that may be relevant to a claim or participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false. RPC 3.4 (a) (4); NYCLA Ethics Opinion 745 (2013)

III. "FRIENDING" ON SOCIAL NETWORKING WEBSITES

A. Assn. of Bar of City of New York, Ethics Opinion 2010-2

1. A lawyer or a lawyer's agent may not attempt to gain access to a social networking website under false pretenses.

2. An attorney or her agent may use her real name and profile to send a "friend" request to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. Ethical boundaries are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all of the ethical requirements.

a. Opinion refers to the fact that it is "not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall."

3. So long as the attorney does not engage in the direct or indirect use of affirmatively deceptive behavior to "friend" a witness, such as creating a fraudulent profile that falsely portrays a lawyer or agent as a long–lost classmate, a prospective employer or a friend of a friend. The attorney has an ethical obligation to disclose his or her real name.

B. cf. N.Y. County Lawyers' Association, Ethics Opinion 737

1. Nongovernment attorneys may… Ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where:… (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; and (iii) the lawyer's conduct and the investigators' conduct that the lawyer is supervising do not otherwise violate the code (including, but not limited to DR 7–104, the "no contact" rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties." (Note "dissemblance", in this content context, includes concealment or misstatement of identity and purpose in the process of evidence gathering.)

C. NYCLA Formal Opinion 750 (2017) – "Adding" an adverse party or adverse witness on Snapschat

1. A lawyer is prohibited, either directly or indirectly, from using deceptive means to access the restricted electronic social media maintained by an adverse party or witness. A lawyer is prohibited, directly or through his or her agent, from seeking to add the adverse party or witness as a "friend" because there is no ability simultaneously to inform the Snapshot user of the lawyer's role in the pending adverse proceeding and the reason the lawyer is seeking access, such that seeking to add the adverse party or witness would result in deception by omission.

D. Unethical v. Inadmissible

1. Radder v CSX Transp., Inc., 68 AD3d 1743, 1743-1745, 893 NYS2d 725 [4th Dept 2009] - Generally, "absent some constitutional, statutory, or decisional authority mandating the suppression of otherwise valid evidence, such evidence will be admissible [in a civil action] even if procured by unethical means" (*Heimanson v Farkas*, 292 AD2d 421, 422 [2002]; *see Nordhauser v New York City Health & Hosps. Corp.*, 176 AD2d 787, 791 [1991]; *see generally, Sackler v Sackler*, 15 NY2d 40, 43-44 [1964]).

IV. DELIVERING CLIENT FILES TO CLIENT

A. NYSBA Ethics Opinion 1142 (1/5/18) – Maintenance of files in Electronic Form

1. Where a lawyer keeps client files received in electronic form in that form and a former client requests a copy of the file in paper form, the lawyer must take reasonable measures to deliver the electronic documents in a form in which the client can access them, but the lawyer may charge the client the reasonable fees and expenses incurred in printing out and delivering a paper copy.

2. Except for documents such as wills, deeds, contracts, and promissory notes or other documents whose legal effect or evidentiary value may be impaired by destroying originals, lawyers are permitted to maintain electronic copies of documents in lieu of paper originals.

B. NYSBA Ethics Opinion 1164 (3/21/19) – Returning Client Files without Keeping a Copy

1. Compliance with the terms of a settlement reached by a former client provides a legitimate reason to comply with that former client's request to destroy the client–owned documents in a lawyer's possession, whether written or digital. The lawyer may condition deletion of the file on

obtaining a release and a simple hold harmless clause from the former client, and may maintain an inventory of the filenames, sizes, and dates for data supplied by the former client to the lawyer during the representation and maintained in the lawyer's files.

V. METADATA

A. Metadata is data hidden in documents that are generated during the course of creating and entering a document.

B. Use of Metadata – Conflicting Opinions

1. Prohibition

a. NYSBA Comm. on Professional Ethics, Op. 782 (2004) - attorneys receiving documents with metadata "have an obligation not to exploit an inadvertence or unauthorized transmission of client confidences or secrets", and using computer technology to intentionally mine metadata contained in an electronic document would constitute "an impermissible intrusion on the attorney – client relationship (citing NYSBA Comm. on Professional Ethics, Op. 749 [2001])

b. NY County Lawyers Assn. Professional Etrhics Comm., Op. 738 (2002) – "[a] lawyer who receives from an adversary electronic documents that appear to contain inadvertently produced metadata is ethically obligated to avoid searching the metadata in those documents."

2. No Prohibition

a. ABA Comm. on Ethics and Professional Responsibility, Formal Ruling 06-442 – A lawyer is not prohibited from extracting metadata intentionally.

VI. JUDICIAL USE OF ELECTRONIC SOCIAL MEDIA

A. ABA Model Code of judicial Conduct, Formal Opinion 462 (2/21/13)

1. As judges are barred from endorsing or opposing candidates for public office, collecting a "like" button on political campaign sites could be perceived as an ethics violation.

2. Judges should not form relationships with persons or groups that may convey an impression that these people and entities are in a position to influence a judge,

3. Judges should take care to avoid comments or interactions that may be interpreted as ex parte communications concerning pending matters and should avoid using social networking sites to obtain information about matters before them.

4. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an electronic social media connection with the judge, the judge should be mindful that such connection may give rise to the level of social relationship or the perception of relationship that requires disclosure or recusal.

B. Independent Internet Research

1. "We also caution the Justice that his independent internet investigation of the plaintiff's standing that included newspaper articles and other materials that fall short of what may be judicially noticed, and which was conducted without providing notice or an opportunity to be heard by any party…was improper and should not be repeated." *HSBC Bank USA, N.A., v Taher*, 104 AD3d 815, 962 NYS2d 301 (2d Dept. 2013)

2. ABA Model Code of Judicial Conduct, Formal Opinion 478 (2017) – Finding "adjudicative facts" about a case online is generally banned. However, a judge is allowed to go online for facts that are subject to judicial notice because they are generally known and not subject to reasonable dispute. Adjudicative facts concern the immediate parties, including who did what, where, when, how and with what motive or intent.

C. A judge who receives a social media message from the victim's relative that contain substantive discussion of the case must disclose the ex parte communication to all parties. OCA Judicial Ethics Opinion 17 – 53 (May 4, 2017)

AUTHENTICATION

I. AUTHENTICATION - WEBSITES AND SOCIAL MEDIA

A. The foundational requirements for authenticating a screenshot from a social media site like Facebook are the same as for a printout from any other website. Basically, the proponent must offer foundational testimony that the screenshot was actually on the website, that it accurately depicts what was on the website, and that the content is attributable to the owner. (*Lorraine v. Market Am. Ins. Co*., 241 F.R.D. 534 (D.Md.2007)) Some courts require the website owner to provide the necessary foundation to authenticate a page from a website. The more liberal courts have held that a printout from a website may be authenticated by a visit to the website. What is required is that the depiction accurately reflects the content of the website and the image of the page on the computer and from which the screen shot was made. A screen shot from a recognized corporation, such as a bank or credit card company generally causes less concern that a personal blog posted where a non-owner can more easily manipulate the content. Information from government websites are deemed self-authenticated if the proponent establishes that the information is current and complete.

B. Suggested Methods of Authorization

1. Testimony from the purported creator of the social network post and related postings;
2. Testimony from persons who received the messages;
3. Testimony about the contextual clues and distinctive aspects in the messages themselves tending to reveal the identity of the sender;
4. Testimony regarding the account holders exclusive access to the originating computer and social media accounts;
5. Expert testimony concerning the results of the search of the social media account holder's computer hard drive;
6. Testimony directly from the social networking website that connects the establishment of the profile to the person who allegedly created and also connects the posting sought to be introduced to the person who initiated it; and
7. Expert testimony regarding how social network accounts are accessed and what methods are used to prevent unauthorized access.

C. Claim of Alteration

1. The party opposing the admission of an email may claim it was altered or forged. Absent specific evidence showing alteration, however, the

court will not exclude an email merely because of the possibility of an alteration.

2. *U.S. v. Safavian*, 644 F.Supp.2d 1 – "The possibility of alteration does not and cannot be the basis for excluding e-mails as unidentified or unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents (and copies of those documents)."

D. Foundations

1. Assuming the proponent is not the person whose website posting is at issue, a foundation can be laid by simply having a witness testify that he or she is the person who printed out the posting, he or she recalls the appearance of the printout which was made from the social media site, and that he or she recognized the exhibit as that printout.

2. Assuming such a witness as above is not available, the proponent can have a witness testify that the witness visited the social media site at issue, read the information there that is reflected in the proposed printout exhibit, remembers the contents of the social media site, and can identify the proposed printout exhibit as accurately reflecting the posting that he or she saw from the social media site. (Similar to the method used authenticating of photograph or other demonstrative exhibit)

3. Totality of the circumstances approach to determine that the social media posting is attributable to a certain person or entity.

4. A forensic computer expert testifies that he or she examined the hard drive of the computer used by a particular person and was able to recover the posting from the hard drive of that computer, thereby providing evidence that the exclusive user of that computer was the source of the posting period.

5. If such a witness is unavailable, other relevant factors include that the printout has adopted the username shown on the profile page.

6. Whether the person has shared his or her social media password with other people. Whether there is a photograph of the persons or the profile page identifies a person to whom the proponent wishes to attribute the posting.

7. Whether there is personal information on the profile page such as birthday, unique name, or other pedigree information.

Steps:
(1) Proof that the witness visited the website.
(2) When the website was visited.
(3) Establish that the website was current as opposed to stale sites. For example, postings reflect current information, dates, etc.
(4) Establish how the site was accessed – Google search and followed the links; Internet Explorer, etc.
(5) Description of the website access – identify material on the website including names, addresses, logos, phone numbers, etc.
(6) Recognition of the website based on past visits
(7) Proof that the screen shot was printed from the website and the date and time the screen shot was captured
(8) Proof that the screenshot in the printout is the same as what the witness saw on the computer screen.
(9) Proof that the printout was not altered or modified from the image on the computer.

SAMPLE QUESTIONS – FACEBOOK PAGE

Q: Are you familiar with the social media website Facebook?
A: Yes.
Q: How are you familiar with it?
A: I have been using it 4 to 5 times per week for the last 3 years.
Q: Generally speaking, what you do with the social media site?
A: I generally keep up with my friends and what they are doing and special things in their lives.
Q: What is a Facebook friendship?
A: You are permitted to follow certain chosen friends.
Q: How is a Facebook friendship created?
A: You invite someone to be your friend and if the person accepts you become Facebook friends.
Q: Is Joan Smith your Facebook friend?
A: Yes.
Q: What is a Facebook wall?
A: This is an area where someone has personal information open only to friends.
Q: How you access someone's Facebook wall?
A: You click their profile on the website.
Q: What type of information is found on Joan Smith's wall?
A: Personal information such as special events, pictures, employment, where she lives, etc.
Q: Have you ever visited Joan Smith's wall?
A: Many times.
Q: Have you done so recently?

A: Actually, I did last Thursday.
Q: What did you see on our wall?
A: I saw a picture of her and my husband with their arms around each other at what appeared to be a party, and another picture at the same place where they were kissing.
Q: Did you print a copy of the pictures you saw?
A: Yes.
Continue with identification of the printout in same manner as with email or text message.

II. JUDICIAL NOTICE OF INFORMATION ON WEBSITES

A. "The court's computerized records, which were not included in the record but of which we take judicial notice show that in accordance with the warning in the court's scheduling notice dated November 23, 2004, admittedly received by plaintiff's attorney, the action was dismissed on March 2, 2005 pursuant to 22 NYCRR 202.27 when plaintiff failed to appear for a pre-note of issue conference." *Perez v. New York City Hous. Auth.*, 47 AD3d 505, 850 NYS2d 75 (1st Dept. 2008)

III. OFFICIAL GOVERNMENT WEBSITES

A. Federal Rules of Evidence §902(5) - website operated by a government agency is self-authenticating.

B. State Department of Insurance for corporate presence in county (*N.Y.C. Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 3 Misc3d 925, 774 NYS2d 916 [Civ. Ct. NY 2004], *revd on other grounds*, 8 Misc3d 33, 798 NYS2d 309 [App. T. 2d Dep't. 2004]

C. Surgeon General report for dangers of second-hand smoke (*DeMatteo v. DeMatteo*, 194 Misc 2d 640, 749 NYS2d 671 [Sup. Ct. NY 2002][Julian, J.]

D. Secretary of State for "entity information" for plaintiff as to its principal place of business (*Tener Consulting Services, LLC v FSA Main St., LLC*, 23 Misc 3d 1120(A), 886 NYS2d 72, [Sup Ct 2009].

E. "However, the Court has learned (from its own research) that plaintiff is still registered with the Secretary of State as the "Chairman or Chief Executive Officer" of Venezia. The Court rather than counsel for defendant uncovered this evidence by a quick review of the official website of the New York Secretary of State. While certainly unusual, the Court is

allowed to take judicial notice of this matter of public record. *See Brandes Meat Corp. v. Cromer,* 146 AD2d 666, 537 NYS2d 177 (2d Dept.1989); *Chasalow v. Board of Assessors of County of Nassau.* 176 AD2d 800, 575 NYS2d 129 (2d Dept.1991). The Court informed the parties that it would be taking judicial notice of this fact at a Court conference." *Munaron v. Munaron*, 21 Misc3d 295, 862 NYS2d 796 [S.Ct.. Westchester Co. 2008 Jamieson, J.]

F. U.S. Naval Observatory for time of sunrise (*United States v. Bervaldi*, 226 F.3d 1256, 1266, n. 9 [11th Cir. 2000])

G. Federal Reserve Board for prime interest rate (*Levan v. Capital Cities ABC, Inc.*, 190 F.3d 1230, 1235, n. 12 [11th Cir. 1999])

H. National Personnel Records Center for records of retired military personnel (*Denius v. Dunlap*, 330 F.3d 919, 926 [7th Cir. 2003])

I. Department of State (NYS) online search results for whether physician was licensed to practice medicine in NYS (*Proscan Radiology of Buffalo v. Progressive Cas. Ins. Co.***,** 12 M3d 1176(A), 820 NYS2d 845 (Civil Ct., NY, 2006) :

> "On the other hand, there are specific exceptions to the hearsay rules with regard to documents maintained by governmental agencies given the inherent reliability of such documents. It would seem that the fact that these documents were obtained by downloading them from the government's website rather than through the physical receipt of them from the governmental agency itself is somewhat of a distinction without a difference. In this regard, the Court notes that the Appellate Division, Second Department, has recently cited with approval a number of cases in which trial courts have taken judicial notice of documents that the courts themselves have downloaded from government websites (*see Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.,* 2009 N.Y. Slip Op 000351, 871 NYS2d 680 [2d Dept 2009], *citing Munaron v. Munaron,* 21 Misc3d 295 [Sup Ct Westchester County 2008]; *Parrino v. Russo,* 19 Misc3d 1127[A], 2008 WL 1915133 [Civ Ct Kings County 2008]; *Nairne v. Perkins,* 14 Misc3d 1237[A], 2007 WL 656301 [Civ Ct Kings County 2007]; *Proscan Radiology of Buffalo v. Progressive Cas. Ins. Co.,* 12 Misc3d 1176 [A], 2006 WL 1815210 [Buffalo City Ct.2006]; *see also Bernstein v. City of New York,* 2007 N.Y. Slip Op 50162[U], 14 Misc3d 1225[A] [Sup Ct Kings County 2007]; *Miriam Osborn Memorial Home Assn. v. Assessor of City of Rye,* 9 Misc3d 1019 [Sup Ct Westchester County 2005]). There is every reason to believe that the information that appears on governmental websites is a reasonably reliable reflection of what the hard copies on file with the government show."

J. cf. *Morales v. City of New York*, 18 M3d 686, 849 NYS2d 406 (S.Ct., 2007) - "this Court is not aware that any New York appellate court has passed definitively upon the admissibility as evidence of public records printed from even a New York government website."

IV. PRIVATE OR COMMERCIAL WEBSITES

A. Hospital website for asthmatic conditions and causes (*Gallegos v. Elite Model Management Corp*., 195 M2d 223,758 NYS.2d 777 [Sup. Ct. NY 2003])

B. Trial court abused its discretion in not taking judicial notice of defendant corporation's historical retirement fund earnings posted on its website (*O'Toole v. Northrop Grumman Corp.,* 499 F3d 1218, 1225 [10th Cir. 2007])

C. Mapquest for mileage distance (*In Re Extradition of Gonzales*, 52 FSupp2d 725, 731, n. 12 [Wd La. 1999]; See, CPLR Rule 4511

V. WEBSITE ADMISSIONS

A. *NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 3 M3d 925, 774 NYS2d 916 (Civ. Ct., Qns. Co., 2004) - Information posted on corporate party's website constitute admissions, and are encompassed by the admissions exception to the hearsay rule. See, *NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.,* 8 M3d 33, 798 NYS2d 309 (App Term) (Trial judge made independent internet investigation to see if defendant was transacting business in NY. "Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of undisputed reliability, and the parties had no opportunity to be heard as to the propriety of taking judicial notice in the particular instance (see, Prince, Richardson on Evidence §20202 [Farrell 11th ed]").

B. Website Statement as non-hearsay – Verbal Act (i.e., breach of warranty case)

VI. AUTHENTICATION - SYSTEM/PROCESS CAPABLE OF PRODUCING RELIABLE/ACCURATE RESULT (FRE 901(B)(9))

A. *U.S. v. Washington*, 498 F.3d 225 (4th Cir. 2007) - computer readout of electronic forensic analysis of defendant's blood sample for drug and alcohol content is admissible if authentic; readout was not hearsay because there was no "declarant" under rule 801 (b).

B. Important for authenticating computer simulations. Generally requires proof of reliability of scientific or technical principles and thus involves a *Daubert* or *Frye* situation. See, e.g. *Ruffin ex rel Sanders v. Bolder*, 809 N.E.2d 1174 [Ill. App. Ct. 2008) (simulation showing force exerted in childbirth)

C. Requires a witness who has personal knowledge to explain how the social media evidence was created or, alternatively, is a qualified expert.

D. Important for authenticating computer simulations

1. Example – Turbo Tax

VII. SELF-AUTHENTICATION (RULE 902)

A. Rule 902(7) allows for self-authentication for documents that bear "inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin."

B. *U.S. Equal Employment Opportunity Commission v. E.I. DuPont de Nemours & Co.,* 2004 WL 2347559 (E.D. La. 10/18/04) - "a printout of a table from the website of the United States Census Bureau," which "contained the internet domain address from which the table was printed, and the date on which it was printed," was admissible because it was self-authenticating."

C. Inscriptions, signs, tag, or labels purporting to be affixed in the course of business and indicating ownership, control, or origin are self-authenticating. (FLR 902[7])

1. Example: automatic signature at end of an e-mail

D. Comparison with another properly authenticated e-mail. (*U.S. v. Safavian*, 435 FSupp.2d 36 (D.D.C. 2006))

E. Presumption of authenticity - Documents produced by adverse party as part of discovery in litigation (see, *Indianapolis Minority Contractors Ass'n., Inc. V. Wiley*, 1998 WL 1988826 (S.D. Ind. 5/13/98); *Perfect 10, Inc., 213 F.Supp.2d 1146.*

VIII. EVIDENTIARY HURDLE – RELEVANCE

A. Does the ESI ten to prove or disprove a fact that is of consequence to the trial?

B. FRE 401 – low threshold

1. cf. with issue of weight and credibility [FRE 104(e)]

2. requirement to show that social media evidence has the "tendency to make the existence of a fact... more probable or less probable than it would be without the evidence.

IX. EVIDENTIARY HURDLE - AUTHENTICATION - GENERALLY

A. Most significant issue for ESI - E-mails, text messages and social media data are subject to the same requirements for authentication as traditional paper documents.

B. Non-testimonial evidence- writings, photographs, recordings – must be authenticated, i.e, the evidence is what it is purported to be. (FRE 901(a))

C. FRE 901(b) identifies ten nonexclusive examples of how authentication can be accomplished.

D. Electronically stored information "may require greater scrutiny than that required for the authentication of 'hard copy' documents." (*Lorraine v. Markel Am. Ins. Co.,* 241 F.R.D. 534, 542-43 (D. Md. 2007)

1. When social media is collected with a proper chain of custody and all associated metadata is preserved, authenticity is much easier to establish. A screen shot won't include metadata or other information that can't be "seen" but which may be critically important to a lawsuit and/or to authenticate the data.

E. General Proposition – anyone with personal knowledge of an electronic mail message, including the sender and recipient, can authenticate

F. Policy - *U.S. v. Safavian*, 644 F.Supp.2d 1 (1009) - "As appellant correctly points out, anybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationery can be copied or stolen…. We see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there is then an adequate foundational showing of their relevance and authenticity."

X. CIRCUMSTANTIAL EVIDENCE AS BASIS FOR AUTHENTICATION

A. Circumstantial Evidence (Fed. Rules of Civil Proc., Rule 901(b)(4)) - offer testimony about the distinctive characteristics of a message when considered in conjunction with the surrounding circumstances.)

1. A party can authenticate electronically stored information under Rule 901(b)(4) with circumstantial evidence that reflects the "contents, substance, internal patterns, or other distinctive characteristics" of the evidence.

B. E-mails and text messages have been admitted based on circumstantial evidence. In *Lorraine*, *supra,* the court noted that similar uncertainties exist with traditional written documents with signatures that can be forged, or distinctive letterhead stationery that can be copied or stolen.

C. A document may be authenticated by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed.R.Evid. 901(b)(4); *United States v. Smith,* 918 F.2d 1501, 1510 (11th Cir.1990) ("[t]he government may authenticate a document solely through the use of circumstantial evidence, including the document's own distinctive characteristics and the circumstances surrounding its discovery"),

D. E-mails properly authenticated when they included defendant's e-mail address, the reply function automatically dialed defendant's e-mail address as sender, messages contained factual details known to defendant, messages included defendant's nickname, and other metadata. *U.S. v. Siddiqui,* 235 F3d 1318, 1322-23 (11th Cir. 2000)

1. Circumstantial evidence can verify emails just as such evidence authenticates a voice heard over the telephone when the message reveals the speaker had knowledge of the facts that only the speaker would likely know. Here, the emails contain sufficient circumstantial evidence to authenticate defendant Charles and recipient and send as the emails were sent from his alleged account referenced the purchase of the house in question, the family members by name, and other facts showing that the emails were written and received by defendant Charles. *Smith v. Charles,* 37 Misc2d 1229(A), 964 NYS2d 63 (Supreme Court, Kings Co. 2012, Lewis, J.)

2. Objections overruled to exhibits printed from the Internet that were printed by a party representative who attached the exhibits to his declaration. The court found that the dates and Web addresses from which the images were printed provided circumstantial indicia of authenticity," which, together with the declaration, would support a reasonable juror in the belief that the documents were what plaintiff said they were." *Perfect 10,*

Inc. v. Cybernet Ventures, Inc. , 213 F.Supp.2d 1146, 1153 – 54 (C.D. Cal. 2001)

E. Consider the e-mail address of the purported sender and the fact that the apparent author would have been familiar with the content of the e-mail.

1. *U.S. v. Safavian*, 435 FSupp.2d 36 (D.D.C. 2006) – emails authenticated by distinctive characteristics including e-mail addresses, the defendant's name, and the contents which contain discussions relating to defendant's work.

XI. AUTHENTICATION – IM COMMUNICATIONS – CIRCUMSTANTIAL EVIDENCE

A. Court properly received, as an admission, Internet instant message from defendant to victim's cousin; although witness did not save or print the message, it was properly authenticated; defendant's close friend testified to defendant's screen name; cousin testified that she sent instant message to that same screen name, and received reply, content of which made no sense unless it was sent by defendant. (*People v. Pierre*, 41 AD3d 289, 838 NYS2d 546 [1st Dept. 2007]). See also, *People v Clevenstine*, 68 AD3d 1448, 1450-51, 891 NYS2d 511 [3d Dept. 2009] lv to appeal denied, 14 NY3d 799, 925 NE2d 937, 899 NYS2d 133 [2010]:

1. "[A]uthenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it," and "[t]he foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted" (*People v McGee*, 49 NY2d 48, 59 [1979]; *see* Prince, Richardson on Evidence § 4-203 [Farrell 11th ed.]).

B. Here, both victims testified that they had engaged in instant messaging about sexual activities with defendant through the social networking site MySpace, an investigator from the computer crime unit of the State Police related that he had retrieved such conversations from the hard drive of the computer used by the victims, a legal compliance officer for MySpace explained that the messages on the computer disk had been exchanged by users of accounts created by defendant and the victims, and defendant's wife recalled the sexually explicit conversations she viewed in defendant's MySpace account while on their computer. Such testimony provided ample authentication for admission of this evidence (*see People v Lynes*, 49 NY2d 286, 291-293 [1980]; *People v Pierre*, 41 AD3d 289, 291 [2007], *lv denied* 9 NY3d 880 [2007]; *see generally* Zitter, Annotation, *Authentication of Electronically Stored Evidence, Including Text Messages and E-mail*, 34 ALR6th 253)." *People v. Clevenstine*, 68 AD3d 1448, 891 NYS2d 511 (3d Dept. 2009)

C. Other jurisdictions that have directly dealt with the issue of the admissibility of a transcript, or a copy-and-paste document of a text message conversation, have determined that authenticity can be shown through the testimony of a participant to the conversation that the document is a fair and accurate representation of the conversation (*see e.g. United States v Gagliardi,* 506 F3d 140 [2d Cir 2007]; *United States v Tank*, 200 F3d 627 [9th Cir 2000] [a participant to the conversation testified that the print-out of the electronic communication was an accurate representation of the exchange and had not been altered in any significant manner]

1. *State v Roseberry*, 197 Ohio App 3d 256, 2011 Ohio 5921, 967 NE2d 233 [Ohio Ct App 2011] [a handwritten transcript of text messages was properly authenticated through testimony from the recipient of the messages, who was also the creator of the transcript]; *Jackson v State*, 2009 Ark App 466, 320 SW3d 13 [2009] [testimony from a participant to the conversation was sufficient]). 1095, 988 NE2d 529 (2013)

2. *cf. Peo. v. Givans*, 45 AD3d 1460, 845 NYS2d 665 (4th Dept. 2007) – Error to admit cell phone text messages sent to defendant without evidence that he ever retrieved or read it and without authentication of its accuracy or reliability and, further, that it was error to permit jury to access entire contents of the cell-phone, including items not admitted into evidence.

XII. AUTHENTICATION - PERSON WITH KNOWLEDGE

A. Rule 901 (b) (1) allows for authentication through testimony from a witness with knowledge that the matter is what it is claimed to be. Generally the person who created the evidence can testify to authentication. Alternatively, testimony may be provided by a witness who has personal knowledge of how the social media information is typically generated. Then, the witness must provide "factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of the system or process that does so." (I., 241 F.R.D. 534, 555-56 [D. Md., 2007])

B. *Robmom v. Weberman*, 2002 WL 1461890, 2002 NY Slip Op 50245 (S.Ct., Kings Co., 2002, Jones, J.), affd. 309 AD2d 844, 766 NYS2d 86 (2d Dept. 2003) - E-mails properly admitted where plaintiff testified that the e-mails were a compilation of the many he had received as a result of defendant's directions on their web sites; that he had received them and printed them out on his office computer; and that they are true and accurate copies of what he had received and printed.

C. *U.S. V. Gagliardi*, 506 F3d 140, 151 (2d Cir. 2007) (chat room logs properly authenticated as having been sent by the defendant through testimony from witnesses who had participated in the online conversations.

D. Photographs of text messages between the defendant and the complainant were properly admitted into evidence…The complainant's testimony that the photographs of the text messages fairly and accurately depicted the text message conversation between her and the defendant was sufficient to authenticate the photographs. *People v. Cotto*, 164 AD3d 826, 826–27, 79 NYS3d 535, leave to appeal denied, 32 N.Y.3d 1110, 115 N.E.3d 633, 91 NYS3d 361 (2018)

E. Recorded Conversation

1. Defendant also argues that County Court erred in permitting the People to introduce a private Facebook message in which he made a threat to the second CI, claiming a lack of foundation. "A recorded conversation—such as a printed copy of the content of a set of cell phone instant messages—may be authenticated through, among other methods, the 'testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered'." (*Matter of Colby II. [Sheba II.]*, 145 AD3d 1271, 1273 [2016], quoting *People v Agudelo*, 96 AD3d 611, 611 [2012], *lv denied* 20 NY3d 1095 [2013]). "The credibility of the authenticating witness and any motive [he or] she may have had to alter the evidence go to the weight to be accorded this evidence, rather than its admissibility" (*People v Agudelo*, 96 AD3d at 611 [citation omitted]). Here, the second CI had been Facebook friends with defendant for two years prior to trial and stated that she knew the message came from defendant's account because an icon of defendant's picture was displayed next to it. She also testified that she had firsthand knowledge of the content of the Facebook message, therefore, she was an appropriate witness to authenticate the message (*see id.* at 612). Additionally, the Facebook message was sufficiently authenticated by the second CI as she explained that the copy shown to her—the same copy that was ultimately admitted as an exhibit at trial—accurately depicted the message that defendant had sent to her (*see Matter of Colby II. [Sheba II.]*, 145 AD3d at 1273). *People v. Shortell*, 155 AD3d 1442, 1444, 66 NYS3d 69, 2017 N.Y. Slip Op. 08410, 2, 2017 WL 5892397 (N.Y. App. Div. 2017), leave to appeal denied, 31 N.Y.3d 1087, 79 NYS3d 109

F. Screenshot

1. We conclude that the father's alleged conduct in allowing a 13-year-old child with no prior experience to operate a boat in that manner "would support a finding of neglect" (*Matter of Bernthon v Mattioli*, 34 AD3d

1165, 1166 [3d Dept 2006]; *see generally* § 1012 [f] [i] [B]), and that the child's statements about the incident were corroborated by the screenshot (*see Matter of Mildred S.G. v Mark G.*, 62 AD3d 460, 462 [1st Dept 2009]), which was properly admitted in evidence at the fact-finding hearing based on the mother's testimony that it accurately represented the father's Facebook page on the date in question and that she had communicated with the father through his Facebook page in the past (*see Matter of Rutland v O'Brien*, 143 AD3d 1060, 1062 [3d Dept 2016]; *see generally People v Price*, 29 NY3d 472, 478-480 [2017]). Montalbano v. Babcock, 155 A.D.3d 1636, 1637, 65 NYS3d 396, 2017 N.Y. Slip Op. 08119, 2, 2017 WL 5506651 (N.Y. App. Div. 2017), leave to appeal denied, 31 N.Y.3d 912, 81 NYS3d 372

XIII. AUTHENTICATION - DISTINCTIVE CHARACTERISTICS

A. Evidence is frequently authenticated circumstantially such as through the distinctive nature of the contents of the messages. *Matter of R.D. (C.L.)*, 58 Misc3d 780 (Fam. Ct., NY Co., 2017). Here, a “screen shot” of text messages sent by a mother to an unknown party agreed to engage in sex for money was authenticated to the following evidence. The father testified that:

1. He observed the incriminating messages on his cell phone and that the screen shot, although he did not personally take it, was an accurate representation of the messages that he saw on the cell phone;
2. The cell phone belong to the mother based on his familiarity with the make, model and color of the cell phone;
3. He has seen the mother use the cell phone many times;
4. When he was visiting his daughters, he picked up the cell phone after running in the mother asked him to handed to her; and
5. The cell phone was password protected, making it unlikely that someone, other than the mother, was able to send the messages sought to be introduced.

B. A document may be authenticated by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed.R.Evid. 901(b)(4); *United States v. Smith*, 918 F.2d 1501, 1510 (11th Cir.1990) ("[t]he government may authenticate a document solely through the use of circumstantial evidence, including the document's own distinctive characteristics and the circumstances surrounding its discovery")

C. E-mails were properly authenticated when they included defendant’s e-mail address, the reply function automatically dialed defendant’s e-mail address as sender, messages contained factual details known to defendant,

messages included defendant's nickname, and other metadata. *U.S. v. Siddiqui,* 235 F3d 1318, 1322-23 (11th Cir. 2000)

1. *U.S. v. Safavian*, 435 FSupp2d 36 (D.D.C. 2006) – emails authenticated by distinctive characteristics including e-mail addresses, the defendant's name, and the contents which contain discussions relating to defendant's work. See also, *Peo. v. Franzese,* 154 AD3d 706, 61 NYS3d 661 (2d Dept. 2018)

2. *Griffin v. Maryland*, 19 A3d 415 (Md. 2011) - In a murder trial, the prosecution's attempt to introduce printouts from a MySpace page, to impeach a defense witness, was unsuccessful as the witness' picture, birth date and location were not sufficiently distinctive characteristics on a MySpace profile page to authenticate the printout. The trial court had given "short shrift" to concerns that someone other than the putative author could have accessed the account and failed to acknowledge the possibility of a likelihood that another user could have created the profile in issue.

In *Griffin*, the court suggested three (3) types of evidence to satisfy the authenticity requirement:

a. Ask the purported creator if he or she created the profile and added the post in question;

b. A search of the computer of the person who allegedly created the profile, examining the hard drive and internal history to determine if it was that person who originated the profile; or

c. Obtain information directly from the social networking website itself to establish who created and posted the relevant information to the profile.

3. *Tienda v. State*, 2010 Tex App Lexis 10031 (2010) - MySpace evidence admitted, the court noting that (1) the evidence was registered to a person with the defendant's *nickname and legal name; (2)* the photographs on the profiles were clearly of the defendant; (3) the profiles referenced the victim's murder and the defendant being arrested and placed on electronic monitoring. The court noted that "this type of individualization is significant in authenticating a particular profile page as having been created by the person depicted in it. The more particular and individualized the information, the greater the support for a reasonable juror's finding that the person depicted supplied the information.

4. Taken together, *Griffen* and *Tienda* show that if the characteristics of the communication proffered as evidence are genuinely distinctive, courts are likely to allow circumstantial authentication based upon content and context. Contrariwise, if the characteristics are general, courts may require additional corroborating evidence. \

XIV. AUTHENTICATION BY HEADER

A. Often the headers of any email which include electronic address of the sender are enough to authenticate

B. *U.S. v. Safavian*, 644 F.Supp.2d 1 (2009) – Court authenticated any e-mail based on the header.

XV. AUTHENTICATION BY E-MAIL THREAD

A. Authentication can also be established via an e-mail thread. For example, if an e-mail was a reply to someone, the digital conversation could serve as the basis of authentication (*U.S. v. Siddiqui*, 235 F3d 1318 [11th Cir. 2000]).

Sample Q&A

Q. Would you please identify Defendant's Exhibit D.
A: It is a copy of an e-mail I sent to my employer.
Q: When did you send this e-mail?
A: September 9, 2017.
Q: Under what circumstances did you send this e-mail?
A: I was replying to an e-mail my employer sent me earlier in the day.
Q: Do you recognize your employees e-mail address?
A: Yes
Q: What is his e-mail address?
A: Workhard@gmail.com
Q: On the e-mails header does it reflect where this email was sent?
A: Yes.
Q: Where was it sent?
A: Workhard@gmail.com

XVI. AUTHENTICATION BY COMPARISON

A. FRE 901(B)(3) - permits authentication by comparison, i.e., a court can authenticate an e-mail by comparing it to the mails previously admitted.

B. The proponent can then ask the court to take judicial notice of the earlier admitted e-mails.

XVII. AUTHENTICATION BY DISCOVERY PRODUCTION

A. The fact that a party opponent produced e-mails during discovery

can serve as a basis for authentication of the subject e-mails.

B. CPLR 4540-a: Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility.

C. The production in response to a request for production is inherently an admission of the authenticity of the documents produced. (*John Paul Mitchell Sys. V. Quality Kind Distribs., Inc.*, 106 FSupp2d 462 [S.D.N.Y. 2000])

XVIII. AUTHENTICATION BY TESTIMONY OF SENDER – E-MAIL

STEPS:

1. The electronic address placed on the e-mail is that of the claimed recipient.
2. The purpose of the communication (why it was sent)
3. If applicable, establish that sender receives an earlier e-mail and replied to the earlier email.
4. Establish that the e-mail was actually sent.
5. Establish that the recipient acknowledged receipt or took action consistent with an acknowledgment of receipt.

SAMPLE QUESTIONS – TESTIMONY OF SENDER

Q: Tell the Court what this document is.
A: It is an e-mail I sent my friend Larry.
Q: Do you know Larry's e-mail address?
A: Yes
Q: What is his email address?
A. Larry the Great@optonline.net
Q: Did you send the email to that address?
A: Yes.
Q: For what purpose did you send the email?
A: I wanted to confirm our dinner plans for that evening.
Q: Did Larry ever acknowledge the email you sent?
A: Yes, he called me an hour after I sent the email to discuss our dinner plans.

XIX. AUTHENTICATION BY TESTIMONY OF THE RECIPIENT

Steps:
1. Acknowledge receipt of e-mail
2. Establish the electronic address of the sender as being the address indicated on the face of the e-mail.
3. Compare earlier e-mails received by the sender.
4. Identify any logos or other identifying information on the e-mail.
5. Establish whether the e-mail received was a reply to one sent earlier by the recipient.
6. Establish any conversations with the sender concerning the communication
7. Establish any actions taken by the sender consistent with the communication

SAMPLE QUESTIONS – TESTIMONY OF RECIPIENT

Q: Please identify this document.
A: It is an e-mail I received from my attorney.
Q: What is the e-mail address of the sender?
A: Dewey@dch.com
Q: Do you recognize any identifying marks on the e-mail?
A: Yes, I recognize the logo of the firm where my attorney works and his phone number is on the e-mail.
Q: When did you receive this e-mail?
A: October 5, 2012.
Q: Had you sent your attorney any e-mails earlier in the day on October 5, 2012?
A: Yes, and this was a reply to an e-mail I sent that morning.
Q: Why did you send your attorney any mail in the morning?
A: I was attempting to set up an appointment with him regarding the issue of visitation with my children.
Q: Did you have a conversation with your attorney after you received this e-mail?
A: Yes, I had a phone conversation with him about 10 minutes after I received the e-mail.
Q: What was the topic of the telephone conversation?
A: It concerned the issue of visitation with my children.

XX. AUTHENTICATION BY CONTENT

A. A proponent of an e-mail may authenticate the e-mail by showing that only the purported author was likely to know the information reflected in the message.

B. Examples:

1. The substantive content of the message might be information only known to the purported sender;

2. If the recipient used a reply feature to respond, the new message will include the sender's original message.

3. If the sender dispatched that message to only one person, its inclusion in the new message indicates that the new message originated with the original recipient.

XXI. AUTHENTICATION BY ACTION CONSISTENT WITH THE MESSAGE

A. After receipt of the e-mail message, the purported recipient takes action consistent with the content of the message. For example, delivery of the merchandise mentioned in the message. Such conduct can provide circumstantial authentication of the source of the message.

XXII. AUTHENTICATION - TEXT MESSAGES & IM'S

A. Nature of Text Messages

1. Text messages - Unlike e-mails, typically travel from device to device the same way a cell phone call travels, rather than over the enterprise e-mail servers.

2. Leave footprints that can reveal the general geographic locations of the sender and recipient at the time of dispatch and receipt.

3. Text message content typically only exists in the handheld devices of the sender and recipient, rather than in a server at a workplace. They have a short shelf life and can be destroyed.

4. Text messages are easily lost because they travel from handheld device to handheld device through third parties (the receiving cell phone tower and wireless service) that tend to not retain the message content for more than a few days. By contrast, an e-mail will travel over the Internet from a computer through a server.

B. The testimony of a "witness with knowledge that a matter is what it is claimed to be is sufficient" to satisfy the standard for authentication (*Gagliardi*, 506 F3d at 151). Here, there is no dispute that the victim, who received these messages on her phone and who compiled them into a single document, had first-hand knowledge of their contents and was an appropriate witness to authenticate the compilation. Moreover, the victim's testimony was corroborated by a detective who had seen the messages on the victim's phone. *People v. Agudelo*, 96 AD3d 611, 947 NYS2d 96 (1st Dept. 2012) leave to appeal denied, 20 NY3d 1095 (2013)

C. A recorded conversation – such as a printed copy of the content of a set of cell phone instant messages – may be authenticated through, among other methods, the testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered. The credibility of the authenticating witness and any motor he or she may have had to alter the evidence go to the weight to be accorded this evidence, rather than its admissibility. *People v. Shortell*, 155 AD3d 1442, 66 NYS3d 69 (3d Dept. 2017)

D. Authentication by Testimony of Sender – Steps:

(1) The context of a message – why was it sent, its purpose, etc.
(2) Establish that the number it was sent to was that of the recipient.
(3) Identify a photograph of the actual text that was sent.
(4) Describe the process of taking the photograph – who took it, what camera was used, was it an accurate reproduction of the actual text, etc.
(5) Identify and offer transcript of the actual text including how the transcript was made – based on the actual text, reviewed by the sender, verified to be an accurate reflection of the actual text.
(6) Establish if there was any responsive text received or any verbal acknowledgment by the recipient in relation to the text sent.

SAMPLE QUESTIONS – TESTIMONY OF SENDER

Q: Identify the document.
A: That is a picture of the text message I forwarded to my employer.
Q: What number was the text sent to?
A: 123–456–7891
Q: Whose numbers that?
A: My employer's number.
Q: When did you send this text?
A: January 10, 2013.
Q: What was the purpose of sending the text to your employer?
A: I wanted to update her on a sale I had just made.
Q: How did you capture the image contained in this exhibit?
A: My brother took a picture of my message on his phone and printed it out for me.
Q: Does that picture accurately reflect how the text looked when you sent it?
A: Yes.

XXIII. AUTHENTICATION BY TESTIMONY OF RECIPIENT

STEPS

1. Have the witness acknowledge recognition of the number, digital signature or name of the person from whom they received a message.
2. Establish the basis of the witness's knowledge of the sender's number (e.g., history of text messages with that person)
3. The context of the text communication (reply to earlier text) or establish the topic that was the subject of the text)
4. If a photograph was used, establish who took the photo, what camera was used, that it was an accurate reproduction of the actual text, etc.
5. Identify and offer transcript of the actual text including how the transcript was made – based on the actual text, reviewed by the sender, verified to be an accurate reflection of the actual text.

SAMPLE QUESTIONS – TESTIMONY OF RECIPIENT

Q: Would you please identify this document?
A: It is a transcript from a text exchange between me and my wife.
Q: What is a text exchange?
A: It's a series of text messages we sent each other as part of an argument we were having.
Q: When was the exchange?
A: During the evening of April 30.
Q: What was the subject of the argument you having?
A: My wife was mad because my girlfriend called her and yelled at her.
Q: Did you ever speak to your wife directly about this matter on that date?
A: Yes, later in the evening I went home and we further argued about this matter.
Q: Tell us how you prepared this transcript?
A: I typed the various e-mails in chronological order as they exactly appeared on my phone.
Q: Is the transcript that's been marked as Defendant's exhibit "F" identical to the actual text messages sent on April 30?
Q: Did you alter or modify in any way the text messages that appear on the transcript?
A: No.

B. Nature of IM's

1. Written communications in electronic format sent from one cell phone to another or some other handheld device.

2. IM's are transmitted via the internet in real time, often through an account provided by an ISP (Internet Service Provider). A screen name or pseudonym is used to identify the sender. Because the sender need only have access to a screen name and password to transmit an IM, some litigants have challenged the admissibility of IMs as being inherently

unreliable. *Peter A. Crusco, "Case Law Continues to Evolve in Admission of Text Messages",* NYLJ, 6/22/2010

C. Authentication

1. Court properly received, as admission, Internet instant message from defendant to victim's cousin; although witness did not save or print message, it was properly authenticated; defendant's close friend testified to defendant's screen name; cousin testified that she sent instant message to that same screen name, and received reply, content of which made no sense unless it was sent by defendant. (*People v. Pierre*, 41 AD3d 289, 838 NYS2d 546 [1st Dept. 2007]) [email authenticated by circumstantial evidence]]) **[email authenticated by circumstantial evidence]**

2. People v Clevenstine, 68 AD3d 1448, 1450-51, 891 NYS2d 511 [3d Dept. 2009] lv to appeal denied, 14 NY3d 799, 925 NE2d 937, 899 NYS2d 133 [2010]: "[A]uthenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it," and "[t]he foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted" (*People v McGee*, 49 NY2d 48, 59 [1979]; *see* Prince, Richardson on Evidence § 4-203 [Farrell 11th ed]). Here, both victims testified that they had engaged in instant messaging about sexual activities with defendant through the social networking site MySpace, an investigator from the computer crime unit of the State Police related that he had retrieved such conversations from the hard drive of the computer used by the victims, a legal compliance officer for MySpace explained that the messages on the computer disk had been exchanged by users of accounts created by defendant and the victims, and defendant's wife recalled the sexually explicit conversations she viewed in defendant's MySpace account while on their computer. Such testimony provided ample authentication for admission of this evidence (*see People v Lynes*, 49 NY2d 286, 291-293 [1980]; *People v Pierre*, 41 AD3d 289, 291 [2007], *lv denied* 9 NY3d 880 [2007]; *see generally* Zitter, Annotation, *Authentication of Electronically Stored Evidence, Including Text Messages and E-mail*, 34 ALR6th 253).

XXIV. PH0TOGRAPHS; DIGITAL IMAGE FROM WEBSITE

A. *People v. Lenihan*, 30 M3d 289, 911 NYS2d 588 (S.Ct., NY Co., 2010) - Defendant precluded from confronting witnesses with printouts of MySpace photos depicting him in gang clothing because of the easy ability to digitally alter photographs on the computer. Accordingly, proof that a message of a photograph came from a particular account or device without further authenticating evidence, is inadequate proof of authorship or

depiction.

B. *In re Marriage of Perry,* 2012 IL App (1-Dist.) 113054 - the foundation for the admissibility of electronic duplicates of photographs from a website saved on a flash drive could be established under the traditional rules of evidence.

C. *People v. Price,* 29 NY3d 472, 58 NYS3d 259 (2017)

1. Court of Appeals addressed the question of "how a party may authenticate a printout of a digital image found on a social media website."

2. The court made it clear that there is no strict rule or formula that must be met in order to have social media communications authenticated in order to be admitted into evidence. However, when a party denies that the actual social media post or picture, frequently offered in the form of a "green shy" quote, was his or hers, there must be sufficient indicia, which may not be difficult to obtain, that the communication came from the author in order to be properly authenticated.

3. The court found the prosecution did not sufficiently authenticate a photograph of the defendant holding a gun which was admitted into evidence during the defendant's criminal trial for robbery. The photograph was obtained from an alleged social media profile of Defendant's on a website. The court noted that there was a failure to proffer evidence that would "actually demonstrate that defendant was aware of – let alone exercise dominion or control over – the profile p. in question." Judge Stein wrote: "… Notably absent with any evidence regarding whether defendant was known to use an account on the website in question, whether he had ever communicated with anyone through the account, or whether the account can be traced to electronic devices owned by him. Nor did the People proffer any evidence indicating whether the account was password protected or assessable by others, whether or non—account holders could pose pictures to the account, or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein."

4. In a concurring opinion, Judge Rivera held that to authenticate a photograph obtained from a social media website, there are 2 requirements:

1. In the printout and accurate representation of the webpage; and

2. If the webpage in the dominion and control of the defendant allowing him to post on it.

D. Cell phones

1. Metadata is embedded in photos taken with a phone with GPS technology. Shows the latitude and longitude of where the image was taken. The image travels with the metadata. If no metadata, means the image has been altered as, e.g., Photoshop. The metadata is then gone.

2. With images, check the metadata which you can do yourself or companies can do it. The same is true for videos with cell phones.

XXV. AUTHENTICATION OF YOU TUBE VIDEO

A. Social media video that was admitted into evidence was properly authenticated by certification from provider of the online service, which indicated when the video was posted online, by a police officer who viewed the video at or about the time that it was posted online, and by defendant's own admissions about the video made in a phone call while he was housed at a detention center, as well as by the video's appearance, contents, substance, internal patterns, and other distinctive characteristics. *People v. Franzese*, 154 AD3d 706, 61 NYS3d 661 (2D Dept. 2018)

XXVI. AUTHENTICATION OF YELP REVIEWS

A. In an action for defamation arising out of a commercial landlord-tenant dispute, immediately after plaintiff obtained a Temporary Restraining Order against the defendant, negative Yelp reviews were posted by anonymous accounts. Plaintiff could not reconcile the criticisms of poor service with any existing customers, and plaintiff obtained the IP addresses of the anonymous posts, which were defendant's home and business addresses. At trial defendant objected to the printed anonymous Yelp host being admitted on the basis of improper authentication. The appellate court held that the printed post should have been admitted based upon the circumstantial evidence. *Kinda v. Carpenter*, 238 Cal.App.4th 989 regardless of whether that party is represented by counsel.

Practical Evidence: Foundations and Evidentiary Tools

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NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
2019 SUMMER MEETING

EVIDENTIARY TOOLS

EVIDENTIARY FOUNDATIONS

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Contents

PART 1

EVIDENTIARY TOOLS

I. PRIOR INCONSISTENT STATEMENT

A. STATUTE - CPLR RULE 4514

> "In addition to impeachment in the manner prescribed by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in writing subscribed by him or was made under oath."

B. ELEMENTS OF PRIOR INCONSISTENT STATEMENT

1. The prior inconsistent statement may be either written or oral. *Lederer v. Lederer*, 108 App.Div.343, affd. 184 NY 542.

2. An adverse witness may be impeached by showing that on some other occasion the witness has made statements which are inconsistent with the witness's testimony. The inconsistency need not be direct and positive, but it is sufficient that the testimony and the prior statements "tend to prove differing facts." *Larkin v. Nassau Electric R.R. Co.*, 205 NY 267, 269, 98 NE 465 [1912])

3. Where a witness is permitted to testify as to opinion, a prior inconsistent statement of opinion may be used to impeach the witness. *Brooks v. Rochester Railway Co.*, 156 NY 244, 50 NE 945 (1898)

C. PRIOR INCONSISTENT STATEMENT AGAINST A PARTY (ADMISSION)

1. Proper for plaintiff to impeach defendant, whom plaintiff called as a witness, with prior consistent statements made at examination before trial and at other trials (pursuant to CPLR 4514), but error to permit plaintiff to impeach defendant with a prior criminal conviction and by attaching his qualifications. *Skerencak v. Fischman*, 214 AD2d 1020, 626 NYS2d 337 [4th Dept. 1995]).

2. Where witness sought to be discredited with a prior inconsistent statement is a party, the laying of a foundation is unnecessary, as the party's statements are treated as admissions and, as such, are received as primary evidence against him or her. (*Viera v. NYC Transit Auth.*, 221 AD2d 625, 634 NYS2d 168 [2d Dept. 1995]).

D. FOUNDATION – NON-PARTY WITNESS

1. "...[t]here must be a proper foundation laid for the introduction of prior inconsistent statements of a witness. In order to prevent surprise and give the witness the first opportunity to explain any apparent inconsistency between his testimony at trial and his previous statements, he must first be questioned as to the time, place and substance of the prior statement." (*Peo. v. Duncan*, 46 NY2d 74, 412 NYS2d 833 [1978])

E. FOUNDATIONAL REQUIREMENTS

1. The witness must be shown the prior statement, if in writing, or its contents must be disclosed to the witness as a basis for cross-examination. It should be marked for identification, shown to the witness to acknowledge authorship, or such authentication otherwise established if the witness does not acknowledge, and it must be received in evidence before its contents may be used as a basis for cross-examination. *Larkin v. Nassau Electic R.R. Co.* 205 NY 267, 269, 98 NE 465 (1912).

2. If the prior inconsistent statement is oral, the witness must be asked whether he/she made the statement, the time and place where it was made, to whom it was made, and the words or substance of the statement. *Larkin v. Nassau Electric R.R. Co.*, 205 NY 267, 269, 98 NE 465 (1912); *People v. Weldon*, 111 NY 569, 19 NE 279 (1888).

3. *People v. Latef*, 176 AD2d 505, 574 NYS2d 700 (1st Dept. 1991) (witness may not be impeached with prior inconsistent statement without first being afforded opportunity to deny or explain it); *People v. Wise*, 176 AD2d 595, 575 NYS2d 39, 40 (1st Dept. 1991) (A party wishing to impeach with purportedly inconsistent prior statement "must show that the witness was specifically asked about, and his attention specifically directed, to the fact at issue").

4. Party Litigant as Witness - The foundational elements discussed above are not required where the witness being impeached is a party litigant because such statement would be independently admissible as admissions by a party. *Blossom v. Barrett*, 37 NY 434 (1868).

F. EVIDENCE IN CHIEF? - TRILOGY OF CASES

1. Letendre v. Hartford Acc. & Indem. Co., 21 NY2d 518, 289 NYS2d 183 (1968) - At the trial of an action by plaintiff employer against defendant insurance company on a fidelity policy insuring said employer against loss caused by fraud or dishonesty of a managerial employee who was a witness at

the trial and who testified that he committed no defalcation, the written admissions of defalcation which had been obtained from said employee by the claims agent of defendant insurance company were produced by the employer and were properly received as evidence of the facts stated and admitted therein, and not merely as an attack on the witness' credibility.

2. "The underpinning for the rule excluding hearsay is that the purported utterer of the quoted statement cannot be subjected to cross-examination for purposes of casting full light on the information contained therein (see Coleman v Southwick, 9 Johns 45, 50). However, since the utterer of the original statement which is the source of the hearsay testimony complained of, Dr. Thompson, testified on the subject matter of the hearsay, as did those presenting the hearsay testimony, Janet's father and mother and the party raising the hearsay objection, Parke, Davis, had a full opportunity to cross-examine and confront all those witnesses at the trial, the hearsay rule should not be applied to bar the testimony." *Vincent v. Thompson,* 50 AD2d 211, 377 NYS2d 118 (1975)

3. cf. *Nucci v. Proper*, 95 NY2d 597, 721 NYS2d 593 (2001) – Due to insufficient indicia of reliability, prior inconsistent statement not receivable as evidence in chief.

G. COLLATERAL OR NOT COLLATERAL

1. Whether extrinsic proof of the prior inconsistent statement may be adduced depends upon the substance of the statement. If it bears upon a material issue in the case, then it is not collateral and extrinsic proof is not permitted. *People v. McCormick*, 303 NY 403, 103 NE2d 529 (1952).

2. Assuming the substance of the prior statement is not collateral, extrinsic evidence of it may be received, but only after the witness being impeached has been confronted with the statement and afforded an opportunity to deny or explain it, and the adverse party has been given an opportunity to examine the witness with respect thereto. *People v. Wise*, 46 NY2d 321, 413 NYS2d 334, on remand, 67 AD2d 737, 413 NYS2d 279 (1979)

H. DENIAL OF STATEMENT

1. If the witness denies having made the statement, or does not remember having made it, he may then be contradicted by any person who heard him make it or by documentary evidence. *Hanlon v. Ehrich*, 178 NY 474 (1904)

I. IMPEACHMENT BY OMISSION OF STATEMENT

1. General Rule

a. A witness may not be impeached simply by showing that he omitted to state a fact, or to state it more fully at a prior time. *Peo. v. Bornholdt,* 33 NY2d 75, 350 NYS2d 369 (1973)

2. Exceptions

a. Where it is shown that at the prior time the witnesses attention was called to the matter and the witness was specifically asked about the facts embraced in the question propounded at trial. *Peo. v. Bornholdt, supra.*

b. When the circumstances surrounding the prior statement make it unnatural to omit certain information. *Peo. v. Savage*, 50 NY2d 673, 431 NYS2d 382 (1980)

J. PRIOR CONSISTENT STATEMENT v. BOLSTERING

1. Reason for Rule

a. "As we observed in *People v Smith* (22 NY3d 462, 465 [2013]), "[t]he term 'bolstering' is used to describe the presentation in evidence of a prior consistent statement—that is, a statement that a testifying witness has previously made out-of-court that is in substance the same as his or her in court testimony." While such statements are generally precluded by the hearsay rule absent an applicable exception, prior consistent statements are notably less prejudicial to the opposing party than other forms of hearsay, since by definition the maker of the statement has said the same thing in court as out of it, and so credibility can be tested through cross-examination (*id.* at 465-466). As a result, "in many cases, the admission of purely redundant hearsay creates no greater evil than waste of time" (*id.* at 466). Still, there exists a risk that a prior consistent statement "may, by simple force of repetition, give to a jury an exaggerated idea of the probative force of a party's case" (*id.*).

2. Non-hearsay Purpose Permitted

a. New York courts have routinely recognized that "nonspecific testimony about [a] child-victim's reports of sexual abuse [does] not constitute improper bolstering [when] offered for the relevant, non-hearsay purpose of explaining the investigative process and completing the narrative of events leading to the defendant's arrest" (*People v Rosario*, 100 AD3d 660, 661 [2d

Dept 2012]; *see also People v Gregory*, 78 AD3d 1246, 1246 [3d Dept 2010] [a police officer's testimony about the victim's comments did not "improperly bolster the victim's version of events (when) admitted not for its truth but for the narrow purpose of explaining an officer's actions and the sequence of events in an investigation, and the testimony is accompanied by an appropriate limiting instruction"]). Here, the objected to testimony fulfilled these legitimate nonhearsay purposes. *People v. Ludwig*, 24 NY3d 221, 230, 997 NYS2d 351 (2014)

K. REHABILITATION BY SHOWING PRIOR CONSISTENT STATEMENT

1. A party may not bolster the testimony of his witness through use of a prior consistent statement unless the witness' testimony has been attacked as a recent fabrication. Peo. v. Smith, 136 AD2d 935, 524 NYS2d 901 (4th Dept., 1988); see also, Smith v. Emkay Fifth Avenue, Inc. 172 AD2d 656, 568 NYS2d 453, 457 (2d Dept. 1991) (trial court properly precluded plaintiff from bolstering her testimony by use of prior consistent statement.

2. "An impeached witness cannot be rehabilitated by his or her antecedent consistent statements unless the cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication..."); *People v. Buchanon*, 176 AD2d 1001, 574 NYS2d 860 (3d Dept. 1991) (credibility of witness may not be corroborated or bolstered by evidence or prior consistent statements where testimony of witness has not been assailed as a recent fabrication, whether such prior consistent statements be written or oral).

3. In personal injury action, where the issue was whether the infant plaintiff's accident occurred because she fell from the monkey bars, as opposed to an orange ladder, and the defense was that the infant was not only mistaken but was coached to tell a false Story (and thus a recent fabrication), error to preclude plaintiff from introducing an entry in the emergency room record where the infant plaintiff told the emergency room physician that she fell from the monkey bars (a prior consistent statement). Additionally, the infant's statement fell within another exception to the hearsay rule, i.e., the statement was germane to the infant plaintiff's medical treatment on the date of the incident. *Nelson v. Friends of Associated Beth Rivka Sch. For Girls*, 119 AD3d 536, 987 NYS2d 907 (2d Dept. 2014)

II. ADVERSE PARTY AS WITNESS

A. GENERAL RULE

A party who calls the adverse party as a witness should not be bound by witness' answers and should be permitted to lead and cross-examine, because he is obviously a hostile witness. *Mtr. of Arlene W. v. Robert D.*, 36 AD2d 455, 456, 324 NYS2d 333 (4th Dept. 1971); see also, *Cornwell v. Cleveland*, 44 AD2d 891, 355 NYS2d 679 (4th Dept. 1974)."

B. NATURE OF CROSS EXAMINATION

1. "...when an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross-examination by the use of leading questions. However, a party may not impeach the credibility of a witness whom he calls (see *Becker v. Koch*, 104 NY 394) unless the witness made a contradictory statement either under oath or in writing (see CPLR 4514)." *Jordan v Parrinello,* 144 AD2d 540, 534 NYS2d 686 (2d Dept. 1988)The general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior statements made either under oath or in writing. *Fox v. Tedesco,* 15 AD3d 538, 789 NYS2d 742 (2d Dept. 2005); *Ferri v. Ferri*, 60 AD3d 625, 878 NYS2d 67(2d Dept. 2009)

C. GENERAL DISCRETION OF COURT

1. While an adverse party who is called as a witness may be viewed as a hostile witness and direct examination may assume the nature of cross-examination by the use of leading questions (*see, Becker v Koch,* 104 NY 394, 400-401), whether to permit such questions over objection is a matter which rests in the discretion of the trial court (*see, Jordan v Parrinello,* 144 AD2d 540, 541; Prince, Richardson on Evidence § 6-228, at 374 [Farrell 11th ed]).

2. The record discloses that respondent was neither reluctant nor evasive in answering questions posed during direct examination, including several questions regarding the children and guns. When the objections to the leading questions were sustained, petitioner's counsel made no effort to elicit the information through questions which were not leading and petitioner does not claim that such questions were not feasible or that their use would have been frustrated by respondent's hostility as an adverse party. In these circumstances, and considering the lack of evidence to support petitioner's application for a change in custody, we see no reversible error in Family Court's ruling." *Ostrander v. Ostrander*, 280 A.D.2d 793, 720 N.Y.S.2d 635 (2001)

D. EXPERT OPINION BY ADVERSE PARTY

1. A party in a civil suit may be called as a witness by his adversary and, as a general proposition, questioned as to matters relevant to the issues in dispute. A plaintiff in a medical malpractice case can call the defendant-doctor as his/her witness as to both "fact" and "opinion". *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 255 NYS2d 65 (1964)

III. EXCLUSION OF WITNESSES

A. GENERAL POLICY IN FAVOR OF EXCLUSION

a. The court is empowered, as a matter of discretion, to exclude witnesses from the courtroom while other witnesses are testifying to safeguard against witness collusion. Although the determination of whether a non-party witness should be excluded from the courtroom is normally left to the sound discretion of the trial court, the "practice of excluding witnesses from the courtroom except while each is testifying is to be strongly recommended." (*Levine v. Levine*, 83 AD2d 606, 441 NYS2d 299 (2d Dept., 1981))(In action to set aside separation agreement, not abuse of discretion to refuse to grant plaintiff's request to exclude the attorney who drafted agreement for both sides);

b. In *Peo.* v. *Cooke*, 292 NY185, 190 (1944), the Court of Appeals stated that "[I]t is heard for us to understand…whey such a motion (to exclude witnesses) should not be granted as of course".

B. EXCEPTION – WITNESS'S PRESENCE ESSENTIAL TO CLIENT'S CAUSE

a. The witness at issue was an employee of the defendant and the representative it had designated to assist in the defense of this action. Under these circumstances, and in the absence of extenuating circumstances, the witness was entitled to remain in the courtroom throughout the trial. *Perry v. Kone, Inc.,* 147 AD3d 1091, 49 NYS3d 696 (2d Dept. 2017)

b. The same reasons for exclusion do not apply to expert witnesses. It has been pointed out that "the presence in the courtroom of an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and will in most cases be beneficial, for he will be more likely to base his expert opinion on

a more accurate understanding of the testimony as it evolves before the jury. *People v. Santana*, 80 NY2d 92, 587 NYS2d 570 (1992)[1]

IV. LAW OF THE CASE

A. "The doctrine of law of the case "is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes, 37 NY2d 162, 165, see Pollack v Pollack, 290 AD2d 548; Thomas v Dietrick, 284 AD2d 325).* Thus, the decision of the judge who first rules in a case binds all court's of co-ordinate jurisdiction, regardless of whether a formal order was entered (*see Matter of Levinson, 11 AD3d 826, lv denied NY3d [Jan. 18, 2005]; Spahn v Griffith, 101 AD2d 1011; Matter of Silverberg v Dillon, 73 AD2d 838)." Messinger v. Messinger*, 16 AD3d 562, 792 NYS2d 162 (2d Dept. 2005)

B. *Hothan v. The Metropolitan Suburban Bus*, NYLJ, 11/21/02, p.24 col.3, S.Ct., Nassau Co., Winslow, J.: "Further, since Noble and Ingleston were decided, the Court of Appeals, in People v. Evans, 94 NY2d 499 (2000), has held that "law of the case '" is inapplicable to discretionary evidentiary rulings. The court observed that "law of the case" is not a "rigid rule of limitation" but a "judicially crafted policy that 'expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power.' (Messenger v. Anderson, 225 US 436, 444...) As such, law of the case is necessarily 'amorphous' in that it 'directs a court's discretion,' but does not restrict its authority (see Arizona v. California, 460 US, at 618...)" People v. Evans, supra, at 503. Further, the Court of Appeals stated that "law of the case...does not contemplate that every trial ruling is binding on retrial... If that were so, a judge conducting a retrial would be corseted." Id., 504. Note that "unduly confined" may be a more apt and contemporary expression."

[1] / Court noted that under the Federal Rules of Evidence, while a fact witness under the Federal Rules must be excluded on the request of a party, an expert witness is generally exempted from the exclusion requirement as "a person whose presence is shown by a party to be essential to the presentation of the party's cause" (Federal Rules Evid, rule 615 [3])

V. REFRESHING WITNESS'S RECOLLECTION

A. WHAT CAN BE USED

1. Any writing or object may be used to refresh the recollection of a witness while testifying irrespective of its source, accuracy, authorship, or time of making. *McCarthy v. Meaney*, 183 NY 190 (1905)

2. Where plaintiff reviewed notes for the express purpose of preparing for his testimony at trial, and although plaintiff never used the words "refresh my recollection" relative to the notes, it was clear that the sole object and ultimate goal of reading the notes immediately prior to trial was to refresh his memory, and thus defendant was entitled to have the diary containing the notes made available to him for inspection and use upon cross-examination. *Chabica v. Schneider*, 213 AD2d 579, 624 NYS2d 271 (2d Dept., 1995)

3. The refreshing recollection doctrine applies where a witness reviews a document prior to testifying at a deposition for refreshing recollection purposes if the document was reviewed for the purpose of refreshing recollection and the testimony is based, at least in part, on that document. Merely looking at a document prior to a deposition would not necessarily trigger disclosure. *Fernekes v. Catskill Regional Med Ctr.,* 75 AD3d 959, 906 NYS2d 167 (3d Dept. 2010)

B. USE OF INADMISSIBLE EVIDENCE

*1. 9*11 tape used to refresh witness' recollection – court found nothing improper with the use of a sound recording as the refreshing recollection device. The fact that the tape itself was inadmissible did not preclude its use as a refreshing recollection device. Other cases have held that where a writing itself is inadmissible, it can still be used as a refreshing recollection device. The reasoning is that it is not the writing or sound recording being offered into evidence, but it is merely used as a tool to refresh recollection. *Seaberg v. North Shore Lincoln-Mercury*, 85 AD3d 1148, 925 NYS2d 669 (2d Dept. 2011)

C. EXHAUSTION OF MEMORY

1. The witness's independent recollection must first be exhausted as a precondition to use of memory stimulant. (*Peo. v. Reger*, 13 AD2d 63, 213 NYS2d 298 [1st Dept. 1961])

2. "When a witness, describing an incident more than a year in the past, says that it 'could have lasted a minute or so', and adds 'I don't know ', the

inference that her recollection could benefit from being refreshed is a compelling one". All *Peo. v. Oddone*, 22 NY3d 369, 980 NYS2d 912 (2013)

D. DISTINCTION WITH PAST RECOLLECTION RECORDED

1. Howard v. McDonough, 77 NY 592, 593 (1879) outlined the New York rule and delineated the important distinction between the present recollection refreshed and past recollection recorded:

a. A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to facts from his own knowledge.

b. When a witness has so far forgotten the facts that he cannot recall them, even after looking at a memorandum of them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and when he believes to be correct, such memorandum, in his own handwriting, may be received as evidence of the facts therein contained, although the witness has no present recollection of them.

E. RIGHT OF OPPOSING PARTY

1. Once the witness has used a writing or object to refresh present recollection, the opposing party has the right to inspect it; to use it on cross-examination, and to introduce it into evidence. *People v. Gezzo*, 307 NY 385 (1954); People v. Reger, 13 AD2d 63, 213 NYS2d 298 (1st Dept. 1961). Although the decisional law is somewhat unclear, it appears that, at least in civil cases, the same right vests in the opposing party where the witness has used a writing or object to refresh recollection before testifying. See, Richardson on Evidence, § 467.

F. PRIVILEGE

1. The attorney work product privilege is not waived when a privileged document is used to refresh the recollection of a witness prior to testimony. (*Beach v. Touradji Capital Mgt.*, 99 AD3d 167, 949 NYS2d 666 (1st Dept. 2012)

VI. PAST RECOLLECTION RECORDED

A. ELEMENTS

1. "The rule of past recollection recorded may be simply stated. When a witness is unable to testify concerning facts recited by or through him in a memorandum, the memorandum is admissible as evidence of the facts contained therein if he observed the matter recorded, it was made contemporaneously with the occurrence of the facts recited and the witness is able to swear that he believed the memorandum correct at the time made." (*Peo. v. Caprio,* 25 AD2d 145, 150, 268 NYS2d 70 [1966), affd. 18 NY2d 617; *Peo. v. Raja*, 77 AD2d 322, 433 NYS2d 200 [2d Dept., 1980]).

2. "[t]he requirements for admission of a memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his [or her] knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information" (*People v. Taylor,* 80 N.Y.2d 1, 8 [1992]; *see Morse v. Colombo,* 31 A.D.3d 916, 917 [2006]). *Zupan v. Price Chopper Operating C*o., 2015 N.Y. Slip Op. 07893, 2015 WL 6510408 (3d Dept. 2015)

3. Family Court properly excluded the mother's journal from evidence. Despite attempts to admit it as a past recollection recorded, her own attorney earlier objected to its disclosure as a document prepared for litigation, and the document included hearsay, the mother admitted that some entries were not made contemporaneously with the events in questions, and she had the opportunity to refresh her recollection from it as often as she wished during the hearing. *Smith v. Miller*, 4 AD3d 697, 772 NYS2d 742 (3d Dept. 2004)

B. FOUNDATIONAL REQUISITES

1.The witness lacks sufficient present recollection of the recorded information.

a. Iannielli v. Consolidated Edison Company, et al., 75 AD2d 223, 428 NYS2d 473 (1980) - Memorandum improperly received as past recollection recorded where maker of memorandum had no independent recollection of the making of same and the only guarantee of correctness offered was his testimony as to his usual habit in making such memoranda.

b. Where plaintiff was capable of recalling and testifying about the events of the night in question without difficulty, his notes do not qualify for

the past recollection recorded exception to the hearsay rule and were properly excluded. (*Landsman v. Village of Hancock*, 296 AD2d 728, 745 NYS2d 258 [3d Dept. 2002])

2. The witness made a note or memorandum about the matter recorded which the witness believes was accurate at the time made.

a. Error to permit into evidence an audiotape of a prior sworn statement of a witness as a past recollection recorded where the witness could not attest to the accuracy of the statement when made. [*Peo. v. Turner*, 210 AD2d 445, 620 NYS2d 434 [2d Dept., 1994])

3. The note or memorandum was made at or about the time of the matter observed.

C. EVIDENTIARY EFFECT

1. "When such a memorandum is admitted, it is not independent evidence of the facts contained therein, but is supplementary to the testimony of the witness. The witness's testimony and the writing's content are taken together and treated in combination as if the witness had testified to the contents of the writing based on present knowledge." (*Peo. v. Taylor*, 80 NY2d 1, 9, 586 NYS2d 545 [1992])

2. Not error for plaintiff to read from her diary during direct examination (*Murphy v. Murphy*, 109 AD2d 965, 486 NYS2d 457 [3d Dept. 1985]).

VII. VOLUMINOUS RECORD RULE

A. GENERAL

1. Exception to Best Evidence Rule

2. Allows the use of summaries where the originals are so numerous so they cannot reasonably be examined in court.

B. REQUIREMENTS

1. Voluminous records

2. Originals must be admissible for the summaries based on the originals to be admissible

3. Summaries may not include information not contained in or computed from the originals

4. Originals or duplicates of voluminous records must be made available to the other side for examination or copying. *Ed Guth Realty, Inc. v. Gingold*, 34 NY2d 440, 358 NYS2d 367 (1974)

C. EXAMPLES

1. Computer printouts were admissible under the "voluminous writing" exception to the best evidence rule. *Ed Guth Realty, Inc. v. Gingold*, 34 NY2d 440, 358 NYS2d 367 (1974)

2. Summaries or balances of accounts may be produced to prove aggregate profits or receipts without the need to produce those documents which set forth the underlying dates. Business summaries have been deemed to be independent from the writings or documents upon which they are drawn. *R & I Electronics, Inc. v. Neuman*, 81 AD2d 832, 438 NYS2d 832 (2d Dept. 1981)

3. Error to refuse to permit use of charts which summarized accountant's voluminous work-papers where the latter were in evidence. (*Herbert H. Post & Co. v. Bitterman*, 219 AD2d 427, 649 NYS2d 21 (2d Dept. 1996).

4. Interplay with Business Record Rule - *Peo. v. Weinberg*, 183 AD2d 932, 586 NSY2d 132 (2d Dept. 1992)

VIII. COLLATERAL EVIDENCE RULE

A. THE RULE

1. The collateral evidence rule limits the ability of the cross-examiner to contradict the witness by introduction of extrinsic evidence. It holds that:

a. "the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility. (citations omitted) This rule is premised on sound policy considerations for if extrinsic evidence which is otherwise inadmissible is allowed to be introduced to contradict each and every answer given by a witness solely for the purpose of impeaching that witness, numerous collateral minitrials would arise involving the accuracy of each of the witness's answers. The resulting length of the trial would by far outweigh the limited probative

value of such evidence." (*Peo. v. Pavao*, 59 NY2d 282, 288, 464 NYS2d 458 [1983])

2. Even where a particular subject is proper impeachment upon cross-examination, it is collateral unless it is relevant to some issue in the case other than credibility or is independently admissible in order to impeach the witness. Such collateral matter, while proper cross-examination because relevant to the witness's credibility, may not be used to impeach the witness by extrinsic evidence. *Badr v. Hogan*, 75 NY2d 629, 634, 555 NYS2d 249 (1990); *People v. Schwartzman*, 24 NY2d 241, 245, 299 NYS2d 817 (1969); *Peo. v. Jackson*, 165 AD2d 724, 564 NYS2d 259 (1st Dept. 1990); *Peo. v. Israel*, 161 AD2d 730, 732, 555 NYS2d 865 (2d Dept. 1990).

3. Where defense counsel on cross examination asked plaintiff whether she had failed an employment-related drug test, a collateral issue relevant only to plaintiff's credibility, and plaintiff testified that the test result was a "false positive" that was proven false upon retesting, it was error to permit defense counsel to refer to the lack of evidence supporting plaintiff's assertion and introduce the drug test result in evidence in an attempt to impeach plaintiff's credibility. *Dunn v. Garrett,* 138 AD3d 1387, 31 NYS3d 326 (4th Dept. 2016)

B. WHAT IS COLLATERAL

1. Court properly precluded plaintiff from using the verified answer of the defendant to impeach her credibility with respect to a collateral matter which had no relevance to any issue in the case. *Perkins v. Murphy*, 7 AD3d 500, 775 NYS2d 591 (2d Dept. 2004)

2. While the collateral evidence rule is said to rest upon auxiliary policy considerations of preventing undue confusion of issues and unfair surprise by extrinsic testimony, when evidence directly challenges the truth of what a witness has said in matters crucial to or material to the issues on trial, by no process of reason can it be held to be collateral. *Peo. v. Hill*, 52 AD2d 609, 383 NYS2d 101 (2d Dept. 1976)

3. Where the subject matter bears upon witness's credibility because it shows that the witness had acted deceitfully on a prior unrelated occasion, it is collateral and, if the witness denies the conduct, the questioner is bound by the witness's answer and may not refute it with independent proof. See also, *Peo. v. Pavao*, 59 NY2d 282, 288, 464 NYS2d 458 (1983).

4. Family Court's improvident exercise of discretion in permitting the introduction of extrinsic evidence to contradict babysitter's testimony regarding matters that had no direct bearing on any issue in child custody modification

case other than credibility was harmless error, as there was a sound and substantial basis in the record for the Family Court's determination without consideration of the improperly admitted evidence. *Gorniok v Zeledon-Mussio,* 82 AD3d 767, 918 NYS2d 516 (2d Dept. 2011)

5. Caveat - However, a negative response by the witness does not preclude further questioning of the witness on the point, "for, it if did, the witness would have it within his power to render futile most cross-examination." *People v. Sorge*, 301 NY 198, 201 [1950].

C. NOT COLLATERAL

1. Subjects of impeachment which are not collateral and with respect to which independent or extrinsic evidence may be produced are:

a. Parole officer's rebuttal testimony flatly contradicting the alibi testimony offered at trial – *Peo. v. Cade*, 73 NY2d 904, 905, 539 NYS2d 287 [1989].

b. The witness's bias or hostility - *Badr v. Hogan*, 75 NY2d 629, 635, 555 NYS2d 249 [1990].

c. The witness's impaired ability to perceive - *Badr v. Hogan*, 75 NY2d 629, 635, 555 NYS2d 249 [1990]

D. INTERPLAY OF COLLATERAL EVIDENCE RULE AND CROSS EXAMINATION OF PRIOR BAD ACTS

1. *Young v. Lacy*, 120 AD3d 1561, 993 NYS2d 222 (4th Dept. 2014) – In personal injury action, error for trial court to refuse to let defendant's attorney question plaintiff as to why she filed tax returns as head of household when she was married and living with her Husband at the time, and the number of dependents she claimed, as the questions raised the possibility of tax fraud which has some tendency to show moral turpitude and thus relevant on the credibility issue. However, defendant's attorney would have been bound by plaintiff's answers and could not resort to extrinsic evidence or other witnesses to refute plaintiff's answers because of the collateral evidence rule.

IX. OFFER OF PROOF

A. Porter v. Porter, NYLJ, 12/12/2001, p. 22 col.2 (S.Ct., Richmond Co., Sunshine, J.) : "Offer of proof" is not a term of art but its' generally accepted meaning ... is to summarize the substance or content of the evidence." *People* v.

Williams, 81 NY2d 303, 314, 598 NYS2d 167 (1993) (offer of proof requirement of CPL 60.42[5]). Accepting offers of proof are "a busy court's attempt to keep the respective parties focused upon a succinct presentation of evidence relevant to the issues to be decided." *Douglas v. Douglas*, 281 AD2d 709, 722 NYS2d 87 (3rd Dept. 2001)."

B. Offers of proof create a solid record for appellate review of the evidentiary exclusion. See *Devito v. Katsch*, 157 AD2d 413, 556 NYS 2d 649 (2nd Dept. 1990). The court may exercise its discretion in refusing to hear testimony that it believes to be irrelevant. *Solomon v. Solomon*, 276 AD 2d 547, 714 NYS2d 304 (2nd Dept. 2000).

1. "It is a cardinal and well settled principle that offers of proof must be made clearly and unambiguously" (*People v. Williams, supra,* at 23, 187 N.Y.S.2d 750, 159 N.E.2d 549). Where there is a bona fide objection to the offer of certain evidence, the proponent of such evidence must take advantage of the opportunity to make an offer of proof in order to demonstrate the relevance of the disputed evidence (*see e.g., People v. Lyons,* 115 A.D.2d 766, 496 N.Y.S.2d 556; *People v. Zambrano,* 114 A.D.2d 872, 494 N.Y.S.2d 904, *lv. denied* 67 N.Y.2d 659, 499 N.Y.S.2d 1056, 490 N.E.2d 573; *People v. Brown,* 68 A.D.2d 503, 512, 417 N.Y.S.2d 966; Fisch, *New York Evidence* § 22 [2d ed 1977])" *People v Billups*, 132 AD2d 612, 518 NYS2d 9 (2d Dept 1987)

2. Purposes of Offer of Proof

a. Convince court to change ruling
b. Preserve alleged error for appeal
c. Shorten trial – cumulative testimony

X. PROOF BY ADMISSIONS

A. ADMISSION BY PARTY - GENERAL

1. Any statement or act by a party, which is contrary to that party's position at trial, may be received as an admission when offered by the opposing party. *Reed v. McCord*, 160 NY 330 (1899). Admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made. *Peo. v. O'Connor*, 21 AD3d 1364, 802 NYS2d 810 (4th Dept., 2005).

2. Statement of Opinion

a. An admission need not be an averment of fact but may also be a statement of opinion, though the party against whom the admission is received is entitled to explain that he or she had no factual basis for the opinion expressed. *Garsten v. MacMurray*, 133 AD2d 442, 519 NYS2d 563 (2d Dept., 1982).

3. Absence of Personal Knowledge

a. Absence of knowledge on the part of the declarant does not preclude the statement's admissibility under the admission's exception. *Reed v. McCord*, 160 NY 330 (1899); *Brusca v. El Al Israel Airlines*, 75 AD2d 798, 427 NYS2d 505 (2d Dept. 1980)

4. Admissions are received not merely as bearing upon the credibility of the party who made it but as evidence of the facts contained in the admission. *Gangi v. Fradus*, 227 NY 452 (1920)

B. FORMAL V. INFORMAL ADMISSIONS

1. Formal judicial admissions take the place of evidence and are concessions, for the purposes of the litigation, of the truth of a fact alleged by an adversary. Informal judicial admissions are facts incidentally admitted during the trial, and are a party's factual statement inconsistent with a position the party later takes. These are not conclusive, being merely evidence of the fact or facts admitted. *Wheeler v. Citizens Telecommunications,* 18 AD3d 1002, 795 NYS2d 370 (3d Dept., 2005).

C. FORMAL JUDICIAL ADMISSIONS

1. Admission in answer, admission in response to notice to admit

a. An admission in an original answer does not lose its effect as an admission of fact when the answer is amended to deny the initial admission. Rather, the initial formal judicial admission is converted into an informal judicial admission, which may be offered as prima facie evidence of the fact admitted. Thus, the plaintiff may offer the initial admissions as prima facie evidence, although the defendants will be entitled to offer evidence of the circumstances surrounding the original admissions and the amendment. (*Kwiecinski v. Chung Hwang*, 65 AD3d 1443, 885 NYS2d 783 [3d Dept. 2009])

b. *Zegarowicz v Ripatti*, 67 AD3d 672, 674-675, 888 NYS2d 554 [2d Dept 2009] - Facts admitted by a party's pleadings constitute formal judicial

admissions (*see Falkowski v 81 & 3 of Watertown.*, 288 AD2d 890, 891 [2001]; Prince, Richardson on Evidence § 8-215, at 523-524 [Farrell 11th ed]).

2. Formal judicial admissions are conclusive of the facts admitted in the action in which they are made (*see Coffin v Grand Rapids Hydraulic Co.,* 136 NY 655 [1893])

D. INFORMAL JUDICIAL ADMISSIONS

1. Informal judicial admissions are facts incidentally admitted during the trial, and are a party's factual statement inconsistent with a position the party later takes. These are not conclusive, being merely evidence of the fact or facts admitted. *Wheeler v. Citizens Telecommunications,* 18 AD3d 1002, 795 NYS2d 370 (3d Dept., 2005).

2. Indefinite Words – Where plaintiff testified at her deposition that she "thought" she moved to New Jersey on a certain date, and her affidavit on venue motion stated she moved after she commenced the action, her deposition testimony, albeit phrased with "I think", was an admission against her. The phrase "I think" is an expression of belief, and under Federal Rules of Evidence rule 801(d)(2)(B), a party's admission is "a statement of which the party has manifested an adoption or *belief* in its truth (emphasis added)" *Addo v. Melnick*, 61 AD3d 453, 877 NYS2d 261 (1st Dept. 2009)

3. Statements contained in a verified complaint or made by a party as a witness, or contained in a deposition, a bill of particulars or an affidavit constitute informal judicial admissions and are generally admissible pursuant to an exception to the hearsay rule. While not conclusive, they are evidence of the fact or facts admitted. *Gorniok v Zeledon-Mussio,* 82 AD3d 767, 918 NYS2d 516 (2d Dept. 2011)

E. ADMISSION BY PARTY – ELEMENTS

1. The witness heard a declarant make a statement.

2. The witness identifies the declarant as the present party-opponent.

3. The statement is inconsistent with the position the party-opponent is taking at trial.

F. ADOPTIVE ADMISSION

1. A third party, not a party to the action, says or writes a statement and a party to the action manifests assent to the statement expressly, impliedly, or by silence.

a. Generally, an adoptive admission is allowed when a party acknowledges and assents to something already uttered by another person, which thus becomes effectively the party's own admission. *Peo. v. Campney*, 94 NY2d 307, 704 NYS2d 916 (1999); *Peo. v. King*, --AD3d--, 2019 NY Slip Op 03813 (2d Dept.)

2. Foundation elements:

a. A declarant (third party) made a statement.

b. The statement was made in the presence of a party.

c. The party heard and understood the statement. (The declarant's statement is thus offered for a nonhearsay purpose, i.e., to show its effect on the state of mind of the party.)

d. The party made a statement that expressed agreement with the declarant's statement.

G. SILENCE AS ADMISSION

1. Silence in the face of a statement made by another person may be construed as acquiescence and adoption of the statement as an admission where one would be likely to protest the statement if it were untrue. *Cohen v. Toole,* 184 App.Div. 70 (1st Dept., 1918).

H. VICARIOUS ADMISSION (STATEMENTS BY AGENT OF PARTY)

1. NY's "Speaking Authority" Requirement

a. The statement of an agent is admissible as an admission against the principal only if the agent is authorized to speak for the principal and the making of the statement falls within the scope of the agent's authority. *Loschiavo v. Port Authority of New York*, 58 NY2d 1040, 462 NYS2d 440 (1983); *Kelly v. Diesel Constr. Div. of Carl A. Morse Inc.*, 35 NY2d 1, 358 NYS2d 685 (1974).

b. The court erred in admitting the alleged statement made by defendant's ticket booth clerk to plaintiff that she had reported the defective condition six times prior to plaintiff's trip and fall. The evidence does not show that the statement was made within the clerk's authority as a speaking agent on behalf of defendant. *Gordzica v. NYCTA*, 103 AD3d 598, 960 NYS2d 103 (1st Dept. 2013)

c. No evidence that the building superintendent was authorized to speak on defendant's behalf with respect to the building's employment practices and hiring and firing of employees. *Boyce v. Spitzer*, 82 AD3d 491, 918 NYS2d 111 (1st Dept. 2011)

d. A declaration made by an agent without authority to speak for the principal, even where the agent was authorized to act in the manner to which his declaration relates, does not fall within the "speaking agent" exception to the rule against hearsay and is not an admission that can be received in evidence against the principal. *Simpson v. NYC Transit Auth.*, 283 AD2d 419, 724 NYS2d 196 (2d Dept 2001); *Tkach v. Golub Corp.*, 265 AD2d 632, 696 NYS2d 289 (3d Dept., 1999); *Nordhauser v. NYC Health & Hospitals Corporation*, 176 AD2d 787, 575 NYS2d 117 (2d Dept., 1991).

2. Speaking Authority Recognized

a. Where an agent's responsibilities including making statements on his principal's behalf, the agent's statements within the scope of his authority are receivable against the principal. *Spett v. President Monroe Bldg. & Mfg. Corp.*, 19 NY2d 203, 278 NYS2d 826; *Loschiavo v. Port Auth. of N.Y.*, 58 NY2d 1040, 462 NYS2d 440 (1983).

3. Implied Speaking Authority

a. Agent-employee was in full charge of the business. *Stecher Lithographic Co., v. Inman*, 174 NY 124 (1903)

b. Agent-employee was superintendent of the job site or facility. *Brusca v. El Al Israel Airlines*, 75 AD2d 798, 427 NYS2d 505 (2d Dept. 1980)

c. Where an employee is given full and extensive managerial responsibility over his employer's entire enterprise or a separate store of the business enterprise, implied authority to speak may be present. *Spett v. Monroe Bldg. & Mfg.,* 19 NY2d 203, 278 NYS2d 826 (1967)

4. Federal Rules of Evidence rule 801(d)(2)(D)

a. Exception to hearsay rule where statements of a party's agent or employee is made in the scope of his or her relationship, even if the agent or employee does not have any authority to speak on behalf of the party.

5. Statement of agent or employee, even without speaking authority, can be admissible if it falls within some other hearsay exception.

a. Excited utterance. *Tyrell v. Wal-Mart Stores,* 97 NY2d 650, 737 NYS2d 43 (2001) (plaintiff failed to establish that unidentified employee was authorized to make alleged statement or that statement fell within excited utterance exception to hearsay rule).

b. Verbal act. *Giardino v. Beranbaum*, 279 AD2d 282, 720 NYS2d 3 (1st Dept. 2001) (Agent's statement not hearsay and is admissible against principal without regard to speaking authority rule, as statement received not for truth but on issue of notice to listener.)

I. FOUNDATION ELEMENTS

1. The declarant was an agent of the party-opponent-principal.

2. The party-opponent authorized the declarant to make the particular statements.

3. The statement is inconsistent with a position the party-opponent is taking at trial or the statement is logically relevant to an issue the proponent has a right to prove at trial.

J. ADMISSIONS BY COUNSEL

1. Statements made by an attorney while acting in his or her capacity as an attorney, are, like statements made by any other agent authorized to speak for the principal, admissible against a party. (*Bellino* v. *Bellino Construction Co., Inc.*, 75 AD2d 630, 427 NYS2d 303 [2d Dept., 1980]); *Tai Wing Hong Importers* v. *King Realty*, 208 AD2d 710, 617 NYS2d 793 (2d Dept., 1994) (Admissions by counsel are admissible against a party, provided that the statements are made by the attorney while acting in his capacity.)

a. Statement in letter from plaintiffs' attorney was admission by plaintiffs' agent receivable against plaintiffs for truth of the matter asserted therein. *DiCamillo v. City of N.Y.*, 245 AD2d 332, 665 NYS2d 97 (2d Dept. 1997)

b. Confession made by parties' attorney in an examination before trial held binding. *Burdick v. Horowitz,* 56 AD2d 882, 392 NYS2d 666 (2d Dept. 1977)

2. cf. *1014 Fifth Ave. Realty Corp.* v. *Manhattan Realty Co.*, 67 NY2d 718, 499 NYS2d 936 (1986) - A concession contained in a brief on a motion for summary judgment is not a formal judicial admission binding the party making it to the very result he is arguing against.

K. ADMISSION BY OPENING STATEMENT AND STATEMENT OF PROPOSED DISPOSITION

1. Plaintiff in action for divorce and ancillary relief established, prima facie, her entitlement to equitable distribution of subject parcel of real property, where defendant admitted in his Statement of Proposed Disposition that he acquired some ownership interest in property during marriage and confirmed timing of his acquisition in opening statements during which defense counsel asserted that, during marriage, defendant purchased property, though partially with money received from another source; that unequivocal, factual assertion made during opening statements constituted judicial admission, and it was thereby established that at least portion of defendant's interest in property was presumptively marital property, shifting burden to defendant to rebut that presumption. *Kosturek v. Kosturek*, 107 A.D.3d 762, 968 N.Y.S.2d 97 (2013)

L. ADMISSIONS BY EXPERT

1. A statement by an expert that is put forward by a party in litigation constitutes an informal judicial admission that is admissible against, although not binding upon, the party that submitted it. (*Djetounmani v. Transit Inc.*, 50 AD3d 944. 857 NYS2d 601 [2d Dept. 2008])

2. Because the appraisal annexed as an exhibit to the amended verified complaint was prepared on behalf of defendants, by their agent authorized to make such a statement, it was a party admission (*see Georges v American Export Lines*, 77 AD2d 26, 33 [1st Dept. 1980]; *Brusca v El Al Israel Airlines*, 75 AD2d 798, 800 [2d Dept. 1980]).*Rosasco v. Cella*, 124 AD3d 447, 448, 1 NYS3d 71 (1s Dept. 2015)

M. WEBSITE

1. NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co., 3 M3d 925, 774 NYS2d 916 (Civ. Ct., Qns. Co., 2004) - Information posted on corporate party's website constitute admissions, and are encompassed by the admissions exception to the hearsay rule. See, NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co., 8 M3d 33, 798 NYS2d 309 (App Term) (Trial judge made independent Internet investigation to see if defendant was transacting business in NY. "Even assuming the court was taking judicial notice of the facts, there was no showing that the web sites consulted were of undisputed reliability, and the parties had no opportunity to be heard as to the propriety of taking judicial notice in the particular instance (see, Prince, Richardson on Evidence §20202 [Farrell 11th ed]").

2. cf. *Morales v. City of New York*, 18 M3d 686, 849 NYS2d 406 (S.Ct., 2007) - "this Court is not aware that any New York appellate court has passed definitively upon the admissibility as evidence of public records printed from even a New York government website."

3. cf. Federal Rules of Evidence §902(5) - website operated by a government agency is self-authenticating.

XI. PRIVILEGE AGAINST SELF-INCRIMINATION

A. STATUTORY PROVISION

> CPLR § 4501. "A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish that he owes a debt or is otherwise subject to a civil suit. This section does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture, nor does it vary any other rule respecting the examination of a witness."

See also, New York Constitution, Article 1, § 6; *Malloy v. Hogan*, 378 US 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

B. NATURE AND SCOPE OF PRIVILEGE

1. Civil litigant has no right to refuse to take the stand. *McDermott v. Manhattan Eye, Ear & Throat Hospital*, 15 NY2d 20, 255 NYS2d 65 (1964).

2. Privilege must be invoked on question by question basis, not categorically. *Slater*, 78 Misc.2d 13, 355 NYS2d 943 (Sup.Ct., Queens Co., 1974).

3. Inquiry as to basis upon invocation to determine whether witness has "reasonable cause to apprehend danger from a direct answer." *State v. Carey Resources, Inc.*, 97 AD2d 508, 467 NYS2d 876 (2d Dept. 1983). Party cannot avail himself of privilege against self-incrimination where his exposure to prosecution is barred by the statute of limitations or double jeopardy. (*Brahm v. Hatch*, 169 AD2d 263, 572 NYS2d 395 [3d Dept. 1991])

C. EFFECT OF EXERCISE IN CIVIL CASE

1. Adverse Inference

a. Kay v. Kay, 37 NY2d 632, 376 NYS2d 443 (1975) - In a civil case, as opposed to a criminal case, the court can make an adverse inference when a party witness pleads his Fifth Amendment privilege. (See, also, *Marine Midland Bank v. Russo*, 50 NY2d 31, 427 NYS2d 961 [1980]. *Carey v. Foster*, 164 AD2d 930, 559 NYS2d 589 [2d Dept., 1990]; *Steiner v. De Buono*, 239 AD2d 708, 657 NYS2d 485 [3d Dept., 1997])

b. Defendant could invoke the privilege, but that did not relieve him of his burden to present adequate evidence of his financial inability to comply with the court order so as to avoid civil contempt liability. *El-Dehdan v. El-Dehdan*, 26 NY3d 19 (2015)

c. Adverse inference from invocation of privilege proper. *Palin v. Palin*, 213 AD2d 707, 624 NYS2d 630 (2d Dept.1995).

d. In contested custody case, trial court did not err in drawing unfavorable inference from wife's assertion of Fifth Amendment privilege, but not from husband's similar assertion, as wife invoked privilege some fourteen times on topic related to her ability to act in custodial capacity and tendency to place wife's own interests above those of children, while husband invoked right only once, regarding incident not reflective of his ability as a father. *Dolezal v. Dolezal*, 218 AD2d 682, 630 NYS2d 550 (2d Dept., 1995)

e. *Nolan v. Nolan*, 107 AD2d 190, 486 NYS2d 415 (3d Dept. 1985) -- Trial court properly inferred marital misconduct on wife's part where she availed herself of her Fifth Amendment right against self-incrimination when questioned regarding an alleged adulterous relationship. (See also, *Fritz v. Fritz*, 88 AD2d 778, 451 NYS2d 519 [4th Dept., 1982])

f. An adverse inference may not be drawn against a non-party witness when he/she invokes privilege against self-incrimination. (*Peo. v. Thomas*, 51 NY2d 466, 434 NYS2d 971 [1980]; *State v. Markowitz*, 273 AD2d 637 [3d Dept. 2000]]

2. Dismissal of Plaintiff's Case – *Levine v. Bornstein*, 13 Misc.2d 161, 174 NYS2d 574 (Sup.Ct., Kings Co., 1958), aff'd 7 AD2d 995, 183 NYS2d 868 (2d Dept. 1959), aff'd 6 NY2d 892, 190 NYS2d 702 (1959).

3. Pendency of Criminal Case - *Dey v. Dey*, NYLJ, 9/27/11, S.Ct., Suffolk Co., Bivona, J. – Plaintiff-husband's motion for protective order to suspend his deposition because of the pendency of criminal charges against him granted to the extent that the deposition could not be taken by videotape but could otherwise proceed. Observations of the plaintiff on videotape (pauses, delays, etc.), if used as evidence in a federal criminal trial, might very well violate the due process rights of the plaintiff as a defendant in a criminal action. Such gestures, taken out of context, might very well rise to the level of constitutional violations of his state and federal protected constitutional rights.

D. CORPORATE RECORDS

1. A corporation has no Fifth Amendment privilege and a custodian of corporate records may not refuse to produce them even though they may incriminate him personally. (*Grand Jury v. Kuriansky*, 69 NY2d 232, 513 NYS2d 359 [1987]) Nonetheless, the person producing the books and records held in the representative capacity cannot be compelled to give oral testimony concerning them if his answers may incriminate him. (*State v. Carey Resources, Inc.*, 97 AD2d 508, 467 NYS2d 876 [2d Dept., 1983]).

2. Corporate records and documents. Custodian of corporate records may not refuse to produce them on Fifth Amendment grounds, even if the records would incriminate custodian personally. *Curico v. U.S.*, 354 US 118, 77 S.Ct. 1145; see also, F*rank v. Frank*, NYLJ, 5/11/84, p.17 col.1, S.Ct., Nassau Co., Burstein, J.

3. A partner in a law firm, even a small law firm, cannot rely on the Fifth Amendment privilege against compelled self-incrimination to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally. *(Mtr. of Nassau County Grand Jury Subpoena*, 4 NY3d 665, 797 NYS2d 790 [2005]). See, *U.S. v. Bellis*, 417 U.S. 85 (1974) (A law partner could not rely on the Fifth Amendment privilege "to avoid producing the records of a collective entity which [were] in his possession in a representative capacity, even if these records might incriminate him personally.")

4. The Fifth Amendment may not be asserted with respect to records required to be kept by law. (*Peo. v. Doe*, 59 NY2d 655, 463 NYS2d 405 [1983])

E. FACTUAL PREDICATE

1.*Flushing Nat. Bank v. Transamerica Ins.*, 135 AD2d 486, 521 NYS2d 727 (2d Dept., 1987) - In invoking the Fifth Amendment privilege, where the danger of incrimination is not readily apparent, the witness may be required to

establish a factual predicate for the invocation of the privilege. (*State v. Carey Resources, Inc.*, 97 AD2d 508, 467 NYS2d 876 [2d Dept., 1983]).

2. A witness may not shield himself or be excuse from answering pertinent inquiries by the mere assertion that his answers might tend to incriminate him. It is always for the court to determine whether there is substance to such claim of the witness. *In re Cappeau*, 198 AD 357, 190 NYS 452 (1st Dept. 1921)

3. A witness is his own judge as to whether his answer to question would tend to incriminate him, unless court is convinced that there is no substance to witness' claim of self-incrimination and that his refusal to answer is mere device or pretext to shield some third person. *People, on Complaint of McKinney, v. Richter*, 182 M. 96, 43 NYS.2d 114 (N.Y. Magis. Ct. 1943)

4. Astor, In re, 62 AD3d 867, 879 NYS2d 560 (1st Dept. 2009) - A blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination cannot be sustained absent unique circumstances, and the privilege may only be asserted where there is reasonable cause to apprehend danger from a direct answer. When the danger of incrimination is not readily apparent, the witness may be required to establish a factual predicate, and make a particularized objection to each discovery request.

F. WAIVER OF FIFTH AMENDMENT PRIVILEGE

1. N.Y. Position - Any disclosure relative to the subject matter does not operate as a waiver, but only when the witness gives testimony that is actually incriminating (*Steinbrecher v. Wapnick*, 24 NY2d 354, 300 NYS2d 555 [1969])

a. If testifies to part of an incriminating event, can be compelled to testify to the whole of the event (*Rogers v. U.S.*, 340 U.S. 367 [1951])

b. *Taber v. Herlihy*, 174 AD2d 777, 570 NYS2d 723 (3d Dept., 1991) -- Petitioner's claim that her Fifth Amendment rights were violated upon cross-examination was unfounded where on direct examination, she voluntarily testified to the smoking of marijuana on occasion, thereby waiving her Fifth Amendment rights with respect to that issue.

2. Yoel v. Yoel, NYLJ, 1/17/89, p.27 col.6, S.Ct., Suffolk Co., Belley, J. -- Defendant did not waive his Fifth Amendment rights concerning the issue of controlled substances by acknowledging in a prior affidavit, in the face of allegations by plaintiff, that he had, in the past, a "small drug problem", and thus he would not be directed to answer questions concerning an expenditure of funds for drugs at an examination before trial. Not only questions calling for

a direct admission of guilt may be repelled by reliance on the Fifth Amendment, but inquiries which would disclose a necessary link in the chain of evidence to prove a crime or would furnish the source from which evidence of its commission might be obtained are similarly protected. As defendant's prior statement was in defense of plaintiff's claim, he cannot be said to have waived his Fifth Amendment rights.

G. SCOPE

Castanier v. The Fleming School, NYLJ, 2/2/8/91, p.25 col.1, S.Ct., N.Y. Co. - The privilege against self-incrimination protects not only answers that would provide direct proof of a crime, but also answers that would furnish links in a chain of evidence and result in prosecution of the party asserting the privilege.

H. PROCEDURE

1. Not in Advance - *Figueroa v. Figueroa*, 160 AD2d 390, 553 NYS2d 753 (1st Dept. 1990) -- The privilege against self-incrimination may not be asserted or claimed in advance of questions actually propounded.

2. No Blanket Refusal

a. Where a party, called upon opposing party's case, refused to answer any and all questions put to him, and not just questions the answers to which he reasonably believed could incriminate him, witness could be precluded from testifying later. *Agnello v. Corbisiero*, 177 AD2d 445, 576 NYS2d 541 (1st Dept. 1991)

b. *Flushing Nat. Bank v. Transamerica Ins.*, 135 AD2d 486, 521 NYS2d 727 (2d Dept. 1987) -The privilege should be raised at the deposition with regard to each question to be asked and with respect to each document required to be produced as "[W]hether the privilege should be sustained is to be governed by 'the implications of the question, in the setting in which it is asked'".

3. Anonymous v. Anonymous, NYLJ, 7/3/13, S.Ct., N.Y. Co., Helewitz, Special Referee -- Where wife invoked the Fifth Amendment privilege during an examination before trial of questions relative to cash funds removed from the parties' business, the court noted that while a negative inference may be drawn from one's refusal to answer questions at trial in a civil matter, this may only be done when there is some independent evidence presented which allows the court to make such an inference. Moreover, imposition of the civil sanction may not be based solely upon the wife's assertion of the Fifth Amendment and a

party's refusal to answer does not automatically lead to an adverse determination but is rather only one of multiple factors to be considered. The court noted that the wife's invocation of the Fifth Amendment privilege was not only reasonable in the circumstances but since she already admitted that her financial statements previously provided to the court were inaccurate, no adverse inference was necessary. The wife only invoked the privilege with respect to certain tax returns because of potential criminal liability for failing to report income to the IRS. The court noted the husband invoked the same privilege in the course of the proceedings for the same reason. Both parties affirmed that they lied on all of their financial documents until they were able to take advantage of an Offshore Voluntary Disclosure Initiative dealing with the admission of hidden income outside of United States, and paying the taxes and interest, in order to avoid criminal charges.

XII. OPINION TESTIMONY BY LAY WITNESSES

A. GENERAL RULE

1. Lay witness must confine his testimony to a report of the facts, and may testify in the form of inferences or opinions only when from the nature of the subject matter no better or more specific evidence can be obtained. Lay witnesses usually restricted to relating what they perceived, e.g. saw, heard, touched, smelled, tasted. By contrast, a witness qualified as an expert with respect to a particular issue is permitted to testify as to his or her opinion. *Morehouse v. Mathews*, 2 NY 514, 515-516 (1849).

2. *Kravitz v. Long Island Jewish-Hillside Medical Ctr.*, 113 AD2d 577, 497 NYS2d 51 (2nd Dept. 1985) – "for at least the last century, lay persons have been permitted to give opinion evidence only when the subject matter of the testimony was such that it would be impossible to accurately describe the facts without stating an opinion or impression (see, Richardson, Evidence §363, 366 [10th ed, Prince]; Fisch, New York Evidence §361 [2nd Ed])."

3. See, *Razzaque v. Krakow Taxi, Inc.*, 238 AD2d 161, 656 NYS2d 208 (1st Dept. 1997): Error to permit plaintiff to testify as to the nature, extent, and effect of his injuries, as such matters require support from expert medical witness.

B. DRUG EFFECTS

1.Lower court properly excluded testimony by defendant's wife as to effects of Prozac on defendant. *People v. Gatewood*, 91 NY2d 905, 668 NYS2d 1000 (1998)

C. DISABILITY; MEDICAL CONDITION

1. "Considering all of the evidence..., *including the testimony of the plaintiff concerning her disability*, we conclude that ...maintenance should continue for a period of 10 rather than 6 years. *Rindos v. Rindos*, 264 AD2d 722, 694 NYS2d 735 (2d Dept. 1999 (emphasis supplied)

2. Individual seeking spousal maintenance is entitled to submit general testimony regarding a medical condition, where the effect of that condition on the person's ability to work is readily apparent without the necessity of expert testimony. A decision of the Social Security Administration may serve as some evidence of a disability, but it is not prima facie evidence thereof. *Knope v. Knope*, 103 AD3d 1256, 959 NYS2d 784 (4th Dept. 2013)

3. While the trial court improperly admitted into evidence and relied upon a determination of the Social Security Administration as to the wife's disability, there was other sufficient admissible evidence which supported the finding that the wife was totally disabled. *Grasso v. Grasso*, 47 AD3d 762, 851 NYS2d 213 (2d Dept. 2008)

D. IDENTIFICATION

1. Lay witness not permitted to testify that the substance was marijuana. *People v. Kenny*, 30 NY2d 154, 331 NYS2d 392 (1972)

E. EXAMPLES OF OPINION TESTIMONY BY LAY WITNESSES

1. Emotional state of People - *Pearce v. Stace*, 207 NY 506 (1913); See, *Falkides*, 40 AD2d 1074, 339 NYS2d 235 (4th Dept., 1972) (While a layman cannot testify that a person is of unsound mind, irrational or emotionally disturbed, he can describe the acts of a person and state whether those acts impressed him as being irrational. (See also, *Gomboy v. Mitchell*, 57 AD2d 916, 395 NYS2d 55 [2d Dept., 1977])

2. Estimated speed of an automobile (*People v. Heyser,* 2 NY2d 390, 161 NYS2d 36 [1957]; *Guthrie v. Overmyer*, 19 AD3d 169, 797 NYS2d 203 [4th Dept. 2005]).

3. Intoxication

a. Whether a person appeared to be intoxicated, feeble or ill (*Lyndaker v. Reynolds,* 300 AD2d 1012, 752 NYS2d 509 [4th Dept. 2003]; *Rawls v. American Mut. Life Ins. Co.*, 27 NY 282 [1863]; *Allen v. Glens Falls Ins. Co.,* 5 AD2d 1020, 173 NYS2d 316).

b. Lay witness may testify that person appeared intoxicated or sober based upon observation and experience. *People v. Leonard S.*, 8 NY2d 60, 201 NYS2d 509 (1960); see also, *People v. Kenny*, 30 NY2d 154, 331 NYS2d 392 (1972) - lay witness may not give opinion that substance was marijuana.

c. "A lay witness is competent to testify that a person appears to be intoxicated when such testimony is based on personal observation and consists of a description of the person's conduct and speech (see, *Ryan v Big Z Corp.*, 210 AD2d 649, 651)." (*Rivera v. City of New York*, 253 AD2d 597, 677 NYS2d 537 [1st Dept. 1998])

F. VALUATION – EXCEPTION

1. "New York courts ... have permitted qualified lay witnesses to present their opinions as to the value of property ... before and after the act complained of" (Fisch, New York Evidence § 372, at 255 [2d ed]]. While a lay witness testifying as to value must have some acquaintance with the particular property at issue, as well as knowledge of its market value, that does not mean that he must therefore qualify as an expert (see, Fisch, New York Evidence § 372, at 256 [2d ed]; 58 NY Jur 2d, Evidence and Witnesses, §§626, 693, at 259-260, 343-344). Therefore, plaintiff may be able to prove damages through the use of lay opinion testimony provided such witnesses are found competent to testify. *Tulin v. Bostic*, 152 AD2d 887, 544 NYS2d 88 (3d Dept. 1989)

2. Because property valuation is not strictly a subject for expert testimony, opinion testimony by a lay witness is competent to establish the value of the property if the witness is acquainted with the value of similar property. *Peo. v. Sheehy*, 274 AD2d 844, 711 NYS2d 856 (3d Dept. 2000)

3. Owner of Property

a. Additionally, it has been recognized that the owner of property can testify as to its value regardless of any showing of special knowledge as to the property's value (see, Fisch, New York Evidence § 372, at 89 [2d ed, 1988-1989 Supp]; 58 NY Jur 2d, Evidence and Witnesses, §705, at 355)." (*Tulin v. Bostic*, 152 AD2d 887, 544 NYS2d 88 (3d Dept. 1989)); *Levine*, 37 AD3d 553, 830 NYS2d 250 (2d Dept. 2007) (Supreme Court properly credited defendant husband's value with regard to certain items because he was familiar with those items and plaintiff wife could not refute his testimony.)

b. "On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown to be competent to speak upon the subject. He must have dealt in, or have some

knowledge of the article concerning which he speaks...". *Teerpenning v. Corn Exchange Ins. Co.*, 43 NY 282 (1871)

c. The general rule requiring that a proper foundation be laid to show the witness has knowledge upon a subject before the witness can testify as to the market value does not apply where the witness is the owner as the owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales; owner's testimony regarding the purchase price of the property may be probative on the issue of value so long as the property is of the sort not subject to prompt depreciation or obsolescence, e.g., jewelry. *Peo. v. Womble*, 111 AD2d 283, 489 NYS2d 521 (2d Dept. 1985)

XIII. READING FROM DEPOSITION OF WITNESS

A. CPLR 3117 – GENERAL

1. CPLR 3117(a)(1) - All or part of a deposition may be used by any party to contradict or impeach the testimony of the deponent as a witness.

2. CPLR 3117(a)(2) - All of part of a deposition of a party may be used for any purpose (including evidence in chief of the facts in the deposition testimony) by any party having an adverse interest to the deponent.

3. Trial judge has the discretion to determine when the deposition may be read.

B. CPLR 3117(A)(3) - UNAVAILABILITY SITUATIONS

1. Deposition of any person (including own party) may be used by any party for any purpose if:

a. Witness is dead;

b. Witness is at a greater distance than 100 miles from the place of trial or is out of the state (unless collusively out of state);

c. Witness is unable to attend or testify because of age, sickness, infirmity or imprisonment;

d. Party offering the deposition has been unable to procure the attendance of the witness by diligent efforts; or

e. On motion or notice, the use is justified due to special circumstances in the interests of justice.

C. READING ONLY PART OF A DEPOSITION

1. If a party reads only part of the deposition testimony, the other party may read in other parts that are of importance to them and which reflect on the matter read in by the first party.

a. The court has broad discretion over controlling this procedure. (*Reape v. City of New York*, 228 AD2d 659, 645 NYS2d 499 [2d Dept. 1996]]

b. See *Villa v. Vetuskey*, 50 AD2d 1093, 376 NYS2d 359 (4th Dept. 1975) – A party seeking to cross-read his own deposition should await his own case to do so and is not ordinarily permitted to do so on the heels of adversary's reading of his deposition in the middle of the adversary's case.

2. CPLR 3117(b) thus permits a party to read in relevant portions of his own deposition only after an adverse party has made use of it.

D. OJBECTION

1. The failure to raise a substantial evidentiary objection to a question at a deposition session is not a waiver of the objection. (CPLR 3115(a),(d))

E. INCONSISTENT DEPOSITION TESTIMONY OF A PARTY

1. A party is not bound by the contents of his deposition testimony and may introduce evidence at trial inconsistent with such testimony.

2. Converse is not permitted, i.e., a party may not use his own deposition testimony to impeach his trial testimony. (See, *Mravlja v. Hoke*, 22 AD2d 848, 254 NYS2d 162 [3d Dept. 1964])

F. USE OF PARTY'S DEPOSITION

1. The deposition of a party may be used for any purpose by adverse party. CPLR 3117(a)(2)

2. If only part of a deposition is read at trial by a party, the other party may read any other part of the deposition which fairness requires ought to be considered in connection with the part which was read. CPLR 3117(b).

3. A party does not make the adverse party his/her own witness by reading the adverse party's deposition, or part thereof, at trial. CPLR 3117(d); *Carr v. U.S. Mattress Corp.,* 166 AD2d 172, 564 NYS2d 67 (1st Dept., 1990).

a. See, *Yeargans*, 24 AD2d 280, 265 NYS2d 562 (1st Dept. 1965) – "It was also prejudicial error to exclude the motor vehicle report offered by the defendant when the report tended to contradict the version of the accident given by the defendant in a deposition before trial. CPLR 3117(d) specifically provides "at the trial, any party may rebut any relevant evidence contained in a deposition, whether introduced by him or by any other party." It may be noted that the deposition was first used by the plaintiff in his case in chief and was not used to contradict or impeach the defendant deponent who had not yet testified. (See CPLR 3117, subd. [d].)"

b. Not error in refusing to allow introduction of defendant's deposition testimony at trial as evidence in chief as defendant, by voluntarily leaving the state and refusing to return for trial, procured her own absence and thus failed to satisfy CPLR 3117(a)(3)(ii). *Dailey v. Keith*, 1 NY3d 586, 774 NYS2d 105 (2004)

G. DEPOSITION CORRECTIONS

1. Deposition corrections submitted in conformity with the requirements of CPLR 3116 (a) "could not properly be considered" where the witness "failed to offer an adequate reason for materially altering the substance of his deposition testimony." *Ashford v. Tannenhauser,* 108 AD3d 7365 (2d Dept. 2013). In addition, an affidavit contradicting deposition testimony "appear[s] to raise the feigned issues of fact to avoid the consequences of the prior testimony and, thus, was insufficient to defeat summary judgment." *Kadisch v. Grumpy Jack's Inc.*, 122 AD3d 788 (2d Dept. 2013)]

XIV. USE OF PRIOR CONVICTION FOR IMPEACHMENT PURPOSES IN A CIVIL CASE

A. CPLR 4513

1. "A person who has been convicted of a *crime* is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he hsall be required to any any relevant question, or by the record. The party cross-examining is not concluded by such answer."

2. Extrinsic proof other than the judgment of conviction is not permitted. (See, *Peo. v. Cardillo*, 207 NY 70 [1912])

B. CONVICTIONS – *SANDOVAL* IN CIVIL CASE

1. *Tripp v. Williams*, 39 M3d 318, 959 NYS2d 412 (Supreme Court, Kings Co., 2013, Battaglia, J.) -- In a personal injury action involving the collapse of a masonry wall, plaintiff was precluded from impeaching defendant with evidence of his 25-year-old convictions of certain sex crimes, apparently committed against minors. CPLR 4513 does not deprive a trial court of all discretion in controlling the use of a criminal conviction for impeachment. The potential for the unfairness in the admission of prior crimes may be as great for a civil litigant, who has no control over the use of a criminal conviction and has no right not to testify, as for a criminal defendant. Here, due to the long passage of time since the convictions and the lack of evidence that the crimes involve forcible conduct, the probative value of the convictions was outweighed by the potential for prejudice to the defendant. The principles articulated in *Peo. v. Sandoval*, 34 NY2d 371, are applicable to civil, as well as criminal, actions.

2. Factors to consider: the probative value of the conviction on the issue of honesty, the importance of credibility to material issues in the case, the age of the conviction, and its potentially inflammatory nature.

C. IMPEACHMENT PERMITTED

1. In personal injury action, the use of the prior criminal convictions to impeach the credibility of the plaintiff in this civil case was permissible notwithstanding that there was an issue with respect to his sobriety at the time of the accident which gave rise to this action. *Scotto v Daddario*, 235 AD2d 470, 652 NYS2d 311 [2d Dept. 1997]

2. "A civil litigant is granted broad authority to use the criminal convictions of a witness to impeach the credibility of that witness and a court may, in its discretion, permit the use of a prior conviction of driving while intoxicated to impeach the credibility of a party who testifies at trial (*see Sauer v. Diaz,* 300 A.D.2d 1136, 1137, 753 N.Y.S.2d 631)". *Morgan v Natl. City Bank*, 32 AD3d 1264, 822 NYS2d 201 (4th Dept. 2006)

XV. CROSS EXAMINATION OF BAD ACTS

A. A witness may be cross-examined on prior specific criminal, vicious or immoral conduct, provided that the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility, and a good faith basis for inquiring is established. *Peo. v. Smith*, 27 NY3d 652, 36 NYS3d 861 (2016)

B. “Unlike material facts in dispute, or matters such as a witness’s bias, hostility, or impaired ability to perceive which may be proved independently for impeachment, plaintiffs allege prior misconduct had no direct bearing on any issue in the case other than credibility. If proven, it would show only that plaintiff had acted deceitfully on a prior *unrelated* occasion. The matter was, therefore, collateral and, under the settled rule, could not be pursued by the cross examiner with extrinsic evidence to refute plaintiff’s denial”. (Citation omitted). *Badr v. Hogan*, 75 NY2d 629 (1990

C. PERJURY

1. “We reject plaintiff's contention that Supreme Court erred in allowing cross-examination of her expert regarding an out of state conviction of contempt. That conviction was based upon lies told by the expert to a judge during the course of the expert's trial testimony. Although the conviction was in 1983, “‘[c]ommission of perjury or other acts of individual dishonesty, or untrustworthiness . . . will usually have a very material relevance, whenever committed’ ” (*Donahue v Quikrete Cos.* [appeal No. 2], 19 AD3d 1008, 1009 [2005], quoting *People v Sandoval*, 34 NY2d 371, 377 [1974]). *Towne v. Burns*, 125 AD3d 1471, 3 NYS3d 844 (4th Dept. 2015)

D. DOMESTIC VIOLENCE

1. Prior bad acts in domestic violence situations are more likely to be considered relevant and probative evidence because the aggression and bad acts are focused on one particular person, demonstrating the defendant's intent and motive. *People v. Pham*, 118 AD3d 1159, 987 NYS2d 687 (3d Dept. 2014)

2. Civil judgments cannot be characterized as bad or immoral ... acts involving moral turpitude that would allow them to be used to question the defendant's credibility” *Quiroz v. Zottola*, 129 AD3d 698, 698, 11 NYS3d 194, 196 (NY App. Div. 2015)

XVI. BUSINESS RECORD RULE

A. THE STATUTE

1. CPLR 4518(a): "Any writing or record, whether in the form of an entry in a book or otherwise, made as memorandum or record of any act, transaction, occurrence or event, shall be admissible in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such

business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind."

2. The primary propose of CPLR 4518 is to permit the admission of a record made in the regular course of business, without having to call as a witness every person who had made the record. *Spoar v. Fudjack*, 24 AD2d 731, 263 NYS2d 340 (4th Dept. 1965). A business record is admissible although the person who prepared the record is available to testify. *Clark* v. *N.Y.C. Transit Auth.*, 174 AD2d 268, 580 NYS2d 221 (1st Dept. 1992)

3. Generally, the foundation for the admissibility of an organization's business records must be established by an employee of the organization itself, i.e., someone who is familiar with the organization's routine practices in making such records. (*Peo.v. Bonhomme*, 85 AD3d 939, 925 NYS2d 157 (2d Dept. 2011)

B. FOUNDATIONAL REQUIREMENTS

1. The records or writings were made in the regular course of business

a. "Essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business" *Peo*. v. *Kennedy,* 68 NY2d 569, 510 NYS2d 853 (1986).

b. Unsworn statement in cover letter of attorney for gas company that "records are maintained . . . in the regular course of business" did not establish requisite evidentiary foundation for their admission under business records exception to hearsay rule. *Little* v. *Livingston Mut. Ins. Co.*, 21 AD3d 1265, 801 NYS2d 460 (4th Dept. 2005).

c. Where parties' agreement required Husband to pay certain dental work provided to the wife, the unsworn letter from the dentist stating payment in a certain sum did not have the indicia of reliability associated with a receipt or business record, as it was not created contemporaneously with the purported payments and there was no showing that it was created in the ordinary course of business. *Gambacorta v. Gambacorta*, 45 AD3d 839, 846 NYS2d 362 (2d Dept. 2007).

2. It was the regular course of business to make such entries (business duty) and the maker of the record must either himself have personal knowledge and a duty to record, or must have received the data from others with personal knowledge and under a duty to transmit the information.

a. Business record exception to hearsay rule not applicable to noncertified and unauthenticated copy of school attendance record, submitted in PINS proceeding in absence of evidence disclosing routine followed by school personnel in recording attendance and generating particular document. *Mtr. of Jodel "KK"*, 189 AD2d 63, 595 NYS2d 835 (3d Dept. 1993).

3. The entries were made at or within a reasonable time after the event occurred

a. Records must be "made at or near the time" of the event or opinion being recorded; "essentially, that recollection be fairly accurate and the habit or routine of making the entries assured." *Peo*. v. *Kennedy*, 68 NY2d 569, 510 NYS2d 853 (1986).

b. A report written by a social worker one year after a conversation reported therein was not made within a reasonable time and does not qualify for admission into evidence as a business entry. *Lichtenstein* v. *Montefiore Hosp.*, 56 AD2d 281, 392 NYS2d 18 (1st Dept. 1977).

c. "The statutory requirement that the business record be prepared within a reasonable time after the occurrence, i.e., while the memory of the event was still fresh enough to be fairly reliable, should not be too rigidly applied" and did not prevent introduction of an accident report prepared 15 days after the event. *Toll* v. *State of New York*, 32 AD2d 47, 299 NYS2d 589 (3d Dept. 1969).

C. **MULTI-TIERED HEARSAY**

1. Where the maker of the document has recorded information imparted by others and of which the maker has no actual knowledge, an additional tier of hearsay is present which poses a potential bar to admissibility.

2. Where petitioner was accused of improperly disclosing to a parent the identity of a person who made a child neglect complaint against the parent, which charge was supported in part by the memorandum of another caseworker of a conversation that caseworker had with the parent, the memorandum was not admissible as a business record exception because the parent was under no business duty to report to the caseworker. *Eggleston* v. *Richardson*, 88 AD2d 750, 451 NYS2d 470 (4th Dept. 1982).

3. For the file to be admissible as a business record, both of the following criteria must be met (*Matter of Leon RR*, 48 NY2d 117, 421 NYS2d 863 [1979])

a. The proponent of the record must demonstrate that it was "within" the scope of the entrant's business duty to record the act, transaction or occurrence sought to be admitted"; and

(1) In child neglect proceeding, certain portions of a report prepared in Georgia pursuant to the Interstate Compact on the Placement of Children constituted hearsay and it was error to admit those portions of the report as it was not established that the reporting party was under a business duty to report the information. *Dakota S., In re*, 43 AD3d 1414, 842 NYS2d 665 (4th Dept. 2007).

(2) Narrative portion of child protective service investigation summary not admissible under the business record exception to the hearsay rule as the source of the information contained in such narrative portion was unknown and thus determination could not be made as to whether the source of the information was under a business duty to report such information. *Penny K. v. Alesha T.*, 39 AD3d 1232, 834 NYS2d 760 (4th Dept. 2007).

b. Each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception. Thus, not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant.

(1) Family members' comments within a psychologist's report not admissible in a Family Court proceeding, as they had no business obligation to provide information to the psychologist. *Mtr. of Loren B. v. Heather A.*, 13 AD3d 998, 788 NYS2d 215 (3d Dept. 2004).

(2) "Generally, however, the trend has been to prohibit the admission of a business record or a statement within such a record where the declarant is outside the business enterprise because the statement lacks the inherent trustworthiness or indicia of reliability to except it from the general prohibition against admitting an out-of-court statement asserted for the truth of the statement." *Hochhauser v. Electric Ins. Co.*, 46 AD3d 174, 844 NYS2d 374 (2d Dept., 2007). [A contractual duty of an insured per the insurance policy to cooperate with the insurer was not a sufficient basis upon which to admit a statement made to the insurer's investigator by the insured, who was not the

claimant, as the statement was not made under circumstances that create a high probability that the statement was truthful.]

4. However, a qualification is extant where the outsider's (e.g., the one without a business duty to impart the information that has been recorded) statement itself qualifies as an exception to the hearsay rule. See, *Toll* v. *State of New York*, 32 AD2d 47, 299 NYS2d 589 (3d Dept., 1969).

a. But see, *Allen v. Wells*, 256 AD2d 651, 681 NYS2d 166 (3d Dept., 1998): On trial to modify custody, father subpoenaed mother's entire DSS case file, seeking all "indicated" abuse or neglect reports relative to mother's children by different father. Trial court received "entire file", over objection, "for the limited purpose of showing indicated reports." Appellate Division found no error: "We have held that '[i]n those instances in which the entire case file is admitted, 'fundamental fairness' will not be violated when a [party] has an opportunity to examine the file, either prior to or during the trial' (*Matter of Melanie Ruth JJ.*, 76 AD2d 1008, 1009, 429 NYS2d 773, lv. denied 51 NY2d 710, 435 NYS2d 1026, 417 NE2d 96; see, *Matter of Patrick H.* [Patrick I.], 226 AD2d 921, 922, 640 NYS2d 690). Here, the record reveals that following the recess petitioner failed to offer any further proof; however, she was not denied that opportunity. Further, Family Court limited its review of the case file to the indicated reports contained therein. In our view, petitioner suffered no prejudice. Family Court's determination reflects that the information from the DSS file was only one of several factors considered and that it was supported by ample admissible evidence notwithstanding the DSS file and, therefore, any error committed by Family Court was harmless. (citations omitted.

b. see also, *"Baby Girl" Q. v. Jewish Child Care Association of New York*, 14 AD3d 392, 787 NYS2d 328 (1st Dept., 2005]) (holding that there was no error where agency's progress notes were admitted into evidence where the bulk of the highlighted portions of the notes were admissible as business records, and the few inadmissible notes were harmless.).

c. In neglect proceeding, Family Court properly admitted the child's case file into evidence as a business record. *Jonathan R., Mtr. of*, 30 AD3d 426, 817 NYS2d 335 (2d Dept., 2006).

5. Frequently, the independent hearsay exception that applies is the *admission by a party exception*. See, e.g., *Kelly* v. *Wasserman*, 5 NY2d 425, 185 NYS2d 538 (1959) (admission by a party litigant to a social worker who recorded the statement pursuant to a business duty); see also, *Peo.* v. *Babala*, 154 AD2d 727, 729, 547 NYS2d 683 (3d Dept., 1989).

D. WHO LAYS FOUNDATION FOR BUSINESS RECORD

1. CPLR 4518(a) is silent as to whom, if anyone, must introduce a business record. Such records are customarily offered through a custodian or employee of the business. *Peo.* v. *Kennedy*, 68 NY2d 569, 510 NYS2d 853 (1986).

a. Foundation witness must have some familiarity with the practices and procedures of the business whose records are being offered. *Faust v. McPherson*, 4 M3d 89, 783 NYS2d 197 (App. Term, 2004).

b. Court erred in admitting certain EZ–Pass records because "[a] proper foundation for [their] admission ... [was not] provided by someone with personal knowledge of the maker's business practices and procedures" (*Palisades Collection, LLC v. Kedik,* 67 A.D.3d 1329, 1330–1331, 890 N.Y.S.2d 230 [internal quotation marks omitted]; *see also KG2, LLC v. Weller,* 105 AD3d 1414, 1415, 966 N.Y.S.2d 298), and there was no indication that the records were certified to comply with CPLR 4518 pursuant to CPLR 3122–a. *Sheridan v. Sheridan*, 129 AD3d 1567, 1567, 12 NYS3d 434, 436 (4th Dept. 2015)

c. The court left open the possibility that an expert from outside the business might establish the necessary foundation. *Peo.* v. *Kennedy*, at p. 578; but see, *Dayanim* v. *Unis*, 171 AD2d 579, 567 NYS2d 673, 674 (1st Dept. 1991) (offering party failed to lay foundation for office records of physician which required testimony by a witness with knowledge of the doctor's business practices and procedures).

d. *Brooke Louise H.* v. *Lutheran Community Services, Inc.*, 158 AD2d 425, 552 NYS2d 3 (1st Dept. 1990) (proper foundation was laid in adoption proceeding for admission of community service agency's case record as a business record by testimony of caseworker with personal knowledge of business practices of agency.)

2. Computer printout of electrical service records was admissible under business records exception even though the person who caused them to be produced was not the person who had fed the original data in to the computer, and fact that printout was produced in response to subpoena did not deprive records of their character as business records. *Briar Hill Apts Co.* v. *Teperman*, 165 AD2d 519, 568 NYS2d 50 (1st Dept. 1991).

E. RECEIPT OF BUSINESS RECORDS OF OTHERS

1. General Rule – The recipient of business records of others, even if regularly filed with the recipient's records, do not become admissible via

recipients business records because employees of recipient lacked knowledge of the other organizations record making procedure. *Carothers v. Geico Indem. Col.,* 79 AD3d 864, 914 NYS2d 199 (2d Dept. 2010)

a. cf. *Peo. v. Cratsley*, 86 NY2d 81, 629 NYS2d 992 (1995) - Testimony of mentally retarded complainant's program counselor established requisite foundation for admission of IQ test report prepared by psychologist as "business record," in rape prosecution, as counselor was familiar with report through working with complainant, report was of kind prepared in accordance with program requirements, and report was prepared on behalf of program and state agency.

2. While the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, such records are nonetheless admissible if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon the recipient in its business. McKinney's CPLR 4518(a). *Deutsche Bank Nat. Trust Co. v. Monica*, 131 AD3d 737, 15 NYS.3d 863 (3d Dept. 2015)

F. CERTIFICATION OF BUSINESS RECORDS - CPLR RULE 31221 (CPLR 3120)

1. Rule 3122-a. Certification of business records. (a) Business records produced pursuant to a subpoena duces tecum under rule 3120 shall be accompanied by a certification, sworn in the form of an affidavit and subscribed by the custodian or other qualified witness charged with responsibility of maintaining the records, stating in substance each of the following:

a. The affiant is the duly authorized custodian or other qualified witness and has authority to make the certification;

b. To the best of the affiant's knowledge, after reasonable inquiry, the records or copies thereof are accurate versions of the documents described in the subpoena duces tecum that are in the possession, custody, or control of the person receiving the subpoena;

c. To the best of the affiant's knowledge, after reasonable inquiry, the records or copies produced represent all the documents described in the subpoena duces tecum, or if they do not represent a complete set of the documents subpoenaed, an explanation of which documents are missing and a reason for their absence;

d. The records or copies produced were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, at the time of the act, transaction, occurrence or event recorded therein, or within a reasonable time thereafter, and that it was the regular course of business to make such records provided; and

e. A certification made in compliance with subdivision (a) is admissible as to the matters set forth therein and as to such matters shall be presumed true. When more than one person has knowledge of the facts, more than one certification may be made.

2. A party intending to offer at a trial or hearing business records authenticated by certification subscribed pursuant to this rule shall, at least thirty days before the trial or hearing, give notice of such intent and specify the place where such records may be inspected at reasonable times. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the offer of business records by certification stating the grounds for the objection. Such objection may be asserted in any instance and shall not be subject to imposition of any penalty or sanction. Unless objection is made pursuant to this subdivision, or is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for objection otherwise required by this subdivision, business records certified in accordance with this rule shall be deemed to have satisfied the requirements of subdivision (a) of rule 4518. Notwithstanding the issuance of such notice or objection to same, a party may subpoena the custodian to appear and testify and require the production of original business records at the trial or hearing.

3. CPLR 3120 amended to eliminate need for a preliminary motion for the discovery of documents, things and land in the possession of a non-party. Such discovery can be obtained simply by service on the non-party of a subpoena duces tecum, with copies to the other parties. There is no need or requirement to schedule a deposition of the non-party.

G. JUDICIAL NOTICE OF FOUNDATION - ADMISSIBILITY IN ABSENCE OF FOUNDATION

1. The Appellate Division affirmed the trial court's admission into evidence of bank records of husband's European accounts, *notwithstanding absence of authenticating foundation by employee of bank*. Court held that judicial notice can provide foundation for admitting business records which are "...so patently trustworthy as to be self-authenticating...." Although business records are customarily offered through a custodial or employee of the business

organization that created them who can explain the record-keeping of his organization, judicial notice can provide a foundation for admitting the records of a particular business when the records are so patently trustworthy as to be self-authenticating. Court found that "...the bank records were procured by defendant himself (under compulsion of court order) from the banks which supposedly created them, and thus their authenticity cannot be seriously challenged. They appear regular on their face, and in format conform to the type of statements with which banks customarily supply their customers on a monthly basis for the purpose of advising them of deposits, withdrawals, and balances. No reasons are offered by defendant why these records should not be viewed as reliable and trustworthy, other than that they are technically hearsay and that no witness was called to testify that they were made in the regular course of the bank's business at or about the time of the transactions they describe, but, in the circumstances, we do not consider this reason enough to exclude what appears to be perfectly trustworthy evidence (emphasis supplied)." *Elkaim v. Elkaim,* 176 AD2d 116, 574 NYS2d 2 (1st Dept. 1991).

a. cf. *Peo. v. Ramos,* 13 NY3d 914, 895 NYS.2d 294 (2010) - "The trial court erred when it admitted hearsay evidence without a proper foundation (CPLR 4518[a]). Even assuming some documents may be admitted as business records without foundation testimony (*see People v. Kennedy,* 68 N.Y.2d 569, 577 n. 4, 510 N.Y.S.2d 853, 503 N.E.2d 501), the record at issue in this case was not such a document. Nothing on its face indicates that it "was made in the regular course of business and that it was the regular course of business to make it" (CPLR 4518[a])."

2. "The financial statement [of the plaintiff), introduced through the affidavit of Metro's chief financial officer, is a business record...and so clearly so that it can be deemed self-authenticating." *Niagara Frontier Transit Metro System, Inc. v. County of Erie*, 212 AD2d 1027, 623 NYS2d 33 (4th Dept. 1995).

3. Court properly excluded testimony and letters from the N.J. Division of Youth and Family Services regarding an investigation conducted by the agency, where the agency's representative could not provide a sufficient foundation of trustworthiness and reliability. *D.H. v. Kindercare Learning Ctr., Inc.,* 6 AD3d 220, 774 NYS2d 527 (1st Dept. 2011)

H. FORM OF RECORDS WHICH QUALIFY

1. Although the best evidence rule applies to business records, precluding admission of secondary evidence in the absence of a proper foundation (*Stevens* v. *Kirby*, 86 AD2d 391), if the copies themselves are produced in the regular course of business, they may come in under CPLR

4518(a). *Dependable Lists, Inc.* v. *Malek*, 98 AD2d 679, 469 NYS2d 754 (1st Dept. 1983); see also, *Peo.* v. *Rosa*, 156 AD2d 733, 734, 549 NYS2d 487 (2d Dept., 1989): "It is well settled that in order to admit a photocopy of a business record into evidence, a witness with personal knowledge of record-keeping procedures must testify that the document sought to be admitted was made in the regular course of business, pursuant to the regular procedures of the business, at or near the time the information was obtained or the act occurred."

2. Business record exception is sufficiently broad to admit *computer printouts*. *Ed Guth Realty, Inc.* v. *Gingold*, 34 NY2d 440, 358 NYS2d 367 (1974); see also, *Briar Hill Apts Co.* v. *Teperman*, 568 NYS2d 50 (1st Dept. 1991); *Peo. v. Weinberg*, 183 AD2d 932, 586 NYS2d 132 (2d Dept. 1992) (holding that computer tapes made in regular course of business where data is entered into the computer at the time of each transaction qualified as an admissible business record); *F.K. Gailey Co., Inc. v. Wahl*, 262 AD2d 985, 692 NYS2d 563 (4th Dept. 1999) (holding that computer printouts of outstanding amounts due plaintiff was properly admitted as a business record as the data was stored in the regular course of business); *Federal Express v. Federal Jeans*, 14 AD3d 424, 788 NYS2d 113 (1st Dept. 2005) (holding that computer generated records admissible upon showing that information was entered in regular course of business.).

3. Attorney's unsworn letter that certain documents were "records…maintained in the regular course of business" does not establish CPLR 4518 foundation. *Little v. Livingston Mut. Ins.*, 21 AD3d 1265, 801 NYS2d 460 (4th Dept. 2005).

a. Summary of tax liability was properly admitted into evidence as a business record where it was the duty of plaintiff's accounting department to prepare such documents in the regular course of business and the document was prepared in the regular course of business. *Flour City Architectural Metals Corp. v. John Gallin & Son, Inc.*, 127 AD2d 559, 511 NYS2d 362 (2d Dept. 1987).

b. Summary of business records, made by a witness who was not under a business duty to make such a summary, was inadmissible hearsay. *In re Nicole*, 296 AD2d 608, 746 NYS2d 53 (3d Dept. 2002).

I. PERMISSIBLE CONTENT; REDACTION OF OBJECTION CONTENT

1. *Conclusions of the declarant,* which the declarant would not be permitted to state from the witness stand, should be redacted from the record if

it is to be received. *Baker v. Sportservice Corporation*, 175 AD2d 654, 573 NYS2d 799, 800 (4th Dept. 1991).

2. "The business entry statute lifts the barrier of the hearsay objection; it does not overcome any other exclusionary rule which might properly be invoked. *Toll v. State*, 32 AD2d 47, 50, 299 NYS2d 589 (3d Dept. 1969).

J. SELF-SERVING RECORDS AND RECORDS PREPARED SOLELY FOR LITIGATION

1. Business records are not disqualified for admission under CPLR 4518 simply because they are self-serving and offered by the party who made them, assuming that they otherwise qualify. Their self-serving nature goes to weight rather than admissibility. *Toll v. State*, 32 AD2d 47, 50, 299 NYS2d 589 (3d Dept. 1969).

2. The Special Referee erred in admitting a spreadsheet into evidence as a business record pursuant to CPLR 4518(a), since the document was prepared by plaintiff's counsel for use at the hearing and was not supported by a proper business record foundation *135 E. 57th St., LLC v. 57th St. Day Spa, LLC*, 126 AD3d 471, 472, 2 NYS3d 789 (1st Dept. 2015)

K. WEIGHT ACCORDED BUSINESS RECORDS

1. Once a foundation has been established under the business record rule, either 4518(a) or 4518(c), the records are admissible and prima facie proof of their contents. The burden of proving them false shifts to the other side. *Restrepo v. State*, 146 Misc.2d 349, 550 NYS2d 536, 540 (Ct. of Claims, 1989, Weisberg, J.), citing to *Mtr. of Quinton A.*, 68 AD2d 394, 417 NYS2d 738 (2d Dept. 1979), revd on other grounds 49 NY2d 328 [wherein the question of weight to be accorded business records concerned hospital records admitted pursuant to CPLR 4518(c) which expressly provides that such documents "are prima facie evidence of the facts contained...", language which is not expressly set forth in CPLR 4518(a)].

2. Relative to those records which are admitted pursuant to CPLR 4518(b) or CPLR 4518(c) [see below], the Court of Appeals has held that the reference to "prima facie evidence" therein refers to "evidence which permits but does not require the trier of fact to find in accordance with the 'presumed' fact, even though no contradictory evidence has been presented. *Peo. v. Mertz*, 68 NY2d 136, 148, 506 NYS2d 290 (1986); see also, *Mtr. of Commissioner of Social Services v Philip DeG*, 59 NY2d 137, 463 NYS2d 761 (1983).

L. HEARSAY EXCEPTION FOR CERTAIN PUBLIC RECORDS

1. CPLR §4520 - hearsay exception for certain records prepared by public officers

2. Requirements (*Miriam Osborn Memorial Home Ass'n. V. Assessor of the City of Rye*, 9 M3d 1019, 800 NYS2d 909 [S.Ct., Westchester Co., 2005, Dickerson, J.])

a. The public record must be made by a public officer;

b. It must be in the form of a "certificate" or "affidavit";

c. The record must be required or authorized by special provision of law;

d. It must be made in the course of the officer's official duty;

e. It must be a record of a fact ascertained or an act performed by the officer; and

f. It must be on file or deposit in a public office of the state.

3. The common law public documents hearsay exception is broader than CPLR §4520 and has not been superceded by the statute. *Consolidated Midland Corp. V. Columbia Pharmaceutical Corp.*, 42 AD2d 601, 345 NSY2d 105 (2d Dept. 1973).

4. A public document can be admissible without the testimony of the official who made it, but it must be authenticated. *Miriam Osborn Memorial Home Ass'n. V. Assessor of the City of Rye*, *supra.*

5. Authentication of certain public records may be accomplished by certification as provided in CPLR §4518.

XVII. MEDICAL RECORDS – HEARSAY

A. STATUTE - CPLR 4518(C)

1. Hospital records admissible and prima facie evidence of the facts contained therein if bears proper certification or authentication per statute - admissible as certified business records.

2. Father was not permitted to introduce medical reports from his psychiatrist on issue of his ability to return to work. A physician's office records, supported by the statutory foundations of CPLR 4518(a), are admissible as business records. However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor's opinion or expert proof. Moreover, certification of the records does not cure the defect because only hospital records, not physician office records, are admissible by certification. *Bronstein-Becher v. Becher*, 25 AD3d 796, 809 NYS2d 140 (2d Dept., 2006).

3. A certificate of authentication pursuant to CPLR 4518(c) must state that the documents authenticated were produced in the normal course of business, contemporaneous with the events documented. It is the date of recordation, not

the date of authentication, that is relevant. *Peo. v. Kinne*, 71 NY2d 879, 527 NYS2d 754 (1988).

4. *In Re John QQ,* 19 AD3d 754, 796 NYS2d 432 (3d Dept., 2005):

> "The medical records from Columbia Memorial Hospital were improperly admitted. While Family Ct. Act § 1046(a)(iv) permits the admissibility of such records to establish proof of abuse or neglect, they may only be admitted 'if the judge finds that [they were] made in the regular course of the business of any hospital ... and that it was in the regular course of such business to make [them], at the time of the act, ... or within a reasonable time thereafter.' Prima facie evidence of this foundational proof can be made by a certification from either the head of the hospital or a responsible employee. However, if the certification is 'by someone other than the head of the hospital ... [it] shall be accompanied by a photocopy of a delegation of authority signed by both the head of the hospital ... and by such other employee' (Family Ct. Act § 1046[a][iv]). Here, the requisite delegation of authority to Story, an employee of the medical records department, was lacking."

5. Documents prepared for litigation lack the indicia of reliability necessary to invoke the business records exception to the hearsay rule. *Peo. v. Rogers*, 8 AD3d 888, 780 NYS2d 393 (3d Dept. 2004).

B. CAVEAT - ONLY ADMISSIBLE TO EXTENT GERMANE TO DIAGNOSIS AND TREATMENT.

1. Portions of hospital record, that related to manner of accident and that were not germane to diagnosis and treatment, constituted inadmissible hearsay, in lawsuit to recover for personal injuries. *Cuevas v. Alexander's, Inc.*, 23 AD3d 428, 805 NYS2d 605 (2d Dept. 2005)

a. Portion of hospital record that recited that victim was "kicked, slapped, pulled by her hair and had a knife to her neck" was germane to diagnosis and treatment and thus admissible. *Peo. v. Baltimore*, 301 AD2d 610, 754 NYS2d 650 (2d Dept. 2003).

b. Statements by victim in port of sexual abuse counselor were not admissible as they were not certified pursuant to CPLR and went beyond the realm of what was germane to diagnosis and treatment. *Peo. v. Benedetto*, 294 AD2d 958, 744 NYS2d 92 (4th Dept. 2002).

2. Physicians' office record or hospital records are ordinarily admissible to extent they are germane to diagnosis and treatment, including medical opinions; however, the record is inadmissible where source of information on hospital or doctor's record is unknown. *Ginsberg v. North Shore Hosp.*, 213 AD2d 592, 624 NYS2d 257 (2d Dept. 1995); *Echeverria v. City of N.Y.*, 166 AD2d409, 560 NYS2d 473 (2d Dept. 1990)

3. While victim's statements to medical personnel as to how injuries were received were admissible, her statements concerning the identity of the attacker were inadmissible as not being germane to diagnosis or treatment. *Peo. v. Thomas*, 282 AD2d 888, 738 NYS2d 145 (4th Dept. 2002)

4. *People v Ortega [Benston]*, 15 NY3d 610, 917 NYS2d 1 [2010] *Domestic Violence*

a. Medical records' description of case as involving "domestic violence" and reference to "safety plan" for victim were relevant to diagnosis and treatment of victim, and thus admissible under business records exception to hearsay rule in prosecution for assault; domestic violence was part of attending physician's diagnosis, domestic assault differed materially from other types of assault in its effect on victim and in resulting treatment, and developing safety plan for victim, including referral to shelter or dispensing information about domestic violence and necessary social services, was important part of victim's treatment.

C. X-RAY & OTHER MEDICAL DIAGNOSTIC IMAGING TESTS - CPLR 4532-A

1. A graphic, numerical, symbolic, or pictorial representations of medical or diagnostic tests of party is admissible without testimony of the technician who created the evidence if the following information is inscribed on the representation:

a. Name of the injured party;

b. Date on which the information was taken;

c. The identifying number; and

d. The name and address of the physician under whose supervision the information was taken.

e. Inscription not necessary if exhibit is part of otherwise admissible hospital records or if physician who took the information testifies

2. Testimony regarding test result

a. A physician cannot testify to a diagnosis based on a test result that has not been received in evidence.

b. A doctor cannot testify based on an X-ray without producing that X-ray and introducing it into evidence. *Hambsch v. NYC Transit Authority*, 63 NY2d 723, 480 NYS2d 195 (1984).

c. Where MRI films not in evidence and there was no indication that they were unavailable, a written MRI report prepared by non-testifying health professional was inadmissible hearsay. *Wagman v. Bradshaw*, 292 AD2d 84, 739 NYS2d 421 (2d Dept. 2002).

3. Physician who did not physically examine the plaintiff could not testify to a diagnosis of plaintiff's back injury based on films that were not in evidence. *Nuzzo v. Castellano*, 254 AD2d 265, 678 NYS2d 118 (2d Dept. 1998).

4. Business duty

a. "Family Court also erred by admitting the psychologist's report into evidence. Two psychologists worked together to create the report, yet only one testified. The testifying psychologist was not the one who interviewed other family members, whose comments were included in the report. Additionally, the report not only included the polygraph examiner's official results, but also his informal opinion as to the father's truthfulness regarding certain topics. Because the report relied on hearsay statements from individuals who had no business obligation to provide information to the psychologist, it was inadmissible as a business record (see Matter of Shane MM. v Family & Children Servs., 280 AD2d 699, 701 [2001])." *Loren B. V. Heather A.*, 13 AD3d 998, 788 NYS2d 215 (3d Dept., 2004).

D. OTHER RECORDS

1. CPLR 4518(a) - Computer Business Records - "An electronic record...used or stored as...a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record."

a. "The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record."

b. "All...circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility.

c. No tangible backup (i.e., floppy disk, hard drive) need by submitted with the electronically produced record.

2. CPLR 4518 (c) affords expedited admission of certain business records which are enumerated in CPLR 2306 and CPLR 2307:

3. Books, papers or other things subpoenaed from a library. CPLR 2307(a). Library may comply with a subpoena duces tecum by delivering to the court certified copies of the books, papers or other things.

4. Books, papers or other things subpoenaed from a department or bureau of a municipal corporation or of the state. CPLR 2307(a). Government entity may comply with a subpoena duces tecum by delivering to the court certified copies of the books, papers or other things.

5. Blood genetic marker and DNA tests (CPLR 4518(d) & (e); *Mtr. of Gregory F.W. and Sharon A.W.*, NYLJ, 9/30/94, p.34 col.5, F.Ct., Monroe Co.; *Rosa B.* v. *Jose C.*, 204 AD2d 795, 611 NYS2d 704 (3d Dept., 1994).

XVIII. FAILURE TO CALL WITNESSES OR PRODUCE EVIDENCE - ADVERSE INFERENCES

A. RULE - GENERAL

1. An unfavorable inference may be drawn when a party fails to produce evidence which is within his or her control and which he or she is naturally expected to produce (*Reichman* v. *Warehouse One, Inc.*, 173 AD2d 250, 252 [1st Dept., 1991); *Gruntz* v. *Deepdate General Hospital*, 163 AD2d 564, 566 [2d Dept., 1990)]; See, *Noce* v. *Kaufman*, 2 NY2d 347, 161 NYS2d 1 [1957] -- "where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inference may be drawn against him which the opposing evidence on the record permits."

B. PRECONDITIONS

1. The preconditions for this [missing witness] charge, applicable to both criminal and civil trials, may be set out as follows:

a. the witness's knowledge is material to the trial;

b. the witness is expected to give noncumulative testimony;

c. the witness is under the “control” of the party against whom the charge is sought, so that the witness would be expected to testify in that party's favor; and

d. the witness is available to that party (*Devito v. Feliciano*, 22 NY3d 159, 165-66, 978 NYS2d 717 (2013)

2. Error to grant missing witness charge where defendants failed to establish that the missing witness was under the plaintiff’s control and would have been expected to provide noncumulative testimony on a material issue in dispute. *Buttice v. Dyer*, 1 AD3d 552, 767 NYS2d 784 (2d Dept. 2003)

C. POWER TO PRODUCE

1. The witness must be one within the power of the party to produce and on whom the party would naturally be expected to call (see, *Ausch* v. *St.Paul Fire & Marine Ins. Co.*, 125 AD2d 43, 511 NYS2d 919 (2d Dept. 1987) -- Relatives are generally considered under the control of a party for the purpose of determining whether unfavorable inference may be drawn against party who fails to produce evidence within his control on which he is naturally expected to produce.

D. EFFECT OF VERBAL EVIDENCE

1. Failure of a party to produce evidence which would conclusively determine the fact in dispute may give rise to a conclusive inference, i.e., a presumption of law, that the fact is not as he claims it to be or is as claimed by the other side; as where a party fails to produce a chattel or a writing which is in his possession and would, if produced, show the fact indisputably...But in the case of a failure to produce mere oral evidence, the rule necessarily falls short of this, oral evidence is not indisputable and conclusive, but depends on 'slippery memory' and honesty. The rule in respect to failure of a party to produce oral evidence is that such failure is a fact to be considered in determining how much weight, if any, should be given to the evidence which he has produced... (*Reehil v. Fraas*, 129 AD2d 563, 114 NYS2d 17 [2d Dept. 1908])

E. MATERIALITY

1. The failure of a party to call a witness under his control who is shown to be in a position to give material evidence may result in an inference that the testimony of such a witness would be unfavorable to such a party, and the trial court may so instruct the jury. *Trotta v. Koch*, 110 AD2d 631, 487 NYS2d 371 (2d Dept., 1985)

2. "While an unfavorable inference may ordinarily arise where a doctor has examined the plaintiff and is not called to testify, where, as here, the testimony would not have constituted material evidence, the inference may not be drawn". *Kushner v. Mollin*, 181 AD2d 866, 581 NYS2d 836 (2d Dept., 1992)

3. Dismissal of separation action based on cruel and inhuman treatment - "These incidents of harassment all allegedly took place in the presence (or within earshot) of witnesses, patients or working staff employed by plaintiff. Nevertheless, not a single witness was called by plaintiff to corroborate any of these allegations." *Lind v. Lind*, 89 AD2d 518, 452 NYS2d 204 (1st Dept., 1982)

4. Divorce granted to husband on ground of cruel and inhuman treatment. Court commented on wife's failure to call members of her family as

witnesses to describe a particular occurrence involving disputed assault claims between the wife's family and the husband, militates against her version of the event. *Cautaudella v. Cataudella*, 74 AD2d 893, 425 NYS2d 863 (2d Dept., 1980)

F. EXCEPTION – CUMULATIVE TESTIMONY

1. *Spiegel v. Spiegel*, 68 AD3d 881, 875 NYS2d 488 (2d Dept. 2009) - Support Magistrate properly declined to draw an adverse inference against the mother for her failure to produce her current child care worker to testify, as testimony from that witness would have been cumulative.

2. *Lauro v. City of New York*, 67 AD3d 744, 746, 889 NYS2d 215 [2d Dept 2009] -- " '[W]hen a doctor who examines an injured plaintiff on the defendant's behalf does not testify at trial, an inference generally arises that the testimony of such witness would be unfavorable to the defendant. The defendant may defeat this inference by demonstrating that the testimony would be merely cumulative, the witness was unavailable or not under the defendant's control, or the witness would address matters not in dispute' " (*Hanlon v Campisi*, 49 AD3d 603, 604 [2008], quoting *Brooks v Judlau Contr., Inc.*, 39 AD3d 447, 449 [2007], *revd* 11 NY3d 204 [2008]).

3. When a missing witness charge is requested in a civil case, the uncalled witness's testimony may properly be considered cumulative only when it is cumulative of testimony or other evidence favoring the party controlling the witness. It may not be considered cumulative simply because it would repeat or be consistent with an opposing party's evidence. *Devito v. Feliciano,* 22 NY3d 159, 161-62, 978 NYS2d 717 (2013)

XIX. CLEAR AND CONVINCING EVIDENCE

A. DEFINITION - Clear and convincing evidence is evidence that satisfies the fact-finder that it is highly probable that what is claimed actually happened. (*Peo. v. Mingo*, 49 AD3d 148, 850 NYS2d 151 [2d Dept. 2008])

B. EXAMPLES

1. To punish a party for civil contempt (*Galones v. Galanos*, 46 AD3d 507, 846 NYS2d 654 [2d Dept. 2007])

2. "[a]dmissibility of tape-recorded conversation requires proof of the accuracy or authenticity of the tape by 'clear and convincing evidence' establishing 'that the offered evidence is genuine and that there has been no

tampering with it (*Peo. v. Ely*, 69 8 NY2d 520, 527 [1986]); *Peo. v. Jackson*, 43 AD3d 488, 841 NYS2d 157 [3d Dept. 2007])

a. Establishing mental illness (*Mtr. of Nichola B.*, 103 AD3d 480, 959 NYS2d 479 [1st Dept. 2013])

PART 11

EVIDENCE FOUNDATIONS - AUTHENTICATION

I. MEANING OF AUTHENTICATION

A. GENERAL

1. The proponent of evidence must prove authenticity as a condition to the admission of evidence by the laying of a proper foundation.

2. Proving authenticity involves proving that the proffered evidence (writing, tape, model, summary, etc.) is what the proponent claims it to be.

3. Laying the proper foundation does not assure admissibility as the document, object or testimony may be barred by means of some other evidentiary rule (e.g., hearsay).

B. STEPS TO INTRODUCE DOCUMENT IN EVIDENCE

1. Mark the document for identification
2. Proponent hands the document given to the witness
3. Proponent asks the witness to identify the document
4. Proponent lays the proper foundation for the exhibit's introduction
5. Move the admission

II. NEW STATUTORY PROVISIONS

A. CPLR 4540-A: (EFFECTIVE JANUARY 1, 2019)- AUTHENTICATION BY PRODUCTION

> Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is

60

not authentic, and shall not preclude any other objection to admissibility.

1. Incorporates the "doctrine of authentication by production", which recognizes that documents are authenticated when produced by the party against whom they are offered.

2. The new provision covers not only documents in written form but also digital records, as well as photographs and tangible items.

3. The requirement that the material is "authored or otherwise created" by the producing party.

a. This means that a party's production of material created by a third party as, e.g., an email received by the producing party in the ordinary course of business and kept in its files, would not qualify for the statute's presumption. Then, common-law rules of authentication would be necessary to establish its authentication.

4. The statute does not apply when the producing party offers into evidence the material the party produced in response to a demand.

5. Rebuttable presumption

a. For example, the parties response to discovery may require that party to produce an unauthentic item, such as a forged document, in the party's files, and production under these circumstances would not be deemed a concession of authentication.

b. To rebut the presumption, the producing party has to establish the material produced "is not authentic". This can be done by evidence of forgery, fraud or some other defect in the materials purported authenticity.

B. CPLR 4511 (C) – WEB MAPPING

Every court shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented. The presumption established by this subdivision shall be rebutted by credible and reliable evidence that

the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an Internet mapping tool does not fairly and accurately portray that which it is being offered to prove.

1. If there is no objection to the proffer, or if the presumption is not otherwise rebutted, the court is mandated to take judicial notice of the digital evidence, and the evidence is thereby admitted.

III. CHAIN OF CUSTODY

A. A chain of custody is employed when the evidence itself is not patently identifiable or is capable of being replaced or altered (e..g, drugs) (*Peo. v. McGee*, 49 NY2d 48, 424 NYS2d 157 [1979])

B. Mere identification by one familiar with the object, however, suffices when the evidence is nonfungible, unique and not subject to alteration. (*Peo. v. Taylor*, 206 AD2d 904, 616 NYS2d 116 [4th Dept. 1994]]

IV. BEST EVIDENCE RULE

A. Under an exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith. Loss of primary evidence under exception to best evidence rule may be established upon showing of a diligent search in location where the document was last known to have been kept, and through testimony of the person who last had custody of the original; the more important the document to resolution of ultimate issue in the case, stricter becomes the requirement of the evidentiary foundation establishing loss for the admission of secondary evidence. *Amica Mut. Ins. Co. v. Kingston Oil Supply Corp.*, 134 AD3d 750, 21 NYS3d 318 (2d Dept. 2015)

B. When seek to prove the *contents* of a writing, recording or photograph, the original of the writing, recording or photograph is required. (*Schozer v. William Penn Life Ins. Co. of New York*, 84 NY2d 639, 620 NYS2d 797 [1994]; *Flynn v. Manhattan & Bronx Surface Transit Operating Authority*, 61 NY2d 769, 473 NYS2d 154 [1984])

1. Does not apply when seek to prove a fact that has an existence independent of a writing, photograph or recording, despite the fact that a writing, photograph or recording evidencing the fact sought to be proved exists.

2. Example - If a photograph is offered to illustrate the witness' testimony, not attempting to prove the contents of the photograph, the best evidence rule does not apply. If, however, the photograph is offered to prove contents of a particular scene, the rule applies.

a. Example - A party seeking to prove payment of a debt may do so by testimony even though a receipt for payment was given. The payment, not the terms of the receipt, is the fact to be proven.

C. Once a sufficient foundation for admission is presented, secondary evidence is subject to an attack by the opposing party not as to admissibility but to the weight to be given the evidence, with the final determination left to the trier of fact. *Kliamovich v Kliamovich*, 85 AD3d 867, 925 NYS2d 591 (2d Dept. 2011)

D. The proponent of the secondary evidence has a heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original. *76-82 St. Marks, LLC v. Gluck*, 147 AD3d 1011, 48 NYS3d 210 (2d Dept. 2017)

1. *Ferraioli v. Ferraioli*, 295 AD2d 268, 744 NYS2d 34 (1st Dept. 2002):

> "An original writing must be placed in evidence when a party seeks to establish the contents of such writing (Schozer v. William Penn Life Insurance Co. of N.Y., 84 N.Y.2d 639, 620 N.Y.S.2d 797, 644 N.E.2d 1353). If a writing is collateral to the issue to be proven, the best evidence rule does not require its production (Grover v. Morris, 73 N.Y. 473, 480). By the same token, a document is not subject to the best evidence rule although related to an original writing subject to the best evidence rule if it does not vary the terms of the original (Kelly v. Crawford, 5 Wall. 785, 72 U.S. 785, 789, 18 L.Ed. 562; VII Wigmore on Evidence 2104 [Chadbourn Rev. 1978]). A post-nuptial agreement which provides for specific equitable distribution and which meets certain statutory requirements is valid and enforceable (Domestic Relations Law 236[B][3]; Matisoff v. Dobi, 90 N.Y.2d 127, 132, 659 N.Y.S.2d 209, 681 N.E.2d 376). Plaintiff's statement of net worth did not vary the terms of the post-nuptial agreement. Defendant had not made any claim that plaintiff had failed to disclose or had concealed income or resources in

connection with the post-nuptial agreement. Indeed, the trial court found plaintiff's statement of net worth only relevant to defendant's affirmative defense of duress. That defense, however, was unrelated to plaintiff's statement of net worth since it was premised on plaintiff's threat to "commence an ugly transatlantic divorce action, forcing defendant to return to New York to litigate unless defendant gave into" plaintiff's demands as incorporated into the post-nuptial agreement. While the terms of the post-nuptial agreement were relevant to this affirmative defense, the appended statement of net worth was incidental and collateral to defendant's claim of duress. The post-nuptial agreement should have been admitted into evidence."

E. MEANING OF "ORIGINAL"

1. First produced and operative document

2. Duplicate originals (*Sarashon v. Kamaiky*, 193 NY 203, 86 NE 20 (1908) (Where a document is executed in counterpart, each part is regarded as an original)

F. CARBON COPIES

1. On such multi-copy forms, all duplicates are admissible as originals without the necessity of producing or accounting for the absence of other counterparts. *People v. Kolp*, 49 AD2d 139, 373 NYS2d 681 (3d Dept. 1975)

G. CPLR 4539

1. Accurate Reproductions in Regular Course of Business - "If any business, institution, or member of a profession or calling, in the regular course of business or activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied, or reproduced it by any process which accurately reproduces forms a durable medium for reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original, whether the original is in existence or not. (See, *Peo.* v. *May*, 162 AD2d 977, 557 NYS2d 238 [4th Dept. 1990])

H. SECONDARY EVIDENCE

1. For secondary evidence to be admissible, the proponent must establish that the original writing has been in existence, that it is genuine (if authenticity is questioned), and that a proper excuse exists for its

nonproduction (*Glatter v. Borten*, 233 AD2d 166, 649 NYS2d 677 [1st Dept. 1966])I. Reasons for Non-production of Original

1. The original is lost - *Harmon v. Matthews*, 27 NYS2d 656 (S.Ct., 1941) - A reasonable search was exhausted; testimony of last custodian usually required.

a. If loss or destruction was result of fraudulent design, parol evidence not admissible.

b. Loss of the original may be established upon a showing of diligent search in the location where the document was last known to have been kept and through the testimony of the person who last had custody of the original. *Schozer* v. *William Penn Life Ins. Co.*, 84 NY2d 639, 620 NYS2d 797 (1994)

2. The document is outside the court's jurisdiction and cannot be obtained; or

3. The document is in the possession or control of the adverse party who, upon due notice, has failed to produce it (Serve notice to produce)

a. *Lapidus* v. *NYC Chapter of NYS Assn. for Retarded Children, Inc.*, 118 AD2d 122, 504 NYS2d 629 (1st Dept. 1986) -- "That plaintiff could not produce the written employment contract upon which he relies is not fatal to his claim. Since the record contains sworn testimony showing the existence of such a document and that it was in the possession of the Association, which was duly served with a notice to produce and has failed to do so, plaintiff may offer secondary evidence establishing its contents".

4. Other bona fides reasons

a. see, *LaRue v. Crandall*, 254 AD2d 633, 679 NYS2d 204 (3d Dept. 1998) - Not error in receiving photocopy of letter from father to mother in evidence where mother testified she had left original at home because she thought copy would suffice and father admitted that he had sent the letter.

b. Where a reasonable excuse is offered for the nonproduction of the original of a separation agreement, a party can rely upon secondary evidence, i.e., a copy of the agreement, to prove the terms of the agreement. (Accepted excuse was that original on file with County Clerk *Story* v. *Brady*, 114 AD2d 1026, 495 NYS2d 464 (2d Dept. 1986)

c. Use of document which contained figures taken from other documents not produced at trial was violation of best evidence rule, absent explanation for failure to produce original documents. *National States Elec.* v. *LFO Construction Corp.*, 203 AD2d 49, 609 NYS2d 900 (1st Dept. 1994)

J. OVERRIDING POLICY

1. The more important the document to the final outcome of the case, the stricter the requirement that an evidentiary foundation be established demonstrating the loss. *(Poslock* v. *Teachers' Ret. Board*, 209 AD2d 87, 624 NYS2d 574 [1st Dept. 1995; *Abildgaard v. Van Den Brulle*, NYLJ, 12/1/14, Civil Ct., NY Co., D'Auguste, J.])

2. Not error for court to apply the best evidence rule to preclude the copy of a letter and file in a malpractice action from being admitted into evidence at trial, since plaintiff failed to meet the strict requirement of proving an evidentiary foundation establishing loss and lack of improper motive for the nonproduction of the originals. *Proner* v. *Julien & Schlesinger, P.C.*, 214 AD2d 460, 625 NYS2d 207 (1st Dept. 1995)

V. AUDIOTAPES

A. STANDARD

1. *Peo. v. Ely*, 68 NY2d 510, 510 NYS2d 518 (1986) - clear and convincing evidence that the offered evidence is genuine and that there has been no tampering.

a. Absent such proof, the witness's concession that the voice on the tapes is his or hers and that he or she recalls making some of the statements on the tape does not exclude the possibility of alteration and that, therefore, does not sufficiently establish authenticity to make the tapes admissible. *Williams v. Rolf*, 144 AD3d 1409, 42 NYS3d 381 (3d Dept. 2016).

B. CHAIN OF CUSTODY NOT REQUIRED

1. "The inherent difficulty with fungible goods simply is not present when evidence of a conversation is sought to be introduced, for the conversation itself is unique and the participants are available to attest to its accuracy. Thus, a chain of custody is not required for the introduction of tape recordings such as those present here." (*Peo. v. McGee*, 49 NY2d 48, 424 NYS2d 157 [1979])

a. Although not a requirement is an alternate method - requires evidence regarding the making of the tapes and identification of the speakers, and that within reasonable limits those who have handled the tape from the time of its making to the production in court; identify it and testify to its custody and unaltered state. *Peo. v. Ely*, 68 NY2d 520, 510 NYS2d 532 (1986)

C. MEANS OF AUTHENTICATION

1. *Peo. v. Ely*, 68 NY2d 520, 510 NYS2d 532 - Testimony of participant to a conversation that it is complete and accurate reproduction of the conversation and has not been altered *(Tepper* v. *Tannenbaum*, 65 AD2d 359, 411 NYS2d 588 [1st Dept. 1978]).

a. Court erred in admitting tape recording where proponent failed to establish by "clear and convincing proof" that the offered evidence is genuine and that there has been no tampering with it. *(Cross v. Davis*, 269 AD2d 837, 703 NYS2d 789 [4th Dept. 2002])

2. *Harry R. v. Esther R.*, 134 M2d 404, 510 NYS2d 792 (Fam. Ct., Bx. Co., 1986) – One does not have to be an expert to use simple tape recorder and where father testified that recording device was operable, he was capable of using it and that recording was authentic, unedited and audible, and he identified speakers, thereby a sufficient foundation having been laid. Testimony of a witness to the conversation or to its recording, such as the machine operator, to the same effect

D. *GRUCCI* CASE

1. *Grucci v Grucci*, 20 NY3d 893, 957 NYS2d 652 [2012]: The husband was accused of violating an order of protection and was indicted by a grand jury. After being acquitted, he brought an action to recover damages for malicious prosecution arising out of plaintiff's arrest on charges of criminal contempt following his alleged violation of an order of protection directing plaintiff to stay away from defendant. The husband sought, through the testimony of his brother, to play for the jury in audiotape of a telephone conversation in which the wife purportedly made it clear to the brother that after she went to the police, she was not in fact afraid of the husband. Court of Appeals held that it was not reversible error for the trial judge to have excluded from evidence, as inadmissible hearsay, statements made by defendant to a witness during a telephone conversation. Although plaintiff argued that defendant's alleged statements were being offered to prove her state of mind (i.e., malice) rather than for their truth, plaintiff wanted the witness to testify that defendant had told him that she was not afraid of plaintiff and that she had expressed an alternative motive for going to the police in order to show that defendant had lied to the authorities. However, for that tactic to work, plaintiff would have had to ask the jury to believe that defendant's alleged statements to the witness were, in fact, true. While defendant's statements were admissible as admissions of a party-opponent, plaintiff never made that argument to the judge. Additionally, the omission of that testimony was not so

crucial with respect to the issue of whether defendant initiated the prosecution as to require a new trial.

The Court of Appeals noted that the predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered. There was no attempt to offer proof about who recorded the conversation, how it was recorded (e.g., the equipment used) or the chain of custody during the nearly nine years that elapsed between the date of the alleged conversation and the trial. Accordingly, given the facts and circumstances of this case, the judge did not abuse his discretion by requiring more than the witness's representation that the tape was "fair and accurate" to establish a sufficient predicate before playing the tape for the jury.

E. FOUNDATION ELEMENTS

1. The operator of the equipment was qualified
2. The operator recorded a conversation at a certain time and place.
3. The operator used certain equipment to record the conversation.
4. The equipment was in good working order.
5. The operator used proper procedures to record the conversation.
6. The tape was a good reproduction of the conversation.
7. The operator accounts for the tape's custody between the time of taping the time of trial. (Optional)

F. PARTICIPANT AND EXPERT

1. Testimony of a participant to a conversation together with proof by an expert that upon analysis of the tapes for splices or alterations, there was neither.

G. AUDIBIITY

1. If a recording is partly inaudible or intelligible, it is nonetheless admissible unless those portion are so substantial as to render the recording as a whole inadmissible; matter of discretion of trial judge. (*Peo. v. Graham*, 57 AD2d 478, 394 NYS2d 982 [4th Dept. 1977]). To be admissible, the tape should be at least sufficiently audible so that independent third parties can listen to it and produce a reasonable transcript. (*Peo. v. Lebow*, 29 NY2d 58, 323 NYS2d 829 [1971]).
2. Insubstantial defects in the overall quality of a recording affect its weight, not its admissibility (*Peo. v. Morgan*, 175 AD2d 930, 573 NYS2d 765 [2d Dept. 1991]).

H. SURREPTITOUS RECORDING

1. Error to hold that defendant was precluded from using any audio tapes at trial to impeach witnesses on the ground that the defendant secretly recorded conversations he had with the plaintiffs and nonparty witnesses; the tapes are admissible if they are relevant and material and their admission does not violate the rules of evidence. (*Breezy Point Coop. v. Young*, 234 AD2d 409, 651 NYS2d 121 [2d Dept. 1996])

VI. PHOTOGRAPHS

A. PURPOSES

1. An illustration of other testimony; or
2. Substantive evidence of the facts portrayed in the photograph.

B. GENERAL FOUNDATION

1. The photograph is a fair and accurate representation of the place, person, scene or subject portrayed. *(Peo. v. Pobliner*, 32 NY2d 356, 354 NYS2d 482 [1973])

2. With respect to photographs, the proper foundation should be established through testimony that the photograph "accurately represent[s] the subject matter depicted". Rarely is it required that the identity and accuracy of a photograph be proved by the photographer. Rather, since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify, or an expert may testify that the photograph has not been altered. *People v. Price*, 29 NY3d 472 (2017)

3. "Short" version - Is this photograph marked as Exhibit "D" a fair and accurate representation of the condition of the bedroom in the marital residence as it existed on April 4, 2009?

C. FOUNDATION ELEMENTS

1. The witness is familiar with the object or scene
2. Any person familiar with the scene or object depicted may verify the photograph. Not necessary to call photographer as witness, so long as someone can testify that the photograph accurately shows what it purports to

show. (*Peo. v. Byrnes*, 33 NY2d 343, 362 NYS2d 913 [1974]; *Kowalski* v. *Loblaws, Inc.*, 61 AD2d 340, 402 NYS2d 681 [1st Dept. 1978])

3. The witness explains the basis for his or her familiarity with the object or scene

4. The witness recognizes the object or scene in the photograph

5. The photograph is a "fair, "accurate", "true" or "good" depiction of the object or scene at the relevant time.

D. On motion for summary judgment, triable issue of fact not raised by photographs offered by plaintiff where there was no evidence as to when they were taken or whether conditions reflected in the photographs were substantially the same as those existing on the date of occurrence. (*LaBella v. Willis Seafood*, 296 AD2d 382, 744 NYS2d 504 [2d Dept. 2002]]

E. BUSINESS RECORD RULE APPLIED TO PHOTOGRAPHS

1. In *Corsi v. Town of Bedford,* 58 AD3d 225, 868 NYS2d 258 [2d Dep't 2008], involving an adverse possession claim, photographs taken by the County were properly admitted into evidence under the business records exception to the hearsay rule (see CPLR 4518[a]). The aerial photographs in issue were made as part of a series of such photographs taken on a regular basis pursuant to a contractual duty, and the "routineness" of the photographs which tends to guarantee truthfulness because of the absence of motivation to falsify was satisfied. (Compare, *Hochhauser v. Electric Ins. Co.,* 46 AD2d 174 (2d Dept. 2007), holding that the contractual duty of an insured (not a claimant) to cooperate, as required by the terms of the insurance policy, was insufficient to permit the insured's statement into evidence as a business record exception as there was lacking inherent trustworthiness or indicia of reliability.

F. CIRCUMSTANTIAL EVIDENCE TO AUTHENTICATE PHOTOGRAPH

1. An alternative method involves circumstantial evidence to provide authentication for the admission of a photograph. For example, testimony that the photograph was found with the defendant's property and that it portrayed individuals known to the arresting officer. (*Peo. v. Dawkins*, 240 AD2d 962 [3d Dept. 1977]; see Martin, "Authenticating Photographs", NYLJ, 2/13/09, p.3 col.1)

VII. VIDEOTAPES

A. GENERAL USE

1. Day-in-life films
2. Standard of Living
3. Surveillance films

B. *Tran v. New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383, 756 NYS2d 509 (2003) – Plaintiff is entitled to surveillance videos prior to giving a deposition.

C. RELEVANCY

1. *In re Chase*, 264 AD2d 330, 694 NYS2d 363 (1st Dept. 1999) – In guardianship proceeding, video taped by a professional production crew that was interviewing Mr. Chase, a Holocaust survivor, for the Steven Spielberg project documenting the Holocaust, where Mr. Chase states that he gave his property to his children, was relevant as the evidence would have substantiated Ms. Chase's testimony that, far from being motivated by a conflict of interest, her actions were consistent with her father's wishes for the management of his finances.

D. FOUNDATION

1. Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape. When the videographer is not called, testimony, expert or otherwise, may also establish that the videotape truly and accurately represents that was before the camera. 2. *Zegarelli v. Hughes*, 3 NY3d 64, 781 NYS2d 488 (2004)

3. The proponent of videotape evidence "must show that the tape is a true, authentic and accurate representation of the event taped without any distortion or deletion. (*Peo. v. Curcio*, 169 M2d 276, 645 NYS2d 750 [S.Ct., St. Lawrence Co., 1996])

4. A videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintain or of the equipment that the videotape accurately represents the subject matter depicted. Testimony, expert or otherwise, may also establish that a videotape truly and accurately represents what was before the camera. Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering. (*Read v. Ellenville*, 20 AD3d 408, 799 NYS2d 78 [2d Dept. 2005])

E. LOST VIDEOTAPE

1. Best evidence rule precludes a witness from testifying to an altercation he observed on a surveillance videotape in the absence of the tape. (*Peo. v. Jimenez*, 8 M3d 803, 796 NYS2d 232 [S.Ct., Bronx Co., Cirigliano, J., 2005]); cf. *Schozer v. Wm. Penn Life Ins.,* 84 NY2d 639, 620 NYS2d 797 (1994) - Lost x-ray

VIII. VOICE IDENTIFICATION - GENERALLY

A. APPLICABLE WHETHER HEARD FIRSTHAND OR THROUGH RECORDING

1. A person's voice can be identified by a witness having some familiarity with the voice, and the familiarity can be acquired either before or after hearing the voice to be identified.

2. Applicable whether heard firsthand or through recording.

B. Error to preclude plaintiff from testifying about two telephone conversations because plaintiff could not recognize the speaker's voice, as the identity of a party to a telephone conversation may be proven by circumstantial evidence. (*Vinciguerra v. Otis Elevator Co., Inc.*, 254 AD2d 350, 678 NYS2d 670 [2d Dept. 1998]]

IX. ORAL STATEMENTS - TELEPHONE CALLS

A. TELEPHONE DIRECTORY DOCTRINE - *Peo. v. Lynes*, 49 NY2d 286, 425 NYS2d 295 (1980) - Examples where witness unfamiliar with voice:

1. Placing of a call to a number listed in a directory or other similar responsible index of subscribers,

2. Unforced acknowledgment by the one answering that he or she is the one listed;

3. Some corroborating evidence

4. Substance of conversation furnishes confirmation of caller's identity, as, e.g., when subsequent events indicate that the party whose identity is sought to be established had to have been a conversant in the telephone conversation;

5. When the caller makes reference to facts of which he alone is likely to have knowledge.

B. AUTHENTICATION OF RECORDING OF TELEPHONE CONVERSATION

1. "We also discern no error in County Court's admission of the recordings of the CI's telephone calls to defendant to arrange the drug buys. Detective Brian Robertson testified that the two controlled telephone calls were made in his presence. While Robertson only heard the CI's end of the conversations, he played the tapes back in order to hear the conversations in their entirety. After the original recordings on mini cassette were copied onto audiocassettes by OCTF, Robertson reviewed the audiocassettes and testified that they matched the recordings of the conversations taken on February 11, 2005. Such testimony provided a sufficient foundation for the admission of the recordings (*see People v Ely*, 68 NY2d 520, 527-528 [1986]; *People v McGee*, 49 NY2d 48, 60 [1979]; *People v Tillman*, 57 AD3d 1021, 1024 [2008]; *United States v McIntosh*, 547 F2d 1048 [1977], cert denied 430 US 919 [1977]; *United States v McMillan*, 508 F2d 101, 104-105 [1974], *cert denied* 421 US 916 [1975]; *Chavira Gonzales v United States*, 314 F2d 750, 752 [1963]). Moreover, the admission of the audiocassettes did not violate the best evidence rule (*see Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 [1994]; *People v Hughes*, 124 AD2d 344, 346 [1986], *lv denied* 69 NY2d 828 [1987])." *People v. Lee*, 66 AD3d 1116, 1120, 887 NYS2d 302 [3d Dept. 2009]

X. HANDWRITING

A. FOUNDATION - WITNESS FAMILIAR WITH HANDWRITING

1. Lay witness can identify handwriting with which he is familiar either by seeing the party write, writings acknowledged by the party to be written by him or receiving correspondence from the party in response to his own communication addressed to him (*Gross* v. *Sormani*, 50 AD2d 531, 189 NYS2d 522 [3d Dept. 1959]; *Peo. v. Corey*, 148 NY 476)

2. Must be based upon familiarity *not* acquired for purposes of litigation (*Peo. v. Molineux*, 168 NY 264, 326: "writings created post litem motam are inadmissible against a party creating them".

a. Exemplars created after a controversy has arisen for purposes of litigation are inadmissible as they are "created at a time when defendant had a motive to disguise his handwriting. (*Nelson v. Brady*, 268 AD 226, 50 NYS 582 [1st Dept. 1944]; *Peo. v. Perry*, NYLJ, 10/27/00

b. Testimony is barred based on familiarity gained for purposes of litigation. *Hynes v. McDermott,* 82 NY 41, 52-54 (1880)

3. Foundation Elements

a. The witness recognized the author's handwriting on the document.

b. The witness if familiar with the author's handwriting style.

c. The witness has a sufficient basis for familiarity.

B. FOUNDATION - TRIER OF FACT DETERMINATION

1. A genuine specimen (exemplar) placed into evidence and expert or trier of fact compares the document in issue to the exemplar. A trier of fact can make his or her own comparison of handwriting samples in the absence of expert testimony on the subject, *Roman v. Goord*, 272 AD2d 695, 708 NYS2d 904 [3d Dept. 2000]; *Johnson v. Coombe,* 271 AD2d 780, 707 NYS2d 251 [3d Dept. 2000])

2. *American Linen Supply Co. V. M.W.S. Enterprises, Inc.,* 6 AD3d 1079, 776 NYS2d 387 (4th Dept. 2004) - Handwriting exemplars of the president of a corporation were relevant and should have been admitted for purpose of comparison to his purported signature on a particular contract since his signing of a 1994 contract was an issue.

3. Hearing Officer conducted his own handwriting analysis after examining the documentation reviewed during the investigation, and we note that he was entitled to make his own comparison without expert testimony. *Christian v. Venettozzi*, 114 AD3d 975, 979 NYS.2d 863 (3d Dept. 2014)

C. FOUNDATION - EXPERT TESTIMONY

1. Expert testimony - comparison of disputed handwriting and exemplars

2. CPLR §4536: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the handwriting of the person claimed to have made the disputed writing shall be permitted."

D. FOUNDATION ELEMENTS

1. The proponent authenticates the examplars.

2. The witness qualified as an expert the document examiner.

3. The witness compares the exemplars and the document in question.

4. Based on the comparison, the witness concludes that the same person who wrote the exemplars wrote the document in question.

5. The witness specifies the basis for his or her opinion, i.e., the similarities between the exemplars and the questioned document.

XI. REPLY LETTER DOCTRINE

A. BASED ON ASSUMPTION OF RELIABILITY OF MAIL SERVICE

1. Reply letters from a corporation, received by due course of mail, purporting to answer prior letters to it, require no authentication. *Todd Protectograph Co. v. Wells Fargo & Co. Express*, 111 M 262, 181 NYS 128 (Sup. Ct., Monroe Co., 1920); see also, *Thayer v. Schley*, 137 AD 166, 121 NYS 1064 (1st Dept. 1910)

B. FOUNDATION ELEMENTS

1. The witness prepared the first letter.
2. The witness placed the letter in an envelope, addressed to the author (of the second letter), and properly stamped and mailed the envelope.
3. The witness thereafter received a letter, arriving in the due course of mail.
4. The second letter referred to the first letter or was responsive to it.
5. The second letter bore the name of the author.
6. The witness recognizes the exhibit as the second letter.
7. The witness specifies the basis on which he recognizes the exhibit.

PART III
ELECTRONIC EVIDENCE

I. Authentication of ESI - General

A. *People v. Johnson,* 51 M3d 450, 28 NYS3d 783 *(Co. Ct., Sullivan Co., 12/31/15, Labuda, J.)*

1. "However, although circumstantial evidence of authenticity may, in some cases, be sufficient to provide an adequate foundation upon which digital evidence may be admitted, circumstantial evidence is an insufficient foundation for admissibility where there is no evidence establishing the security of a website from which purported information has been accessed or that a purported author had exclusive access thereto. *Commonwealth v. Williams,* 456 Mass. 857, 869 [2010]. Indeed, "courts have recognized that authentication of ESI may require greater scrutiny than that required for the authentication of hard copy' documents ..." (*Lorraine, supra,* 241 F.R.D. at 542–543), and that decisions as to the admissibility of such items "are to be evaluated on a case-by case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity" (*Lorraine, id.*, 241 F.R.D. at 543, quoting *In the Interest of F.P.,* 878 A.2d 91, 96 [Sup.Ct. PA 2005]). "Indeed, courts increasingly are demanding that proponents of evidence obtained from electronically stored information pay more attention to the foundational requirements than has been customary for introducing evidence not produced from electronic sources." *Lorraine, supra,* 241 F.R.D. at 543.

B. SOME METHODS OF AUTHENTICATION

1. Authentication by Personal Knowledge
2. Authentication by Comparison to Known Authentic Samples
3. Authentication by Circumstantial Evidence Coupled with Distinctive Characteristics
4. Public Record or Reports as Authentication
5. Self–Authentication

II. The "Bible" - Lorraine V. Markel Amer. Ins. Co., 241 F.R.D. 534 [D. Md. 2007)]

A. LORRAINE - US Magistrate Judge Paul Grimm - seminal opinion regarding admission of ESI

B. 5 EVIDENTIARY HURDLES FOR ESI

1. Relevancy - is the ESI relevant as determined by FRE Rule 401 (Does it have any tendency to make some fact that is of consequence to litigation more or less probable than it otherwise would be?);
2. Authentication - if relevant, is it authentic as required by Rule 901 (a), i.e., can the proponent show that the ESI is what it purports to be?;
3. Hearsay - if ESI is offered for its substantive truth, is it hearsay and if so, is it covered by any applicable exception?;
4. Best Evidence Rule - is a form of ESI being offered an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content of ESI?; and
5. Prejudice - is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or should otherwise be excluded under Rule 403?.

III. EVIDENTIARY HURDLE - RELEVANCE

A. Does the ESI have a tendency to prove or disprove a fact that is of consequence to the trial?

B. FRE 401 – low threshold – cf. with issue of weight and credibility [FRE 104(e)] - requirement to show that social media evidence has the "tendency to make the existence of a fact… more probable or less probable than it would be without the evidence."

IV. EVIDENTIARY HURDLE - AUTHENTICATION

A. GENERALLY

1. Most significant issue for ESI

2. Non-testimonial evidence- writings, photographs, recordings – must be authenticated, i.e, the evidence is what it is purported to be. (FRE 901(a))

3. FRE 901(b) identifies ten nonexclusive examples of how authentication can be accomplished.

4. Electronically stored information "may require greater scrutiny than that required for the authentication of 'hard copy' documents." (*Lorraine v. Markel Am. Ins. Co.,* 241 F.R.D. 534, 542-43 (D. Md. 2007)

B. PERSON WITH KNOWLEDGE

1. Rule 901 (b) (1) allows for authentication through testimony from a witness with knowledge that the matter is what it is claimed to be. Generally the person who created the evidence can testify to authentication. Alternatively testimony may be provided by a witness who has personal knowledge of how the social media information is typically generated. Then, the witness must provide "factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so." (*Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534, 555-56 [D. Md., 2007])

2. Where Plaintiff, at a deposition, weas confronted with 13 pages of printouts allegedly from his Facebook account and denied that they were from his account, and then sought to depose the individual who obtained the printouts, Defendant precluded from offering the printouts at trial unless he produced such person for a deposition, as Plaintiff would be left with on other means to prove or disprove the authenticity. *Lantigua v. Goldstein*, 149 AD3d 1057, 53 NYS3d 163 (2d Dept. 2017)

3. E-mails properly admitted where plaintiff testified that the e-mails were a compilation of the many he had received as a result of defendant's directions on their web sites; that he had received them and printed them out on his office computer; and that they are true and accurate copies of what he had received and printed. *Robmom v. Weberman,* 2002 WL 1461890 (S.Ct., Kings Co., 2002, Jones, J.)

4. U.S. v. Gagliardi, 506 F3d 140, 151 (2d Cir. 2007) (chat room logs properly authenticated as having been sent by the defendant through testimony from witnesses who had participated in the online conversations.)

V. AUTHENTICATION BY DISTINCTIVE CHARACTERISTICS

A. A document may be authenticated by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed.R.Evid. 901(b)(4); *United States v. Smith,* 918 F.2d 1501, 1510 (11th Cir.1990) ("[t]he government may authenticate a document solely through the use of circumstantial evidence, including the document's own distinctive characteristics and the circumstances surrounding its discovery".) See also, *Peo. v. Moye*, 51 M3d 1216(A), 38 NYS3d 832 (S.Ct., Qns. Co., 2106)

B. E-mails properly authenticated when they included defendant's e-mail address, the reply function automatically dialed defendant's e-mail address as sender, messages contained factual details known to defendant, messages included defendant's nickname, and other metadata. *U.S. v. Siddiqui,* 235 F3d 1318, 1322-23 (11th Cir. 2000)Emails authenticated by distinctive characteristics including e-mail addresses, the defendant's name, and the contents which contain discussions relating to defendant's work. *U.S. v. Safavian*, 435 FSupp.2d 36 (D.D.C. 2006)

C. GRIFFEN & TIENDA CASES

1. Griffin v. Maryland, 19 A.3d. 415 (Md. 2011) - In a murder trial, the prosecution's attempt to introduce printouts from a MySpace page to impeach a defense witness, was unsuccessful as the witnesses picture, birth date, and location were not sufficiently distinctive characteristics on a MySpace profile page to authenticate the printout. The trial court had given "short shrift" to concerns that someone other than the punitive author could have accessed the account and failed to acknowledge the possibility of a likelihood that another user could have created the profile in issue.

a. In *Griffin*, The court suggested three (3) types of evidence to satisfy the authenticity requirement: (1) Ask the purported creator if he or she created the profile and added the post in question; (2) A search of the computer of the person who allegedly created the profile, examining the hard drive and internal history to determine if it was that person who originated the profile; or (3) Obtain information directly from the social networking website itself to establish who created and posted the relevant information to the profile.

2. Tienda v. State, 2010 Tex. App. Lexis 10031 (2010) - MySpace evidence admitted, the court noting that (1) the evidence was registered to a person with the defendant's *nickname and legal name; (2)* the photographs on the profiles were clearly of the defendant; the profiles referenced the victim's murder and the defendant being arrested and placed on electronic monitoring.

The court noted that "this type of individualization is significant in authenticating a particular profile, page as having been created by the person depicted in it. The more particular would individualize the information, the greater the support for a reasonable juror's finding that the person depicted supplied the information.

3. Taken together, *Griffen* and *Tienda* show that if the characteristics of the communication proffered as evidence are genuinely distinctive, courts are likely to allow circumstantial authentication based upon content and context. Contrariwise, if the characteristics are general, courts may require additional corroborating evidence.

VI. AUTHENTICATION - EMAILS

A. GENERAL PROPOSITION

1. Anyone with personal knowledge of an electronic mail message, including the sender and recipient, can authenticate

2. Policy - *U.S. v. Safavian*, 644 F.Supp.2d 1 (1009) - "As appellant correctly points out, anybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationery can be copied or stolen.... We see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there is then an adequate foundational showing of their relevance and authenticity."

B. AUTHENTICATION BY HEADER

1.Often the headers on any email which include electronic address of the sender are enough to authenticate

2. *U.S. v. Safavian*, 644 F.Supp.2d 1 (2009) – Court authenticated any e-mail based on the header.

VII. AUTHENTICATION BY E-MAIL THREAD

A. Authentication can also be established via an e-mail thread. For example, if e-mail was a reply to someone, the digital conversation could serve as the basis of authentication (*U.S. v. Siddiqui*, 235 F3d 1318 (11th Cir. 2000).

Sample Q&A
Q. Would you please identify Defendant's exhibit D.
A: It is a copy of an e-mail I sent to my employer.
Q: When did you send this e-mail?
A: September 9, 2012.
Q: Under what circumstances did you send this e-mail?
A: I was replying to an e-mail my employer sent me earlier in the day.
Q: Do you recognize your employees e-mail address?
A: Yes
Q: What is his e-mail address?
A: Workhard@gmail.com
Q: On the e-mails header does it reflect where this email was sent?
A: Yes.
Q: Where was it sent?
A: Workhard@gmail.com

VIII. AUTHENTICATION BY COMPARISON

A. FRE 901(B)(3) - permits authentication by comparison, i.e., a court can authenticate an e-mail by comparing it to the emails previously admitted. (For instance, the jury could compare an email with other emails that have already been produced and authenticated. Email A, which bears the same address as previously-authenticated Email B, can be compared with Email B and authenticated under this rule. (*U.S. v. Safavian*, 435 F.Supp.2d 36 [D.D.C. 2006])

1. The proponent can then ask the court to take judicial notice of the earlier admitted e-mails.

IX. AUTHENTICATION BY DISCOVERY PRODUCTION

A. The fact that a party opponent produced e-mails during discovery can serve as a basis for authentication of the subject e-mails.

B. The production in response to a request for production is inherently an admission of the authenticity of the documents produced. (*John Paul Mitchell Sys. V. Quality Kind Distribs., Inc.*, 106 F.Supp.2d 462 [S.D.N.Y. 2000])

C. Tip - reason to inventory all documents received during discovery. Specifically, Bates stamp everything received and send a confirmatory letter of what was produced if the producing party did not provide a detailed inventory of the records.

X. AUTHENTICATION BY TESTIMONY OF SENDER

A. STEPS

1. The electronic address placed on the e-mail is that of the claimed recipient.
2. The purpose of the communication (why it was sent)
3. If applicable, establish that the sender receives an earlier e-mail and replied to the earlier e-mail.
4. Establish that the e-mail was actually sent
5. Establish that the recipient acknowledged receipt or took action consistent with an acknowledgment of receipt.

SAMPLE QUESTIONS – TESTIMONY OF SENDER

Q: Tell the Court what this document is.
A: It is an e-mail I sent my friend Larry.
Q: Do you know Larry's e-mail address?
A: Yes
Q: What is his email address?
A. LarrytheGreat@optonline.net
Q: Did you send the email to that address?
A: Yes.
Q: For what purpose did you send the email?
A: I wanted to confirm our dinner plans for that evening.
Q: Did Larry ever acknowledge the email you sent?
A: Yes, he called me an hour after I sent the email to discuss our dinner plans.

XI. AUTHENTICATION BY TESTIMONY OF THE RECIPIENT

A. STEPS

1. Acknowledge receipt of e-mail.
2. Establish the electronic address of the sender as being the address indicated on the face of the e-mail.
3. Compare earlier e-mails received by the sender.
4. Identify any logos or other identifying information on the e-mail.
5. Establish whether the e-mail received was a reply to one sent earlier by the recipient.
6. Establish any conversations with the sender concerning the communication.
7. Establish any actions taken by the sender consistent with the communication.

SAMPLE QUESTIONS – TESTIMONY OF RECIPIENT

Q: Please identify this document.
A: It is an e-mail I received from my attorney.
Q: What is the e-mail address of the sender?
A: Dewey@dch.com
Q: Do you recognize any identifying marks on the e-mail?
A: Yes, I recognize the logo of the firm where my attorney works and his phone number is on the e-mail.
Q: When did you receive this e-mail?
A: October 5, 2012.
Q: Had you sent your attorney any e-mails earlier in the day on October 5, 2012?
A: Yes, and this was a reply to an e-mail I sent that morning.
Q: Why did you send your attorney any mail in the morning?
A: I was attempting to set up an appointment with him regarding the issue of visitation with my children.
Q: Did you have a conversation with your attorney after you received this e-mail?
A: Yes, I had a phone conversation with him about 10 minutes after I received the e-mail.
Q: What was the topic of the telephone conversation?
A: It concerned the issue of visitation with my children.

XII. CLAIM OF ALTERATION

A. The party opposing the admission of an e-mail may claim it was altered or forged. Absent specific evidence showing alteration, however, the court will not exclude an e-mail merely because of the possibility of an alteration.

B. *U.S. v. Safavian*, 644 F.Supp.2d 1 (1009) - "The possibility of alteration does not and cannot be the basis for excluding e-mails as unidentified or unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents (and copies of those documents).

XIII. REPLY LETTER (E-MAIL) DOCTRINE

A. If a person sends a letter to another person, and after receiving at the recipient replies, the reply letter provides some evidence of authentication of the initial letter. Under this doctrine, as applied to e-mails, the proponent must show that the author prepared the e-mail, the recipient received it, and the recipient replied to the first e-mail and in the contents of the body referred to the first e-mail. Additionally, the testimony should show that the reply bore the office signature, the sender recognized the exhibit as a second or reply e-mail and the basis on which he recognizes the exhibit

.

XIV. AUTHENTICATION BY CONTENT

A. A proponent of an e-mail may authenticate the e-mail by showing that only the purported author was likely to know the information reflected in the message.

B. Examples:

1. The substantive content of the message might be information only known to the purported sender;
2. If the recipient used a reply feature to respond, the new message will include the sender's original message. If the sender dispatched that message to only one person, its inclusion in the new message indicates that the new message originated with the original recipient
3. After receipt of the e-mail message, the purported recipient takes action consistent with the content of the message. For example, delivery of the merchandise mentioned in the message. Such conduct can provide circumstantial authentication of the source of the message.

XV. AUTHENTICATION - TEXT MESSAGES & IM'S

A. TESTIMONY OF PARTICIPANT

1. The testimony of a "witness with knowledge that a matter is what it is claimed to be is sufficient" to satisfy the standard for authentication (*Gagliardi*, 506 F3d at 151). Here, there is no dispute that the victim, who received these messages on her phone and who compiled them into a single document, had first-hand knowledge of their contents and was an appropriate witness to authenticate the compilation. Moreover, the victim's testimony was corroborated by a detective who had seen the messages on the victim's phone. *People v. Agudelo*, 96 AD3d 611, 947 NYS2d 96 (1st Dept. 2012) leave to appeal denied, 20 NY3d 1095 (2013)

2. A recorded conversation, such as a printed copy of the content of a set of cell phone instant messages, may be authenticated for admission through, among other methods, the testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered. *In re Colby II*, 145 AD2d 1271, 43 NYS3d 587 (3d Dept. 2016)

a. In neglect trial against mother, sufficient foundation was laid for the authentication, for proper admission of two text messages taken from the mother's cell phone involving a conversation between the mother and an unknown individual wherein the mother agreed to engage in sex for money; father testified that screen shot of tax messages was accurate representation of how tax messages appeared on the mother's phone, and further testified to several identifying factors indicating that the phone belong to the mother and the messages were sent by her, and there were distinctive characteristics of the messages indicating that they were authored by the mother. *Matter of R.D.*, 56 Misc3d 780, 67 NYS3d 86 (Family Court, NY Co., 2017, Goldstein, J.)

3. Each individual text message in a chain requires a separate foundation and basis for admissibility. See, *Peo. V. Rodriquez,* 149 AD3d 464, 50 NYS3d 385 *(*1st Dept. 2017); *Peo. v. Dixon*, 144 AD3d 701, 40 NYS3d 184 (2d Dept. 2016)

B. AUTHENTICATION BY TESTIMONY OF SENDER - STEPS

1. The context of a message – why was sent, its purpose, etc.
2. Establish that the number it was sent to was that of the recipient.
3. Identify a photograph of the actual text that was sent.
4. Describe the process of taking the photograph – who took it, what camera was used, was it an accurate reproduction of the actual text, etc.

5. Identify and offer transcript of the actual text including how the transcript was made – based on the actual text, reviewed by the sender, verified to be an accurate reflection of the actual text.

6. Establish if there was any responsive text received or any verbal acknowledgment by the recipient in relation to the text sent.

SAMPLE QUESTIONS – TESTIMONY OF SENDER

Q: Identify the document.
A: That is a picture of the text message I forwarded to my employer.
Q: What number was the text sent to?
A: 123–456–7891
Q: Whose numbers that?
A: My employer's number.
Q: When did you send this text?
A: January 10, 2013.
Q: What was the purpose of sending the text to your employer?
A: I wanted to update her on a sale I had just made.
Q: How did you capture the image contained in this exhibit?
A: My brother took a picture of my message on his phone and printed it out for me.
Q: Does that picture accurately reflect how the text looked when you sent it?
A: Yes.

C. AUTHENTICATION BY TESTIMONY OF RECIPIENT – STEPS

1. Have the witness acknowledge recognition of the number, digital signature or name of the person from whom they received a message.

2. Establish the basis of the witness's knowledge of the sender's number (e.g., history of text messages with that person)

3. The context of the text communication (reply to earlier text or establish the topic that was the subject of the text)

4. If a photograph was used, establish who took the photo, what camera used, that it was an accurate reproduction of the actual text, etc.

5. Identify and offer transcript of the actual text including how the transcript was made – based on the actual text, reviewed by the sender, verified to be accurate reflection of the actual text.

SAMPLE QUESTIONS – TESTIMONY OF RECIPIENT

Q: Would you please identify this document?
A: It is a transcript from a text exchange between me and my wife.
Q: What is a text exchange?
A: It's a series of text messages we sent each other as part of an argument we were having.
Q: When was the exchange?
A: During the evening of April 30.

Q: What was the subject of the argument you were having?
A: My wife was mad because my girlfriend called her and yelled at her.
Q: Did you ever speak to your wife directly about this matter on that date?
A: Yes, later in the evening I went home and we further argued about this matter.
Q: Tell us how you prepared this transcript?
A: I typed the various e-mails in chronological order as they exactly appeared on my phone.
Q: Is the transcript that's been marked as Defendant's Exhibit "F" identical to the actual text messages sent on April 30?
A: Yes.
Q: Did you alter or modify in any way the text messages that appear on the transcript?
A: No.

XVI. AUTHENTICATION - WEBSITES AND SOCIAL MEDIA

A. The foundational requirements for authenticating a screenshot from a social media site like Facebook are the same as for a printout from any other website. Basically, offer foundational testimony that the screenshot was actually on the website, that it accurately depicts what was on the website, and that the content is attributable to the owner. (*Lorraine v. Market Am. Ins. Co.,* 241 F.R.D. 534 (D.Md.2007)). Some courts require the website owner to provide the necessary foundation to authenticate a page from a website. The more liberal courts have held that a printout from a website may be authenticated by a visit to the website. What is required is that the depiction accurately reflects the content of the website and the image of the page on the computer on which the screen shot was made. A screen shot from a recognized corporation, such as a bank or credit card company, generally causes less concern than a personal blog posted where a non-owner can more easily manipulate the content. Information from government websites are deemed self-authenticated if the proponent establishes that the information is current and complete.

B. STEPS

1. Proof that the witness visited the website
2. When the website was visited.
3. Establish that the website was current as opposed to stale sites. For example, postings reflect current information, dates, etc.
4. Establish how the site was accessed – Google search and followed the links; Internet Explorer, etc.
5. Description of the website access – identify material on the website including names, addresses, logos, phone numbers, etc.
6. Recognition of the website based on past visits

7. Proof that the screen shot was printed from the website and the date and time

8. Proof that the screenshot in the printout is the same as what the witness saw on the computer screen.

9. Proof that the printout was not altered or modified from the image on the computer

SAMPLE QUESTIONS – FACEBOOK PAGE

Q: Are you familiar with the social media website Facebook?
A: Yes.
Q: How are you familiar with it?
A: I have been using it 4 to 5 times per week for the last 3 years.
Q: Generally speaking, what do you do with the social media site?
A: I generally keep up with my friends and what they are doing and special things in their lives.
Q: What is a Facebook friendship?
A: You are permitted to follow certain chosen friends.
Q: How is a Facebook friendship created?
A: You invite someone to be your friend and if the person accepts you become Facebook friends.
Q: Is Joan Smith your Facebook friends?
A: Yes.
Q: What is a Facebook wall?
A: This is an area where someone has personal information open only to friends.
Q: How can you access someone's Facebook wall?
A: You click their profile on the website.
Q: What type of information is found on Joan Smith's wall?
A: Personal information such as special events, pictures, employment, where she lives, etc.
Q: Have you ever visited Joan Smith's wall?
A: Many times.
Q: Have you done so recently?
A: Actually, I did last Thursday.
Q: What did you see on our wall?
A: I saw a picture of her and my husband with their arms around each other at what appeared to be a party, and another picture at the same place where they were kissing.
Q: Did you print a copy of the pictures you saw?
A: Yes.
Continue with identification of the printout in same manner as with email or text message.

XVII. JUDICIAL NOTICE OF INFORMATION ON WEBSITES

A. The court's computerized records, which were not included in the record, but of which we take judicial notice, show that in accordance with the warning in the court's scheduling notice dated November 23, 2004, admittedly received by plaintiff's attorney, the action was dismissed on March 2, 2005 pursuant to 22 NYCRR 202.27 when plaintiff failed to appear for a pre-note of issue conference. *Perez v. New York City Hous. Auth.*, 47 AD3d 505, 850 NYS2d 75 (1st Dept. 2008)

B. OFFICIAL GOVERNMENT WEBSITES - Federal Rules of Evidence §902(5) - website operated by a government agency is self-authenticating.

1. State Department of Insurance for corporate presence in county (*N.Y.C. Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 3 Misc.3d 925, 774 N.Y.S.2d 916 [Civ. Ct. NY 2004], *revd on other grounds*, 8 Misc.3d 33, 798 N.Y.S.2d 309 [App. T. 2d Dep't. 2004]

2. Surgeon General for dangers of second-hand smoke (*DeMatteo v. DeMatteo*, 194 Misc. 2d 640, 749 N.Y.S.2d 671 [Sup. Ct. NY 2002][Julian, J.])

3. Secretary of State for "entity information" for plaintiff as to its principal place of business (*Tener Consulting Services, LLC v FSA Main St., LLC*, 23 Misc 3d 1120(A), 886 NYS2d 72, [Sup Ct 2009]; Secretary of State for "entity information" regarding corporate officers (*Munaron v. Munaron*, 21 Misc.3d 295, 862 N.Y.S.2d 796 [Sup. Ct. Westchester Co. 2008][Jamieson, J.)

4. "However, the Court has learned (from its own research) that plaintiff is still registered with the Secretary of State as the "Chairman or Chief Executive Officer" of Venezia. The Court rather than counsel for defendant uncovered this evidence by a quick review of the official website of the New York Secretary of State. While certainly unusual, the Court is allowed to take judicial notice of this matter of public record. *See Brandes Meat Corp. v. Cromer,* 146 AD2d 666, 537 NYS2d 177 (2d Dept. 1989)*; Chasalow v. Board of Assessors of County of Nassau,* 176 AD2d 800, 575 NYS2d 129 (2d Dept. 1991). The Court informed the parties that it would be taking judicial notice of this fact at a Court conference."

5. U.S. Naval Observatory for time of sunrise (United States v. Bervaldi, 226 F.3d 1256, 1266, n. 9 [11th Cir. 2000])

6. Federal Reserve Board for prime interest rate (*Levan v. Capital Cities ABC, Inc.*, 190 F.3d 1230, 1235, n. 12 [11th Cir. 1999])

7. National Personnel Records Center for records of retired military personnel (*Denius v. Dunlap*, 330 F.3d 919, 926 [7th Cir. 2003])

8. Department of State (NYS) online search results for whether physician was licensed to practice medicine in NYS (*Proscan Radiology of Buffalo v. Progressive Cas. Ins. Co.*, 12 M3d 1176(A), 820 NYS2d 845 (Civil Ct., NY, 2006) : "On the other hand, there are specific exceptions to the hearsay rules with regard to documents maintained by governmental agencies given the inherent reliability of such documents. It would seem that the fact that these

documents were obtained by downloading them from the government's website rather than through the physical receipt of them from the governmental agency itself is somewhat of a distinction without a difference. In this regard, the Court notes that the Appellate Division, Second Department, has recently cited with approval a number of cases in which trial courts have taken judicial notice of documents that the courts themselves have downloaded from government websites (*see Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.,* 2009 N.Y. Slip Op 000351, 871 N.Y.S.2d 680 [2d Dept 2009], *citing Munaron v. Munaron,* 21 Misc.3d 295 [Sup Ct Westchester County 2008]; *Parrino v. Russo,* 19 Misc.3d 1127[A], 2008 WL 1915133 [Civ Ct Kings County 2008]; *Nairne v. Perkins,* 14 Misc.3d 1237[A], 2007 WL 656301 [Civ Ct Kings County 2007]; *Proscan Radiology of Buffalo v. Progressive Cas. Ins. Co.,* 12 Misc.3d 1176 [A], 2006 WL 1815210 [Buffalo City Ct.2006]; *see also Bernstein v. City of New York,* 2007 N.Y. Slip Op 50162[U], 14 Misc.3d 1225[A] [Sup Ct Kings County 2007]; *Miriam Osborn Memorial Home Assn. v. Assessor of City of Rye,* 9 Misc.3d 1019 [Sup Ct Westchester County 2005]). There is every reason to believe that the information that appears on governmental websites is a reasonably reliable reflection of what the hard copies on file with the government show.

9. cf. *Morales v. City of New York*, 18 M3d 686, 849 NYS2d 406 (S.Ct., 2007) - "this Court is not aware that any New York appellate court has passed definitively upon the admissibility as evidence of public records printed from even a New York government website."

C. PRIVATE OR COMMERCIAL WEBSITES

1. Hospital website for asthmatic conditions and causes (*Gallegos v. Elite Model Management Corp.*, 758 N.Y.S.2d 777 [Sup. Ct. NY 2003])

2. Trial court abused its discretion in not taking judicial notice of defendant corporation's historical retirement fund earnings posted on its website (*O'Toole v. Northrop Grumman Corp.,* 499 F.3d 1218, 1225 [10th Cir. 2007])

3. Mapquest for mileage distance (*In Re Extradition of Gonzales*, 52 F.Supp.2d 725, 731, n. 12 [Wd La. 1999])

D. WEBSITE ADMISSIONS

1. *NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 3 M3d 925, 774 NYS2d 916 (Civ. Ct., Qns. Co., 2004) - Information posted on corporate party's website constitute admissions, and are encompassed by the admissions exception to the hearsay rule. See, *NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.,* 8 M3d 33, 798 NYS2d 309 (App Term) (Trial judge made independent internet investigation to see if defendant was transacting business in NY. "Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of undisputed reliability, and the parties had no opportunity to

be heard as to the propriety of taking judicial notice in the particular instance (see, Prince, Richardson on Evidence §20202 [Farrell 11th ed]").

2. Website Statement as non-hearsay – Verbal Act (i.e., breach of warranty case)

XVIII.

A. *U.S. v. Washington*, 498 F.3d 225 (4th Cir. 2007) - computer readout of electronic forensic analysis of defendant's blood sample for drug and alcohol content admissible if authentic, readout was not hearsay because there was no "declarant" under rule 801 (b).

B. Important for authenticating computer simulations. Generally requires proof of reliability of scientific or technical principles and thus get involved in a *Daubert* or *Frye* situation

C. Requires a witness who has personal knowledge to explain how the social media evidence was created or, alternatively, is a qualified expert.

1. Example: Turbo Tax

XIX. SELF-AUTHENTICATION (RULE 902)

A. Rule 907(7)) allows for self-authentication for documents that bear "inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin."

B. *U.S. Equal Employment Opportunity Commission v. E.I. DuPont de Nemours & Co.,* 2004 WL 2347559 (E.D. La. 10/18/04) - "a printout of a table from the website of the United States Census Bureau," which "contain the internet domain address from which the table was printed, and the date on which it was printed," was admissible because it was self-authenticating."

1. Example: automatic signature at end of an e-mail

C. Comparison with another properly authenticated e-mail. (*U.S. v. Safavian*, 435 F.Supp.2d 36 (D.D.C. 2006))

XX. ISSUE OF EXPECTATION OF PRIVACY

A. E-DOCS STORED AT WORK

1. Physician's e-mail communications with his attorney, which e-mails were stored on defendant-hospital's e-mail server, were not confidential, for purposes of attorney-client privilege, where hospital's electronic communications policy, of which the physician had actual and constructive notice, prohibited personal use of hospital's e-mail system and stated that hospital reserved the right to monitor, access, and disclose communications

transmitted on hospitals e-mail server at any time without prior notice, though physician's employment contract required hospital to provide him with computer equipment. *Scott v. Beth Israel Med. Ctr.*, 17 Misc.3d 934, 847 N.Y.S.2d 436 [Sup. Ct. N.Y Co. 2007][Ramos, J.]

2. An employee used a work-issued laptop to e-mail confidential files to her attorney purportedly in contravention of her employers "work only" use policy. As the employee used the work computer to send the e-mails from home through her personal AOL account (and thus, the documents never "passed through" the employer's system), the court found that the privilege was not waived. *Curto v. Medical World Communications Inc.*, 2006 WL 1318387 (EDNY, 5/16/06)

3. Employee lacked any reasonable expectation of privacy, and thus confidentiality, in his personal use of employer's e-mail system, and accordingly e-mails which employee sent through employer's system were not subject to attorney-client privilege; employer's e-mail policy, of which employee had at least constructive notice, asserted that employer owned all e-mails on its system, that employer reserved the right to audit networks and systems to ensure employees' compliance with e-mail policy, and that employer reserved the right to access and review any messages and to disclose such messages to any party. *Peerenboom v. Marvel Entm't, LLC*, 148 AD3d 531, 50 NYS3d 49 (1st Dept. 2017)

B. GPS - CELL PHONES - *People v. Moorer*, NYLJ, 2/22/13 (County Ct., Monroe Co., DeMarco, J.) -- A cell phone user has no "reasonable" expectation of privacy that the devices built in global positioning technology will not be used by police to locate the phone.

1. Government can attach a GPS tracking device to a public employee's personal vehicle without a warrant. When an employee chooses to use his car during the business day, GPS tracking of the car may be considered a workplace search, and public employees have a diminished right of privacy in the workplace if a search satisfies a standard of reasonableness. *Matter of Cunningham v. NYS Department of Labori*, 21 NY3d 515, 974 NYS2d 896 (2013)

XXI. METADATA; HASH VALUES

A. DEFINITION

1. Data about data; DNA of a digital file; the information embedded within electronic documents - typically includes its history, tracking, and management, which may also include changes to that document.

2. Data hidden in documents that is generated during the course of creating and editing documents and which describes the history, tracking or management of an electronic document. The data shows the characteristics,

origins, usage, structure, alteration and validity of electronic evidence. Every digital file has metadata.

3. Important to get the file in its native format.

B. TYPES

1. Substantive metadata - records and reflects any changes to a document made by the creator or user of a document, and can reveal prior edits made by the creator. Such metadata is automatically linked with the documents and travels with it anytime it is sent electronically.

2. System metadata – created automatically by operating system or application; includes author, date and time of creation and the date a document was modified.

a. Microsoft Office Documents - Metadata exists in all Microsoft Office Documents (Word, Excel, Power Point etc.)

C. DUTY TO PRESERVE; USE OF METADATA

1. Plaintiff discarded computer after its duty to preserve arose but claimed that defendants were not prejudiced because many of the files were printed prior to disposal. The court noted "converting the files from the data format to hard copy form would have resulted in the loss of discoverable metadata." *Harry Weiss v. Moscowitz,* 106 AD3d 668 (1st Dept. 2013)

D. Metadata associated with a digital photograph established that it had not been taken at the time of the event, and thus was not probative of the condition of the scene at the time of the accident. *Alfano v. LC Main, 38 M3d 1233 (S.Ct., Westchester Co., 3/18/13)*

E. MINING FOR METADATA - PROPER?

1. ABA - Yes - "the ABA Model Rules of Professional Conduct permit a lawyer to review and use embedded information contained in e-mail and other electronic documents, whether received from opposing counsel, an adverse party or an agent of an adverse party." The Model Rules thus do not prohibit a lawyer from "mining for metadata" and taking full advantage of any discoveries. (ABA Comm. on Ethics and Professional Responsibility, Formal Op. 06-442 (2006). It is the sending lawyer's duty to maintain client confidentiality by properly "scrubbing" the data to avoid disclosing client confidences. "Scrubbing" means eliminating certain embedded information in an electronic document before sending it to others.

2. NY County Lawyers - No - "when a lawyer sends opposing counsel correspondence or other material with metadata, the receiving attorney may not ethically search the metadata in those electronic documents with the intent to find privileged material . . . ." Every lawyer still has an obligation to "scrub" electronic documents to avoid disclosing client confidences and secrets, but clearly not all documents will always be properly "scrubbed" because mistakes do happen. In such situations, the NYCLA opinion instructs New York lawyers

not to take advantage of the sending attorney's oversight by "mining for metadata."

3. NYSBA - NYS Bar Ass'n Comm. on Professional Ethics, Op. 749 (2001) and 782: "Lawyers may not ethically use available technology to surreptitiously examine and trace e-mail and other electronic documents." (Opinion 749)

a. "Lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in metadata in documents they transmitted electronically to opposing counsel or other third parties." (Opinion 782)

F. HASH VALUES

1. Embedded unique identifier for a digital file; by means of an algorithm, a unique number is assigned to each digital file. The distinctive characteristic is used for authentication.

2. Equivalent of a "DNA Profile" for a Hard Drive or Single File

XXII. ESI PRESERVATION; SPYWARE

A. Where husband installed spyware on the wife's iPhone and then used that spyware to monitor his wife's communications, including more than 200 privileged emails with her attorney, the court held that a negative inference and/or the production of the opposing parties computers was mandated, with the court reserving the right to impose harsher sanctions, depending on the results of the forensic computer inspection, with the preclusion of evidence being a possible partial sanction. As the husband invoked the Fifth Amendment regarding all questions surrounding purchases of spyware and whether he used it to intercept the wife's privileged communications, the only way to ascertain whether the husband actually violated the wife's attorney-client privilege was to be able to review the documents and data records on her husband's computing devices. *Crocker C. v. Anne R.,* 49 M3d 1202(A) (Supreme Court, Kings Co., 2015, Sunshine, J.

B. Where husband installed spyware on the wife's iPhone and then used that spyware to monitor his wife's communications, including more than 200 privileged emails with her attorney, and then purposefully engaged in spoliation of the evidence while simultaneously asserting his Fifth Amendment right against self-incrimination, the Court struck his pleadings seeking spousal support, equitable distribution and counsel fees. *Crocker C. v. Anne R.*, 58 M3d 1221(A) (Supreme Court, Kings Co., 2018, Sunshine, J.)

Matrimonial Case Update: The Year in Review

Bruce J. Wagner, Esq.
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NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
CONTINUING LEGAL EDUCATION

SUMMER 2019 MEETING
Saratoga Hilton
Saratoga Springs, NY
July 13, 2019, 11:10 a.m. – 12:00 noon

"Matrimonial Update"

OUTLINE

(September 10, 2018 – April 25, 2019)

Bruce J. Wagner
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TABLE OF CONTENTS

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These materials cover the period September 10, 2018 through April 25, 2019.

I. AGREEMENTS

A. Enforcement – Statute of Limitations

In Svatovic v. Svatovic, 2018 Westlaw 6052110 (1st Dept. Nov. 20, 2018), both parties appealed from, among other things, a March 2017 Supreme Court judgment which, after a hearing in the wife's 2014 divorce action, determined that the husband was entitled to $250,000 from the wife as his share of the former marital residence, pursuant to the terms of a September 1995 agreement. The parties were married in 1974 and have 2 children. The agreement provided that the residence would be sold "as quickly as possible" when the children attained age 22, which occurred in May 2003. The First Department modified, on the law, "to declare that enforcement of the parties' separation agreement is barred by the applicable statute of limitations and that all claims regarding the sale of the former marital residence and payment of equitable distribution therefrom are dismissed as time barred," based upon the 6 year statute of limitations

set forth in CPLR 213(2).

B. Interpretation – Emancipation

In Goldstein v. Goldstein, 2018 Westlaw 5931506 (2d Dept. Nov. 14, 2018), both parties appealed from, among other things, an October 2016 Supreme Court order, which granted the father's October 2014 motion to terminate child support based upon an emancipation clause in the parties' 1999 stipulation, incorporated into their 200 judgment of divorce, and which denied his motion for recoupment of $7,846 in child support paid to the mother while the motion was pending. The child permanently relocated to the father's residence on June 30, 2014, which constituted an emancipation event under the stipulation. The child submitted an affidavit stating that she "made the decision to permanently reside" with the father as of June 30, 2014, has not spent overnights at the mother's house since that date, and that, although she began college in late August 2014, she considers the father's house her home "and intend[s] to return there during school breaks and holidays." The Second Department affirmed, holding that the father established an emancipation event, but was not entitled to recoupment based upon the "strong public policy in this State, which the Child Support Standards Act did not alter, against restitution or recoupment of the overpayment of child support."

C. Interpretation – Pension & DRO

In McPhillips v. McPhillips, 2018 Westlaw 5020373 (2d Dept. Oct. 17, 2018), the husband appealed from February 2016 and March 2017 Supreme Court orders, which, in effect, denied his motions for leave to enter his proposed domestic relations order and an amended domestic relation order, and granted the wife's cross motion for leave to enter her proposed domestic relations order. The Second Department modified the February 2016 order, on the law, by denying the wife's cross motion and modified the March 2017 order, on the law, by granting

the husband's motion, except to the extent that the wife shall not be required to share in the cost of his election of a survivor benefit for his second wife. The parties' stipulation, incorporated into a January 1994 divorce judgment, provided for a "fifty/fifty division of all of [the husband's] pension benefits accumulated from the date of this marriage, May 7, 1977, through the date of service of the summons and complaint, January 28, 1989," and that the wife is "to be the recipient of 50 percent of any and all benefits payable to the [husband] upon his retirement which were accumulated during that period of time." The husband retired in July 2010, and in 2014, the parties each submitted a proposed DRO. The wife's proposed DRO calculated her share of the husband's pension benefits based on "a fraction for which the numerator shall be credited service accrued between May 7, 1977 and January 28, 1989, and the denominator shall be the total number of months of service credit . . . which [the husband] has *at the time of retirement.*" The husband's proposed DRO employed a fraction in which "the numerator . . . shall be the total number of months of credited service between the [husband's] date of initial credited service in the Retirement System, or the date of the parties' marriage, that being May 7, 1977, whichever is later, up to the date of the division of marital assets, that being January 28, 1989, and the denominator shall be the total number of months of credited service which the Participant had in the Retirement System *as of the date of the division of marital assets, that being January 28, 1989*" (emphasis added). The Appellate Division held that the formula set forth in the wife's proposed DRO conflicts with the stipulation of settlement, which provided for a "fifty/fifty division of all pension benefits accumulated from the date of this marriage, May 7, 1977, *through the date of service of the summons and complaint, January 28, 1989*," and that the wife is "to be the recipient of 50 percent of any and all benefits payable to the [husband] upon his retirement *which were accumulated during that period of time*" (emphasis added). The Second

Department noted that the "stipulation of settlement made no reference to the formula set forth in *Majauskas v Majauskas* (61 NY2d 481), nor can such a reference be implied from the unambiguous terms of the stipulation." The Court concluded that since the wife's share of the husband's pension is limited to 50% of "*any and all* benefits payable to the defendant upon his retirement which were accumulated" from the date of the marriage, to wit: May 7, 1977, through the date of the service of the summons and complaint, January 28, 1989, the wife shall not be required to share in the cost of the defendant's election of a survivor benefit for his second wife."

In Econopouly v. Econopouly, 2018 Westlaw 6797467 (3d Dept. Dec. 27, 2018), the former husband (husband) appealed from an April 2017 Supreme Court order which, upon the motion of the former wife (wife), directed entry of a "QDRO" (actually a COAP) against his federal pension benefits pursuant to a 1992 divorce judgment and stipulation. In May 2017, the wife's counsel mailed the COAP (presumably to OPM in Washington, D.C.) and the husband's counsel was copied on the letter and the order. There was no affidavit or proof of the May 2017 mailing of the order to the husband's counsel. The husband's counsel entered the order in August 2017, served notice of entry upon the wife's counsel and appealed therefrom on the same day. The Third Department held that the husband's August 2017 appeal was timely, and given that no appeal as of right lies from a QDRO, treated the husband's notice of appeal as a motion for leave to appeal and granted the same. The Appellate Division rejected the husband's interpretation of the stipulation (which appeared to be that the wife's entitlement was limited to his salary level as of the time of the stipulation), and concluded that the wife's COAP, which provided for a 50% distribution of the marital portion of his pension pursuant to the Majauskas formula, was proper, and affirmed.

D. Residence Sale – Court Imposed Terms Reversed

In Sitbon-Robson v. Robson, 95 NYS3d 797 (1st Dept. Apr. 4, 2019), the wife appealed from a May 2018 Supreme Court order, which directed that if the marital residence was not sold by June 30, 2018, the parties were to confer with the broker who would set the asking price, and if not sold by September 30, 2018, the parties were permitted to apply for a receiver to sell the residence. The First Department modified, on the law, to delete Supreme Court's foregoing directives. The parties entered into a prior stipulation which addressed the pricing and sale of the marital residence. The Appellate Division noted that "the parties did not challenge the validity of the stipulation or consent to the alteration of those terms," and Supreme Court therefore "lacked the authority to reform those terms to what it thought was proper."

E. Set Aside Denied

In Bradley v. Bradley, 2018 Westlaw 6537058 (1st Dept. Dec. 13, 2018), both parties appealed from an August 2017 Supreme Court order, which, without a hearing, denied the wife's motion to vacate the divorce judgment and incorporated stipulation and the husband's cross motion for counsel fees and sanctions. The First Department affirmed, finding an "absence of fraud, overreaching, mistake or duress" and noting that: the wife "was represented by able and experienced counsel, had been involved in negotiations for a period of time, came close to an agreement two weeks prior to reaching settlement, and spent the entire day negotiating the final terms of the settlement"; "the court conducted a proper allocution of the wife who represented that she understood the terms of the stipulation"; and the wife's "submission of two unsworn letters from physicians was insufficient to establish that she was so incapacitated as to warrant setting aside the stipulation." The Appellate Division held that "the wife has since ratified the stipulation of settlement by seeking disbursements in accordance with its terms." With regard to

the husband's cross appeal seeking sanctions and fees, the First Department concluded that the husband "failed to show that the challenged conduct, while without legal merit, was 'so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1.'"

F. Set Aside – Duress and Unconscionability – Summary Judgment Denied

In Gandham v. Gandham, 2019 Westlaw 1272551 (2d Dept. Mar. 20, 2019), the wife appealed from February 2017 and March 2017 Supreme Court orders which, respectively, granted a nonparty's motion to quash certain subpoenas she issued, and granted the husband's motion for summary judgment dismissing her counterclaim to enforce a June 2016 stipulation of settlement. The Second Department affirmed the order granting the nonparty's motion to quash and reversed, on the facts, the order granting the husband's motion for summary judgment. The parties' June 2016 stipulation settled the husband's 2014 action for divorce and provided that said action would be discontinued. The husband commenced a second action later in June 2016 and the wife counterclaimed for enforcement of the June 2016 stipulation, against which counterclaim the husband moved for summary judgment, alleging that the stipulation, was "the product of duress and was unconscionable." The husband claimed that the stipulation "transferred virtually all of the marital assets to the defendant and all of the marital debts to the plaintiff," but also "recited that the transfers were 'to compensate the [defendant] for all the marital assets wasted by the [plaintiff],' including payments to women with whom the [plaintiff] allegedly had adulterous relationships and whom he held out publicly as his wives." In December 2016, the wife served subpoenas duces tecum and a subpoena seeking testimony on a nonparty -- one of the women with whom the wife alleged the husband had an adulterous relationship. Supreme Court's February 2017 order granted the motion to quash because: (1) the subpoenas did not comply with CPLR 3101(a)(4) [failure to state the circumstances or reasons

the evidence was needed]; and (2) the nonparty demonstrated that the evidence sought was "utterly irrelevant" to the action. The Appellate Division, in affirming the February 2017 order, disagreed "that the testimony sought from the nonparty was utterly irrelevant," but agreed with Supreme Court "that the subpoenas were defective since, among other things, the defendant failed to provide the nonparty with the required explanation of the circumstances or reasons requiring disclosure either on the face of the subpoenas or in any accompanying material," citing CPLR 3101[a][4]. The Court concluded that "Supreme Court should not have granted the plaintiff's motion *** for summary judgment dismissing the defendant's counterclaim." The Second Department held: "Assuming the facts alleged in the stipulation regarding the plaintiff's wasteful conduct are proven, the stipulation is not unconscionable on its face, and the plaintiff failed to establish, prima facie, his entitlement to judgment as a matter of law dismissing the counterclaim on the basis that the stipulation is unconscionable (citations omitted)." As to duress, in denying summary judgment to the husband, the Appellate Division found that he "met his prima facie burden for judgment as a matter of law dismissing the defendant's counterclaim based upon the defense of duress, by proffering evidence demonstrating that the defendant coerced him to sign the stipulation by making credible threats that she would commit suicide if he refused to sign the stipulation. However, in opposition, the defendant raised a triable issue of fact as to whether the plaintiff executed the stipulation under duress."

G. Set Aside – Duress, Coercion, Fraud & Unconscionability – Summary Judgment Denied in Part; Ratification Not Found

In Shah v. Mitra, 2019 Westlaw 1549204 (2d Dept. Apr. 10, 2019), the parties were married in 2001 and have two children. The wife appealed from a January 2019 Supreme Court order, which among other things, denied her motion to dismiss the husband's counterclaim based

upon unconscionability and granted the husband's cross-motion for summary judgment upon the same counterclaim, so as to set aside certain portions of a December 2015 postnuptial agreement. The husband cross-appealed from the dismissal of his counterclaims upon the grounds of fraud, coercion and duress, and from the denial of his cross-motion for summary judgment upon the same counterclaims. The December 2015 agreement provided "that it would be considered a marital settlement agreement in the event the parties divorce." The wife commenced a divorce action in June 2016, seeking incorporation of the agreement. The Second Department modified, on the law, by denying the husband's cross-motion for summary judgment upon his unconscionability counterclaim (and which had resulted in the setting aside of certain provisions of the agreement), and otherwise affirmed. The Appellate Division rejected the wife's ratification claim, holding that her documentary evidence "failed to establish, as a matter of law, that the defendant ratified the agreement." With regard to his fraud counterclaim, the husband alleged that the wife promised him that if he signed the agreement, she would "fully commit to working on the parties[']marital issues and that there will be no divorce." He further alleged that the wife further represented that the agreement would "prevent [a] divorce" and that at the time that she made such representations, "she knew such representations were false." The Second Department, as did Supreme Court, found that "the factual allegations underlying the defendant's claims of fraudulent inducement are flatly contradicted by the terms of the agreement. Contrary to the defendant's allegations, the unambiguous terms of the agreement explicitly preserved both parties' 'right to obtain a judgment of divorce from the other' and further provided that, in the event that either party sought to exercise their right to a divorce, the agreement would be incorporated but not merged into a judgment of divorce. The agreement also contained a clause which provided that its terms 'may not be changed orally but only by a written agreement signed

by both parties.' Inasmuch as the defendant's answer does not contain any other allegedly false misrepresentations attributable to the plaintiff, we agree with the court's determination to grant those branches of the plaintiff's motion which were pursuant to CPLR 3211(a) to dismiss the defendant's first counterclaim. *** Furthermore, under such circumstances, we also agree with the court's determination to deny that branch of the defendant's motion which was, in effect, for summary judgment on his first counterclaim." As to the issue of coercion, the husband's counterclaim alleged that in the three months leading up to the execution of the agreement, the wife told him that "if he did not sign the [agreement] . . . the marriage . . . would be over." With respect to duress, the Appellate Division found that the husband's counterclaim stated that the wife "exerted pressure" on him "by representing to [him] that unless he executed the [agreement], their marriage would terminate" and held that the husband's counterclaims for coercion and duress "are not supported by sufficient allegations from which it could reasonably be found that the agreement is unenforceable on the grounds of duress or coercion," noting that "the exercise or threatened exercise of a legal right [here, starting a divorce action] [does] not amount to duress (citations omitted). Nor are the defendant's allegations sufficient to allege coercion (citations omitted)." With respect to the issue of unconscionability, the Second Department held that "the defendant's pleadings, as amplified by his submissions in opposition to the plaintiff's motion and in support of his cross motion (citation omitted), are sufficient to allege both procedural and substantive unconscionability (citation omitted)." The husband alleged "that although the agreement was prepared by a mediator, the mediator was not independent and that the financial terms contained therein were based on the [wife's] wishes" and that "the process was rushed, that his interaction with the mediator consisted of a single, hour-long session, and that he was compelled to sign the agreement before consulting with his attorney." The husband

claimed that the agreement required him "to waive his right and interest in virtually all marital property, including most retirement assets, the [p]laintiff's lucrative medical practice, the marital residence, other real property accumulated during the marriage and reasonable spousal maintenance and child support." Further, the husband stated that although there existed a "tremendous disparity in the parties' respective incomes," he was required to match the plaintiff's contributions towards the children's operating account. The Court concluded that the husband sufficiently stated a cause of action alleging unconscionability, and noted that while the wife disputes many of the husband's factual allegations, including his description of the events leading up to the execution of the agreement, the effect of the substantive terms of the agreement, and his valuation of the parties' marital assets and income, the documentary evidence submitted in support of her motion failed to "utterly refute[ ] [the defendant's] factual allegations as a matter of law (citation omitted)." The Appellate Division rejected the husband's argument that he was entitled to judgment as a matter of law upon his unconscionability counterclaim, and held that Supreme Court erred by granting him summary judgment thereon. The Court concluded that the husband's evidentiary submissions upon his cross-motion "failed to demonstrate, prima facie, that the agreement is one 'such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other' (citation omitted)."

H. Set Aside – Unconscionability – Disclosure and Hearing Ordered

In Mizrahi v. Mizrahi, 2019 Westlaw 1782170 (2d Dept. Apr. 24, 2019), the wife appealed from an April 2016 Supreme Court order, which, in her January 2016 divorce action, denied her motion to set aside the parties' January 2015 separation agreement and granted the husband's cross motion to dismiss her unconscionability claim, and *sua sponte* (based upon the

agreement's loser pays clause) awarded the husband $4,000 in counsel fees. The parties were married on August 15, 1996 and have two children together. The Second Department reversed, on the law, and remitted to Supreme Court for financial disclosure and a hearing, holding that the wife "raised an inference that the parties' separation agreement was invalid, sufficient to warrant a hearing." The Appellate Division found that the December 2015 agreement "was the product of a mediation conducted by the attorney who prepared the document." The husband had counsel and the wife consulted with an attorney. The agreement states, in bold print, that the wife's consulting attorney advised her not to sign the agreement "based upon the fact that there has been no discovery in the matter whatsoever, and [the attorney's] considered opinion that the support provisions in the agreement are not adequate to meet the [plaintiff's] and children's basic needs." The wife had no income and the husband represented his income to be $100,000 per year. The agreement provided, among other things, that the husband would: pay child support of $3,000 per month; pay $500 per month in maintenance; provide health insurance for the children; 75% of the children's uninsured medical expenses; pay the plaintiff a lump sum of $45,000 for a share in his business. The Appellate Division noted that the wife's rent was over $5,200 per month, while her combined support was $3,500 per month and that she was in the process of being evicted due to missed rental payments. The Second Department concluded: "Given that the agreement's support provisions were insufficient to cover the rent for the marital residence and other basic needs of the plaintiff and the children, as well as the lack of financial disclosure regarding the value of the defendant's business, condominium, and actual income, questions of fact existed as to whether the separation agreement was invalid, sufficient to warrant a hearing (citations omitted). Given the lack of any financial disclosure, the Supreme Court should have exercised its equitable powers and directed disclosure regarding the parties' finances

at the time the agreement was executed, to be followed by a hearing to test the validity of the separation agreement."

II. ATTORNEY & CLIENT

A. Disqualification – Associate Changed Firms

In Janczewski v. Janczewski, 92 NYS3d 665 (2d Dept. Feb. 13, 2019), the husband appealed from a February 2018 Supreme Court order, which granted the wife's motion to disqualify his attorneys. The Second Department affirmed, noting that from July 2016 to February 2017, an associate worked on the wife's case and then commenced employment at the law firm representing the husband, "giving rise to an irrebuttable presumption of disqualification," which was warranted "based on the appearance of impropriety."

B. Disqualification – Contact with Children

In Anonymous 2017-1 v. Anonymous 2017-2, 2018 Westlaw 5316851, NY Law Journ. Nov. 9, 2018 at 21, col. 5 (Sup. Ct. Nassau Co., Lorintz, J., Oct.23, 2018), the mother received a speeding ticket in November 2017, and hired an attorney to handle the same. The mother thereafter became concerned that the ticket had not been resolved and that her license may have been suspended. The mother "feared that this could be used to justify her arrest, which she believed was being engineered by the [father], his counsel and [a] private investigator"; she observed the investigator parked near her home upon her return thereto on April 2, 2018, at which time he was photographing her, the children (ages 8 and 10) and their nanny. At or about the same time, the mother also observed a marked police car parked near her home. The mother then called her attorney regarding her fears of being arrested for driving with a suspended license, and the attorney then drove to the mother's home and transported her, the children and another adult to the home of a friend of the mother. The father moved to disqualify the mother's

attorney "based upon his alleged unauthorized contact with the children" in violation of Rules of Professional Conduct 4.2. Supreme Court "found it both relevant and helpful to conduct an *in camera* interview of both children" and held two individual *in camera* interviews of the children, each in the presence of the AFC. Supreme Court noted that "[b]oth children stated that they did not know their father's lawyer but verified that they knew their mother's lawyer, ***." Supreme Court concluded: "From the interview, it was clear that there were conversations between [the mother's attorney] and the children during the car ride" which "included discussions about what was happening with the private investigator. Additionally, the children were aware that the private investigator was hired by the [father]. This information was provided to them by the [mother]." Supreme Court granted the motion to disqualify the mother's attorney, holding: "By purporting to rescue their mother, in their presence and without their counsel, from an unlawful arrest engineered by their father, [the mother's attorney] risked influencing the children to think favorably of him and the [mother] and unfavorably of the [father]. In doing so, he acted against the best interests of the children. (citation omitted). Since [the mother's attorney] failed to notify the Attorney for the Child [AFC], *** who was appointed to protect the children's interests, [the AFC] was unable to act. *** [The mother's attorney's] failure to notify [the AFC], before or after the events of April 2, 2018, ***, evidence his indifference to the attorney-client relationship existing between the children and their counsel. His disqualification is therefore necessary to protect the rights of the children."

C. Disqualification – Initial Consultation

In Graziano v. Andzel-Graziano, 2019 Westlaw 758554 (3d Dept. Feb. 21, 2019), the husband appealed from a May 2018 Supreme Court order which denied his motion to disqualify the wife's counsel. The husband's March 2015 divorce action was settled by a March 2017

stipulation incorporated into an October 2017 judgment. In February 2018, the husband sought a money judgment, counsel fees and disqualification of the wife's newly retained attorney. The husband had a consultation with the wife's attorney in 2011, 4 years prior to the commencement of his divorce action. The Third Department stated: "The sole issue to be determined *** is whether the husband *** [demonstrated] *** that the issues discussed between him and the wife's counsel in 2011 are substantially related to said counsel's present representation of the wife in the instant dispute. We conclude that they are not." The Appellate Division therefore affirmed, finding that the wife's counsel "stated that he has no recollection of this [2011] legal consultation, he took no notes of the meeting and he did not obtain or review any financial documentation from the husband." The Court concluded: "*** the husband concedes that the subject postjudgment litigation *** is not, standing alone, sufficient to establish a substantial relationship between the husband's initial consultation with the wife's counsel and the present litigation, but instead argues that the inclusion of a request for counsel fees in relation to the present motion necessarily brings up for review his financial circumstances and, therefore, creates the requisite substantial relationship. We disagree."

III. CHILD SUPPORT

A. Aunt & Uncle v. Father; Life Insurance – Reduced

In Matter of Lozaldo v. Cristando, 164 AD3d 1241 (2d Dept. Sept. 12, 2018), the father appealed from a June 2017 Family Court order, which denied his objections to so much of a March 2017 Support Magistrate order as directed him, after a hearing upon the petition of the children's maternal aunt and uncle, to pay 100% of the children's unreimbursed medical and educational expenses, and to maintain a $1,000,000 life insurance policy designating the children as irrevocable primary beneficiaries. The Second Department modified, on the facts and in the

exercise of discretion, by granting the father's objections to the extent of reducing his life insurance obligation to $750,000. The aunt and uncle were awarded residential custody of the children after the death of the mother, and share joint legal custody with the father. The Appellate Division noted that Family Court Act §413(1)(a) provides that "the *parents* of a child under the age of [21] years are chargeable with the support of such child ***" (emphasis added), but "does not require a third party who is not a parent to financially support a child." The Court reasoned that since the aunt and uncle had not adopted the children, the father was responsible for their support and Family Court's order was appropriate under the circumstances. The Second Department found that "in view of [the father's] obligations, the amount of insurance that the father must maintain should be reduced from the sum of $1,000,000 to the sum of $750,000."

B. College Denied; Imputed Income

In Morille-Hinds v. Hinds, 2019 Westlaw 693232 (2d Dept. Feb. 20, 2019), the wife appealed from an April 2016 Supreme Court amended judgment, rendered upon a January 2014 decision after trial and an April 2015 order, which, among other things: (1) directed her to pay the husband $23,122.25 for counsel fees; (2) distributed 50% of the marital property to him; (3) failed to equitably distribute $3,500 allegedly dissipated by the husband; (4) awarded child support based upon his actual income without imputation of additional income; and (5) declined to direct the husband to pay college expenses for the parties' child. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by awarding the wife a credit of $1,750 for her 50% share of marital funds spent by the husband, and otherwise affirmed. The parties were married in August 1993 and had one child born in 1995. The wife commenced the action in September 2007 and Supreme Court rendered a judgment in June 2010 following trial. The husband appealed from so much of the June 2010 judgment which "awarded him only 15%

of the value of the parties' real property, the plaintiff's retirement accounts, and certain bank accounts, and imputed an annual income to him in the sum of $80,000 for the purpose of his child support obligation." 87 AD3d 526 (2d Dept. 2011). The Appellate Division reversed and remitted equitable distribution and child support. The wife is a microbiologist and the monied spouse and the husband is a handyman/contractor. Both parties were 54 years old at the time of the retrial. The Second Department noted that the parties "acquired significant assets during the marriage, including multifamily homes, a home and vacant parcels in St. Lucia, and substantial retirement assets. Most assets were held in the plaintiff's name. The plaintiff earned significant income as compared to the defendant's earnings, which were minimal." On this appeal, the wife contends that she was "entitled to a larger percentage of marital assets as a result of her outsized marital efforts in comparison to the defendant, whom she considered 'lazy,' inasmuch as she was the primary wage earner and also claimed to be the primary caretaker for the parties' child," despite the Appellate Division's finding in the prior appeal that the husband "made significant contributions to the value of the parties' real property." 87 AD3d at 527. The Second Department opined on the prior appeal that the husband's "contribution to the care of the parties' child should have been considered." 87 AD3d at 528. The Appellate Division affirmed the equal distribution of marital property, agreeing with Supreme Court's determination "that each of the parties made significant contributions to the acquisition of the marital assets during this 14-year marriage" and that the husband "also contributed substantially by searching for and finding investment properties that increased significantly in value due to his utilization of his contracting/construction skills in renovating and remodeling the properties" and "participated in the care of the parties' child." On the issue of dissipation, the Second Department agreed with the wife that "Supreme Court should have awarded her 50% of the $3,500 balance that was in the

Kraft Foods federal credit union savings account prior to commencement of the action, which sums were spent by the defendant." With respect to imputed income, the Appellate Division rejected the wife's argument that "despite reporting almost nonexistent income of the defendant on joint returns over the years, the defendant should pay child support based upon an $80,000 yearly income," citing its decision upon the prior appeal, which found that "the Supreme Court's determination that the defendant could earn $80,000 annually lacks support in the record." 87 AD3d at 528. On the present appeal, the Second Department found that the husband's "highest reported annual income during the marriage was $18,570" and agreed with Supreme Court's finding that "there was no evidence that the defendant's earning potential was greater than what was earned during the marriage." As to college expenses, the Appellate Division agreed with Supreme Court's determination declining to direct the husband to pay a share thereof, given that the wife "failed to provide any documentary proof of the cost of the college the child had been accepted to and was planning to attend." The Court upheld the counsel fee award, "considering the disparity in the parties' incomes, as well as the fact that the plaintiff failed to produce documents, and that she maintained unreasonable positions regarding the issues of equitable distribution and child support despite the guidance offered by this Court upon its remittal of the issues."

C. CSSA – Cap $300,000; Imputed Income

In Feng v. Jansche, 2019 Westlaw 1028961 (1st Dept. Mar. 5, 2019), both parties appealed from an October 2017 Supreme Court judgment which, upon a July 2017 decision after trial of the wife's 2013 divorce action: (1) distributed 40% of the stipulated valued of the husband's stock options and restricted stock units to the wife; (2) terminated the temporary maintenance award as of July 31, 2017 and declined to award the wife post-divorce maintenance;

(3) imputed income of $831,710 to the husband, imposed a CSSA income cap of $400,000 and made the child support award prospective; and (4) awarded the wife $25,000 in counsel fees. The First Department modified, on the law and the facts, to: (1) award the wife 50% of the value of the marital portion of defendant's stock options and restricted stock units; (2) impose a CSSA income cap of $300,000 and award child support retroactive to October 1, 2014; and (3) remand for further proceedings. The Appellate Division held that "[t]o the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487." With respect to maintenance, the First Department determined that Supreme Court "properly declined to award plaintiff post-divorce maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist" and correctly terminated the temporary order as of July 2017 when its decision after trial was issued. The Court noted that the duration of temporary maintenance "was one of the factors [Supreme] court considered in determining that further maintenance was not warranted." On the issue of imputed income, the Appellate Division held that Supreme Court "properly imputed income to defendant based on the average of his total income for the years 2012 through 2014." As to child support, the First Department found that Supreme Court "correctly considered the standard of living the child would have enjoyed had the marriage remained intact in deviating from the statutory cap," but given the fact that the husband was ordered to pay 88% of extracurricular activities, summer camp, and private school, the Court reduced the CSSA income cap to $300,000. With respect to the issue of retroactivity, the Appellate Division agreed with the wife that Supreme Court "erred in making the child support award prospective only (citation omitted). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support." The action was

remanded for a determination of retroactive child support owed, including add-on expenses, and whether the husband should pay arrears "in one sum or periodic sums." The First Department upheld the $25,000 counsel fee award, determining that Supreme Court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions," and given that the husband had already paid $120,000 of the wife's counsel fees, the total of $145,000 was more than half of her fees at the time of trial.

In Flom v. Flom, 2019 Westlaw 1064152 (1st Dept. Mar. 7, 2019), the wife appealed from a March 2017 Supreme Court judgment which, among other things: (1) distributed 40% of certain marital assets to the wife and 60% to the husband, including an in-kind distribution of an LLC; (2) apportioned 40% of the assets and liabilities related to certain investments to the wife and 60% to the husband; (3) awarded the wife $26,000 per month in taxable maintenance for 6 years; and (4) imputed annual income to the wife of $50,000 for CSSA purposes and applied the then-statutory cap of $141,000. The First Department modified, on the law and the facts, by: (1) increasing the wife's distribution of assets to 50%; (2) increasing her distribution of and responsibility for, the assets and liabilities of the investments to 50%; and (3) imposing a CSSA cap of $300,000, without imputing any income to the wife, and increasing child support for the parties' unemancipated child from $1,238 per month to $4,250 per month, retroactive to the entry of judgment. The Appellate Division held that Supreme Court "improvidently exercised its discretion in distributing the marital assets 60% to plaintiff and 40% to defendant," citing the principle that "where both spouses equally contribute to the marriage which is of long duration, a division should be made which is as equal as possible." The parties were married for 18 years and had 2 children. The Court found that "the referee divided the marital property unequally

solely because defendant was not employed outside the home and the parties hired domestic help, and thus, in the referee's view, she did not contribute equally to the marriage." The First Department cited the trial testimony, which established that the mother "was actively involved with the children, coaching their athletic teams, attending parent-teacher conferences, and, as plaintiff testified, being 'their mom.'" Increasing the marital property distribution to the wife to 50%, the Appellate Division stated: "It is undisputed that the parties enjoyed a lavish lifestyle, and the evidence indicated that defendant played a major role in managing the home, including entertaining clients and paying household expenses from the parties' joint account. The referee's finding that there was no evidence that defendant 'ever cooked a meal, dusted a table or mopped a floor' did not support the court's determination that she was therefore entitled to only 40% of the parties' marital assets." On the issue of marital debt, the First Department determined that Supreme Court "providently exercised its discretion in apportioning liability to defendant for failed investments *** that plaintiff personally guaranteed with a collateral account," finding that "[the husband's] conduct in guaranteeing the loans did not absolve defendant of joint liability." The Court concluded on this issue: "Since the investments were made during the marriage for the benefit of the parties, the parties should share [equally] in the losses." With regard to the in-kind distribution of the husband's interest in an LLC, which the Court increased to 50%, the Appellate Division rejected the husband's argument that the same "could not be distributed because defendant failed to value the asset" given that he proposed "prior to trial to distribute [the LLC interest] in lieu of maintenance." The Appellate Division upheld the maintenance award "based on the lavish lifestyle of the parties during the marriage, and the fact that [the wife] had not worked outside the home in over 20 years." Given the wife's now increased equitable distribution award, and Supreme Court's direction that the husband provide her with health

insurance until she qualifies for Medicare, the Court rejected the wife's argument for "at least 12 years, if not lifetime, maintenance." With regard to child support, the First Department held that there was "no basis" for the imputation of $50,000 in annual income to the wife and noted the referee's findings that: the husband "had significantly greater financial resources and a gross income that greatly exceeded defendant's"; the child enjoyed a "luxurious standard of living" during the marriage; and "no deviation from the then-income cap of $141,000 was warranted because plaintiff had voluntarily agreed to pay the child's educational expenses, coaching, tutoring and summer camp." The Court concluded that "given the factors considered, but subsequently disregarded, by the referee *** we find that a $300,000 income cap, which would result in a monthly basic child support award of $4,250, retroactive to entry of the judgment of divorce, would satisfy the child's 'actual needs' and afford him an 'appropriate lifestyle.'"

D. CSSA – COLA Vacated; $143,000 Cap Imposed

In Matter of Murray v. Murray, 164 AD3d 1451 (2d Dept. Sept. 26, 2018), the mother appealed from a September 2017 Family Court order, which denied her objections to a June 2017 Support Magistrate Order rendered after a hearing, reducing the father's child support obligation. The parties were divorced in January 2002. An October 2009 consent Family Court order set the father's child support obligation for two children at $740.56 per week, payable through the SCU. In March 2017, the SCU notified the parties of a proposed COLA order increasing the father's obligation to $822 per week for the remaining unemancipated child. The mother objected to the COLA order and after a hearing, the Magistrate capped the application of the CSSA to the parties' combined parental income of $371,697 at $143,000 and directed the father to pay $360 per week for the then 20 year old child who was entering her third year of college. On appeal, the Second Department affirmed, finding that the Support Magistrate "providently exercised her

discretion in applying the child support percentage to $143,000 of the parties' combined parental income," given that the mother "failed to demonstrate why *** it was unjust or inappropriate for the Support Magistrate to decline to apply the child support percentage to the parties' combined parental income over the statutory cap."

E. CSSA – Imputed Income

In Mack v. Mack, 2019 Westlaw 758593 (3d Dept. Feb. 21, 2019), the husband appealed from an October 2017 Supreme Court judgment, which distributed marital property and debt and imputed $200,000 in income to him for support purposes. The Third Department affirmed. The parties were married in 2002 and have 2 children born in 2002 and 2004. Supreme Court directed the husband to pay maintenance of $2,485.68 monthly until 2022 and child support of $2,238.50 monthly. The Appellate Division agreed that Supreme Court correctly found that a debt owed by the husband's premarital company (PTI) to a foreign corporation was not his personal obligation and "just as the assets of PTI are separate property, the debts of that corporation should not be considered part of the marital estate." The Third Department rejected the husband's claim that Supreme Court "erroneously considered a $200,000 debt owed by PTI to the husband as a marital asset subject to equitable distribution" and noted that his "argument that the corporation may not be able to repay the loan is belied by a $50,000 payment made during the pendency of this action." With respect to the husband's challenge to equal distribution of marital property, the Appellate Division held that considering "particularly, the almost 15-year duration of the marriage and the wife's contributions to the household as a homemaker and in caring for the parties' children, while forgoing her own career, the court did not abuse its discretion in awarding the wife 50% of the marital property." As to the issue of imputed income, the Court noted the husband's testimony that "as an electrical engineer, he earned $115,000 in 1995 and was earning

$125,000 by 2000, when he left his job and formed PTI. Recent tax returns showed that PTI ran in the negative and the husband had no income." The Third Department held that Supreme Court properly imputed $200,000 in income to the husband, despite his claim that he had no regular paycheck and no earnings, "based on the parties' standard of living, the reality of the husband's business and accounting practices, and testimony that the husband paid personal expenses from corporate accounts."

F. CSSA – Imputed Income – Fiancé Support

In Matter of Picone v. Golio, 93 NYS3d 879 (2d Dept. Mar. 13, 2019), Golio, the non-custodial parent, appealed from a June 2018 order denying his objections to a December 2017 Support Magistrate order, which, after a hearing, upon imputing an additional $47,600 to his earned income, directed him to pay child support of $1,460 per month for 2 children. The Second Department affirmed, noting that the Support Magistrate determined that Golio's annual income was $94,532, including imputed income of $47,600 "based upon his testimony regarding his access to and receipt of financial support from his fiancé," which constitutes "money, goods, or services provided by relatives and friends," as defined by FCA §413[1][b][5][iv].

G. CSSA - Imputed Income – Inheritance; Private School Expenses

In Matter of Weissbach v. Weissbach, 2019 Westlaw 454189 (2d Dept. Feb. 6, 2019), the mother appealed from an April 2018 Family Court order which, after a hearing on the mother's January 2017 petition: (1) directed the father to pay $25 per week in child support for 3 children and (2) denied an award of private school expenses. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) awarding $546.16 per week in child support and (2) directing the father to pay 78% of the children's private school expenses. Family Court imputed an additional $20,800 per year to the father, above the income of $8,354

per year he claimed from his auto parts business, less $639.08 for social security and medicare taxes, finding CSSA income of $28,514.92. Family Court also imputed $27,040 to the mother based on her testimony that she had worked as a medical assistant at $13 per hour. While the father's CSSA obligation would have been $158.01 per week, Family Court found that such sum "would be unjust and inappropriate," because he was already voluntarily paying most of the household expenses for the children and the mother, and reduced the obligation to $25 per week. The Appellate Division found that Family Court should have imputed an additional $70,000 per year to the father, finding that "since 2009, the father had been contributing an additional $70,000 per year toward household expenses from sums that he had inherited." The Second Department determined that the parties' combined parental income was $125,554.92 per year and the father's pro rata share of the basic child support obligation was 78%, or $546.16 per week. The Court held that "the father's voluntary contributions to household expenses do not furnish a basis to depart from the Child Support Standards Act calculation (*see* Family Ct Act §413[1][f]). Such voluntary payments constitute, at most, an unenforceable promise to pay." As to private school expenses, given that "the credible evidence established that the children were enrolled in private school with the father's approval, and that the father could support himself and contribute to the children's private school tuition and expenses" Family Court should have directed the father to pay 78% thereof.

H. Enforcement – Medical Evidence in Defense Inadequate; Modification – Denied – SSD Not Determinative

In Matter of Linda D. v. Theo C., 2018 Westlaw 5985456 (1st Dept. Nov. 15, 2018), the father appealed from a September 2017 Family Court order, which granted the mother's objections by modifying a March 2017 Support Magistrate order, which, after a hearing,

determined the father was not in willful violation of a child support order and granted his petition for a downward modification, to the extent of vacating the modified order of support, dismissing the father's downward modification petition, and reinstating the prior order for $1,200 in monthly child support. The First Department affirmed, finding that "the father failed to rebut the prima facie evidence of his willful violation of the order of support" and holding that "the Support Magistrate mistakenly relied on letters from the father's health care providers that had not been properly admitted into evidence." The Appellate Division further determined that Family Court properly dismissed the father's downward modification, noting that the father's "receipt of Social Security disability benefits did not preclude a finding that he was capable of work."

I. Modification - Imputed Income; No Jurisdiction Over Tax Refund

In Matter of Bashir v. Brunner, 2019 Westlaw 408769 (4th Dept. Feb. 1, 2019), the mother appealed from a November 2017 Family Court order denying her objections to a Support Magistrate order, which, after a hearing, reduced the father's child support obligation. The Appellate Division held that Family Court properly denied the mother's objection to that part of the order "finding that the mother lived rent-free," given that the Magistrate "did not credit the mother's testimony that she paid rent when she was able to do so." As to imputed income, the Fourth Department held that the Magistrate properly determined that the mother's testimony, stating "she was forced to leave her employment so that she could care for the children, whose child care costs she could no longer afford due to the father's temporary failure to pay child support," was not credible. The Appellate Division did find that Family Court erred in denying her objection to that portion of the Magistrate's order which, "in effect, distributed half of the parties' tax refund to the father by reducing his child support obligation by that amount." The Court concluded: "[T]he father's entitlement to claim the child[ren] as [] dependent[s] for income

tax purposes is not an element of support set forth in Family Court Act article 4, and thus the court lacks jurisdiction" to distribute the parties' tax refund. The Fourth Department remitted to Family Court to recalculate the father's child support obligation without regard to the income tax refund.

J. Modification – Income Decrease Caused by Relocation Nearer to Child

In Matter of Parmenter v. Nash, 2018 Westlaw 5875499 (4th Dept. Nov. 9, 2018), the father appealed from a June 2017 Family Court order, which denied his objection to a Support Magistrate order dismissing his petition for downward modification, based upon a decrease in his income due to his relocation. The Fourth Department reversed, on the law, granted the father's objection, reinstated his petition, and remitted to Family Court. From 2013 to 2015, the parties resided together with their son in northern Virginia. In 2015, the mother relocated with the child to Onondaga County. Six months later, the father quit his job in Virginia and moved to New York in order to be closer to the child. The Appellate Division held that the general rule, holding a non-custodial parent responsible for a voluntarily cessation of higher paying employment, "should not be inflexibly applied where a parent quits a job for a sufficiently compelling reason, such as the need to live closer to a child (citations omitted) ." The Court concluded that "[t]he equities weigh heavily in favor of the father here given that it was the mother who moved the child hundreds of miles away from the father and thereby created the difficulties inherent in long-distance parenting."

K. Modification – Medical Evidence Inadequate; Public Assistance Arrears Cap Denied

In Matter of Mandile v. Deshotel, 2018 Westlaw 5875868 (4th Dept. Nov. 9, 2018), the mother appealed from a November 2016 Family Court order, which confirmed a Support

Magistrate order that she willfully violated a prior child support order and awarded the father a money judgment. The Fourth Department affirmed, finding that the mother failed to pay the amounts directed by the support order, and the burden thus shifted to her to submit "some competent, credible evidence of [her] inability to make the required payments" (citations omitted). The Appellate Division held that the mother failed to meet her burden, and while she "presented some evidence of medical conditions that allegedly disabled her from work, her medical records indicate that the diagnoses related to those conditions were 'based solely on [the mother's] subjective complaints, rather than any objective testing.'" (Citations omitted). The Support Magistrate found that "the mother did not seek treatment for her alleged conditions until shortly after the father filed his first violation petition and that she had testified several years earlier that she did not intend to work because she could be fully supported by her paramour." The Fourth Department rejected the mother's arrears cap argument, noting that if "the sole source of a noncustodial parent's income is public assistance, unpaid child support arrears in excess of five hundred dollars shall not accrue," citing FCA 413(1)(g), and finding that here, although "the mother received public assistance and did not maintain employment, circumstantial evidence suggested that she 'ha[d] access to, and receive[d], financial support from [her live-in paramour].'" (Citations omitted).

L. Modification – 2010 Amendments – Changed Circumstances

In Bishop v. Bishop, 2019 Westlaw 1051899 (2d Dept. Mar. 6, 2019), the mother appealed from an October 2016 Supreme Court order which, without a hearing: (1) granted the father's motion pursuant to CPLR 3211(a)(7) to dismiss her April 2016 petition for an upward modification of the child support provisions of an October 2013 judgment incorporating an April 2013 stipulation; and (2) denied her cross motion pursuant to Domestic Relations Law §238 and

22 NYCRR §130-1.1 for counsel fees. The Second Department modified, on the law, by: (1) denying the father's motion to dismiss; and (2) by reversing the denial of the mother's cross motion pursuant to Domestic Relations Law §238 for counsel fees, and remitting for a hearing on upward modification of child support and counsel fees. The April 2013 stipulation provided that the father would pay the mother $3,000 per month in child support. In May 2016, following the mother's April 2016 Family Court modification petition, the father moved in Supreme Court to: appoint a forensic psychiatrist to determine whether a modification of custody was in the children's best interests; transfer the Family Court petition to Supreme Court; and, as above stated, dismiss the modification petition. On consent, Supreme Court converted the modification petition into a post-judgment motion, and the father's motion to appoint a forensic psychiatrist was withdrawn. The April 2013 stipulation specifically opted out of the 3 year and 15% modification grounds, meaning that the wife had the burden of establishing "a substantial change in circumstances," as defined by DRL §236[B][9][b][2][i]. The Appellate Division noted that when evaluating a claim of "substantial change in circumstances," a court must consider "the increased needs of the children, the increased cost of living insofar as it results in greater expenses for the children, a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children," and must hold a hearing "where the parties' evidentiary submissions disclose the existence of genuine issues of fact." The Second Department found that "the parties' evidentiary submissions raised genuine issues of fact with regard to whether an increased cost of living and expenses related to the children and an increase in the plaintiff's income warranted upward modification" and Supreme Court should have denied the father's motion to dismiss and should have held a hearing. As to counsel fees, the Court held: "***given the presumption that counsel fees should

be awarded to the less monied spouse (*see* Domestic Relations Law §238), the Supreme Court also should have held a hearing on *** defendant's cross motion *** pursuant to Domestic Relations Law §238 ***." The Appellate Division concluded that "Supreme Court providently exercised its discretion in denying that branch of [the mother's] cross motion *** pursuant to 22 NYCRR 130-1.1 for an award of counsel fees based on her contention that *** plaintiff's motion ** to appoint a forensic psychiatrist was frivolous."

M. Modification – 2010 Amendments – Denial Vacated

In Fasano v. Fasano, 164 AD3d 1421 (2d Dept. Sept. 26, 2018), the mother appealed from a June 2017 Supreme Court judgment which denied her motion to modify an October 2012 stipulation, which set the father's child support obligation for two children at $1,500 per month. The October 2012 stipulation varied from the CSSA, which would have required $1,994 per month on the first $130,000 of combined parental income (CPI) and $2,576 on the entire CPI. The stated reason for deviation was to allow the father to retain the marital residence as a place for the children. The wife commenced a divorce action in December 2013, and moved in June 2014 for upward modification, based upon the father's sale of the marital residence and move to a different school district, and significant uninsured health expenses for one child who had been hospitalized for mental illness. On appeal, the Second Department reversed, on the law and the facts, holding that Supreme Court should have granted the motion for upward modification, based upon "a substantial change in circumstances" as defined by DRL 236(B)(9)(b)(2)(i), and remitted for a new determination and calculation under the CSSA.

IV. COUNSEL & EXPERT FEES

A. After Stipulation – Increased

In Licostie v. Licostie, 2019 Westlaw 1782182 (2d Dept. Apr. 24, 2019), the wife

appealed from a September 2017 Supreme Court order which granted her motion for counsel fees only to the extent of $2,500. The parties' stipulation reserved the wife's right to move for counsel fees. The Second Department modified, on the facts and in the exercise of discretion, by increasing the counsel fee award to $7,500, considering "in particular, the disparity in the parties' incomes." To the same effect, also in a case with a stipulation allowing the wife to move for counsel fees, is D'Angio v. D'Angio, 2019 Westlaw 1782227 (2d Dept. Apr. 24, 2019), where the award was increased from $2,500 to $15,000, also in consideration of the disparity in the parties' incomes.

B. After Trial

In Belilos v. Rivera, 164 AD3d 1411 (2d Dept. Sept. 26, 2018), both parties appealed from an October 2015 Supreme Court judgment which awarded the wife maintenance of $5,000 per month for 5 years, restored $150,000 of the wife's inherited separate property, which had been placed in a joint account, to the wife, awarded the wife 25% of the husband's enhanced earning capacity from advanced degrees and certifications and 50% of the husband's business interests, and awarded the wife $75,000 in counsel fees and $15,000 in expert witness fees. The Second Department affirmed. As to the inheritance, the wife established that she received $150,000 from her uncle, which was deposited into a joint account because she had no bank accounts in her name alone, and further, the husband admitted at his deposition that he intended to return the $150,000 to the wife "to make things right." The Appellate Division upheld the 50% award of the business interests, and as to the 25% enhanced earning capacity award, found that the wife "demonstrated that she substantially contributed to the defendant's acquisitions of his advanced degrees and certifications." The Court upheld the maintenance, counsel fee and expert witness fee awards as appropriate exercises of discretion.

In Giallo-Uvino v. Uvino, 2018 Westlaw 5020409 (2d Dept. Oct. 17, 2018), the wife appealed from an April 2016 Supreme Court judgment of divorce which, upon a February 2016 decision of the court made after an inquest, among other things: (1) valued the husband's law practice as of the date of trial and determined that the practice had no value; (2) awarded her only 55% of the net proceeds of the sale ($561,266.75) of the marital residence; (3) declined to award her an attorney's fee and expert fees, and (4) determined that the wife was not entitled to an award of maintenance. The Second Department modified, on the law, on the facts, and in the exercise of discretion: (1) by awarding the wife 70% of the net proceeds of the sale of the marital residence; and (2) by awarding the wife an attorney's fee of $70,000. The parties were married in June 2000, and have one child. The wife worked as a registered nurse, and the husband was an attorney with his own law practice. In July 2012, the wife commenced this action for a divorce and the husband appeared in the action. He failed to appear for the trial in July 2015, and Supreme Court held an inquest. The Appellate Division held that "Supreme Court providently exercised its discretion in valuing the [husband's] law practice as of the date of trial, rather than the date of commencement of the action," given that the wife "failed to establish that the defendant, who was disbarred during the pendency of this action (citation omitted) intentionally lost his license in order to devalue his law practice (citation omitted) *** [and] failed to establish that the defendant's business had any value as of the date of trial." As to maintenance, the Second Department found: "considering the relevant factors, including, inter alia, the duration of the marriage, the present and future earning capacity of the parties, and the ability of the party seeking maintenance to become self-supporting, the Supreme Court did not improvidently exercise its discretion in declining to award maintenance to the plaintiff." The Appellate Division held that "Supreme Court improvidently exercised its discretion in awarding the plaintiff only

55% of the net proceeds of the sale of the marital residence" [and] [b]ased on the circumstances of this case, we find that the plaintiff is entitled to 70% of the net proceeds of the sale of the marital residence." As to counsel fees, the Court concluded that "Supreme Court improvidently exercised its discretion in declining to award the plaintiff an attorney's fee," and a factor to be considered is "whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation (citations omitted)." Here the Second Department found that the husband failed "to timely provide certain financial documentation which unnecessarily prolonged the litigation, [and] the court should have awarded the plaintiff an attorney's fee in the sum of $70,000."

In Gorman v. Gorman, 2018 Westlaw 5274250 (2d Dept. Oct. 24, 2018), the wife appealed from a December 2015 Supreme Court judgment which, after trial, awarded her only $4,500 per month in maintenance for 8 years, distributed marital property, and imputed annual income to her of $26,000, and the husband cross-appealed from so much of the judgment as failed to award him a share of bank accounts, as awarded maintenance, and $20,000 in counsel fees to the wife. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) decreasing the amount of maintenance to $2,750 per month and making the same tax-free to the wife, but increasing the duration until the earliest of the wife's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party; (2) requiring the husband to maintain $500,000 in life insurance for the wife so long as he is obligated to pay maintenance; (3) by directing the husband to provide health insurance for the wife until she becomes eligible for coverage through employment or through Medicare, whichever shall first occur; and (4) providing that the parties' joint checking account and savings accounts ($95,981.18 + $44,458.50), be equally divided between the parties, with a

$1,600 credit to the wife. The parties were married on May 16, 1987. The wife worked as a legal secretary for a period of time, and left the workforce to become a homemaker and to care for the parties' two children (now in their mid-to-late twenties), while the husband worked in various capacities connected with the US military, including defense contracting work in Iraq. The husband commenced the action in August 2011. As to maintenance, the Appellate Division found that "considering the relevant factors, including the ages of the parties, the long duration of the marriage and the extended absence of the defendant from the workforce, the distribution of the marital assets, the parties' respective past and future earning capacities, and the availability of retirement funds and pensions, the Supreme Court providently exercised its discretion in awarding the defendant durational, as opposed to lifetime, maintenance (citations omitted). However, rather than providing for a durational limitation of eight years and subjecting that award to termination upon the plaintiff's remarriage, under the circumstances of this case, the maintenance award should continue until the earliest of the defendant's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party (citations omitted). "As to imputed income to the husband of $151,192, the Second Department found that "from 2008 through late 2013, the plaintiff was employed overseas in Iraq and, as a result of such employment, received a significantly augmented salary, enhanced overtime, and no-cost room and board. In December 2013, the plaintiff returned to the United States, taking up residence in Ohio, where he resides with his fiancée. As of the time of trial, the plaintiff was employed by the Department of Defense as a quality assurance inspector at a salary of $81,079 per year. The plaintiff did not submit a current statement of net worth. He acknowledged that his earnings are deposited into a joint checking account with his fiancée and that all of his monthly expenses are shared with his fiancée. The plaintiff also acknowledged that

he regularly gambles, to the point that he has received free hotel accommodations, airfare, vacations (including a cruise), and other free or discounted items because of his frequent gambling. In 2013, he reported gambling winnings of $11,250 on his tax return. He acknowledged winning $1,800 over two days of gambling in September 2014." The Appellate Division concluded that the imputed income to the husband should be $100,000. With regard to imputed income to the wife, the Court stated: "While we agree with the defendant that the Supreme Court should not have imputed income to her based on statistical information from the New York State Department of Labor that was not admitted in evidence at trial (citation omitted), there was evidence, nonetheless, that the defendant had earned $15 per hour as a legal secretary during the early part of the marriage. Even though she has been out of the work force for an extended period of time and does not have a college degree, she is in good health and has a sufficient employment history to warrant the conclusion that she is capable of earning at least the sum of $26,000 annually, which is the amount of income imputed to her by the court." The Second Department concluded on the issue of maintenance that the husband should pay the wife $2,750 per month, "which sum shall be neither tax deductible by the plaintiff nor taxable to the defendant." As to life insurance, the Appellate Division directed the husband "to purchase, pursuant to Domestic Relations Law §236(B)(8)(a), a life insurance policy in the amount of $500,000, designating the defendant as sole irrevocable beneficiary for only as long as the plaintiff is obligated to pay maintenance to the defendant." On the issue of health insurance, the Appellate Division held that Supreme Court "should have directed the plaintiff to provide health insurance for the plaintiff until she becomes eligible for coverage through employment or through Medicare." As to the marital residence, the Court held that "Supreme Court providently exercised its discretion in directing the sale of the marital residence because the parties' children

have reached majority, there is no need of a spouse as a custodial parent to occupy the residence for the children (citation omitted), and neither party submitted a market-based valuation of the marital residence. With regard to the bank accounts, the Court directed and equal division as to their commencement date values, but since the husband "purchased a diamond engagement ring for $3,200 for his fiancée prior to commencement of this action, and failed to prove that it was separate property," the wife is entitled to a 50% credit for the ring's purchase price ($1,600). Finally, the Second Department held that given "the relative financial circumstances of the parties and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant $20,000 in attorney's fees."

In Romeo v. Muenzler-Romeo, 2019 Westlaw 575623 (2d Dept. Feb. 13, 2019), the husband appealed from an August 2017 Supreme Court judgment, upon a March 2017 decision after trial of the wife's April 2014 action, which awarded the wife maintenance of $1,900 per month for 8 years and counsel fees of $26,000. The Second Department affirmed. The parties were married in August 1995, at which time the husband was retired from NYPD and working part-time, while the wife worked as a substitute teacher. The Appellate Division upheld the maintenance award based upon Supreme Court's consideration of the standard of living, property distribution, duration of the marriage, the parties' health and future earning capacity, and the wife's ability to become self-supporting. As to counsel fees, the Second Department affirmed, based upon the disparity between the parties' incomes, the relative merits of the parties' positions, and the husband's conduct "that delayed the proceedings."

In Morille-Hinds v. Hinds, 2019 Westlaw 693232 (2d Dept. Feb. 20, 2019), the wife appealed from an April 2016 Supreme Court amended judgment, rendered upon a January 2014 decision after trial and an April 2015 order, which, among other things: (1) directed her to pay

the husband $23,122.25 for counsel fees; (2) distributed 50% of the marital property to him; (3) failed to equitably distribute $3,500 allegedly dissipated by the husband; (4) awarded child support based upon his actual income without imputation of additional income; and (5) declined to direct the husband to pay college expenses for the parties' child. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by awarding the wife a credit of $1,750 for her 50% share of marital funds spent by the husband, and otherwise affirmed. The parties were married in August 1993 and had one child born in 1995. The wife commenced the action in September 2007 and Supreme Court rendered a judgment in June 2010 following trial. The husband appealed from so much of the June 2010 judgment which "awarded him only 15% of the value of the parties' real property, the plaintiff's retirement accounts, and certain bank accounts, and imputed an annual income to him in the sum of $80,000 for the purpose of his child support obligation." 87 AD3d 526 (2d Dept. 2011). The Appellate Division reversed and remitted equitable distribution and child support. The wife is a microbiologist and the monied spouse and the husband is a handyman/contractor. Both parties were 54 years old at the time of the retrial. The Second Department noted that the parties "acquired significant assets during the marriage, including multifamily homes, a home and vacant parcels in St. Lucia, and substantial retirement assets. Most assets were held in the plaintiff's name. The plaintiff earned significant income as compared to the defendant's earnings, which were minimal." On this appeal, the wife contends that she was "entitled to a larger percentage of marital assets as a result of her outsized marital efforts in comparison to the defendant, whom she considered 'lazy,' inasmuch as she was the primary wage earner and also claimed to be the primary caretaker for the parties' child," despite the Appellate Division's finding in the prior appeal that the husband "made significant contributions to the value of the parties' real property." 87 AD3d at 527. The Second Department

opined on the prior appeal that the husband's "contribution to the care of the parties' child should have been considered." 87 AD3d at 528. The Appellate Division affirmed the equal distribution of marital property, agreeing with Supreme Court's determination "that each of the parties made significant contributions to the acquisition of the marital assets during this 14-year marriage" and that the husband "also contributed substantially by searching for and finding investment properties that increased significantly in value due to his utilization of his contracting/construction skills in renovating and remodeling the properties" and "participated in the care of the parties' child." On the issue of dissipation, the Second Department agreed with the wife that "Supreme Court should have awarded her 50% of the $3,500 balance that was in the Kraft Foods federal credit union savings account prior to commencement of the action, which sums were spent by the defendant." With respect to imputed income, the Appellate Division rejected the wife's argument that "despite reporting almost nonexistent income of the defendant on joint returns over the years, the defendant should pay child support based upon an $80,000 yearly income," citing its decision upon the prior appeal, which found that "the Supreme Court's determination that the defendant could earn $80,000 annually lacks support in the record." 87 AD3d at 528. On the present appeal, the Second Department found that the husband's "highest reported annual income during the marriage was $18,570" and agreed with Supreme Court's finding that "there was no evidence that the defendant's earning potential was greater than what was earned during the marriage." As to college expenses, the Appellate Division agreed with Supreme Court's determination declining to direct the husband to pay a share thereof, given that the wife "failed to provide any documentary proof of the cost of the college the child had been accepted to and was planning to attend." The Court upheld the counsel fee award, "considering the disparity in the parties' incomes, as well as the fact that the plaintiff failed to produce

documents, and that she maintained unreasonable positions regarding the issues of equitable distribution and child support despite the guidance offered by this Court upon its remittal of the issues."

In Feng v. Jansche, 2019 Westlaw 1028961 (1st Dept. Mar. 5, 2019), both parties appealed from an October 2017 Supreme Court judgment which, upon a July 2017 decision after trial of the wife's 2013 divorce action: (1) distributed 40% of the stipulated valued of the husband's stock options and restricted stock units to the wife; (2) valued the marital funds at $410,696.82; (3) terminated the temporary maintenance award as of July 31, 2017 and declined to award the wife post-divorce maintenance; (4) imputed income of $831,710 to the husband, imposed a CSSA income cap of $400,000 and made the child support award prospective; and (5) awarded the wife $25,000 in counsel fees. The First Department modified, on the law and the facts, to: (1) award the wife 50% of the value of the marital portion of defendant's stock options and restricted stock units; (2) impose a CSSA income cap of $300,000 and award child support retroactive to October 1, 2014; and (3) remand for further proceedings. The Appellate Division held that "[t]o the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487." With respect to maintenance, the First Department determined that Supreme Court "properly declined to award plaintiff post-divorce maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist" and correctly terminated the temporary order as of July 2017 when its decision after trial was issued. The Court noted that the duration of temporary maintenance "was one of the factors [Supreme] court considered in determining that further maintenance was not warranted." On the issue of imputed income, the Appellate Division held that Supreme Court "properly imputed income to defendant

based on the average of his total income for the years 2012 through 2014." As to child support, the First Department found that Supreme Court "correctly considered the standard of living the child would have enjoyed had the marriage remained intact in deviating from the statutory cap," but given the fact that the husband was ordered to pay 88% of extracurricular activities, summer camp, and private school, the Court reduced the CSSA income cap to $300,000. With respect to the issue of retroactivity, the Appellate Division agreed with the wife that Supreme Court "erred in making the child support award prospective only (citation omitted). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support." The action was remanded for a determination of retroactive child support owed, including add-on expenses, and whether the husband should pay arrears "in one sum or periodic sums." The First Department upheld the $25,000 counsel fee award, determining that Supreme Court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions," and given that the husband had already paid $120,000 of the wife's counsel fees, the total of $145,000 was more than half of her fees at the time of trial.

In Jankovic v. Jankovic, 170 AD3d 1174 (2d Dept. Mar. 27, 2019), the husband appealed from a July 2016 Supreme Court judgment, rendered upon a January 2015 decision after trial in the husband's 2011 action, which awarded the wife $333 per month in non-durational maintenance and counsel fees of $15,000. The Second Department affirmed. The parties were married in 1978 and all of their children are emancipated. As to maintenance, the Appellate Division held that Supreme Court property considered "the 30-year duration of the marriage, the age of the defendant, her health, and her limited education, as well as her limited future earning capacity and the disparity in the parties' respective incomes." With respect to counsel fees, the

Second Department found that Supreme Court was within its discretion to consider the disparity in the parties' incomes and "particularly the plaintiff's refusal to pay defendant any of the sums awarded to her under a pendente lite order in the action, the complexity of the issues involved, and the relative merits of the parties' positions."

C. After Trial – Reduced

In Button v. Button, 2018 Westlaw 5292748 (3d Dept. Oct. 25, 2018), the husband appealed from a February 2017 Supreme Court judgment, which determined custodial and visitation issues, directed child support of $525 bi-weekly, counsel fees of $7,500 to the wife, equitable distribution of debt and the husband's NYS pension, and maintenance of $550 bi-weekly. The parties were married in October 2006 and have 3 children, born in 2012, 2013 and 2015. The parties were in their mid-30s at the time of trial and both in good health. The wife moved with the children from the marital residence in April 2015 and commenced this action in June 2015. Supreme Court continued temporary orders of custody and child support that had been entered in Family Court. The Appellate Division rejected the husband's argument that a reduction of his visitation was error, but agreed that Supreme Court erred by requiring that he provide all transportation and by failing to provide specific times for holiday visits. The Third Department noted "that it was unnecessary for Supreme Court to consider whether a change in circumstances had occurred because the temporary custody order was issued without the benefit of a full plenary hearing (citations omitted) and, further, did not address holiday and vacation schedules." The Court noted that the wife and children live with the wife's parents — a 45-minute drive from the marital residence where the husband continues to reside and that she "did not have a vehicle and arranged for her transportation needs entirely by borrowing vehicles from her parents and a sibling." As of the time of trial, the wife was to graduate from nursing school

in May 2018 and begin full-time employment as a registered nurse. The Appellate Division did not disturb the schedule, given that the husband received an additional 4 weeks in the summer and also received a holiday schedule, but found: "In light of the 1½-hour round trip between the parties' residences, the requirement that the husband provide all transportation unduly impairs his mid-week dinner visit; thus, we modify the judgment to provide that the parties shall equally share transportation for the mid-week dinner visits. We also modify the holiday and vacation schedules to include exchange times, as follows: Christmas Eve shall begin at 6:00 p.m. on December 23 and end at 8:00 p.m. on December 24; Christmas Day shall begin at 8:00 p.m. on December 24 and end on December 26 at 8:00 a.m., when the Christmas vacation begins; all other holidays shall begin at 6:00 p.m. the day preceding the holiday and end at 8:00 a.m. the day after the holiday; and the winter and spring school vacations shall begin at the end of the last school day prior to the vacation period and shall end at 6:00 p.m. on the last day of the vacation period." With regard to equitable distribution, the Appellate Division noted that the former marital residence had stipulated equity of $36,600, and the husband has a defined benefit pension plan with New York State. There was additional marital debt, which Supreme Court ordered be assumed $40,106 by the husband and $3,430 by the wife. The wife wanted the residence to be sold, but Supreme Court awarded the same, with its debt, to the husband. Supreme Court "appeared to equally divide the marital portion of the husband's New York retirement according to the *Majauskas* formula." With regard to the marital debt, the Third Department stated: "we cannot say that Supreme Court's distribution of the marital home and the parties' debt is unjust or inequitable." As to the issue of the pension, the husband argued that the court erred in ordering that he provide the wife with "the minimum survivor benefit" for his pension plan. The Appellate Division stated: "We take judicial notice of the applicable rules of the New York State and Local

Retirement System. A participant may designate a former spouse to receive a portion of the preretirement ordinary death benefit and may name others to receive the remainder of that benefit. However, only one beneficiary, or alternate payee, may be named for retirement benefits. We agree with the husband that it would be inequitable to require that he name the wife as a beneficiary of his retirement benefits and thereby preclude him from sharing those benefits with any other person, such as a subsequent spouse. In that regard, we note that the marital portion of the pension is small, the parties are relatively young and the wife has the prospect of gaining employment that should enable her to provide for retirement. Therefore, we modify the judgment by specifically awarding the wife one half of the marital portion of the husband's pension according to the *Majauskas* formula, including one half of the marital portion of the ordinary preretirement death benefit, but excluding any requirement that the husband elect any option that would continue postretirement benefits to the wife following his death." The Third Department agreed with the husband that the maintenance award was excessive and held: "Although Supreme Court properly awarded maintenance to the wife — who had been the primary caretaker of the children since the birth of the oldest child — while she obtained training as a registered nurse that would allow her to obtain employment and become self-sufficient, the maintenance award must be reassessed in light of its failure to consider the wife's needs and the husband's ability to pay." The Court noted that "neither party could continue to enjoy the predivorce standard of living, which was sustained only by incurring substantial debt, and the parties' negative net worth established that they were in significant financial distress at the time of trial. The obligations imposed on the husband by the judgment total approximately $48,806 annually. Payment of those obligations from his gross earnings of $73,083 would leave him with very little income to cover his own living expenses. At the time of trial, the wife's own living

expenses were modest. She incurred no housing expenses because she and the children were residing with her parents, and she had no vehicle of her own. Thus, her direct expenses were limited to gas, food and clothing. Accordingly, we reduce the amount of the maintenance award to $200 biweekly, retroactive to the date of commencement of the action and continuing until July 1, 2018." The Court recalculated the child support award, given reduced maintenance, and found that the presumptively correct amount of the husband's basic child support obligation for three children is $694.81 biweekly. With respect to counsel fees, the Appellate Division agreed that "Supreme Court abused its discretion by awarding the wife $7,500 in counsel fees." The Court concluded: "As aptly noted by Supreme Court, the marital debt exceeded the net value of the parties' assets; indeed, upon equitable distribution, each has a negative net worth. However, inasmuch as the husband was employed and the wife was unemployed while she completed her nursing education, Supreme Court properly found that the wife was the less monied spouse. Although the husband's income is greater than the wife's, his earnings are modest and are largely devoted to payment of maintenance, child support and marital debt. The fact of the matter is that neither party has sufficient assets or income for payment of counsel fees. Although an award of counsel fees to the wife was appropriate, upon consideration of the parties' financial circumstances, we reduce the award to $3,750."

D. Reversed – Debt, No Monied Spouse

In Haggerty v. Haggerty, 2019 Westlaw 408799 (4th Dept. Feb. 1, 2019), the wife appealed from a June 2017 Supreme Court judgment which, among other things, directed her to pay counsel fees of $14,000 to the husband. The Fourth Department modified in the exercise of discretion and on the law, by vacating the counsel fees award, and otherwise affirmed. The Appellate Division rejected the wife's argument that she should have been given a credit for

marital assets allegedly dissipated by the husband, finding that he "established that he used those particular assets to pay for marital expenses." The Fourth Department rejected the wife's contention that Supreme Court erred in directing that her ability to claim one of the parties' two children as a dependency exemption was upon the condition that she remain "current with her child support obligation for a full calendar year," noting her "prior failure to pay child support." With respect to the parties' combined student loan debt, the Appellate Division recognized that there "may be circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse" and concluded that Supreme Court "did not abuse or improvidently exercise its discretion in directing that each party be responsible for his or her student loan debt." The Fourth Department agreed with the wife that the $14,000 counsel fee award to the husband should be vacated, finding that "where neither party is a 'less monied spouse' (Domestic Relations Law §237[a]), and plaintiff [the wife] has significantly more student loan debt than defendant, we conclude in the exercise of our discretion that the award should be vacated and that each party should be responsible for his or her own attorneys' fees."

E. Enforcement and Modification of Child Support – Granted

In Matter of Edelson v. Warren, 2019 Westlaw 149513 (1st Dept. Jan. 10, 2019), the mother appealed from an October 2017 Family Court order, which denied her objections to a Support Magistrate counsel fee award against her, in the father's child support enforcement proceeding in which she also sought downward modification of her child support obligation. The First Department affirmed, rejecting the mother's argument that the Magistrate erroneously included fees incurred in the modification portion of the proceeding. The Appellate Division noted that the Support Magistrate "deemed the modification and willfulness issues 'interrelated,' and the parties acknowledge that, upon the conclusion of the modification proceedings, they

agreed that the evidence and testimony would be adopted for purposes of the violation proceedings." The Court further cited the Magistrate's findings that the mother engaged in "commingling of personal and business expenses, and her failure, in the Support Magistrate's view, to seek employment opportunities diligently after the demise of her business" and that "the proceedings were protracted because of respondent's [the mother's] efforts to reduce her child support obligation."

F. Enforcement of Child Support – Granted

In Matter of Mensch v. Mensch, 2019 Westlaw 138442 (2d Dept. Jan. 9, 2019), the mother appealed from a May 2018 Family Court order, which denied her objections to an April 2018 Support Magistrate order denying her motion for counsel fees. The Second Department reversed, on the facts and in the exercise of discretion, granted the mother's objections and her motion for counsel fees, and remitted to Family Court to determine the amount of fees. The mother filed an enforcement petition in December 2017, alleging that the father failed to pay $1,635 in child support from April 2017 through August 2017, which sum the father paid, shortly after the petition was filed. The Appellate Division held that the denial of counsel fees "was an improvident exercise of discretion," given that the father paid the alleged arrears "only after the mother was forced to expend attorneys' fees to commence an enforcement proceeding" and that the father should not have engaged "in self-help by withholding child support payments that he ultimately did not dispute were due and owing."

G. Sanctions; iPad Access Not Disclosed

In Strauss v. Strauss, 2019 Westlaw 1768592 (1st Dept. Apr. 23, 2019), the husband appealed from a February 2018 Supreme Court order, which granted the wife's motion for sanctions against him and his counsel, and from a May 2018 order of the same court which

awarded her attorneys $180,000 in counsel fees. The First Department affirmed the sanctions order and modified the counsel fee order, on the law and the facts, by vacating the award and remitting for a hearing thereon. The husband obtained access to the wife's iPad and private text messages, "falsely told her that he did not have the iPad and that it was lost, and provided the text messages to his counsel, who admittedly failed to disclose to opposing counsel or the court the fact that he was in possession of the iPad and text messages, until two years later when they disclosed that they intended to use the text messages at trial." The Appellate Division held that the wife "demonstrated that such conduct implicated criminal laws and, while [the husband] asserts that he needed to preserve the information for use in the custody trial, he also concedes that he had other evidence that would have supported his position at trial. Thus, there would have been no reason to rely on the text messages other than to harass and embarrass plaintiff (22 NYCRR §130-1.1[c][2]). The foregoing frivolous conduct supports the imposition of sanctions (22 NYCRR §130-1.2)." With regard to the issue of counsel fees, the First Department noted that the wife's motion did not include an affirmation from her attorneys explaining its invoices, and held that Supreme Court "insufficiently explained in its decision."

H. Submission Inadequate

In Prochilo v. Prochilo, 2018 Westlaw 5623823 (2d Dept. Oct. 31, 2018), the wife appealed from a March 2016 Supreme Court order, which denied her motion for counsel fees. The Second Department affirmed. The parties were married in August 2006 and the wife commenced the divorce action in May 2011. The parties' June 2015 stipulation resolved all issues except counsel fees; the wife had already received $24,000 in temporary fees. The wife argued that she was entitled to additional attorney's fees because the husband "was the monied spouse and he engaged in obstructionist conduct that prolonged litigation." The Appellate

Division held: "We see no basis to disturb the court's denial of the plaintiff's motion for an award of attorney's fees since the plaintiff failed to provide updated financial information and based her motion on a three-year-old net worth statement.

V. CUSTODY & VISITATION

A. Alcohol Abuse

In Antonella GG. v. Andrew GG., 2019 Westlaw 758601 (3d Dept. Feb. 21, 2019), the mother appealed from an April 2017 Supreme Court order which, after a hearing, granted the father sole legal and physical custody of 2 children born in 2002 and 2003, with significant unsupervised visitation to the mother. The Third Department affirmed, noting from the testimony "that the mother has an alcohol abuse problem that worsened in the years before the parties' split" and that witnesses "depicted the mother as an angry, incoherent drunk who physically and verbally abused the father, accosted responding police officers and engaged in other inappropriate behavior that the children were not insulated from in any way." With respect to legal custody, the Appellate Division found that "the parties have severe communication difficulties that preclude a joint custodial arrangement." The Court concluded: "The father sought to introduce out-of-court statements of the children regarding the mother's misuse of alcohol, which constituted proof of neglect, and the statements were sufficiently corroborated so as to warrant their admission," citing FCA §1046[a][iii][vi].

B. Domestic Violence; Interference with Parental Relationship

In Matter of Wojciulewicz v. McCauley, 2018 Westlaw 5875655 (4th Dept. Nov. 9, 2018), the father appealed from a February 2017 Family Court order which awarded primary legal and physical custody of the children to the mother. The Fourth Department affirmed, finding a sound and substantial basis in the record, noting that the mother "has been a victim of

domestic violence, first with the father when they resided together, and then with an abusive live-in boyfriend with whom she had other children." The Appellate Division found: "There are two critical factors that weigh in favor of the mother: the father's use of excessive punishment, including excessive corporal punishment, and his failure to foster the children's relationship with the mother. The record reflects multiple instances of excessive punishment from the father, the most serious of which involved striking one of the children multiple times with a belt. *** Additionally, the father made a concerted effort to interfere with contact between the children and the mother when the children were in his custody, as well as to interfere with contact between the children in his custody and their siblings. The record establishes that, for a period of six months, the mother was only able to see two of the children if she went to their school and saw them during lunch and the father prevented phone contact between the mother and the children."

C. Facilitate Non-Custodial Parent; Needs of Child; Relocations; Stability

In Matter of Jarvis L. v. Jasmine L., 88 NYS3d 888 (1st Dept. Jan. 3, 2019), the mother appealed from a June 2017 Family Court order, which granted sole legal custody of the child to the father. The First Department affirmed, noting that "the child thrives in the stable environment of petitioner's home and that petitioner is better equipped than respondent mother to address the child's educational, emotional, and material needs. For the first seven years of the child's life, while respondent was the child's primary caretaker, she had a difficult time providing a stable home environment for him, as evidenced by a series of relocations. Moreover, the child missed a substantial number of days from school, repeated the first grade, displayed behavioral problems, and changed school districts three times. During the year that he was in petitioner's care, the child thrived academically, participated in extracurricular activities, and exhibited improved

behavior." The Appellate Division found that the father "was more willing than respondent to facilitate the noncustodial parent's relationship with the child" and concluded that Family Court "gave proper weight to the child's expressed preference to reside with petitioner."

D. Father – Interference – Absconding with Child

In Matter of Jarvis v. Lashley, 169 AD3d 1043 (2d Dept. Feb. 27, 2019), the mother appealed from a February 2017 Family Court order, which granted sole custody of a child born in 2011 to the father. The Second Department affirmed, noting that the parents lived together until the child was 4 years old, when in October 2015, the mother took the child to Georgia without telling the father. The Appellate Division found that the mother: "willfully interfered with the relationship between the father and the child by absconding with the child for three months and not facilitating contact between the father and the child during that time; *** [and] failed to foster a positive relationship between the child and the father after returning to New York."

E. Modification – Education; Hygiene; Rejection of Therapy; School Suspensions

In Matter of Richard I., Jr., v. Darcel I., 2019 Westlaw 1799257 (1st Dept. Apr. 25, 2019), the mother appealed from an April 2018 Family Court order which, after a hearing, modified a prior order so as to grant the father sole legal and physical custody of the subject child. The First Department affirmed, finding that while in the mother's custody, "the child struggled in school, was often late to school and had poor hygiene. The child was also suspended twice from school for violent behavior, and the mother failed to enroll him in therapy despite recommendations by the school. On the other hand, the father worked with the school to help the child improve, enrolled the child in individual therapy and participated in sessions with him, and consistently provided for the child's care and well-being (citations omitted)." The Appellate Division noted:

"The forensic evaluator found that both parents had a strong relationship with the child, but that the father was more willing than the mother to facilitate the noncustodial parent's relationship with the child (citation omitted)."

F. Modification – Sole Custody; Supervised Visitation; Travel to Japan

In Matter of Kayo I. v. Eddie W., 2019 Westlaw 611499 (1st Dept. Feb. 14, 2019), the father appealed from an October 2016 Family Court order, which, after a hearing, modified the parties' 2010 stipulation by awarding the mother sole legal custody, ordering supervised visitation, and permitting the mother to travel to Japan with the child without his consent. The First Department affirmed, holding that the award of sole custody was proper given that joint legal custody is no longer viable, considering the father's "use of physical discipline *** in violation of court orders, and the child's resulting reluctance to be alone with his father." The Court rejected the father's claims that the mother "interfered in his relationship with the child," finding that the mother "was acting on the child's behalf." The Appellate Division held that Supreme Court "properly ordered that respondent's visitation be supervised." The First Department concluded: "The court providently exercised its discretion in permitting petitioner, the custodial parent, to travel to Japan with the child for one month each year, upon 6 weeks notice to the father but without obtaining respondent's prior consent."

G. Modification – Summary Judgment – Mental Health, Neglect

In Matter of Elisa N. v. Yoav I., 2019 Westlaw 1178745 (1st Dept. Mar. 14, 2019), the father appealed from a January 2016 Family Court order, which granted the mother's summary judgment motion upon her petition to modify an October 2014 custody order, and awarded her sole custody of the subject children. The October 2014 order was rendered following a hearing, and granted supervised visitation to the father "without end unless the father could demonstrate

that he was receiving treatment for his mental illness within the next six months." The First Department affirmed, holding that "a full plenary hearing was not required because [Family Court] possessed ample information to render an informed decision on the children's best interests and because the father offered no proof that he was in compliance with his treatment of his mental health issue." The Appellate Division determined that the "neglect finding against [the father] constituted a change in circumstances warranting a modification of the prior custody arrangement" and it was clear that the father "did not get such treatment and that the safety risk to the children has not been mitigated" since the prior order.

H. Modification – Therapeutic Visits; Wishes of Child (14 y/o)

In Matter of Granzow v. Granzow, 168 AD3d 1049 (2d Dept. Jan. 30, 2019), the mother appealed from an October 2017 Family Court order, which, after a hearing, dismissed her October 2016 petition to modify a June 2016 consent order, so as to direct therapeutic visitation with the parties' then 14 year old child, as provided by said order. The June 2016 order provided for joint legal custody and sole physical custody to the father, and provided that "there shall be therapeutic visitation between [the mother] and the minor child as agreed upon by the parties, giving due consideration to the recommendations of the child's therapist and [the mother's] therapist, and consent for such visitation shall not be unreasonably withheld." The order further provided that "in the event such therapeutic visitation does not take place by September 1st, 2016, this shall be deemed a change in circumstances for [the mother] to file a petition for modification." The Second Department affirmed, noting: "the child's therapist unequivocally testified that, in her opinion, the child would not benefit from therapeutic visitation with the mother at this time, and the child was clear and consistent in expressing his opposition to any form of parental access with the mother (citation omitted). To the extent that the court relied

upon the in camera interview of the then 14-year-old child, it was entitled to place great weight on his expressed wishes."

I. Modification – to Father

In Matter of Xavier C. v. Armetha K., 2019 Westlaw 123484 (1st Dept. Jan. 8, 2019), the mother appealed from a February 2018 Family Court order which, after a hearing, modified a prior order by granting the father primary physical custody and final decision-making authority. The First Department affirmed, finding that the hearing testimony established that the father "had a place for the child in his home, and had a plan for addressing his medical, psychological, dental, and educational needs." The Appellate Division determined that "the mother discouraged the relationship between the father and the child by misleading the child as to the identity of his biological father and by failing to produce the child for at least three visits" and "also refused to comply with a prior court order granting the father joint legal custody by refusing to provide him with information about the child's education, medical issues and appointments absent further explicit court directive to do so, and by refusing to involve the father in joint decision making with respect to the child." The Court noted in conclusion that "the child had numerous absences and was late to school on many occasions, and was not promoted to first grade, while in the mother's care" and "she did not address the child's dental health until it became an emergency and he needed to have four teeth extracted."

J. Modification - Without Hearing, Reversed

In Matter of Michael G. v Katherine C., 2018 Westlaw 6537034 (1st Dept. Dec. 13, 2018), the mother appealed from a December 2017 Family Court order, which granted the father's modification petition and awarded him sole legal and physical custody of the child, suspended the mother's access for a year, and prohibited the mother from filing any modification

petitions for a year. The First Department modified, on the law, by reversing so much of the order which suspended the mother's access to the child, and remanded for further proceedings. The Appellate Division noted that there were sufficient alleged changed circumstances, including: the father's claim that the mother had unilaterally prevented him from exercising his visitation under the prior order; the statement by ACS counsel that a report that the father had abused the child was unfounded; and the concerns of the father and the AFC that the mother had coached the then three-year-old child to make false allegations. The Appellate Division held that Family Court "erred when, without holding an evidentiary hearing, it made a final order transferring physical and legal custody to the father and suspending all contact between the mother and the child for a year," where the mother had been the child's primary caretaker. The Court concluded that Family Court's prohibition on future petitions, given "no evidence that the mother had a history of relitigating the same claim or otherwise engaging in frivolous litigation against the father," was not appropriate.

In Matter of Williams v. Jenkins, 2018 Westlaw 6519193 (2d Dept. Dec. 12, 2018), the father appealed from a March 2016 Supreme Court order which, without a hearing, granted the mother's June 2015 petition for sole legal and physical custody of the subject child and for permission to relocate with the child to Illinois, and suspended the father's parental access with the child. The Second Department reversed, on the law, and remitted for a hearing on the mother's petition before a different Justice and a new determination, pending which hearing, Supreme Court was directed to "expeditiously establish a new parental access schedule for the father, and the provisions of the order entered March 3, 2016, pertaining to the child's relocation shall otherwise remain in effect." The parties are unmarried and have one child together. A May 2014 Supreme Court order provided for joint legal custody with physical custody to the mother,

and directed that neither parent could relocate with the child outside New York City or the State of New Jersey, without the written consent of the other parent and the establishment of a mutually agreeable post-relocation parental access schedule, or court approval for relocation. The father claimed that the mother did relocate without court approval. The Appellate Division found that prior to a March 2016 court appearance "the father purportedly appeared at the courthouse and, inter alia, screamed and used inappropriate language at courthouse staff. Without conducting a hearing, the Supreme Court immediately entered an order awarding the mother sole legal and physical custody of the child, and permission to relocate with the child to Illinois." The March 2016 order further provided: "due to the father's disruptive and obstreperous behavior in the court room, having cursed at court personnel . . . all [of the father's parental access is] suspended," and that the father could petition for parental access upon completion of a drug treatment program. The Second Department concluded that the order "serve[d] more as a punishment to the [father] for h[is] misconduct than as an appropriate custody award in the child[ ]'s best interests. (Citation omitted). "

K. Refusal to Allow GAL to Meet Father's Girlfriend; Zones of Decision Making Rejected

In Amley v. Amley, 169 AD3d 605 (1st Dept. Feb. 26, 2019), the father appealed from an October 2016 Supreme Court order after trial, which awarded the mother sole custody of the parties' daughter. The First Department affirmed, noting that the father had not seen the child since March 2016 "due to his refusal to satisfy the court's precondition that he allow [the child's guardian ad litem] to meet his girlfriend, an indication that he apparently cares more about his own needs than those of his child." The Appellate Division held that Supreme Court "correctly set aside the parties' stipulations, which appear to have allocated arenas of decision-making to

each parent, because the stipulations required cooperation and coordination between the parents, which the court correctly found impeded by intense animosity at this juncture."

L. Relocation - Granted (FL) – Initial Custody Determination

In Matter of Ivan J. v. Kathryn G., 164 AD3d 1151 (1st Dept. Sept. 25, 2018), the father appealed from a November 2017 Family Court order which, after a nine day hearing, granted the mother's petition for custody and permitted her to relocate with the parties' child to Florida. The First Department affirmed, noting that where, as here, there is no prior custody order, the Tropea factors "do not govern, and relocation should be considered as one factor in determining the child's best interests." The Appellate Division found that the mother's "plan for caring for the child reflected an ability and willingness to be regularly and fully available for the child in ways that the father cannot and does not." The mother had obtained employment in Florida with the prospect of increasing salary and responsibility, and, further the child had a close relationship with a sister in Florida.

M. Relocation – Granted (VA)

In Matter of Tanya B. v. Tyree C., 2019 Westlaw 80619 (3d Dept. Jan. 3, 2019), the father appealed from an August 2017 Family Court order which, after a hearing, granted the mother's February 2017 petition for permission to relocate from Broome County to Virginia (a 6-hour drive) with the parties' then 7 year old child. A June 2013 order provided for sole custody to the mother and the father had supervised visitation as agreed. The Third Department affirmed, finding that the mother "had been unemployed for two years," was "unsuccessful in her efforts to obtain employment," and her only income was $1,000 per month in SSD benefits. The mother had a written offer of employment and housing in Virginia and planned to reside near a close friend who has grandchildren of comparable ages to the child. The Court found that the mother

had recently married and the two planned to relocate to Virginia together. The mother testified that the combined income of she and her spouse would allow them to meet all living expenses. The Appellate Division further noted that "the father's relationship with the child was almost nonexistent, as evidenced by the fact that he had only seen the seven-year-old child once or twice during the preceding four years."

N. Relocation - Radius Clause Not Determinative

In Matter of Jaimes v. Gyerko, 2018 Westlaw 5274177 (2d Dept. Oct. 24, 2018), the father appealed from a June 2017 Family Court order which, without a hearing, granted the mother's motion to dismiss his petition to modify a March 2014 stipulated order, to enjoin her from relocation with the parties' children from Mamaroneck to Woodbridge, CT, and to appoint an attorney for the children. The Second Department reversed, on the law, denied the mother's motion, and remitted to Family Court for a hearing on the father's petition, holding that while the proposed relocation was within the 55 mile radius permitted by the March 2014 order, the father argued that the relocation would not be in the children's best interests. Therefore, the Appellate Division held that Family Court should not have granted a summary dismissal of the father's petition pursuant to CPLR 3211(a)(1), because the parties' agreement was "not dispositive, but rather, is a factor to be considered along with all of the other factors a hearing court should consider when determining whether the proposed relocation is in the best interests of the children."

O. School Change – Denied

In Verfenstein v. Verfenstein, 95 NYS3d 856 (2d Dept. Apr. 3, 2019), the mother appealed from an August 2017 Supreme Court order, which, after a hearing, denied the mother's motion for permission to enroll the child in the United Nations International School (UNIS), a

private school in Manhattan. The parties married in 2009 and had one child, who is biracial, and separated in 2010, at which time they agreed that the child would live with the mother in Queens. When the child began kindergarten, the parties agreed upon a public school near the father's home in Port Washington (Nassau County) and that the child would live with him on weekdays during the academic year. The father commenced the divorce action in 2016 and the mother moved in August 2016 for permission to enroll the child in UNIS, "contending that the child's educational and emotional well-being as a biracial child would be better suited by being in an ethnically and cultural diverse academic environment." An October 2016 stipulation resolved custody issues other than the school choice and a forensic evaluation was ordered. The Second Department affirmed, holding that the mother's contention was not supported by the evidence, and noting that the mother "conceded that she did not know the percentage of biracial children attending UNIS" and that the child had excelled academically. The Court concluded: "No evidence was presented that the child had been denied his biracial identity in the Port Washington school district, or that his status as a biracial child in that school district had hindered his academic or personal development."

P. Sole - Domestic Violence, Relocation (CA) Permitted

In Levitin v. Levitin, 2018 Westlaw 6332529 (2d Dept. Dec. 5, 2018), the father appealed from a September 2017 Supreme Court judgment of divorce, which, upon a November 2016 decision after trial, among other things, awarded the mother sole custody of the parties' 3 children and permission to relocate to California. The Second Department modified the judgment, on the facts and in the exercise of discretion, only by: (1) adding thereto a provision stating that with respect to the Jewish holidays of Rosh Hashanah, Succoth, Hanukkah, and Purim, commencing upon the close of the school day for all three children on the day prior to the

holiday and ending on the day prior to the children's return to school, the defendant shall have the children on all even numbered years and the plaintiff shall have the children on all odd numbered years, and (2) adding thereto a provision directing that the defendant's telephone contact with the children on Friday evenings and the beginning of Jewish holidays shall be one hour prior to sunset in New York City. The Appellate Division noted that "[t]he plaintiff [mother] alleged that she was the victim of domestic violence, including rape by the defendant" and Supreme Court "credited the plaintiff's allegations of domestic violence and rape." The Second Department held that "contrary to the defendant's contention, the Supreme Court properly considered the allegations of domestic violence, along with all the other relevant factors, in awarding sole custody of the parties' children to the plaintiff" and that "plaintiff's proposed relocation to California with the parties' children is in the best interests of the children." The Appellate Division concluded that the mother demonstrated that the father "ostracized and alienated her from their Orthodox Jewish community in New York, that she could not meet the family's living expenses in New York, and if she were permitted to relocate, she would receive, from her parents, financial assistance and assistance with child care, as well as the opportunity for her and the children to live with her parents rent-free."

Q. Summary Judgment Suspending Visits – Reversed

In Matter of Kenneth J. v. Lesley B., 2018 Westlaw 4778935 (1st Dept. Oct. 4, 2018), the father appealed from a June 2017 Family Court order, which granted the mother's motion for summary judgment and suspended all visitation and contact of any kind between the parties' child and he. The First Department reversed, and restored the pending petitions, holding that Family Court erred in modifying the existing order without a hearing, in reliance upon an in camera interview with the child, motion papers, unsworn letters from a therapist, and an unsworn

and uncertified mental health report, which was "not in admissible form, as is required on a motion for summary judgment."

R. Third Party – Grandparent v. Great Grandparent

In Matter of Cornell SJ v. Altemease RJ, 164 AD3d 1184 (1st Dept. Sept, 27, 2018), the children's (ages 9 and 11) adoptive mother, their maternal great-grandmother, appealed from a June 2017 Family Court order which granted guardianship to her son, the children's grandfather. The First Department modified, on the law and the facts, to the extent of remanding to Family Court to establish visitation for the great-grandmother. The Appellate Division found that the great-grandmother abandoned the children for 5 days without any adult care after an argument with her son, and she returned briefly and then left again and failed to contact the children, provide for them or visit them for almost 11 months. The Court found that the grandfather had been the children's primary caregiver and took care of all of their needs. The First Department concluded that Family Court erred by conditioning visitation upon the children's consent and the parties' agreement.

S. Third Party – Grandparent – Denied

In Miner v. Miner, 164 AD3d 1620 (4th Dept. Sept. 28, 2018), the maternal grandparents and the attorney for the child appealed from a February 2018 Family Court order, which granted sole custody of the children to the father. The Fourth Department affirmed, holding that the grandparents failed to establish extraordinary circumstances based upon an "extended disruption of custody," given that the longest period they had custody of the children was 7 months, following which the father regained custody. The Appellate Division found that the grandparents failed to establish standing by reason of alleged domestic violence against the mother, given that the charges against the father were dismissed.

In Matter of Jones v. Laubacker, 2018 Westlaw 6714408 (4th Dept. Dec. 21, 2018), the parents in an intact family appealed from a May 2018 Family Court order, which, following a hearing, granted the paternal grandmother visitation with two children, including an infant born approximately 5 months following the filing of her initial petition, for two weekends per month. The Family Court order was stayed pending appeal. The Fourth Department reversed, on the law, and dismissed the petitions, finding that Family Court's order "lacks a sound and substantial basis in the record." Prior to a June 25, 2017 incident at the grandmother's home, the older child had at least one overnight visit at the grandmother's home every weekend. On that date, the father and his brother "engaged in a heated argument, which involved yelling," and the father told the grandmother, "[N]o more weekends." An OCFS hot line report was made that same day. CPS investigated and the report was determined to be unfounded. The grandmother filed her first petition on June 28, 2017, which "accused the father of committing 'an incident of domestic violence' on June 25," and noted that a CPS investigation of the incident had commenced. A police officer interviewed the grandmother, who urged him to arrest the father for harassment, but the District Attorney declined to press charges. On November 24, 2017 the younger of the two subject children was born, prompting the grandmother to file a second petition seeking visitation. The Appellate Division noted that the Court of Appeals has emphasized that "the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one," citing Matter of E.S. v. P.D., 8 NY3d 150, 157 (2007). The Fourth Department found: "The parents here are fit. *** There was virtually no evidence to the contrary." The Appellate Division concluded: "Although the grandmother and the child have an extensive preexisting relationship, the grandmother exhibited a willingness to use her position in the legal system to undermine the

parental relationship by initiating Family Court proceedings almost immediately, rather than making a good faith attempt to fix her family relationships without resorting to litigation. That evidence makes it difficult to draw any conclusion other than that the grandmother 'is responsible for escalating a minor incident into a full-blown family crisis, totally ignoring the damaging impact [her] behavior would have on the [family relationships] and making no effort to mitigate that impact' (citation omitted). There is now palpable animosity between the parties. Approximately three months after the litigation commenced, the parents legally changed their hyphenated surname to remove the grandmother's surname. *** Although animosity alone is not a sufficient reason to deny visitation (citation omitted), here, the animosity threatens to disrupt the harmonious functioning of the family unit."

T. Third Party – Maternal Aunt – Alcohol Abuse; Supervised Visitation to Father

In Matter of Haims v. Lehmann, 2019 Westlaw 1782129 (2d Dept., Apr. 25, 2019), the maternal aunt appealed from a December 2017 Family Court order which, after a hearing: awarded her joint legal custody with the father (sole physical custody to her) and failed to award her sole legal custody of a daughter born in November 2011 to her sister (deceased in June 2015) and the father; discontinued the father's therapeutic supervised visitation; and awarded the father unsupervised visitation, including every weekend, Friday through Sunday, effective August 2018. The father cross-appealed from so much of the same order as awarded joint legal custody and sole physical custody to the maternal aunt. The Second Department modified, on the law and the facts, by: (1) awarding the maternal aunt sole legal custody; (2) reinstating the father's therapeutic supervised visitation and deleting the unsupervised visitation; and (3) remitting to Family Court to specify a schedule for the father's aforesaid visitation. The parents separated in March 2013 and the child primarily resided with the mother until May 2015, when the mother

was hospitalized and she stayed with the maternal aunt. Following the mother's death in June 2015, the child remained with the maternal aunt and her family. The maternal aunt filed for guardianship in August 2015, which proceeding was later converted, upon consent, to a custody proceeding. The Appellate Division held that "the maternal aunt sustained her burden of demonstrating the existence of extraordinary circumstances" including the evidence that "the father had abused alcohol for nearly 20 years, had a history of relapses during prior attempts to attain sobriety, and was only at the beginning stages of treatment to achieve sobriety during this most recent period of abstinence." The Second Department determined that Family Court "should not have awarded joint legal custody of the child to the parties given the hostility and antagonism between them" and "should have awarded sole legal custody of the child to the maternal aunt." With regard to the father's visitation, the Court concluded that Family Court's award "lacked a sound and substantial basis in the record."

U. Third Party – Standing – Equitable Estoppel

In Matter of Chimienti v. Perperis, 2019 Westlaw 1646344 (2d Dept. Apr. 17, 2019), Perperis, the biological mother of two children born in September 2014 and May 2016, appealed from a March 2018 Family Court order providing for joint custody with physical custody and final decision-making authority to her upon consent, based upon a September 2017 order rendered following a hearing and which determined that Chimienti had established standing via equitable estoppel. The Second Department affirmed, noting that the Court of Appeals in Matter of Brooke S.B. "expressly left open the issue of whether, in the absence of a preconception agreement, a former same-sex, nonbiological, nonadoptive partner of a biological parent could establish standing based upon equitable estoppel." The Appellate Division held that Family Court's finding that Chimienti "demonstrated by clear and convincing evidence that Perperis

created and fostered a parent-child relationship between Chimienti and the children is entitled to great weight" upon credibility grounds. The parties began a relationship in 2014 before the older child was conceived and remained together until early 2017, after the birth of the younger child in May 2016. Perperis allowed Chimienti access to the children for about 4 months following their separation, but then refused to allow access, and these proceedings ensued. The Court concluded by noting that Perperis "held out ***[Chimienti] to others as the co-parent of the children."

v. UCCJEA - Another Proceeding Pending

Matter of Kawisiiostha N. v. Arthur O., 170 AD3d 1445 (3d Dept. Mar. 28, 2019), the mother appealed from an August 2017 Family Court order which, *sua sponte*, dismissed her July 2017 petition seeking custody of 2 children born in 2009 and 2010, upon the ground that another court had continuing exclusive jurisdiction. The parents and children lived in the territory of the Pawnee Nation of Oklahoma, until December 2015, when the mother moved to NY with the children without the father's consent. In December 2015, the father filed for custody in the Tribal Court; the mother failed to appear and the Tribal Court granted the father full custody in February 2017. Family Court, upon the father's petition, enforced the Tribal Court order directing the return of the children to the Pawnee Nation. The Third Department affirmed, holding that a New York court may not exercise custody jurisdiction where another proceeding is pending in another state, unless that court terminates the proceeding, DRL 76-e(1), a circumstance not here present.

w. UCCJEA – Home State

In Matter of Montanez v. Tompkinson, 2018 Westlaw 6332479 (2d Dept. Dec. 5, 2018), the father appealed from a February 2018 Family Court order, which declined jurisdiction on the

ground that New York is an inconvenient forum and stayed the proceeding pending the reopening of the mother's custody proceeding in Hawaii. The Second Department reversed, on the facts and in the exercise of discretion, and remitted to Family Court. The child was born in New York in May 2016 and in early February 2017, the mother moved to Hawaii with the child, after the father allegedly perpetrated acts of domestic violence against her in the child's presence. On February 7, 2017, ACS commenced a neglect proceeding against the father in Family Court. The mother sought a temporary order of protection in Hawaii Court several weeks later. In May 2017, the father filed for custody in Family Court but was unable to serve the mother until December 2017. In August 2017, the mother filed for custody in Hawaii. The Hawaii Court, apparently unaware of either the neglect petition or the father's custody petition in New York, and upon the father's default, awarded the mother, among other things, sole legal and physical custody. The neglect petition was settled in January 2018, at which time Family Court learned of the Hawaii proceeding. Family Court conferred with the Hawaii Court, and learned that the father was personally served with the mother's petitions. Family Court then declined to exercise jurisdiction, on the ground that New York is an inconvenient forum and that Hawaii is a more appropriate forum, pursuant to Domestic Relations Law §76-f. The Appellate Division determined that Family Court speculated that the Hawaii Court would "likely entertain an application by the father to vacate his default, and then proceed on the merits of the mother's petition." The Second Department held that New York was the child's home state pursuant to the UCCJEA, and, therefore, the Hawaii Court lacked subject matter jurisdiction to make determinations on the mother's custody petition. The Court reasoned that Domestic Relations Law § 76-f(3) provides: "[i]f a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings *upon*

condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper" (emphasis added). The statute, on its face, presumes that a child custody proceeding *will be* commenced in the designated state, not that there already have been child custody proceedings conducted in that state. Here, the Family Court stayed the father's custody proceeding 'pending the *reopening* of the mother's custody proceeding in Hawaii' (emphasis added). Merely reopening the mother's custody proceeding in Hawaii does not ensure that the father will not be prejudiced by the evidence previously received in Hawaii without his participation." The Appellate Division concluded: "Therefore, the Family Court should not have declined to exercise jurisdiction and designated Hawaii as a more appropriate forum without first being assured by the Hawaii Court that all of its prior orders issued without subject matter jurisdiction were vacated. Further, any stay of the father's New York custody proceeding should have been upon the condition that child custody proceedings be promptly recommenced in Hawaii such that all parties would have the opportunity to be heard in a hearing de novo (*see* Domestic Relations Law §76-f[3])."

In Matter of Dean v. Sherron, 2018 Westlaw 6714141 (4th Dept. Dec. 21, 2018), the mother appealed from a September 2017 Family Court order, which dismissed her custody petition for lack of jurisdiction. The Fourth Department reversed, on the law, reinstated the petition and remitted to Family Court for further proceedings. The Appellate Division noted that a "period of temporary absence during the six-month time frame is considered part of the time period to establish home-state residency" pursuant to DRL §75-a[7] and that if a parent wrongfully removes a child from a state, the time following the removal is considered a temporary absence. The Fourth Department found that there were "disputed issues of fact whether the child's four-or five-month stay in North Carolina constituted a temporary absence

from New York State, in light of allegations that respondent father withheld the child from the mother for purposes of establishing a 'home state' in North Carolina (citations omitted) and whether the mother's absence from New York State interrupted the child's six-month pre-petition residency period required by Domestic Relations Law §76 (1) (a)."

X. UCCJEA – Inconvenient Forum

In Matter of Veen v. Golovanoff, 2019 Westlaw 576085 (2d Dept. Feb. 13, 2019), the father appealed from a February 2018 Family Court order, which dismissed the father's enforcement petition based upon lack of jurisdiction. The Second Department affirmed. The parties are divorced and a November 2010 order provided for physical custody to the mother and access to the father. The mother moved to California with the children, with the father's permission, in August 2011. In September 2013, the mother and children moved to Washington state. The father filed his petition in July 2017 and the mother filed a modification petition in Washington in November 2017. The two courts conferred and Family Court relinquished jurisdiction upon the ground of inconvenient forum, citing DRL 76-a(1)(a), 76-f(1) and (2). The Appellate Division upheld Supreme Court's determination, based upon the children's absence from New York since August 2011 and the mother's willingness to pay the father's travel expenses to Washington for a parental evaluation.

Y. UCCJEA – Temporary Emergency Jurisdiction

In Matter of Alger v. Jacobs, 2019 Westlaw 408968 (4th Dept. Feb. 1, 2019), the father appealed from a July 2016 Family Court order, which among other things, directed him to stay away from petitioner and the then 11-month old child and which awarded her sole custody of the child. The father argued on appeal that Family Court erred in denying his motion to dismiss the petitions for lack of subject matter jurisdiction. The Fourth Department affirmed, noting that

DRL 76-c(1) provides that New York courts have "temporary emergency jurisdiction if the child is present in this state and . . . it is necessary in an emergency to protect the child, a sibling or parent of the child." The child was present in New York when the mother filed the petitions. Therefore, Family Court had to determine if it was "necessary in an emergency to protect the child, a sibling or parent of the child." The Appellate Division agreed that "the allegations in the petitions were sufficient to establish the requisite emergency, i.e., they allege acts of physical violence perpetrated by the father against the mother, resulting in her hospitalization in an intensive care unit for several days." The father was incarcerated in Florida and the mother relocated to New York to be with family, who could help her with the child, and to be safe in the event the father was released.

z. Visitation – Supervised

In Matter of William F.G. v. Lisa M.B., 2019 Westlaw 409049 (4th Dept. Feb. 1, 2019), the mother and the attorney for the child appealed from a June 2017 Family Court order which granted the father's petition to modify a prior stipulated order and directed that the father's wife may supervise his visits with the subject children, at locations designated by him, including his own home. The Fourth Department reversed on the law and dismissed the petition. The father was convicted of sexually abusing the parties' then-four-year-old daughter, and the prior order: granted sole legal and physical custody of the children to the mother; required the father's visitation to be supervised by either his therapist, who specializes in sexual abuse, or the maternal grandmother of the children; and specified that visitation was to occur at a location mutually agreed upon by the father and the grandmother. The Appellate Division agreed with the mother that Family Court "erred in drawing a negative inference against her based on her failure to testify at the hearing." The Fourth Department found that a negative inference was not

warranted, in that the mother "had no relevant testimony to offer inasmuch as she had no personal knowledge of the allegations in the modification petition, i.e., the father's completion of sex offender treatment, his compliance with the terms of his probation, his visits with the children, and his marriage to his new wife." The Appellate Division concluded: "The father's employment, his lack of a criminal history other than the sexual abuse of his child, his completion of sex offender treatment, his lack of a history with Child Protective Services, and his lack of a mental health diagnosis do not constitute a change in circumstances because those circumstances existed at the time of the parties' stipulation." The Court noted that "the maternal grandmother has a long history of successfully facilitating positive interaction between the children and the father while providing meaningful protection to the children" since 2013. The Appellate Division cited the testimony of the father's wife, which "demonstrates that she did not know the details of the sexual abuse committed by the father against his daughter."

AA. Visitation – Transportation Responsibility

In Button v. Button, 2018 Westlaw 5292748 (3d Dept. Oct. 25, 2018), the husband appealed from a February 2017 Supreme Court judgment, which determined custodial and visitation issues, directed child support of $525 bi-weekly, counsel fees of $7,500 to the wife, equitable distribution of debt and the husband's NYS pension, and maintenance of $550 bi-weekly. The parties were married in October 2006 and have 3 children, born in 2012, 2013 and 2015. The parties were in their mid-30s at the time of trial and both in good health. The wife moved with the children from the marital residence in April 2015 and commenced this action in June 2015. Supreme Court continued temporary orders of custody and child support that had been entered in Family Court. The Appellate Division rejected the husband's argument that a reduction of his visitation was error, but agreed that Supreme Court erred by requiring that he

provide all transportation and by failing to provide specific times for holiday visits. The Third Department noted "that it was unnecessary for Supreme Court to consider whether a change in circumstances had occurred because the temporary custody order was issued without the benefit of a full plenary hearing (citations omitted) and, further, did not address holiday and vacation schedules." The Court noted that the wife and children live with the wife's parents — a 45-minute drive from the marital residence where the husband continues to reside and that she "did not have a vehicle and arranged for her transportation needs entirely by borrowing vehicles from her parents and a sibling." As of the time of trial, the wife was to graduate from nursing school in May 2018 and begin full-time employment as a registered nurse. The Appellate Division did not disturb the schedule, given that the husband received an additional 4 weeks in the summer and also received a holiday schedule, but found: "In light of the 1½-hour round trip between the parties' residences, the requirement that the husband provide all transportation unduly impairs his mid-week dinner visit; thus, we modify the judgment to provide that the parties shall equally share transportation for the mid-week dinner visits. We also modify the holiday and vacation schedules to include exchange times, as follows: Christmas Eve shall begin at 6:00 p.m. on December 23 and end at 8:00 p.m. on December 24; Christmas Day shall begin at 8:00 p.m. on December 24 and end on December 26 at 8:00 a.m., when the Christmas vacation begins; all other holidays shall begin at 6:00 p.m. the day preceding the holiday and end at 8:00 a.m. the day after the holiday; and the winter and spring school vacations shall begin at the end of the last school day prior to the vacation period and shall end at 6:00 p.m. on the last day of the vacation period." With regard to equitable distribution, the Appellate Division noted that the former marital residence had stipulated equity of $36,600, and the husband has a defined benefit pension plan with New York State. There was additional marital debt, which Supreme Court ordered be

assumed $40,106 by the husband and $3,430 by the wife. The wife wanted the residence to be sold, but Supreme Court awarded the same, with its debt, to the husband. Supreme Court "appeared to equally divide the marital portion of the husband's New York retirement according to the *Majauskas* formula." With regard to the marital debt, the Third Department stated: "we cannot say that Supreme Court's distribution of the marital home and the parties' debt is unjust or inequitable." As to the issue of the pension, the husband argued that the court erred in ordering that he provide the wife with "the minimum survivor benefit" for his pension plan. The Appellate Division stated: "We take judicial notice of the applicable rules of the New York State and Local Retirement System. A participant may designate a former spouse to receive a portion of the preretirement ordinary death benefit and may name others to receive the remainder of that benefit. However, only one beneficiary, or alternate payee, may be named for retirement benefits. We agree with the husband that it would be inequitable to require that he name the wife as a beneficiary of his retirement benefits and thereby preclude him from sharing those benefits with any other person, such as a subsequent spouse. In that regard, we note that the marital portion of the pension is small, the parties are relatively young and the wife has the prospect of gaining employment that should enable her to provide for retirement. Therefore, we modify the judgment by specifically awarding the wife one half of the martial portion of the husband's pension according to the *Majauskas* formula, including one half of the marital portion of the ordinary preretirement death benefit, but excluding any requirement that the husband elect any option that would continue postretirement benefits to the wife following his death." The Third Department agreed with the husband that the maintenance award was excessive and held: "Although Supreme Court properly awarded maintenance to the wife — who had been the primary caretaker of the children since the birth of the oldest child — while she obtained training

as a registered nurse that would allow her to obtain employment and become self-sufficient, the maintenance award must be reassessed in light of its failure to consider the wife's needs and the husband's ability to pay." The Court noted that "neither party could continue to enjoy the predivorce standard of living, which was sustained only by incurring substantial debt, and the parties' negative net worth established that they were in significant financial distress at the time of trial. The obligations imposed on the husband by the judgment total approximately $48,806 annually. Payment of those obligations from his gross earnings of $73,083 would leave him with very little income to cover his own living expenses. At the time of trial, the wife's own living expenses were modest. She incurred no housing expenses because she and the children were residing with her parents, and she had no vehicle of her own. Thus, her direct expenses were limited to gas, food and clothing. Accordingly, we reduce the amount of the maintenance award to $200 biweekly, retroactive to the date of commencement of the action and continuing until July 1, 2018." The Court recalculated the child support award, given reduced maintenance, and found that the presumptively correct amount of the husband's basic child support obligation for three children is $694.81 biweekly. With respect to counsel fees, the Appellate Division agreed that "Supreme Court abused its discretion by awarding the wife $7,500 in counsel fees." The Court concluded: "As aptly noted by Supreme Court, the marital debt exceeded the net value of the parties' assets; indeed, upon equitable distribution, each has a negative net worth. However, inasmuch as the husband was employed and the wife was unemployed while she completed her nursing education, Supreme Court properly found that the wife was the less monied spouse. Although the husband's income is greater than the wife's, his earnings are modest and are largely devoted to payment of maintenance, child support and marital debt. The fact of the matter is that neither party has sufficient assets or income for payment of counsel fees. Although an award of

counsel fees to the wife was appropriate, upon consideration of the parties' financial circumstances, we reduce the award to $3,750."

VI. DISCLOSURE

A. Devices and Email, Social Media Accounts

In Vasquez-Santos v. Mathew, 2019 Westlaw 302266 (1st Dept. Jan. 24, 2019), defendant appealed from a June 2018 Supreme Court order, which denied her motion to compel access by a third-party data mining company to plaintiff's devices, email accounts, and social media accounts, to obtain photographs and other evidence of plaintiff engaging in physical activities. The First Department reversed, on the law and the facts and granted defendant's motion, to the extent that access to plaintiff's accounts and devices was limited to "only those items posted or sent after the accident" and to "those items discussing or showing" plaintiff "engaging in basketball or other similar physical activities." The Appellate Division held: "Private social media information can be discoverable to the extent it 'contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims.'" Here, Plaintiff was at one time was a semi-professional basketball player, and claims that "he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball."

B. Nonparty – Reasons Needed

In Gandham v. Gandham, 2019 Westlaw 1272551 (2d Dept. Mar. 20, 2019), the wife appealed from February 2017 and March 2017 Supreme Court orders which, respectively, granted a nonparty's motion to quash certain subpoenas she issued, and granted the husband's motion for summary judgment dismissing her counterclaim to enforce a June 2016 stipulation of settlement. The Second Department affirmed the order granting the nonparty's motion to quash and reversed, on the facts, the order granting the husband's motion for summary judgment. The

parties' June 2016 stipulation settled the husband's 2014 action for divorce and provided that said action would be discontinued. The husband commenced a second action later in June 2016 and the wife counterclaimed for enforcement of the June 2016 stipulation, against which counterclaim the husband moved for summary judgment, alleging that the stipulation, was "the product of duress and was unconscionable." The husband claimed that the stipulation "transferred virtually all of the marital assets to the defendant and all of the marital debts to the plaintiff," but also "recited that the transfers were 'to compensate the [defendant] for all the marital assets wasted by the [plaintiff],' including payments to women with whom the [plaintiff] allegedly had adulterous relationships and whom he held out publicly as his wives." In December 2016, the wife served subpoenas duces tecum and a subpoena seeking testimony on a nonparty -- one of the women with whom the wife alleged the husband had an adulterous relationship. Supreme Court's February 2017 order granted the motion to quash because: (1) the subpoenas did not comply with CPLR 3101(a)(4) [failure to state the circumstances or reasons the evidence was needed]; and (2) the nonparty demonstrated that the evidence sought was "utterly irrelevant" to the action. The Appellate Division, in affirming the February 2017 order, disagreed "that the testimony sought from the nonparty was utterly irrelevant," but agreed with Supreme Court "that the subpoenas were defective since, among other things, the defendant failed to provide the nonparty with the required explanation of the circumstances or reasons requiring disclosure either on the face of the subpoenas or in any accompanying material," citing CPLR 3101[a][4]. The Court concluded that "Supreme Court should not have granted the plaintiff's motion *** for summary judgment dismissing the defendant's counterclaim." The Second Department held: "Assuming the facts alleged in the stipulation regarding the plaintiff's wasteful conduct are proven, the stipulation is not unconscionable on its face, and the plaintiff

failed to establish, prima facie, his entitlement to judgment as a matter of law dismissing the counterclaim on the basis that the stipulation is unconscionable (citations omitted)." As to duress, in denying summary judgment to the husband, the Appellate Division found that he "met his prima facie burden for judgment as a matter of law dismissing the defendant's counterclaim based upon the defense of duress, by proffering evidence demonstrating that the defendant coerced him to sign the stipulation by making credible threats that she would commit suicide if he refused to sign the stipulation. However, in opposition, the defendant raised a triable issue of fact as to whether the plaintiff executed the stipulation under duress."

VII. ENFORCEMENT

A. Contempt – Health Insurance; Counsel Fees

In Estes v. Bradley, 2018 Westlaw 6519327 (2d Dept. Dec. 12, 2018), the wife appealed from a May 2016 Supreme Court order, which denied, as academic, her January 2016 motion to hold the husband in contempt, for failing to comply with an April 2013 order directing him to provide health insurance for her, and which granted her, without a hearing, counsel fees only to the extent of $10,000. The Second Department reversed, on the law and the facts, and in the exercise of discretion, and remitted for further proceedings. The parties entered into a stipulation of settlement in April 2015, so-ordered in July 2015, which provided that each party would obtain his or her own health insurance, at his or her own expense, after the judgment of divorce was entered. Despite the fact that the judgment of divorce was entered while the wife's January 2016 motion was pending, the Appellate Division held that her request that the husband be found in contempt of the April 2013 order, which mandated him to provide her with health insurance during the pendency of this action, was not rendered academic. With regard to counsel fees, the Second Department found that "although the Supreme Court providently exercised its discretion

in granting that branch of the defendant's motion which was for an award of an attorney's fee (citations omitted), we agree with the defendant that the court improvidently exercised its discretion in awarding her the sum of only $10,000." The Court concluded that $10,000 was "inadequate" and that "a hearing is necessary to determine the amount of a reasonable attorney's fee to which the defendant is entitled, in a sum to exceed $10,000."

B. Incarceration Upheld

In Matter of Garrett v. Jones, 2018 Westlaw 5659897 (3d Dept. Nov. 1, 2018), the father appealed from an April 2017 Family Court order, which revoked the suspension of his sentence of 30 days' incarceration, which suspension had been conditioned upon his making regular child support payments, for his child born in 2005, for 26 weeks following a November 2016 Court appearance. In February 2017, the matter was restored to the calendar upon the mother's allegation that the father was $350 in arrears since November 2016, and he made no further payments before the April 2017 hearing, at which time he stated that his "anticipated new employment had been delayed but that he expected to begin work soon." The Third Department affirmed, finding that "the father paid only $250 toward the total of approximately $950 in child support payments that became due between the entry of the order suspending his sentence of incarceration and the revocation of the suspension," and, further, that the father "failed to support his assertions that new employment was imminent with any evidence other than his own self-serving testimony." The Appellate Division held that "the father's consistent failure to take advantage of the opportunities offered to him by Family Court to comply with his child support obligations," constituted "good cause for the revocation of the suspension of his sentence."

C. Money Judgment – Credit for Payments Made

In Stern v. Stern, 2018 Westlaw 5020059 (2d Dept. Oct. 17, 2018), the husband appealed

from an October 2015 Supreme Court order, which granted the wife's July 2014 motion for a money judgment against him for $353,400, plus prejudgment interest. The Second Department reversed, on the law and the facts, denied an award of prejudgment interest, and remitted for a hearing and a new determination of the motion for a money judgment. The parties were married in August 1980 and the wife commenced this action for divorce in May 2006. A September 2006 preliminary conference order provided as to pendente lite relief: "Status quo [voluntary support payments and household expenses] to be maintained. No motion at this time." During the matrimonial trial, the wife moved for emergency pendente lite relief and a January 2009 order directed the husband to pay the wife's car insurance and $200 per week as interim maintenance. The parties were divorced by an April 2010 judgment of divorce, which directed the husband to pay the wife maintenance retroactive to the date of the commencement of this action, May 26, 2006, and continuing until October 25, 2009. The judgment of divorce also provided that the husband was entitled to credits against his maintenance obligation "for payments of *pendente lite* spousal maintenance actually made pursuant to Court Order." The husband argued in opposition to the wife's motion that he was entitled to credits totaling $393,516.53 against his maintenance obligation. The Appellate Division held that the husband "is entitled to credits against his maintenance obligation as established in the judgment of divorce with regard to the plaintiff's share of such expenses such as mortgage, real estate taxes, and automobile insurance payments" and rejected the wife's contention that the husband's voluntary payments made pursuant to the preliminary conference order, which does not specifically enumerate the payments to be made, cannot qualify as "payments of *pendente lite* spousal maintenance actually made pursuant to Court Order." The Court concluded that to deny the husband a credit for payments made on account of the wife's expenses "would not only be inequitable by providing a windfall for the

benefitted spouse, but it would also discourage voluntary support payments during the pendency of matrimonial actions and likely cause a precipitous rise of pendente lite motion practice by nonmonied spouses." The Second Department concluded: "The amount of credit to which the defendant is entitled cannot be determined on this record. While some payments documented by the defendant appear to be for the benefit of the plaintiff only and could qualify for a credit against maintenance, others are plainly for the children, professional expenses, and other expenses which would not be within the ambit of expenses which the plaintiff would be responsible to pay out of the maintenance she receives." As to prejudgment interest, the Court found that the husband "correctly contends that prejudgment interest should not be assessed against him since he made substantial payments in good faith pursuant to the preliminary conference order, negating a finding of willfulness which would trigger such an award."

D. Receiver Appointed

In Caponera v. Caponera, 165 AD3d 1221 (2d Dept. Oct. 31, 2018), the husband appealed from a September 2015 Supreme Court order, which granted the wife's motion to appoint her as receiver of the marital residence. The Second Department affirmed. The parties' April 2010 stipulation, which was incorporated into a September 2010 judgment, provided that the wife would have exclusive occupancy of the marital residence until November 1, 2013, unless she remarried or cohabited with an unrelated adult, in which case the marital residence would be placed on the market for sale. A July 2014 so-ordered stipulation provided that the marital residence would be transferred to the wife, who married shortly thereafter. The husband then refused to effectuate the transfer of ownership and the wife moved to be appointed as receiver of the marital residence. The Appellate Division held that given "the acrimonious relationship between the parties and the defendant's willful failure to cooperate in effectuating

the transfer of ownership of the marital residence to the plaintiff, as required by the parties' July 2014 so-ordered stipulation, the Supreme Court providently exercised its discretion in appointing the plaintiff to be the receiver of the marital residence."

VIII. EQUITABLE DISTRIBUTION

A. Credit for Funds Dissipated; Proportions (50%)

In Morille-Hinds v. Hinds, 2019 Westlaw 693232 (2d Dept. Feb. 20, 2019), the wife appealed from an April 2016 Supreme Court amended judgment, rendered upon a January 2014 decision after trial and an April 2015 order, which, among other things: (1) directed her to pay the husband $23,122.25 for counsel fees; (2) distributed 50% of the marital property to him; (3) failed to equitably distribute $3,500 allegedly dissipated by the husband; (4) awarded child support based upon his actual income without imputation of additional income; and (5) declined to direct the husband to pay college expenses for the parties' child. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by awarding the wife a credit of $1,750 for her 50% share of marital funds spent by the husband, and otherwise affirmed. The parties were married in August 1993 and had one child born in 1995. The wife commenced the action in September 2007 and Supreme Court rendered a judgment in June 2010 following trial. The husband appealed from so much of the June 2010 judgment which "awarded him only 15% of the value of the parties' real property, the plaintiff's retirement accounts, and certain bank accounts, and imputed an annual income to him in the sum of $80,000 for the purpose of his child support obligation." 87 AD3d 526 (2d Dept. 2011). The Appellate Division reversed and remitted equitable distribution and child support. The wife is a microbiologist and the monied spouse and the husband is a handyman/contractor. Both parties were 54 years old at the time of the retrial. The Second Department noted that the parties "acquired significant assets during the

marriage, including multifamily homes, a home and vacant parcels in St. Lucia, and substantial retirement assets. Most assets were held in the plaintiff's name. The plaintiff earned significant income as compared to the defendant's earnings, which were minimal." On this appeal, the wife contends that she was "entitled to a larger percentage of marital assets as a result of her outsized marital efforts in comparison to the defendant, whom she considered 'lazy,' inasmuch as she was the primary wage earner and also claimed to be the primary caretaker for the parties' child," despite the Appellate Division's finding in the prior appeal that the husband "made significant contributions to the value of the parties' real property." 87 AD3d at 527. The Second Department opined on the prior appeal that the husband's "contribution to the care of the parties' child should have been considered." 87 AD3d at 528. The Appellate Division affirmed the equal distribution of marital property, agreeing with Supreme Court's determination "that each of the parties made significant contributions to the acquisition of the marital assets during this 14-year marriage" and that the husband "also contributed substantially by searching for and finding investment properties that increased significantly in value due to his utilization of his contracting/construction skills in renovating and remodeling the properties" and "participated in the care of the parties' child." On the issue of dissipation, the Second Department agreed with the wife that "Supreme Court should have awarded her 50% of the $3,500 balance that was in the Kraft Foods federal credit union savings account prior to commencement of the action, which sums were spent by the defendant." With respect to imputed income, the Appellate Division rejected the wife's argument that "despite reporting almost nonexistent income of the defendant on joint returns over the years, the defendant should pay child support based upon an $80,000 yearly income," citing its decision upon the prior appeal, which found that "the Supreme Court's determination that the defendant could earn $80,000 annually lacks support in the record." 87

AD3d at 528. On the present appeal, the Second Department found that the husband's "highest reported annual income during the marriage was $18,570" and agreed with Supreme Court's finding that "there was no evidence that the defendant's earning potential was greater than what was earned during the marriage." As to college expenses, the Appellate Division agreed with Supreme Court's determination declining to direct the husband to pay a share thereof, given that the wife "failed to provide any documentary proof of the cost of the college the child had been accepted to and was planning to attend." The Court upheld the counsel fee award, "considering the disparity in the parties' incomes, as well as the fact that the plaintiff failed to produce documents, and that she maintained unreasonable positions regarding the issues of equitable distribution and child support despite the guidance offered by this Court upon its remittal of the issues."

B. Debt - Proportions (50%)

In Mack v. Mack, 2019 Westlaw 758593 (3d Dept. Feb. 21, 2019), the husband appealed from an October 2017 Supreme Court judgment, which distributed marital property and debt and imputed $200,000 in income to him for support purposes. The Third Department affirmed. The parties were married in 2002 and have 2 children born in 2002 and 2004. Supreme Court directed the husband to pay maintenance of $2,485.68 monthly until 2022 and child support of $2,238.50 monthly. The Appellate Division agreed that Supreme Court correctly found that a debt owed by the husband's premarital company (PTI) to a foreign corporation was not his personal obligation and "just as the assets of PTI are separate property, the debts of that corporation should not be considered part of the marital estate." The Third Department rejected the husband's claim that Supreme Court "erroneously considered a $200,000 debt owed by PTI to the husband as a marital asset subject to equitable distribution" and noted that his "argument

that the corporation may not be able to repay the loan is belied by a $50,000 payment made during the pendency of this action." With respect to the husband's challenge to equal distribution of marital property, the Appellate Division held that considering "particularly, the almost 15-year duration of the marriage and the wife's contributions to the household as a homemaker and in caring for the parties' children, while forgoing her own career, the court did not abuse its discretion in awarding the wife 50% of the marital property." As to the issue of imputed income, the Court noted the husband's testimony that "as an electrical engineer, he earned $115,000 in 1995 and was earning $125,000 by 2000, when he left his job and formed PTI. Recent tax returns showed that PTI ran in the negative and the husband had no income." The Third Department held that Supreme Court properly imputed $200,000 in income to the husband, despite his claim that he had no regular paycheck and no earnings, "based on the parties' standard of living, the reality of the husband's business and accounting practices, and testimony that the husband paid personal expenses from corporate accounts."

In Flom v. Flom, 2019 Westlaw 1064152 (1st Dept. Mar. 7, 2019), the wife appealed from a March 2017 Supreme Court judgment which, among other things: (1) distributed 40% of certain marital assets to the wife and 60% to the husband, including an in-kind distribution of an LLC; (2) apportioned 40% of the assets and liabilities related to certain investments to the wife and 60% to the husband; (3) awarded the wife $26,000 per month in taxable maintenance for 6 years; and (4) imputed annual income to the wife of $50,000 for CSSA purposes and applied the then-statutory cap of $141,000. The First Department modified, on the law and the facts, by: (1) increasing the wife's distribution of assets to 50%; (2) increasing her distribution of and responsibility for, the assets and liabilities of the investments to 50%; and (3) imposing a CSSA cap of $300,000, without imputing any income to the wife, and increasing child support for the

parties' unemancipated child from $1,238 per month to $4,250 per month, retroactive to the entry of judgment. The Appellate Division held that Supreme Court "improvidently exercised its discretion in distributing the marital assets 60% to plaintiff and 40% to defendant," citing the principle that "where both spouses equally contribute to the marriage which is of long duration, a division should be made which is as equal as possible." The parties were married for 18 years and had 2 children. The Court found that "the referee divided the marital property unequally solely because defendant was not employed outside the home and the parties hired domestic help, and thus, in the referee's view, she did not contribute equally to the marriage." The First Department cited the trial testimony, which established that the mother "was actively involved with the children, coaching their athletic teams, attending parent-teacher conferences, and, as plaintiff testified, being 'their mom.'" Increasing the marital property distribution to the wife to 50%, the Appellate Division stated: "It is undisputed that the parties enjoyed a lavish lifestyle, and the evidence indicated that defendant played a major role in managing the home, including entertaining clients and paying household expenses from the parties' joint account. The referee's finding that there was no evidence that defendant 'ever cooked a meal, dusted a table or mopped a floor' did not support the court's determination that she was therefore entitled to only 40% of the parties' marital assets." On the issue of marital debt, the First Department determined that Supreme Court "providently exercised its discretion in apportioning liability to defendant for failed investments *** that plaintiff personally guaranteed with a collateral account," finding that "[the husband's] conduct in guaranteeing the loans did not absolve defendant of joint liability." The Court concluded on this issue: "Since the investments were made during the marriage for the benefit of the parties, the parties should share [equally] in the losses." With regard to the in-kind distribution of the husband's interest in an LLC, which the Court increased to 50%, the Appellate

Division rejected the husband's argument that the same "could not be distributed because defendant failed to value the asset" because he proposed "prior to trial to distribute [the LLC interest] in lieu of maintenance." The Appellate Division upheld the maintenance award "based on the lavish lifestyle of the parties during the marriage, and the fact that [the wife] had not worked outside the home in over 20 years." Given the wife's now increased equitable distribution award, and Supreme Court's direction that the husband provide her with health insurance until she qualifies for Medicare, the Court rejected the wife's argument for "at least 12 years, if not lifetime, maintenance." With regard to child support, the First Department held that there was "no basis" for the imputation of $50,000 in annual income to the wife and noted the referee's findings that: the husband "had significantly greater financial resources and a gross income that greatly exceeded defendant's"; the child enjoyed a "luxurious standard of living" during the marriage; and "no deviation from the then-income cap of $141,000 was warranted because plaintiff had voluntarily agreed to pay the child's educational expenses, coaching, tutoring and summer camp." The Court concluded that "given the factors considered, but subsequently disregarded, by the referee *** we find that a $300,000 income cap, which would result in a monthly basic child support award of $4,250, retroactive to entry of the judgment of divorce, would satisfy the child's 'actual needs' and afford him an 'appropriate lifestyle.'"

C. Debt - Proportions; Separate Property Credit

In Westreich v. Westreich, 2019 Westlaw 692975 (2d Dept. Feb. 20, 2019), the husband appealed from a March 2017 Supreme Court judgment, rendered upon an August 2016 decision after trial and a January 2017 order granting the wife counsel fees of $425,000, which: (1) allocated certain marital debt 75% to him and only 25% to the wife; (2) denied him a $2,565,934 separate property credit for the marital residence; (3) awarded the wife 75% of the sale proceeds

from certain antiques, furnishings, and artwork and awarded her 100% of her jewelry; and (4) awarded the wife counsel fees of $425,000. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) directing that the outstanding debt owed to a Trust shall be paid 50% by each party; and (2) awarding the husband a $2,565,934 separate property credit, and otherwise affirming the judgment. The parties were married in May 2001 and have 2 children born in 2002 and 2003. The wife commenced the divorce action in May 2013. A July 2015 agreement resolved custody issues (joint legal, equal sharing) and provided that the wife would be deemed the primary residential parent for CSSA purposes. The remaining issues were tried commencing in January 2016. The Second Department noted the parties' "substantial wealth" and that: the husband was awarded a multimillion dollar condominium in Sea Island, Georgia; the wife was awarded a multimillion dollar vacation property in Southampton; the marital residence in Old Westbury, which is to be sold, is worth between $7.6 and $10.5 million; the husband has a business interest (Monday Properties) found to be worth over $7.5 million, of which the wife was awarded a 25% share; and the husband has an interest in a portfolio of office buildings in Rosslyn, Virginia, determined to be worth almost $14.5 million, of which nearly $9.7 million was determined to be marital property and of which the wife was awarded a 25% interest. The wife asserted on appeal that the net value of her equitable distribution award is $17,336,371, taking into account both the assets and the debts allocated to her. The husband argued on appeal that responsibility for the debt owed to the Trust should have been allocated equally between the parties, based upon Supreme Court's finding that the same was used for his purchase of real estate holdings, and that such holdings generated income for the parties during the marriage. The Appellate Division agreed, holding that there was "no dispute as to the legitimacy of the debt and that both parties benefitted therefrom" and that there

was "no reason why responsibility for the amount of debt left unpaid should be allocated differently from the responsibility for [a prior] partial payment *** made on that same debt." The Court concluded: "Given the substantial nature of the assets received by both parties, the Supreme Court's unchallenged and explicit finding that the debt to the Trust was marital debt from which both parties benefitted, and the court's determination that the defendant's payment of a portion of the Trust debt from marital funds during the pendency of the action was not inappropriate, we conclude that the responsibility for the remaining debt owed to the Trust should be apportioned equally between the parties." With respect to the allocation to him of 75% of certain other debt attributable to a real estate investment and only 25% to the wife, the Appellate Division held that since Supreme Court "allocated the value of Monday Properties 75% to the defendant and 25% to the plaintiff, we see no reason to disturb the court's allocation of this investment debt in the same proportion, particularly given the absence of any finding by the court that the plaintiff derived any particular or special benefit from the subject property." With respect to the husband's claim for a separate property credit of $2,565,934 for the marital residence, although Supreme Court allocated the sale proceeds 60% to him and 40% to the wife, based on his contribution of separate property to the purchase, renovation, and furnishing of the residence, the Appellate Division held that given that there was no evidence that refuted his contention that the source of funds transferred into a joint account a few days before the closing was the husband's separate property, and further, that "there was no evidence that the funds used to provide the cash component of the purchase price of the marital residence did, or even could have, come from any marital property source, *** the conclusion is inescapable that the $2,565,934 came from the defendant's premarital assets, and he should have received a credit therefor." With respect to the husband's argument that Supreme Court should not have awarded

the wife 75% of the proceeds from the sale of the furnishings, antiques, and art in the marital residence, and 100% of her own jewelry, the Second Department upheld this determination, given that the wife "used her knowledge and expertise in acquiring the personalty in the marital residence, while the defendant was uninvolved. Further, the parties gave each other jewelry during the marriage, and it was appropriate for each party to retain his and her jewelry." The Appellate Division did not address the counsel fee issue directly, except to state that the husband's "remaining contentions are without merit."

D. Debt – Student Loans (Each Own); Wasteful Dissipation Not Found

In Haggerty v. Haggerty, 2019 Westlaw 408799 (4th Dept. Feb. 1, 2019), the wife appealed from a June 2017 Supreme Court judgment which, among other things, directed her to pay counsel fees of $14,000 to the husband. The Fourth Department modified in the exercise of discretion and on the law, by vacating the counsel fees award, and otherwise affirmed. The Appellate Division rejected the wife's argument that she should have been given a credit for marital assets allegedly dissipated by the husband, finding that he "established that he used those particular assets to pay for marital expenses." The Fourth Department rejected the wife's contention that Supreme Court erred in directing that her ability to claim one of the parties' two children as a dependency exemption was upon the condition that she remain "current with her child support obligation for a full calendar year," noting her "prior failure to pay child support." With respect to the parties' combined student loan debt, the Appellate Division recognized that there "may be circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse" and concluded that Supreme Court "did not abuse or improvidently exercise its discretion in directing that each party be responsible for his or her student loan debt." The Fourth Department agreed with the wife that the $14,000 counsel

fee award to the husband should be vacated, finding that "where neither party is a 'less monied spouse' (Domestic Relations Law §237[a]), and plaintiff [the wife] has significantly more student loan debt than defendant, we conclude in the exercise of our discretion that the award should be vacated and that each party should be responsible for his or her own attorneys' fees."

E. Debt – Student Loan

In Ragucci v. Ragucci, 170 AD3d 1481 (3d Dept. Mar. 28, 2019), the husband appealed from a January 2018 Supreme Court judgment, which held him solely responsible for a $224,000 student loan for the college education of the parties' middle child, born in 1990. The Third Department affirmed. The subject child attended a private college at a cost of $36,000 per year, and college savings accounts from the paternal grandfather were insufficient to cover the total costs. The husband testified that he and the wife told the child that her chosen college was cost prohibitive and that, if she wanted to attend, she would be responsible to pay for her education. The Appellate Division found: "Significantly, only the husband's personal information and signature appear on the loan application. We further note that it is undisputed that the husband was in charge of the family's finances during the marriage. Ultimately, the principal balance on the student loan totaled more than $154,000." The husband testified that, with the assistance of his father, he made the student loan payments starting in 2009, and stopped making payments in April 2012 when his father became ill. The husband mistakenly believed that the child had thereafter taken responsibility for the loan repayments; apparently, the child had instead been making payments on other loans. The student loan went into default, resulting in imposition of more than $43,000 in additional fees and collection costs. The Court concluded: "Supreme Court found that the wife had no knowledge of the student loan. The wife testified that she was not aware of the loan prior to this divorce action, and that she believed that the grandfather had

contributed to the child's education costs, as with the parties' other children. The husband did not assert in his testimony that he and the wife ever discussed the loan, and further admitted that he had never asked the wife to contribute to the loan repayments. In 2012, he listed the loan in his interrogatories as his individual obligation. Moreover, the husband testified that it was his understanding that, as the co-signer on the loan, he was obligated to make payments on the loan in the event of a default. Under these circumstances, we cannot say that Supreme Court abused its discretion in allocating the student loan debt solely to the husband."

F. Debt - Unequal; Pension – No Survivor Benefit

In Button v. Button, 2018 Westlaw 5292748 (3d Dept. Oct. 25, 2018), the husband appealed from a February 2017 Supreme Court judgment, which determined custodial and visitation issues, directed child support of $525 bi-weekly, counsel fees of $7,500 to the wife, equitable distribution of debt and the husband's NYS pension, and maintenance of $550 bi-weekly. The parties were married in October 2006 and have 3 children, born in 2012, 2013 and 2015. The parties were in their mid-30s at the time of trial and both in good health. The wife moved with the children from the marital residence in April 2015 and commenced this action in June 2015. Supreme Court continued temporary orders of custody and child support that had been entered in Family Court. The Appellate Division rejected the husband's argument that a reduction of his visitation was error, but agreed that Supreme Court erred by requiring that he provide all transportation and by failing to provide specific times for holiday visits. The Third Department noted "that it was unnecessary for Supreme Court to consider whether a change in circumstances had occurred because the temporary custody order was issued without the benefit of a full plenary hearing (citations omitted) and, further, did not address holiday and vacation schedules." The Court noted that the wife and children live with the wife's parents — a 45-

minute drive from the marital residence where the husband continues to reside and that she "did not have a vehicle and arranged for her transportation needs entirely by borrowing vehicles from her parents and a sibling." As of the time of trial, the wife was to graduate from nursing school in May 2018 and begin full-time employment as a registered nurse. The Appellate Division did not disturb the schedule, given that the husband received an additional 4 weeks in the summer and also received a holiday schedule, but found: "In light of the 1½-hour round trip between the parties' residences, the requirement that the husband provide all transportation unduly impairs his mid-week dinner visit; thus, we modify the judgment to provide that the parties shall equally share transportation for the mid-week dinner visits. We also modify the holiday and vacation schedules to include exchange times, as follows: Christmas Eve shall begin at 6:00 p.m. on December 23 and end at 8:00 p.m. on December 24; Christmas Day shall begin at 8:00 p.m. on December 24 and end on December 26 at 8:00 a.m., when the Christmas vacation begins; all other holidays shall begin at 6:00 p.m. the day preceding the holiday and end at 8:00 a.m. the day after the holiday; and the winter and spring school vacations shall begin at the end of the last school day prior to the vacation period and shall end at 6:00 p.m. on the last day of the vacation period." With regard to equitable distribution, the Appellate Division noted that the former marital residence had stipulated equity of $36,600, and the husband has a defined benefit pension plan with New York State. There was additional marital debt, which Supreme Court ordered be assumed $40,106 by the husband and $3,430 by the wife. The wife wanted the residence to be sold, but Supreme Court awarded the same, with its debt, to the husband. Supreme Court "appeared to equally divide the marital portion of the husband's New York retirement according to the *Majauskas* formula." With regard to the marital debt, the Third Department stated: "we cannot say that Supreme Court's distribution of the marital home and the parties' debt is unjust or

inequitable." As to the issue of the pension, the husband argued that the court erred in ordering that he provide the wife with "the minimum survivor benefit" for his pension plan. The Appellate Division stated: "We take judicial notice of the applicable rules of the New York State and Local Retirement System. A participant may designate a former spouse to receive a portion of the preretirement ordinary death benefit and may name others to receive the remainder of that benefit. However, only one beneficiary, or alternate payee, may be named for retirement benefits. We agree with the husband that it would be inequitable to require that he name the wife as a beneficiary of his retirement benefits and thereby preclude him from sharing those benefits with any other person, such as a subsequent spouse. In that regard, we note that the marital portion of the pension is small, the parties are relatively young and the wife has the prospect of gaining employment that should enable her to provide for retirement. Therefore, we modify the judgment by specifically awarding the wife one half of the martial portion of the husband's pension according to the *Majauskas* formula, including one half of the marital portion of the ordinary preretirement death benefit, but excluding any requirement that the husband elect any option that would continue postretirement benefits to the wife following his death." The Third Department agreed with the husband that the maintenance award was excessive and held: "Although Supreme Court properly awarded maintenance to the wife — who had been the primary caretaker of the children since the birth of the oldest child — while she obtained training as a registered nurse that would allow her to obtain employment and become self-sufficient, the maintenance award must be reassessed in light of its failure to consider the wife's needs and the husband's ability to pay." The Court noted that "neither party could continue to enjoy the predivorce standard of living, which was sustained only by incurring substantial debt, and the parties' negative net worth established that they were in significant financial distress at the time

of trial. The obligations imposed on the husband by the judgment total approximately $48,806 annually. Payment of those obligations from his gross earnings of $73,083 would leave him with very little income to cover his own living expenses. At the time of trial, the wife's own living expenses were modest. She incurred no housing expenses because she and the children were residing with her parents, and she had no vehicle of her own. Thus, her direct expenses were limited to gas, food and clothing. Accordingly, we reduce the amount of the maintenance award to $200 biweekly, retroactive to the date of commencement of the action and continuing until July 1, 2018." The Court recalculated the child support award, given reduced maintenance, and found that the presumptively correct amount of the husband's basic child support obligation for three children is $694.81 biweekly. With respect to counsel fees, the Appellate Division agreed that "Supreme Court abused its discretion by awarding the wife $7,500 in counsel fees." The Court concluded: "As aptly noted by Supreme Court, the marital debt exceeded the net value of the parties' assets; indeed, upon equitable distribution, each has a negative net worth. However, inasmuch as the husband was employed and the wife was unemployed while she completed her nursing education, Supreme Court properly found that the wife was the less monied spouse. Although the husband's income is greater than the wife's, his earnings are modest and are largely devoted to payment of maintenance, child support and marital debt. The fact of the matter is that neither party has sufficient assets or income for payment of counsel fees. Although an award of counsel fees to the wife was appropriate, upon consideration of the parties' financial circumstances, we reduce the award to $3,750."

G. Enhanced Earnings (MBA – 0%); Separate Obligation & Student Loan Debt

In Lynch v. Lynch, 2019 Westlaw 138524 (2d Dept. Jan. 9, 2019), the wife appealed from a December 2015 Supreme Court judgment, which, upon an April 2015 decision made in

the wife's October 2011 divorce action, upon written submissions in lieu of a trial: (1) declined to make any equitable distribution award to her for an MBA received by the husband during the marriage; (2) directed that the parties be equally responsible for certain amounts the husband borrowed from the parties' home equity line of credit; and (3) granted the husband a credit for one-half of student loans paid for his MBA. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by deleting the credit to the husband for one-half of the student loans paid for his MBA. The parties were married on December 26, 1993. It was a second marriage for both parties and there were no children of their marriage. The husband lost his job as a JP Morgan Vice President in late 2001, where he earned a high of $233,562 in 1996. He started his MBA program in September 2002 and earned his degree in May 2004. With regard to relative contributions, the Court found: "His classes were held on Saturdays and he studied and prepared papers without assistance from the plaintiff. His tuition and books were paid by student loans and by credit card. The plaintiff, however, provided the defendant with funds for personal and living expenses, paid joint expenses such as the home mortgage and car insurance, provided medical insurance through her employment, maintained the marital residence, and helped care for the children and the family pets." Defendant became re-employed with JP Morgan Chase in February 2003 and earned over $186,000 in 2005 including part-time teaching, before taking a Senior Vice President job at Citigroup in 2006. At Citigroup, the husband earned highs of $260,847 in 2012 and $250,000 in 2013, before being laid off in July 2013. The wife's expert valued the MBA enhanced earnings at $185,463, plus an additional $21,362 based on the husband's part-time teaching position. The wife contended that she was entitled to 35% of the $206,000 total of the enhancements. The Second Department found that the husband "did not acquire his MBA degree until May 2004. Between 1996 and 2000, the

defendant's actual earnings exceeded the 'base line' earnings [$197,540] attributed to him. Thus, we agree with the Supreme Court's conclusion that the statistical data used by the plaintiff's expert to establish the defendant's 'base line' earnings significantly understated the defendant's pre-MBA degree earnings capacity. Given that the defendant earned $233,562 while employed by J.P. Morgan in 1996, we cannot accept the premise of the plaintiff's expert that his income of $240,723 per year while employed by Citigroup in 2011 reflects a substantial, measurable enhancement of his lifetime earning capacity attributable to his acquisition of an MBA degree in 2004. We see no error in the court's conclusion that obtaining the MBA degree merely allowed the defendant to secure employment at a substantially similar level of compensation to what he had earned in the past." The Court concluded that (a) the husband's part-time teaching position "did not reflect an enhancement to his lifetime earning capacity by virtue of his acquisition of the MBA degree"; and (b) "even if the defendant were to be viewed as having enhanced his lifetime income by reason of his acquisition of an MBA degree, the plaintiff failed to establish that she made substantial contributions towards his achievement of that degree." While the wife established that the husband "may have borrowed the sum of $30,000 from the HELOC to make a scheduled lump sum payment to his prior wife," the Court concluded: "This is not the sort of expenditure made during the marriage that may be second-guessed by the courts in a later divorce action (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 421-422)." As to the student loan debt, the Second Department held that since the wife "was not granted a distributive award based on the value of the MBA degree, and given the court's determination not to obligate the plaintiff to pay any portion of the balance of these loans herself, the provision giving the defendant an equitable distribution credit for one-half of the amount he paid to satisfy these loans should be deleted." With regard to the choice of written submissions as opposed to a trial, the

Court stated: "While we disapprove of this unorthodox procedure, the resort to it provides no basis for reversal given the explicit consent by counsel to forgo the parties' respective rights to a trial on the contested issues."

H. Marital Property Presumption

In Prokopov v. Doskotch, 166 AD3d 1408 (3d Dept. Nov. 29, 2018), the husband appealed from a December 2015 Supreme Court judgment which directed equitable distribution. The parties were married in January 2002 and have two children born in 2002 and 2009. The wife commenced the divorce action in February 2013. The Third Department affirmed, rejecting the husband's argument that Supreme Court erred by characterizing as a marital asset, a certain rental property acquired by his mother and gifted to him. The Appellate Division found: (1) that the property was acquired in June 2008, in the name of the husband's mother, who deeded the property to the husband in August 2008; (2) in September 2012, the husband deeded the property back to his mother; and (3) the husband made a $1,000 down payment to acquire the property and provided a $50,504.49 bank check to pay the balance due at closing. The husband testified that his mother provided the funds used to purchase the property, and described a joint fund that he had with his mother, from which $58,314 had been withdrawn in January 2007 and deposited into his account pending the closing. The husband denied ever having access to or depositing any money into the joint fund. The wife testified that the funds to buy the rental property were from the husband's salary, and that the husband's mother had no income to place in the joint fund. The wife also testified that the husband personally performed substantial renovations on the property, collected the rents and used the funds to pay marital expenses. Supreme Court found that the husband's explanation as to his mother's interest in the property lacked credibility, and the Appellate Division noted that "no showing was made as to the actual source of funds deposited

into that account, which was opened in August 2005." The Court concluded: "It is also telling that, shortly after the wife informed the husband that she had consulted an attorney about a divorce, he transferred the property back to his mother. His explanation for doing so — to avoid arguments at home — was simply implausible. We conclude that the record evidence supports the court's determination to distribute the rental property as a marital asset."

I. Proportions – Bank Accounts – Credit for Use of Marital Funds; Marital Residence Sale Directed

In Gorman v. Gorman, 2018 Westlaw 5274250 (2d Dept. Oct. 24, 2018), the wife appealed from a December 2015 Supreme Court judgment which, after trial, awarded her only $4,500 per month in maintenance for 8 years, distributed marital property, and imputed annual income to her of $26,000, and the husband cross-appealed from so much of the judgment as failed to award him a share of bank accounts, as awarded maintenance, and $20,000 in counsel fees to the wife. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) decreasing the amount of maintenance to $2,750 per month and making the same tax-free to the wife, but increasing the duration until the earliest of the wife's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party; (2) requiring the husband to maintain $500,000 in life insurance for the wife so long as he is obligated to pay maintenance; (3) by directing the husband to provide health insurance for the wife until she becomes eligible for coverage through employment or through Medicare, whichever shall first occur; and (4) providing that the parties' joint checking account and savings accounts ($95,981.18 + $44,458.50), be equally divided between the parties, with a $1,600 credit to the wife. The parties were married on May 16, 1987. The wife worked as a legal secretary for a period of time, and left the workforce to become a homemaker and to care for the

parties' two children (now in their mid-to-late twenties), while the husband in various capacities connected with the US military, including defense contracting work in Iraq. The husband commenced the action in August 2011. As to maintenance, the Appellate Division found that "considering the relevant factors, including the ages of the parties, the long duration of the marriage and the extended absence of the defendant from the workforce, the distribution of the marital assets, the parties' respective past and future earning capacities, and the availability of retirement funds and pensions, the Supreme Court providently exercised its discretion in awarding the defendant durational, as opposed to lifetime, maintenance (citations omitted). However, rather than providing for a durational limitation of eight years and subjecting that award to termination upon the plaintiff's remarriage, under the circumstances of this case, the maintenance award should continue until the earliest of the defendant's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party (citations omitted)." As to imputed income to the husband of $151,192, the Second Department found that "from 2008 through late 2013, the plaintiff was employed overseas in Iraq and, as a result of such employment, received a significantly augmented salary, enhanced overtime, and no-cost room and board. In December 2013, the plaintiff returned to the United States, taking up residence in Ohio, where he resides with his fiancée. As of the time of trial, the plaintiff was employed by the Department of Defense as a quality assurance inspector at a salary of $81,079 per year. The plaintiff did not submit a current statement of net worth. He acknowledged that his earnings are deposited into a joint checking account with his fiancée and that all of his monthly expenses are shared with his fiancée. The plaintiff also acknowledged that he regularly gambles, to the point that he has received free hotel accommodations, airfare, vacations (including a cruise), and other free or discounted items because of his frequent

gambling. In 2013, he reported gambling winnings of $11,250 on his tax return. He acknowledged winning $1,800 over two days of gambling in September 2014." The Appellate Division concluded that the imputed income to the husband should be $100,000. With regard to imputed income to the wife, the Court stated: "While we agree with the defendant that the Supreme Court should not have imputed income to her based on statistical information from the New York State Department of Labor that was not admitted in evidence at trial (citation omitted), there was evidence, nonetheless, that the defendant had earned $15 per hour as a legal secretary during the early part of the marriage. Even though she has been out of the work force for an extended period of time and does not have a college degree, she is in good health and has a sufficient employment history to warrant the conclusion that she is capable of earning at least the sum of $26,000 annually, which is the amount of income imputed to her by the court." The Second Department concluded on the issue of maintenance that the husband should pay the wife $2,750 per month, "which sum shall be neither tax deductible by the plaintiff nor taxable to the defendant." As to life insurance, the Appellate Division directed the husband "to purchase, pursuant to Domestic Relations Law §236(B)(8)(a), a life insurance policy in the amount of $500,000, designating the defendant as sole irrevocable beneficiary for only as long as the plaintiff is obligated to pay maintenance to the defendant." On the issue of health insurance, the Appellate Division held that Supreme Court "should have directed the plaintiff to provide health insurance for the plaintiff until she becomes eligible for coverage through employment or through Medicare." As to the marital residence, the Court held that "Supreme Court providently exercised its discretion in directing the sale of the marital residence because the parties' children have reached majority, there is no need of a spouse as a custodial parent to occupy the residence for the children (citation omitted), and neither party submitted a market-based valuation of the

marital residence. With regard to the bank accounts, the Court directed and equal division as to their commencement date values, but since the husband "purchased a diamond engagement ring for $3,200 for his fiancée prior to commencement of this action, and failed to prove that it was separate property," the wife is entitled to a 50% credit for the ring's purchase price ($1,600). Finally, the Second Department held that given "the relative financial circumstances of the parties and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant $20,000 in attorney's fees."

J. Proportions – Business (10% & 40%); Valuation Date - DOC

In Cotton v. Roedelbronn, 170 AD3d 595 (1st Dept. Mar. 26, 2019), the wife appealed from an October 2017 Supreme Court judgment, which awarded her 10% of the husband's business interests valued at $19.94 million and 40% of two other business interests valued at $3.28 million and $655,943, respectively, and maintenance of $20,000 per month for 3 years. The First Department affirmed, rejecting the wife's contention that the date of commencement valuation of the businesses was improper, and finding that the husband's business assets were actively managed. As to the proportions, the 10% award was upheld because "the value of these businesses was primarily derived from efforts made by plaintiff and his partners prior to the marriage, and that defendant made little, if any, contribution to the growth of these businesses" and, further, that the wife "at times acted as a hindrance to plaintiff's business dealings." The Appellate Division upheld the 40% award, declining to increase it to 50%, noting the Referee's finding that while the wife "made no direct contribution to these business entities, *** she shared in the parties' restrained lifestyle that allowed these particular investments to grow." The First Department affirmed the maintenance award, citing both the Referee's finding that the wife's statement of net worth was "riddled with misstatements, inaccuracies and unsubstantiated

expenses" and expert testimony "that this amount and duration would be sufficient to meet defendant's needs and allow her to re-enter the employment market."

K. Proportions - Business (50%); Enhanced Earning Capacity (25%); Separate Property Commingled, Restored

In Belilos v. Rivera, 164 AD3d 1411 (2d Dept. Sept. 26, 2018), both parties appealed from an October 2015 Supreme Court judgment which awarded the wife maintenance of $5,000 per month for 5 years, restored $150,000 of the wife's separate property, which had been placed in a joint account, to the wife, awarded the wife 25% of the husband's enhanced earning capacity from advanced degrees and certifications and 50% of the husband's business interests, and awarded the wife $75,000 in counsel fees and $15,000 in expert witness fees. The Second Department affirmed. As to the inheritance, the wife established that she received $150,000 as an inheritance from her uncle, which was deposited into a joint account because she had no bank accounts in her name alone, and further, the husband admitted at his deposition that he intended to return the $150,000 to the wife "to make things right." The Appellate Division upheld the 50% award of the business interests, and as to the 25% enhanced earning capacity award, found that the wife "demonstrated that she substantially contributed to the defendant's acquisitions of his advanced degrees and certifications." The Court upheld the maintenance, counsel fee and expert witness fee awards as appropriate exercises of discretion.

L. Proportions – Long Marriage (50%); Separate Property – Commingling

In Eschemuller v. Eschemuller, 167 AD3d 983 (2d Dept. Dec. 26, 2018), the husband appealed from a January 2016 Supreme Court judgment which, upon a May 2015 decision after trial, directed equitable distribution. The parties were both born on 1947, married in August 1969 and have two emancipated children. The husband earned his MBA and engineer's license

during the marriage, and the wife has a master's degree and license in teaching and worked as a teacher. The parties separated in May 2007 and the wife commenced the action in June 2007. The Second Department affirmed the judgment, finding that "although the defendant [husband] was the more substantial wage earner throughout the marriage, the plaintiff [wife] made both economic and noneconomic contributions to the marriage which allowed the parties to amass a substantial marital estate," and holding that Supreme Court "providently divided the parties' marital assets, in effect, equally." As to the issue of separate property commingling, the Appellate Division held that the husband "failed to establish that, over the years, certain personal injury awards retained their separate character" and that he "failed to present sufficient evidence to support his claim of a set off for personal injury awards."

M. Proportions- Marital Residence (5%); Separate Property – Found

In Larowitz v. Lebetkin, 170 AD3d 578 (1st Dept. Mar. 26, 2019), the husband appealed from an October 2015 Supreme Court judgment, which, in the wife's 2011 action for divorce, valued the marital residence at $1.6 million, awarded him 5% of the appreciation thereof, and determined the wife's Merrill Lynch account to be her separate property. The date of the marriage is not specified; however, the Court's decision refers to 1995 as being "after the marriage" and 1982 being "well before the marriage." The First Department affirmed, rejecting the husband's argument that a 5% award is "only for spouses who commit heinous domestic violence," while noting that "he received 30% of two other assets and 50% of a third asset." The Appellate Division found that the husband's challenge to the neutral expert's marital residence appraisal, based on his testimony alone, was unavailing. The Court found that the wife "attested on her net worth statement, and testified at trial, that the Merrill Lynch account was opened in 1982, well before the marriage, for her and her sister's benefit, and was funded by gifts from her

father."

N. Proportions – Marital Residence (70%); Valuation – Law Practice ($0)

In Giallo-Uvino v. Uvino, 2018 Westlaw 5020409 (2d Dept. Oct. 17, 2018), the wife appealed from an April 2016 Supreme Court judgment of divorce which, upon a February 2016 decision of the court made after an inquest, among other things: (1) valued the husband's law practice as of the date of trial and determined that the practice had no value; (2) awarded her only 55% of the net proceeds of the sale ($561,266.75) of the marital residence; (3) declined to award her an attorney's fee and expert fees, and (4) determined that the wife was not entitled to an award of maintenance. The Second Department modified, on the law, on the facts, and in the exercise of discretion: (1) by awarding the wife 70% of the net proceeds of the sale of the marital residence; and (2) by awarding the wife an attorney's fee of $70,000. The parties were married in June 2000, and have one child. The wife worked as a registered nurse, and the husband was an attorney with his own law practice. In July 2012, the wife commenced this action for a divorce and the husband appeared in the action. He failed to appear for the trial in July 2015, and Supreme Court held an inquest. The Appellate Division held that "Supreme Court providently exercised its discretion in valuing the [husband's] law practice as of the date of trial, rather than the date of commencement of the action," given that the wife "failed to establish that the defendant, who was disbarred during the pendency of this action (citation omitted) intentionally lost his license in order to devalue his law practice (citation omitted) *** [and] failed to establish that the defendant's business had any value as of the date of trial." As to maintenance, the Second Department found: "considering the relevant factors, including, inter alia, the duration of the marriage, the present and future earning capacity of the parties, and the ability of the party seeking maintenance to become self-supporting, the Supreme Court did not improvidently

exercise its discretion in declining to award maintenance to the plaintiff." The Appellate Division held that "Supreme Court improvidently exercised its discretion in awarding the plaintiff only 55% of the net proceeds of the sale of the marital residence" [and] [b]ased on the circumstances of this case, we find that the plaintiff is entitled to 70% of the net proceeds of the sale of the marital residence." As to counsel fees, the Court concluded that "Supreme Court improvidently exercised its discretion in declining to award the plaintiff an attorney's fee," and a factor to be considered is "whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation (citations omitted)." Here the Second Department found that the husband failed "to timely provide certain financial documentation which unnecessarily prolonged the litigation, [and] the court should have awarded the plaintiff an attorney's fee in the sum of $70,000."

o. Proportions - Medical Practice (30%); Trust Not Distributed

In Oppenheim v. Oppenheim, 168 AD3d 1085 (2d Dept. Jan. 30, 2019), the wife appealed from an April 2016 Supreme Court judgment, rendered upon a January 2016 decision after the trial of an April 2014 action, which failed to distribute the value of a family trust created in 2012, failed to award her maintenance, and awarded her only a 30% share of the husband's interest in a medical practice. The Second Department affirmed. The parties were married in 1992 and have 3 children, all emancipated. The husband is a neurosurgeon, and the wife is licensed as a Certified Financial Analyst, but has not been employed since the first child was born. Supreme Court found that the wife failed to prove that the husband acted inequitably in the creation of the family trust or that his intent was to defraud her for his own benefit, and determined that the family trust was created prior to any indication of marital discord. Supreme Court awarded the wife a 30% share of the husband's interest in the medical practice, based upon

her indirect contributions, and declined to award her maintenance, given "the parties' distributive shares of the substantial marital estate." The Appellate Division noted that the wife "has never challenged the validity of the family trust and has not sought to set it aside" and held that Supreme Court "providently exercised its discretion in declining to award equitable distribution of the value of the family trust" because the wife did not prove that the husband "acted inequitably in regard to the formation of the family trust." With regard to the medical practice, the Second Department held that Supreme Court "providently exercised its discretion in determining that the defendant, based on indirect contributions, was entitled to a 30% share" of the husband's interest in the medical practice. The Court concluded: "Upon consideration of the relative financial positions and circumstances of the plaintiff and the defendant, and all other relevant factors, the Supreme Court providently exercised its discretion in declining to award the defendant maintenance."

P. Proportions - Stock Options (50%)

In Feng v. Jansche, 2019 Westlaw 1028961 (1st Dept. Mar. 5, 2019), both parties appealed from an October 2017 Supreme Court judgment which, upon a July 2017 decision after trial of the wife's 2013 divorce action: (1) distributed 40% of the stipulated valued of the husband's stock options and restricted stock units to the wife; (2) valued the marital funds at $410,696.82; (3) terminated the temporary maintenance award as of July 31, 2017 and declined to award the wife post-divorce maintenance; (4) imputed income of $831,710 to the husband, imposed a CSSA income cap of $400,000 and made the child support award prospective; and (5) awarded the wife $25,000 in counsel fees. The First Department modified, on the law and the facts, to: (1) award the wife 50% of the value of the marital portion of defendant's stock options and restricted stock units; (2) impose a CSSA income cap of $300,000 and award child support

retroactive to October 1, 2014; and (3) remand for further proceedings. The Appellate Division held that "[t]o the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487." With respect to maintenance, the First Department determined that Supreme Court "properly declined to award plaintiff post-divorce maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist" and correctly terminated the temporary order as of July 2017 when its decision after trial was issued. The Court noted that the duration of temporary maintenance "was one of the factors [Supreme] court considered in determining that further maintenance was not warranted." On the issue of imputed income, the Appellate Division held that Supreme Court "properly imputed income to defendant based on the average of his total income for the years 2012 through 2014." As to child support, the First Department found that Supreme Court "correctly considered the standard of living the child would have enjoyed had the marriage remained intact in deviating from the statutory cap," but given the fact that the husband was ordered to pay 88% of extracurricular activities, summer camp, and private school, the Court reduced the CSSA income cap to $300,000. With respect to the issue of retroactivity, the Appellate Division agreed with the wife that Supreme Court "erred in making the child support award prospective only (citation omitted). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support." The action was remanded for a determination of retroactive child support owed, including add-on expenses, and whether the husband should pay arrears "in one sum or periodic sums." The First Department upheld the $25,000 counsel fee award, determining that Supreme Court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions," and

given that the husband had already paid $120,000 of the wife's counsel fees, the total of $145,000 was more than half of her fees at the time of trial.

Q. Security Deposits; Transfer Taxes

In Raposo v. Raposo, 164 AD3d 1383 (2d Dept. Sept. 19, 2018), both parties appealed from a November 2015 Supreme Court judgment, which, among other things, failed to direct the husband to transfer to the wife any security deposits for the rental properties which the judgment directed to be transferred to her. The Second Department modified, on the law and the facts, by directing the parties to equally share any transfer taxes resulting from the transfer of properties to the wife, and by directing the husband to transfer to the wife any security deposits pertaining to the rental properties transferred to her pursuant to the judgment. The parties were married for 31 years and the principal issue at trial was the equitable distribution of rental properties in Queens, which the husband developed and managed. The judgment awarded the wife an in-kind distribution of some of the rental properties, equal to approximately 45% of the equity of the parties' rental properties. The Appellate Division held that "Supreme Court's determination to distribute rental properties to the plaintiff in-kind, as opposed to awarding her a distributive award payable in installments, was not an improvident exercise of discretion," despite the husband's preference to retain ownership and control over all of the rental properties. The Second Department held that Supreme Court "should have directed that both parties equally share any transfer tax liability resulting from the transfers of rental properties to the plaintiff." The Court concluded that Supreme Court "should have directed the defendant to transfer to the plaintiff any security deposits that the defendant collected for the rental properties which were directed to be transferred to the plaintiff pursuant to the judgment of divorce (*see* General Obligations Law §7-105)."

IX. EVIDENCE

A. Hearsay – Statements of Children – Custody

In Antonella GG. v. Andrew GG., 2019 Westlaw 758601 (3d Dept. Feb. 21, 2019), the mother appealed from an April 2017 Supreme Court order which, after a hearing, granted the father sole legal and physical custody of 2 children born in 2002 and 2003, with significant unsupervised visitation to the mother. The Third Department affirmed, noting from the testimony "that the mother has an alcohol abuse problem that worsened in the years before the parties' split" and that witnesses "depicted the mother as an angry, incoherent drunk who physically and verbally abused the father, accosted responding police officers and engaged in other inappropriate behavior that the children were not insulated from in any way." With respect to legal custody, the Appellate Division found that "the parties have severe communication difficulties that preclude a joint custodial arrangement." The Court concluded: "The father sought to introduce out-of-court statements of the children regarding the mother's misuse of alcohol, which constituted proof of neglect, and the statements were sufficiently corroborated so as to warrant their admission," citing FCA §1046[a][iii][vi].

B. Hearsay – Statements of Children – Family Offense

In Matter of Kristie GG. V. Sean GG., 2018 Westlaw 6683333 (3d Dept. Dec. 20, 2018), the father appealed from a March 2017 Family Court order, which, upon the mother's family offense petition, found that he committed harassment in the second degree against the children and issued a 2-year order protection. The parties have 3 three children, born in 2000, 2002 and 2007, who, pursuant to a judgment of divorce, primarily reside with the mother in Otsego County and have visitation with the father. During a February 2016 visit in Otsego County, the father allegedly grabbed the middle child during an argument, in the presence of the other two children.

On consent, Family Court granted the motion of the attorney for the children to preclude the parties from calling the children as witnesses. Over the father's hearsay objections, two detectives testified as to the children's out-of-court statements about the incident. The mother also testified as to the children's statements. Video recordings of the police interviews with the children were admitted into evidence, over the father's objections. The father testified that he took the middle child by the arm to lead him outside the hotel but, after the child was disrespectful and hit the father's arm, the father grabbed the child by both arms to get him under control. The Third Department reversed, noting that "[o]nly competent, material and relevant evidence may be admitted in a fact-finding hearing," citing Family Court Act §834, and that "competent evidence excludes hearsay testimony unless an exception exists." Family Court relied upon Family Court Act §1046 (a) (vi): "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect." Clearly applicable to Family Court Act Article 10 and 10-A proceedings, courts have extended FCA 1046(a)(vi) to FCA Article 6 custody and visitation proceedings, and have allowed such out-of-court statements, so long as they relate to abuse or neglect and are sufficiently corroborated. Although this is a case of first impression in the Third Department, the First and Second Departments have held that the exception "has no application to family offense proceedings under article 8 (citations omitted)." The Appellate Division concluded that Family Court erred in admitting the children's out-of-court statements during the fact-finding hearing. Even though the father consented to the AFC's preclusion motion, the Third Department found that "his consent to the motion may have been based on a different understanding of its implication," and reversed and remitted for a new fact-finding hearing.

C. Medical Records – Foundation

In Matter of Jennings v. Domagala, 2018 Westlaw 6715079 (4th Dept. Dec. 21, 2018), the father appealed from an April 2017 Supreme Court order, which, after a hearing, granted the mother's motion for modification of the child support terms of an incorporated agreement, which provided for joint legal and shared physical custody of the child, and an opt out of the CSSA, whereby the parties waived child support from each other. The Appellate Division reversed, vacated the child support award and remitted for a new hearing. The mother alleged that she was no longer able to work due to injuries she sustained in an automobile accident. Over the father's objection, Supreme Court admitted into evidence two documents prepared by the mother's physician, to show that she was temporarily totally disabled. The Fourth Department found that the mother "failed to lay a proper foundation for the admission of those documents," citing CPLR 4518(a). The Appellate Division concluded: "Without those documents, plaintiff failed to meet her burden of establishing a substantial change in circumstances sufficient to warrant an upward modification of child support inasmuch as she 'did not provide competent medical evidence of [her] disability or establish that [her] alleged disability rendered [her] unable to work' (citations omitted)."

D. Negative Inference Improper

In Matter of William F.G. v. Lisa M.B., 2019 Westlaw ____ (4th Dept. Feb. 1, 2019), the mother and the attorney for the child appealed from a June 2017 Family Court order which granted the father's petition to modify a prior stipulated order and directed that the father's wife may supervise his visits with the subject children, at locations designated by him, including his own home. The Fourth Department reversed, on the law without costs and dismissed the petition. The father was convicted of sexually abusing the parties' then-four-year-old daughter, and the

prior order: granted sole legal and physical custody of the children to the mother; required the father's visitation to be supervised by either his therapist, who specializes in sexual abuse, or the maternal grandmother of the children; and specified that visitation was to occur at a location mutually agreed upon by the father and the grandmother. The Appellate Division agreed with the mother that Family Court "erred in drawing a negative inference against her based on her failure to testify at the hearing." The Fourth Department found that a negative inference was not warranted, in that the mother "had no relevant testimony to offer inasmuch as she had no personal knowledge of the allegations in the modification petition, i.e., the father's completion of sex offender treatment, his compliance with the terms of his probation, his visits with the children, and his marriage to his new wife." The Appellate Division concluded: "The father's employment, his lack of a criminal history other than the sexual abuse of his child, his completion of sex offender treatment, his lack of a history with Child Protective Services, and his lack of a mental health diagnosis do not constitute a change in circumstances because those circumstances existed at the time of the parties' stipulation." The Court noted that "the maternal grandmother has a long history of successfully facilitating positive interaction between the children and the father while providing meaningful protection to the children" since 2013. The Appellate Division cited the testimony of the father's wife, which "demonstrates that she did not know the details of the sexual abuse committed by the father against his daughter."

X. FAMILY OFFENSE

A. Assault 2d, Attempted Assault 3d, Menacing 2d – Found

In Matter of Amanda R. v. Daniel A.R., 2018 Westlaw 5985432 (1st Dept. Nov. 15, 2018), the father appealed from a September 2017 Family Court order which, after a hearing, found that he committed the menacing in the second degree, assault in the second degree, and

attempted assault in the third degree, and granted the mother a two year order of protection. The First Department affirmed, holding that the mother established, by a fair preponderance of the evidence, that the father committed menacing in the second degree (Penal Law §120.14), assault in the second degree (Penal Law §120.05[1]), and attempted assault in the third degree (Penal Law §120.00[1]). The mother testified that: in December 2010, while she was 8½ months pregnant, the father shoved her down onto a bed during an argument; in May 2012, during an argument, the father got on top of her and choked her causing her to lose consciousness, and causing her neck to swell and have red marks on it for numerous days; and in early September 2014, the father punched her very hard in the face causing her to fall and knock over a closet.

B. Criminal Mischief 4th – Not Found

In Matter of Ghassem T. v. Kevin T., 93 NYS3d 835 (1st Dept. Mar. 7, 2019), respondent (petitioner's son) appealed from an April 2017 Family Court order, which, after a hearing, found that he committed harassment in the second degree and criminal mischief in the fourth degree, and granted a one year order of protection in favor of his father. The First Department modified, on the law, to vacate the finding that the son committed criminal mischief in the fourth degree [PL 145.00(1)], upon the ground that the property he allegedly damaged "had been gifted to him by petitioner."

C. Extension of Order of Protection

In Matter of Jacobs v. Jacobs, 2018 Westlaw 6626785 (2d Dept. Dec. 19, 2018), the father appealed from a December 2017 Family Court order which, after a hearing, upon finding good cause to extend a 2-year April 2015 order of protection, which directed him to stay away from his son, extended the same for a period of five years. The Second Department affirmed, noting that Family Court Act §842 provides that upon motion, the Family Court may "extend the

order of protection for a reasonable period of time upon a showing of good cause or consent of the parties. The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order." The Appellate Division found that "the father made statements to the petitioner's then-employer, the Westchester County Department of Correction, which needlessly caused a significant police response to the petitioner's home while the petitioner's eight-year-old son was visiting. In addition, since the imposition of the original order of protection, the father has commenced multiple court actions against the petitioner, all found to be lacking in merit." The Court concluded that "the father continued to interfere with the petitioner's peaceful existence and well-being," and the "finding of good cause to extend the order of protection is supported by the record."

In Matter of Lashlee v. Lashlee, 91 NYS3d 711 (2d Dept. Feb. 6, 2019), the father appealed from an April 2018 Family Court order, which, after a hearing and a finding of good cause, extended a June 2015 order of protection for 5 years. The Second Department affirmed. The June 2015 order directed the father to stay away from and refrain from communicating with the mother, except in emergencies involving the parties' two children. The mother testified that: the father may have followed her and the children when they travelled to South Carolina, as he sent the children postcards from states along the route to South Carolina; the father sent the police to her home the day before Thanksgiving to retrieve mail, even though he had not lived at the home for four years; he requested copies of the mother's employment personnel file in connection with a support proceeding, allegedly with the intent of having the mother fired from her job; and he had sent upsetting emails to his former attorney which led to the attorney's request to be relieved as the father's counsel. The Appellate Division noted that "Family Court

found credible evidence that while the mother and the father have had no direct contact since the issuance of the order of protection, the father continued to interfere with the mother's peaceful existence and well-being through other means."

D. Harassment 2d – Found

In Matter of Mullings v. Mullings, 89 NYS3d 905 (2d Dept. Jan. 16, 2019), respondent appealed from a March 2018 Family Court order, which found that he committed harassment in the second degree and granted a 2-year stay away order of protection. The Second Department affirmed, holding that "credible evidence established that the [respondent] threatened to shoot the petitioner and to kick the petitioner's son in the liver, and that the [respondent] previously had angrily and intentionally broken the petitioner's computer.

In Matter of Reyes v. Reyes, 2019 Westlaw 209002 (2d Dept. Jan. 16, 2019), the grandson appealed from a March 2018 Family Court order which, after a hearing, found that he committed harassment in the second degree against his 86-year-old grandmother and issued a 2-year stay away order of protection. The Second Department affirmed, holding that "a fair preponderance of the evidence" demonstrated that the grandson, "with the intent to harass, annoy, or alarm the petitioner, engaged in a course of conduct consisting of following the petitioner around her apartment, cursing at the petitioner, and staying in her apartment until all hours of the night, despite her numerous requests that he leave, which alarmed and frightened the petitioner and served no legitimate purpose."

In Matter of Wilson v. Wilson, 169 AD3d 1279 (3d Dept. Feb. 28, 2019), the husband appealed from a November 2017 Family Court order which, following a hearing, found that he committed family offenses and granted the wife a 2-year order of protection. The Third Department affirmed. The parties resided together until February 2017, when the wife told the

husband to leave the marital residence due to his drug use. The Appellate Division found that beginning in the fall of 2016, during disputes which the wife testified were caused by the husband's crystal methamphetamine addiction, the husband "referred to petitioner in vulgar terms *** and *** grabbed her and pinned her in place while demanding that she listen to him." The wife further testified that on Christmas Eve 2016, the husband "pushed her onto a bed, clambered on top of her and punched a hole in the wall after she kicked him away." The husband conceded that in February 2017, he had "physically restrained [the wife] and punched a wall." The Third Department concluded that the testimony established that the husband "harbored an intent to annoy, harass or alarm" the wife and that he "committed, at the very least, the family offense of harassment in the second degree."

In Matter of Jasna Mina W. v. Waheed S., 170 AD3d 572 (1st Dept. March 26, 2019), the respondent appealed from a March 2018 Family Court order which, after a hearing, found that he committed harassment in the second degree. The First Department affirmed, holding that Family Court's order was properly based upon petitioner's testimony which "described physical contact, including poking and pinching her in order to harass her into having sex, and also a course of conduct including persistent unwanted communications, name calling and threats, all of which were intended to and did cause her alarm or seriously annoy her, and which served no legitimate purpose."

E. Harassment 2d , Menacing 2d- Found

In Matter of Putnam v. Jenney, 2019 Westlaw 80614 (3d Dept. Jan. 3, 2019), Respondent, Petitioner's brother-in-law, appealed from an October 2017 Family Court order which, after a hearing on Petitioner's August 2017 family offense petition, found that he had committed harassment 2d and menacing 2d and issued a two-year order of protection. The Third

Department affirmed, noting that Family Court's "determinations regarding the credibility of witnesses are entitled to great weight on appeal." Petitioner, who lived with his girlfriend, Marie Wing, respondent, and respondent's wife, Kylea Jenney (Petitioner's sister), alleged that respondent "pulled a knife out on [him]" during an argument and that such behavior was "dangerous or threatening." The Appellate Division found that the testimony that respondent "threatened petitioner with a knife established by a preponderance of the evidence that respondent committed the family offense[s] of menacing in the second degree [intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon [or] dangerous instrument, Penal Law §120.14] and harassment in the second degree [with intent to harass, annoy or alarm another person[,] [h]e or she . . . subjects such person to physical contact, or attempts or threatens to do the same, Penal Law §240.26(1)]." The Court noted that intent "may be inferred from the surrounding circumstances." Ms. Wing testified that respondent and Kylea Jenney (Jenney) were arguing and, when petitioner "stuck up for" Jenney, his sibling, respondent "asked Jenney to get his knife, Jenney complied and, while holding the knife in his hand, respondent told petitioner, 'go back in your bedroom before I stab you.'" Both Wing, who was pregnant at the time, and petitioner testified that they moved out of the apartment because they were fearful of respondent and his threatening behavior.

F. Harassment 2d, Menacing 3d – Found

In Matter of Erin C. v. Walid M., 2018 Westlaw 5259568 (1st Dept. Oct. 23, 2018), respondent appealed from a May 2017 Family Court order, which found that he had committed the family offenses of menacing in the third degree (PL §120.15) and harassment in the second degree (PL §240.26[3]) and granted petitioner a six-month order of protection against him. The

First Department affirmed. The Appellate Division held that petitioner's testimony met her burden of proof by a fair preponderance of the evidence, and "showed that she arrived home on the evening of February 25, 2016, to find respondent extremely agitated, and he began to 'stalk' her around the apartment, screaming insults at her with such intensity that she was forced to lock herself in her bedroom, fearing physical injury." The Court further found that "respondent continued to send petitioner multiple text messages, which were combative and insulting, for no legitimate purpose, through the night and over a period of days, at a time when, by all accounts, he was distraught that the parties, were not reconciling."

In Matter of Shirley D.-A. v. Gregory D.-A., 168 AD3d 635 (1st Dept. Jan. 31, 2019), respondent appealed from a November 2017 Family Court order which, after a hearing, found that he committed harassment in the second degree and menacing in the third degree, granted a one-year order of protection, and excluded him from petitioner's home effective January 15, 2018. The First Department affirmed, holding that petitioner proved "by a fair preponderance of the evidence that respondent, her son, committed the [stated] family offenses." The Appellate Division noted the mother's testimony that: "she moved out of her apartment and into her daughter's apartment in part due to fear of living with respondent who was living in her apartment"; "on November 15, 2017, when she returned to her apartment, respondent made numerous threatening statements and gestures toward her while following her from room to room." The Court concluded that "these actions and statements indicate that respondent was intending to harass, annoy or alarm petitioner, and that he intended to place her in fear of physical injury."

G. Intimate Relationship

In Matter of Raigosa v. Zafirakopoulos, 2018 Westlaw 6519212 (2d Dept. Dec. 12,

2018), petitioner appealed from a January 2018 Family Court order, which, without a hearing, granted respondent's motion to dismiss her family offense petition for lack of subject matter jurisdiction pursuant to FCA §812(1)(e) [no "intimate relationship"]. The Second Department reversed, on the law, reinstated the petition, and remitted to Family Court for a hearing to determine whether there is subject matter jurisdiction pursuant to Family Court Act §812(1)(e), a new determination thereafter of the respondent's motion to dismiss, and further proceedings, if warranted. Petitioner alleged that the parties "have an intimate relationship," as they were living together as roommates. In dismissing the petition, Family Court found that the parties did not have an intimate relationship because their relationship was not sexual in nature. The relevant statute confers family offense jurisdiction over "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time." (Family Ct Act §812[1][e]). The "[f]actors the court may consider in determining whether a relationship is an 'intimate relationship' include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship" (Family Ct Act §812[1][e]). The Appellate Division concluded that "Family Court's determination that the absence of sexual intimacy between the parties by itself conclusively established that there was no 'intimate relationship' within the meaning of Family Court Act §812(1)(e) was improper."

In Matter of Rizzo v. Pravato, 2019 Westlaw 1141778 (2d Dept. Mar. 13, 2019), petitioner appealed from a March 2018 Family Court order which, without a hearing, dismissed her March 2017 family offense petition against her step-aunt for lack of subject matter jurisdiction. The Second Department reversed, on the law, reinstated the petition, and remitted to

Family Court for a hearing to determine subject matter jurisdiction pursuant to Family Court Act §812(1)(e). Petitioner's mother was married to respondent's brother; respondent was the sister of petitioner's stepfather. Here, the issue is whether the parties are "members of the same family or household," FCA §812(1), defined as here relevant as "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time." FCA §812[1][a], [e]. The Appellate Division held that "Family Court should not have determined, without a hearing, that the parties were not and had never been in an intimate relationship," given that "the legislature left it to the courts to determine on a case-by-case basis what qualifies as an intimate relationship within the meaning of Family Court Act §812(1)(e) based upon consideration of factors such as the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship." The Court concluded that "in light of the parties' conflicting allegations as to whether they had an 'intimate relationship' within the meaning of Family Court Act §812(1)(e), the Family Court *** should have conducted a hearing on that issue."

H. Sufficiency

In People v. Creecy, NY Law Journ. Nov. 5, 2018 at 17, col. 3 (Town Ct. Mamaroneck, Meister, J., Oct. 29, 2018), defendant moved to dismiss the information filed against him, alleging harassment in the 2d degree, PL 240.26(1), upon the ground of facial insufficiency. The information alleged that defendant, with intent to harass, annoy or alarm his wife, and threatening to subject her to physical contact, stated to her: "Brick by brick, dollar by dollar, body by body, I'm going to start with you, and I'm going to run through every person who has ever helped you." Defendant conceded he made the statement to his wife in their home, while

discussing their legal separation terms and being angered over her use of marital funds. The parties did not dispute that the above quote was a line from a Denzel Washington movie entitled "The Equalizer," which they had recently seen together. The Court denied the motion, rejecting Defendant's contention that because his statement was from a movie, it was somehow less threatening. The Court took judicial notice of the film's description as a "vigilante action thriller," its poster bearing an image of the star thereof carrying an automatic weapon and its "R" rating for "strong bloody violence and language throughout." The Court concluded: "Invoking language from a violent film that the parties had recently viewed together, and that evidently so strongly impressed the Defendant that he remembered the line verbatim, adds a chilling tone to it from which a threat of intended and imminent violence can easily be inferred."

I. Venue

In Matter of Natalie A. v. Chadwick P., 2018 Westlaw 6174920 (1st Dept. Nov. 27, 2018), the mother appealed from a December 2017 Family Court order which granted the father's motion to change venue and transferred the mother's family offense and custody petitions to Clinton County. The First Department reversed, on the law, and denied the father's motion. The Appellate Division noted that the parties lived in Clinton County from 2011 to until September 23, 2017, "when the mother fled to escape a physical altercation in the home." The First Department held that "Family Court failed to consider the allegations of domestic violence against [the mother] by the father in Clinton County, which precipitated her abrupt move to safety in New York County, where her parents live, and the indicia of her residence in New York City" which included "a sworn affidavit that she had already secured a full-time job, health insurance, and a pediatrician for the child." The Court concluded: "The allegations of domestic violence and the safety of the mother support keeping New York County as the venue for these

proceedings."

J. Violation – Dismissed

In Matter of Scobie v. Zimmerman, 2018 Westlaw 5288914 (3d Dept. Oct. 25, 2018), petitioner appealed from a September 2017 Family Court order which, *sua sponte* at the initial appearance, dismissed her petition seeking to find respondent in willful violation of a "refrain from" order of protection. The Third Department affirmed and found: "The petition contains what purports to be quotations from a conversation between respondent and his attorney in the county courthouse while petitioner was in an adjoining room. Although petitioner asserts that respondent made a threat to her life and said that she would disappear, the quoted language does not directly refer to petitioner. Even if it did, there is no allegation that respondent directed his remarks toward petitioner or that he intended for her to overhear him. Indeed, there is no allegation that respondent was aware that petitioner was nearby or listening to his private conversation with his attorney. The allegations in the petition are facially insufficient to demonstrate any acts that would constitute menacing, harassment or any other willful violation of the order of protection."

K. Violation – Incarceration; Self-Incrimination Privilege

In Matter of DeSiena v. DeSiena, 167 AD3d 1006 (2d Dept. Dec. 26, 2018), the husband appealed from a January 2018 Family Court order which, after a hearing, found that he twice violated an April 2017 stay-away temporary order of protection, granted a permanent order of protection, and directed that he be incarcerated for a period of six months for each violation. The Second Department affirmed. The April 2017 order directed the husband to refrain from any communication with the wife and to stay at least 500 feet away from the wife, her home, and her place of employment. The husband invoked his Fifth Amendment privilege against self-

incrimination in response to some of the questions posed by the wife's attorney. A nonparty witness observed the husband, the day after he was served with April 2017 order of protection, posting a flyer which contained disparaging remarks about the wife, 15 feet away from the wife's place of employment. The husband also sent a letter to the wife, in which he stated that he had a "special offer" for her, but that she would need to telephone him to hear the details. Family Court determined, beyond a reasonable doubt, that the husband willfully violated the temporary order of protection by: (1) failing to stay at least 500 feet away from the wife's place of employment; and (2) failing to refrain from communication with the wife. The Appellate Division held that "beyond a reasonable doubt, [the husband] *** willfully violated the temporary order of protection on two separate occasions by failing to stay at least 500 feet away from the wife's place of employment and by failing to refrain from communication with the wife. The Second Department further held that Family Court "was not entitled to draw a negative inference from the invocation of his Fifth Amendment privilege against self-incrimination, as the proceeding was criminal and not civil in nature." The Court concluded: "Since the record demonstrates that the court did not draw a negative inference based on the husband's assertion of his Fifth Amendment privilege, the husband's contention that the court violated his Fifth Amendment right against self-incrimination is without merit."

XI. INCOME TAX

A. Dependency Exemptions – Conditions

In Haggerty v. Haggerty, 2019 Westlaw 409799 (4th Dept. Feb. 1, 2019), the wife appealed from a June 2017 Supreme Court judgment which, among other things, directed her to pay counsel fees of $14,000 to the husband. The Fourth Department modified in the exercise of discretion and on the law, by vacating the counsel fees award, and otherwise affirmed. The

Appellate Division rejected the wife's argument that she should have been given a credit for marital assets allegedly dissipated by the husband, finding that he "established that he used those particular assets to pay for marital expenses." The Fourth Department rejected the wife's contention that Supreme Court erred in directing that her ability to claim one of the parties' two children as a dependency exemption was upon the condition that she remain "current with her child support obligation for a full calendar year," noting her "prior failure to pay child support." With respect to the parties' combined student loan debt, the Appellate Division recognized that there "may be circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse" and concluded that Supreme Court "did not abuse or improvidently exercise its discretion in directing that each party be responsible for his or her student loan debt." The Fourth Department agreed with the wife that the $14,000 counsel fee award to the husband should be vacated, finding that "where neither party is a 'less monied spouse' (Domestic Relations Law §237[a]), and plaintiff [the wife] has significantly more student loan debt than defendant, we conclude in the exercise of our discretion that the award should be vacated and that each party should be responsible for his or her own attorneys' fees."

XII. MAINTENANCE

A. Denied

In Giallo-Uvino v. Uvino, 2018 Westlaw 5020409 (2d Dept. Oct. 17, 2018), the wife appealed from an April 2016 Supreme Court judgment of divorce which, upon a February 2016 decision of the court made after an inquest, among other things: (1) valued the husband's law practice as of the date of trial and determined that the practice had no value; (2) awarded her only 55% of the net proceeds of the sale ($561,266.75) of the marital residence; (3) declined to award her an attorney's fee and expert fees, and (4) determined that the wife was not entitled to an

award of maintenance. The Second Department modified, on the law, on the facts, and in the exercise of discretion: (1) by awarding the wife 70% of the net proceeds of the sale of the marital residence; and (2) by awarding the wife an attorney's fee of $70,000. The parties were married in June 2000, and have one child. The wife worked as a registered nurse, and the husband was an attorney with his own law practice. In July 2012, the wife commenced this action for a divorce and the husband appeared in the action. He failed to appear for the trial in July 2015, and Supreme Court held an inquest. The Appellate Division held that "Supreme Court providently exercised its discretion in valuing the [husband's] law practice as of the date of trial, rather than the date of commencement of the action," given that the wife "failed to establish that the defendant, who was disbarred during the pendency of this action (citation omitted) intentionally lost his license in order to devalue his law practice (citation omitted) *** [and] failed to establish that the defendant's business had any value as of the date of trial." As to maintenance, the Second Department found: "considering the relevant factors, including, inter alia, the duration of the marriage, the present and future earning capacity of the parties, and the ability of the party seeking maintenance to become self-supporting, the Supreme Court did not improvidently exercise its discretion in declining to award maintenance to the plaintiff." The Appellate Division held that "Supreme Court improvidently exercised its discretion in awarding the plaintiff only 55% of the net proceeds of the sale of the marital residence" [and] [b]ased on the circumstances of this case, we find that the plaintiff is entitled to 70% of the net proceeds of the sale of the marital residence." As to counsel fees, the Court concluded that "Supreme Court improvidently exercised its discretion in declining to award the plaintiff an attorney's fee," and a factor to be considered is "whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation (citations omitted)." Here the Second Department

found that the husband failed "to timely provide certain financial documentation which unnecessarily prolonged the litigation, [and] the court should have awarded the plaintiff an attorney's fee in the sum of $70,000."

B. Denied – Distributive Award as Factor

In Oppenheim v. Oppenheim, 2019 Westlaw 362109 (2d Dept. Jan. 30, 2019), the wife appealed from an April 2016 Supreme Court judgment, rendered upon a January 2016 decision after the trial of an April 2014 action, which failed to distribute the value of a family trust created in 2012, failed to award her defendant maintenance, and awarded her only a 30% share of the husband's interest in a medical practice. The Second Department affirmed. The parties were married in 1992 and have 3 children, all emancipated. The husband is a neurosurgeon, and the wife is licensed as a Certified Financial Analyst, but has not been employed since the first child was born. Supreme Court found that the wife failed to prove that the husband acted inequitably in the creation of the family trust or that his intent was to defraud her for his own benefit, and determined that the family trust was created prior to any indication of marital discord. Supreme Court awarded the wife a 30% share of the husband's interest in the medical practice, based upon her indirect contributions, and declined to award her maintenance, given "the parties' distributive shares of the substantial marital estate." The Appellate Division noted that the wife "has never challenged the validity of the family trust and has not sought to set it aside" and held that Supreme Court "providently exercised its discretion in declining to award equitable distribution of the value of the family trust" because the wife did not prove that the husband "acted inequitably in regard to the formation of the family trust." With regard to the medical practice, the Second Department held that Supreme Court "providently exercised its discretion in determining that the defendant, based on indirect contributions, was entitled to a 30% share" of

the husband's interest in the medical practice. The Court concluded: "Upon consideration of the relative financial positions and circumstances of the plaintiff and the defendant, and all other relevant factors, the Supreme Court providently exercised its discretion in declining to award the defendant maintenance."

C. Denied - Duration of Temporary Award as Factor; Earning Capacity

In Feng v. Jansche, 2019 Westlaw 1028961 (1st Dept. Mar. 5, 2019), both parties appealed from an October 2017 Supreme Court judgment which, upon a July 2017 decision after trial of the wife's 2013 divorce action: (1) distributed 40% of the stipulated valued of the husband's stock options and restricted stock units to the wife; (2) valued the marital funds at $410,696.82; (3) terminated the temporary maintenance award as of July 31, 2017 and declined to award the wife post-divorce maintenance; (4) imputed income of $831,710 to the husband, imposed a CSSA income cap of $400,000 and made the child support award prospective; and (5) awarded the wife $25,000 in counsel fees. The First Department modified, on the law and the facts, to: (1) award the wife 50% of the value of the marital portion of defendant's stock options and restricted stock units; (2) impose a CSSA income cap of $300,000 and award child support retroactive to October 1, 2014; and (3) remand for further proceedings. The Appellate Division held that "[t]o the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487." With respect to maintenance, the First Department determined that Supreme Court "properly declined to award plaintiff post-divorce maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist" and correctly terminated the temporary order as of July 2017 when its decision after trial was issued. The Court noted that the duration of temporary maintenance "was one of the factors [Supreme] court

considered in determining that further maintenance was not warranted." On the issue of imputed income, the Appellate Division held that Supreme Court "properly imputed income to defendant based on the average of his total income for the years 2012 through 2014." As to child support, the First Department found that Supreme Court "correctly considered the standard of living the child would have enjoyed had the marriage remained intact in deviating from the statutory cap," but given the fact that the husband was ordered to pay 88% of extracurricular activities, summer camp, and private school, the Court reduced the CSSA income cap to $300,000. With respect to the issue of retroactivity, the Appellate Division agreed with the wife that Supreme Court "erred in making the child support award prospective only (citation omitted). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support." The action was remanded for a determination of retroactive child support owed, including add-on expenses, and whether the husband should pay arrears "in one sum or periodic sums." The First Department upheld the $25,000 counsel fee award, determining that Supreme Court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions," and given that the husband had already paid $120,000 of the wife's counsel fees, the total of $145,000 was more than half of her fees at the time of trial.

D. Durational – Affirmed

In Belilos v. Rivera, 164 AD3d 1411 (2d Dept. Sept. 26, 2018), both parties appealed from an October 2015 Supreme Court judgment which awarded the wife maintenance of $5,000 per month for 5 years, restored $150,000 of the wife's separate property, which had been placed in a joint account, to the wife, awarded the wife 25% of the husband's enhanced earning capacity from advanced degrees and certifications and 50% of the husband's business interests,

and awarded the wife $75,000 in counsel fees and $15,000 in expert witness fees. The Second Department affirmed. As to the inheritance, the wife established that she received $150,000 as an inheritance from her uncle, which was deposited into a joint account because she had no bank accounts in her name alone, and further, the husband admitted at his deposition that he intended to return the $150,000 to the wife "to make things right." The Appellate Division upheld the 50% award of the business interests, and as to the 25% enhanced earning capacity award, found that the wife "demonstrated that she substantially contributed to the defendant's acquisitions of his advanced degrees and certifications." The Court upheld the maintenance, counsel fee and expert witness fee awards as appropriate exercises of discretion.

In Romeo v. Muenzler-Romeo, 2019 Westlaw 575623 (2d Dept. Feb. 13, 2019), the husband appealed from an August 2017 Supreme Court judgment, upon a March 2017 decision after trial of the wife's April 2014 action, which awarded the wife maintenance of $1,900 per month for 8 years and counsel fees of $26,000. The Second Department affirmed. The parties were married in August 1995, at which time the husband was retired from NYPD and working part-time, while the wife worked as a substitute teacher. The Appellate Division upheld the maintenance award based upon Supreme Court's consideration of the standard of living, property distribution, duration of the marriage, the parties' health and future earning capacity, and the wife's ability to become self-supporting. As to counsel fees, the Second Department affirmed, based upon the disparity between the parties' incomes, the relative merits of the parties' positions, and the husband's conduct "that delayed the proceedings."

In Flom v. Flom, 2019 Westlaw 1064152 (1st Dept. Mar. 7, 2019), the wife appealed from a March 2017 Supreme Court judgment which, among other things: (1) distributed 40% of certain marital assets to the wife and 60% to the husband, including an in-kind distribution of an

LLC; (2) apportioned 40% of the assets and liabilities related to certain investments to the wife and 60% to the husband; (3) awarded the wife $26,000 per month in taxable maintenance for 6 years; and (4) imputed annual income to the wife of $50,000 for CSSA purposes and applied the then-statutory cap of $141,000. The First Department modified, on the law and the facts, by: (1) increasing the wife's distribution of assets to 50%; (2) increasing her distribution of and responsibility for, the assets and liabilities of the investments to 50%; and (3) imposing a CSSA cap of $300,000, without imputing any income to the wife, and increasing child support for the parties' unemancipated child from $1,238 per month to $4,250 per month, retroactive to the entry of judgment. The Appellate Division held that Supreme Court "improvidently exercised its discretion in distributing the marital assets 60% to plaintiff and 40% to defendant," citing the principle that "where both spouses equally contribute to the marriage which is of long duration, a division should be made which is as equal as possible." The parties were married for 18 years and had 2 children. The Court found that "the referee divided the marital property unequally solely because defendant was not employed outside the home and the parties hired domestic help, and thus, in the referee's view, she did not contribute equally to the marriage." The First Department cited the trial testimony, which established that the mother "was actively involved with the children, coaching their athletic teams, attending parent-teacher conferences, and, as plaintiff testified, being 'their mom.'" Increasing the marital property distribution to the wife to 50%, the Appellate Division stated: "It is undisputed that the parties enjoyed a lavish lifestyle, and the evidence indicated that defendant played a major role in managing the home, including entertaining clients and paying household expenses from the parties' joint account. The referee's finding that there was no evidence that defendant 'ever cooked a meal, dusted a table or mopped a floor' did not support the court's determination that she was therefore entitled to only 40% of

the parties' marital assets." On the issue of marital debt, the First Department determined that Supreme Court "providently exercised its discretion in apportioning liability to defendant for failed investments *** that plaintiff personally guaranteed with a collateral account," finding that "[the husband's] conduct in guaranteeing the loans did not absolve defendant of joint liability." The Court concluded on this issue: "Since the investments were made during the marriage for the benefit of the parties, the parties should share [equally] in the losses." With regard to the in-kind distribution of the husband's interest in an LLC, which the Court increased to 50%, the Appellate Division rejected the husband's argument that the same "could not be distributed because defendant failed to value the asset" because he proposed "prior to trial to distribute [the LLC interest] in lieu of maintenance." The Appellate Division upheld the maintenance award "based on the lavish lifestyle of the parties during the marriage, and the fact that [the wife] had not worked outside the home in over 20 years." Given the wife's now increased equitable distribution award, and Supreme Court's direction that the husband provide her with health insurance until she qualifies for Medicare, the Court rejected the wife's argument for "at least 12 years, if not lifetime, maintenance." With regard to child support, the First Department held that there was "no basis" for the imputation of $50,000 in annual income to the wife and noted the referee's findings that: the husband "had significantly greater financial resources and a gross income that greatly exceeded defendant's"; the child enjoyed a "luxurious standard of living" during the marriage; and "no deviation from the then-income cap of $141,000 was warranted because plaintiff had voluntarily agreed to pay the child's educational expenses, coaching, tutoring and summer camp." The Court concluded that "given the factors considered, but subsequently disregarded, by the referee *** we find that a $300,000 income cap, which would result in a monthly basic child support award of $4,250, retroactive to entry of the judgment of

divorce, would satisfy the child's 'actual needs' and afford him an 'appropriate lifestyle.'"

In Cotton v. Roedelbronn, 2019 Westlaw ____ (1st Dept. Mar. 26, 2019), the wife appealed from an October 2017 Supreme Court judgment, which awarded her 10% of the husband's business interests valued at $19.94 million and 40% of two other business interests valued at $3.28 million and $655,943, respectively, and maintenance of $20,000 per year for 3 years. The First Department affirmed, rejecting the wife's contention that the date of commencement valuation of the businesses was improper, and finding that the husband's business assets were actively managed. As to the proportions, the 10% award was upheld because "the value of these businesses was primarily derived from efforts made by plaintiff and his partners prior to the marriage, and that defendant made little, if any, contribution to the growth of these businesses" and, further, that the wife "at times acted as a hindrance to plaintiff's business dealings." The Appellate Division upheld the 40% award, declining to increase it to 50%, noting the Referee's finding that while the wife "made no direct contribution to these business entities, *** she shared in the parties' restrained lifestyle that allowed these particular investments to grow." The First Department affirmed the maintenance award, citing both the Referee's finding that the wife's statement of net worth was "riddled with misstatements, inaccuracies and unsubstantiated expenses" and expert testimony "that this amount and duration would be sufficient to meet defendant's needs and allow her to re-enter the employment market."

E. Durational – Affirmed; Percentage of Bonus

In Rogowski v. Rogowski, 2019 Westlaw 1781817 (2d Dept. Apr. 24, 2019), the husband (as a *pro se* appellant) appealed from a March 2010 Supreme Court judgment which, following trial of the wife's 2008 divorce action, awarded the wife maintenance of $2,500 per month for 5

years and 60% of his annual employment bonus in excess of $14,200. The Second Department affirmed, holding that Supreme Court properly considered the statutory maintenance factors and noting: "Given that the parties agreed that the plaintiff would quit work and care for the children, and given the evidence adduced regarding the parties' respective incomes and future employment prospects, the court did not improvidently exercise its discretion in determining the amount or duration of maintenance. Also, contrary to the defendant's contention, the award of a portion of the defendant's annual employment bonus as a part of maintenance did not constitute an improper open-ended obligation (citations omitted)."

F. Durational – Age 66; Imputed Income

In Brendle v. Roberts-Brendle, 2019 Westlaw 576710 (2d Dept. Feb. 13, 2019), the husband appealed from a February 2016 Supreme Court judgment, upon a December 2015 decision after trial, which imputed a $150,000 per year income to him and awarded the wife maintenance of $2,500 per month for 10 years and $1,250 per month to her age 66. The Second Department affirmed. The parties were married in 1996 and have 2 children. The Court upheld the imputed income finding, based upon the husband's "past earnings and demonstrated earning capacity," which included a business operated by the parties and a restaurant he opened after the commencement of the action. The parties stipulated that the wife would receive $50,000 for her interest in the marital business. The Appellate Division upheld the maintenance award based upon the length of the marriage, the wife's age and limited earning capacity, the marital standard of living and the stipulated distribution of the business.

G. Durational - Amount Reduced, Duration Increased; Health Insurance; Imputed Income; Life Insurance; Tax-Free

In Gorman v. Gorman, 2018 Westlaw 5274250 (2d Dept. Oct. 24, 2018), the wife

appealed from a December 2015 Supreme Court judgment which, after trial, awarded her only $4,500 per month in maintenance for 8 years, distributed marital property, and imputed annual income to her of $26,000, and the husband cross-appealed from so much of the judgment as failed to award him a share of bank accounts, as awarded maintenance, and $20,000 in counsel fees to the wife. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) decreasing the amount of maintenance to $2,750 per month and making the same tax-free to the wife, but increasing the duration until the earliest of the wife's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party; (2) requiring the husband to maintain $500,000 in life insurance for the wife so long as he is obligated to pay maintenance; (3) by directing the husband to provide health insurance for the wife until she becomes eligible for coverage through employment or through Medicare, whichever shall first occur; and (4) providing that the parties' joint checking account and savings accounts ($95,981.18 + $44,458.50), be equally divided between the parties, with a $1,600 credit to the wife. The parties were married on May 16, 1987. The wife worked as a legal secretary for a period of time, and left the workforce to become a homemaker and to care for the parties' two children (now in their mid-to-late twenties), while the husband in various capacities connected with the US military, including defense contracting work in Iraq. The husband commenced the action in August 2011. As to maintenance, the Appellate Division found that "considering the relevant factors, including the ages of the parties, the long duration of the marriage and the extended absence of the defendant from the workforce, the distribution of the marital assets, the parties' respective past and future earning capacities, and the availability of retirement funds and pensions, the Supreme Court providently exercised its discretion in awarding the defendant durational, as opposed to lifetime, maintenance (citations omitted).

However, rather than providing for a durational limitation of eight years and subjecting that award to termination upon the plaintiff's remarriage, under the circumstances of this case, the maintenance award should continue until the earliest of the defendant's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party (citations omitted)." As to imputed income to the husband of $151,192, the Second Department found that "from 2008 through late 2013, the plaintiff was employed overseas in Iraq and, as a result of such employment, received a significantly augmented salary, enhanced overtime, and no-cost room and board. In December 2013, the plaintiff returned to the United States, taking up residence in Ohio, where he resides with his fiancée. As of the time of trial, the plaintiff was employed by the Department of Defense as a quality assurance inspector at a salary of $81,079 per year. The plaintiff did not submit a current statement of net worth. He acknowledged that his earnings are deposited into a joint checking account with his fiancée and that all of his monthly expenses are shared with his fiancée. The plaintiff also acknowledged that he regularly gambles, to the point that he has received free hotel accommodations, airfare, vacations (including a cruise), and other free or discounted items because of his frequent gambling. In 2013, he reported gambling winnings of $11,250 on his tax return. He acknowledged winning $1,800 over two days of gambling in September 2014." The Appellate Division concluded that the imputed income to the husband should be $100,000. With regard to imputed income to the wife, the Court stated: "While we agree with the defendant that the Supreme Court should not have imputed income to her based on statistical information from the New York State Department of Labor that was not admitted in evidence at trial (citation omitted), there was evidence, nonetheless, that the defendant had earned $15 per hour as a legal secretary during the early part of the marriage. Even though she has been out of the work force

for an extended period of time and does not have a college degree, she is in good health and has a sufficient employment history to warrant the conclusion that she is capable of earning at least the sum of $26,000 annually, which is the amount of income imputed to her by the court." The Second Department concluded on the issue of maintenance that the husband should pay the wife $2,750 per month, "which sum shall be neither tax deductible by the plaintiff nor taxable to the defendant." As to life insurance, the Appellate Division directed the husband "to purchase, pursuant to Domestic Relations Law §236(B)(8)(a), a life insurance policy in the amount of $500,000, designating the defendant as sole irrevocable beneficiary for only as long as the plaintiff is obligated to pay maintenance to the defendant." On the issue of health insurance, the Appellate Division held that Supreme Court "should have directed the plaintiff to provide health insurance for the plaintiff until she becomes eligible for coverage through employment or through Medicare." As to the marital residence, the Court held that "Supreme Court providently exercised its discretion in directing the sale of the marital residence because the parties' children have reached majority, there is no need of a spouse as a custodial parent to occupy the residence for the children (citation omitted), and neither party submitted a market-based valuation of the marital residence. With regard to the bank accounts, the Court directed and equal division as to their commencement date values, but since the husband "purchased a diamond engagement ring for $3,200 for his fiancée prior to commencement of this action, and failed to prove that it was separate property," the wife is entitled to a 50% credit for the ring's purchase price ($1,600). Finally, the Second Department held that given "the relative financial circumstances of the parties and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant $20,000 in attorney's fees."

H. Durational - Increased to Age 62; Health Insurance; Life Insurance; Retroactivity

In DiLascio v. DiLascio, 2019 Westlaw 1141928 (2d Dept. Mar. 13, 2019), the wife appealed from a June 2016 Supreme Court judgment, upon October and December 2015 decisions after trial, which, among other things: (1) awarded her maintenance of only $140,000 per year until the earliest of May 1, 2022, the death of either party, or her remarriage; (2) directed that maintenance and child support would begin on the first day of the first month following entry of judgment and declined to make said awards retroactive to the September 2012 commencement of the action; and (3) directed the husband to maintain life insurance of only $500,000. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) increasing the duration of maintenance so as to terminate at the earliest of the wife's age 62, the death of either party, or her remarriage; (2) directing that maintenance and child support shall be retroactive to September 19, 2012; (3) directing the husband to pay for the wife's health insurance for the same duration as his maintenance obligation; and (4) directing the husband to maintain a declining term policy of life insurance for the wife's benefit, until payment of child support, maintenance, and health insurance is completed, in an amount sufficient to secure those obligations. The Appellate Division remitted to Supreme Court for a calculation of the amount of retroactive maintenance and child support arrears from September 19, 2012, giving the husband appropriate credit for the actual amount of the carrying charges on the marital home and expenses he paid pursuant to the pendente lite order, and taking into account his payments of pendente lite maintenance and child support, and to determine an appropriate amount of life insurance to secure the payment of the maintenance, child support, and health insurance. The parties were married in 1997 and have two children, a son, who resides with the wife, and a daughter, who resides with the husband. The son became severely disabled at the age 5, has required 24-hour care and attends school with a private duty nurse, with nursing

care paid for by Medicare and supplemented by both parents for any gaps in coverage. The parties had a prenuptial agreement in which they were governed as to property by a "title scheme." The husband "had a highly lucrative career in the financial industry, and the [wife] last worked as an ultrasound technician before the marriage." As to maintenance, the Appellate Division agreed "with the Supreme Court's determination, upon its consideration of all of the factors set forth in Domestic Relations Law former §236(B)(6)(a), that, notwithstanding the plaintiff's care of their disabled son, an award of lifetime maintenance was not appropriate," but increased the award of durational maintenance until the wife's age 62, subject to the above termination events, as such an extension "would more realistically provide the plaintiff a sufficient opportunity to become self-supporting." With regard to retroactivity, the Court cited the statutory rule that the awards "are retroactive to, the date the applications for maintenance and child support were first made, which, in this case, was September 19, 2012," citing Domestic Relations Law §236[B][6][a] and [7][a]. On the health insurance issue, the Second Department held that "in light of all of the circumstances of this case, the defendant should be directed to pay the plaintiff's health insurance costs during the period the defendant is obligated to pay maintenance."

I. Non-Durational – Affirmed

In Jankovic v. Jankovic, 170 AD3d 1174 (2d Dept. Mar. 27, 2019), the husband appealed from a July 2016 Supreme Court judgment, rendered upon a January 2015 decision after trial in the husband's 2011 action, which awarded the wife $333 per month in non-durational maintenance and counsel fees of $15,000. The Second Department affirmed. The parties were married in 1978 and all of their children are emancipated. As to maintenance, the Appellate Division held that Supreme Court property considered "the 30-year duration of the marriage, the

age of the defendant, her health, and her limited education, as well as her limited future earning capacity and the disparity in the parties' respective incomes." With respect to counsel fees, the Second Department found that Supreme Court was within its discretion to consider the disparity in the parties' incomes and "particularly the plaintiff's refusal to pay defendant any of the sums awarded to her under a pendente lite order in the action, the complexity of the issues involved, and the relative merits of the parties' positions."

J. Termination – Cohabitation

In Kelly v. Leaird Kelly, 2019 Westlaw 1218215 (4th Dept. Mar. 15, 2019), the former husband (husband) appealed from an August 2017 Supreme Court order which, after a hearing, denied his motion to terminate maintenance to the former wife (wife) upon the ground of cohabitation. The Fourth Department reversed, on the law, and granted the husband's motion. The parties' incorporated agreement provided that maintenance ends if the wife remarries or if there is "a judicial finding of cohabitation pursuant to Domestic Relations Law §248." The Appellate Division reasoned: "Pursuant to Domestic Relations Law §248, cohabitation means 'habitually living with another person' (citations omitted)" and noted that the Court of Appeals "found that a common element 'in the various dictionary definitions [of cohabitation] is that they refer to people living together in a relationship or manner resembling or suggestive of marriage,'" citing Graev v Graev, 11 NY3d 262, 272 (2008). The Fourth Department noted, among other hearing testimony, that "it is undisputed that defendant reconnected with the man on a dating website and moved directly into his home from her marital residence, after which they commenced a sexual relationship. They have taken multiple vacations together, including for his family reunion, and they sometimes shared a room while on those vacations. Defendant wears a diamond ring on her left hand that the man purchased. They also testified regarding their

complicated financial interdependence." The Court concluded that "the record does not show that the sexual relationship between defendant and the man had ended" and found that the husband "established by a preponderance of the evidence that defendant was engaged in a relationship or living with the man in a manner resembling or suggestive of marriage."

XIII. PATERNITY

A. Equitable Estoppel – Denied

In Matter of Ramos v. Broderek, 2018 Westlaw 5931352 (2d Dept. Nov. 14, 2018), Broderek appealed from a September 2017 Family Court order, which declined to apply equitable estoppel and adjudicated him to be the father of a child born in March 2011. The Second Department affirmed. The mother and Broderek had an intimate relationship beginning in June or July 2010, and the mother testified that for approximately one month, after he became aware that she was pregnant, Broderek acted as though he was the father of the unborn child. However, near the time of conception, the mother also had intimate relations with her ex-husband, who was excluded by an August 2011 DNA test. The ex-husband and the child never had a relationship. When the child was approximately four years old, the mother married another man, with whom the child does not have a close relationship. A December 2016 DNA test indicated a 99.99% probability that Broderek was the father. In January 2017, the mother filed a paternity petition against Broderek. The Appellate Division agreed that equitable estoppel did not apply and noted that the principle "does not involve the equities between [or among] the . . . adults" and "[t]he paramount concern in applying equitable estoppel in paternity cases is the best interests of the subject child" (citations omitted). The Court concluded that "the evidence did not demonstrate a close relationship between the child and either the mother's former or current husband such that the application of equitable estoppel would be in the child's best interests."

XIV. PENDENTE LITE

A. Counsel Fees

In Skokos v. Skokos, 2019 Westlaw 138353 (2d Dept. Jan. 9, 2019), the husband appealed from a May 2016 Supreme Court order, which, in his August 2015 divorce action, granted the wife's cross motion for temporary counsel fees to the extent of $15,000. The parties were married in November 2015 and have 1 child. The Second Department affirmed, finding that the wife is the nonmonied spouse and "the evidence *** revealed a significant disparity in the financial circumstances of the parties, as the plaintiff owns and derives his income from a successful construction business, and the defendant, who has not been employed outside the home since the beginning of the marriage, has relatively few financial resources."

B. Counsel Fees – Custody

In Matter of Balber v. Zealand, 2019 Westlaw 611368 (1st Dept. Feb. 14, 2019), the father appealed from June 2017 and April 2018 Supreme Court orders which, respectively, awarded the mother interim counsel fees in the sums of $35,000 and $85,000, pursuant to DRL 237(b), based upon her total requests of $225,000. The First Department affirmed, rejecting the father's argument that DRL 237(b) does not authorize counsel fee awards in custody disputes between unmarried parents, given its plain language: "upon any application *** by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct a *** parent to pay counsel fees *** directly to the attorney of the other *** parent ***."

XV. PROCEDURE

A. Service – Failure to Notify SCU of Address Change

In Matter of L. v. A., NY Law Journ. Nov. 5, 2018 at 17, col. 5 (Fam. Ct. Bronx Co., Bahr, S.M., Oct. 16, 2018), Family Court rejected respondent's contention, in the context of his

motion to vacate a default order finding him in willful violation, that substituted service was invalid to his last known address, given that respondent had failed to advise SCU of his change of address, as required by FCA 443. The facts and history are set forth in the court's over 5 page, single-spaced decision, but of note is that the process server's affidavit of due diligence, submitted in support of the mother's application for substituted service, stated that the server had spoken with respondent's ex-wife, who advised that the father no longer lived at the last address on file with SCU, and that "he is avoiding service as there are multiple orders out against him."

B. Time to Appeal

In Econopouly v. Econopouly, 167 AD3d 1378 (3d Dept. Dec. 27, 2018), the former husband (husband) appealed from an April 2017 Supreme Court order which, upon the motion of the former wife (wife), directed entry of a "QDRO" (actually a COAP) against his federal pension benefits pursuant to a 1992 divorce judgment and stipulation. In May 2017, the wife's counsel mailed the COAP (presumably to OPM in Washington, D.C.) and the husband's counsel was copied on the letter and the order. There was no affidavit or proof of the May 2017 mailing of the order to the husband's counsel. The husband's counsel entered the order in August 2017, served notice of entry upon the wife's counsel and appealed therefrom on the same day. The Third Department held that the husband's August 2017 appeal was timely, and given that no appeal as of right lies from a QDRO, treated the husband's notice of appeal as a motion for leave to appeal and granted the same. The Appellate Division rejected the husband's contention that his interpretation of the stipulation, which appeared to be that the wife's entitlement was based on the salary level as of the time of the stipulation, and concluded that the wife's COAP, which provided for a 50% distribution of the marital portion of his pension pursuant to the Majauskas formula, was proper, and affirmed.

XVI. LEGISLATIVE AND COURT RULE ITEMS

A. Authentication – Party Production of Documents

New CPLR Rule 4540-a is **added, effective January 1, 2019,** to provide that "material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility." A06048/S04869, Laws of 2018, Chapter 219.

B. Court-Appointed Special Advocates

Judiciary Law §212(2) is **amended, effective October 1, 2018**, to adopt rules and regulations standardizing the use of court-appointed special advocate (CASA) programs and governing the structure, administration and operation of such programs, and to create a new Judiciary Law article 21-C requiring such CASA volunteers to only exercise the functions and duties specifically authorized by the court. A01050/S02059-A, Laws of 2018, Chapter 291.

C. Family Offense – Coercion 3rd added

Family Court Act §§812(1) and 821(1)(a) were **amended, effective November 1, 2018**, to add coercion in the third degree to the list of enumerated family offenses.

D. Family Offense – Firearms

Family Court Act §842-a was **amended, effective June 11, 2018**, to add "rifles and shotguns" to the provisions of law regarding weapons surrender and firearms license suspension and revocation, to conform with federal law. A.10272/S.08121, Laws of 2018, Chapter 60.

E. Judicial Notice – Internet Mapping

CPLR Rule 4511 is **amended, effective December 28, 2018** is amended, by adding a new subdivision (c), which provides, among other things: "Every court shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented. *** A party intending to offer such image or information at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the request for judicial notice of such image or information, stating the grounds for the objection." A11191/S09061, Laws of 2018, Chapter 516.

F. Judgments of Divorce – Incorporation, Retain Jurisdiction and Future Application Paragraphs, Part Deux

Administrative Order AO/269/18, dated September 20, 2018, amends 22 NYCRR 202.50(b)(3), **effective for all divorce submissions made after September 30, 2018, but not enforced until October 30, 2018**, regarding two matters pertaining to judgments: (1) Last year, a new prescribed decretal paragraph was added pertaining to incorporation of an agreement into a judgment, which is now labeled as box A and there is no change to that language. There is a new box B, which would cover, for example, a pure default in an uncontested divorce, where the court is deciding the ancillary issues, and now gives the check box option: "there is no settlement agreement." (2) Last year's amendments, which require the "retain jurisdiction" paragraph and the "any applications brought in Supreme Court" paragraph, have now been modified to require,

in 3 places, the insertion of the words "if any." The amendment is set forth in its entirety below (additions are underlined and deletions are bracketed [ ]) and may also be found at the Divorce Resources web page of our matrimonial practice committee http://ww2.nycourts.gov/divorce/legislationandcourtrules.shtml and is incorporated into the very latest version of form UD-11, the judgment of divorce http://ww2.nycourts.gov/divorce/divorce_withchildrenunder21.shtml

Fill in Box A or Box B. whichever, applies:

A. □ **ORDERED AND ADJUDGED** that the Settlement Agreement entered into between the parties on the day of , □ an original OR □ a transcript of which is on file with this Court and incorporated herein by reference, shall survive and shall not be merged into this judgment, and the parties are hereby directed to comply with all legally enforceable terms and conditions of said agreement as if such terms and conditions were set forth in their entirety herein; [and]

OR

B. □There is no Settlement Agreement entered between the parties; and it is further

ORDERED AND ADJUDGED, that the Supreme Court shall retain jurisdiction to hear any applications to enforce the provisions of said Settlement Agreement, if any, or to enforce or modify the provisions of this judgment, provided the court retains jurisdiction of the matter concurrently with the Family Court for the purpose of specifically enforcing, such of the provisions of that (separation agreement)(stipulation agreement, if any), as are capable of specific enforcement, to the extent permitted by law, and of modifying such judgment with respect to maintenance, support, custody or visitation to the extent permitted by law, or both; and it is further

ORDERED AND ADJUDGED, that any applications brought in Supreme Court to enforce the provisions of said Settlement Agreement, if any, or to enforce or modify the provisions of this Judgment shall be brought in a County wherein one of the parties reside; provided that if there are minor children of the marriage, such applications shall be brought in a County wherein one of the parties or the child or children reside, except, in the discretion of the judge, for good cause. Good cause applications shall be made by motion or order to show cause. Where the address of either party and any child or children is unknown and not a matter of public record, or is subject to an existing confidentiality order pursuant to DRL §254 or FCA §154-b, such applications may be brought in the County where the Judgment was entered; and it is further

G. Statement of Client's Rights and Responsibilities

22 NYCRR §1400.2 is **amended, effective February 15, 2019**, to prescribe a revised

Statement of Client's Rights and Responsibilities.

H. Trial Subpoena Documents

CPLR §2305 is **amended, effective August 24, 2018**, to add a new subdivision (d), providing that where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where applicable, forthwith. A06047/S04867, Laws of 2018, Chapter 218. Applies to all actions pending on or after the effective date.

Dated: April 28, 2019

At: Albany, NY

NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
CONTINUING LEGAL EDUCATION

SUMMER 2019 MEETING
Saratoga Hilton
Saratoga Springs, NY
July 13, 2019, 11:10 a.m. – 12:00 noon

"Matrimonial Update"

SUPPLEMENTAL OUTLINE

(April 26, 2019 – May 23, 2019)

Bruce J. Wagner
McNamee Lochner P.C.
677 Broadway, 5th Fl.
Albany, NY 12207-2503

Telephone: 518-447-3329
Facsimile: 518-867-4729
E-mail: wagner@mltw.com

TABLE OF CONTENTS

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These materials cover the period April 26, 2019 through May 23, 2019.

I. AGREEMENTS

A. Interpretation – Arbitration

In Rosen v. Rosen, 2019 Westlaw 2030218 (2d Dept. May 8, 2019), the wife appealed from a July 2017 Supreme Court order, which granted the husband's motion to compel arbitration of her claims for child support enforcement and modification, and to stay proceedings pending such arbitration. The Second Department reversed, on the law, denied the husband's motion to compel arbitration of the enforcement claim and to stay arbitration, and remitted for a new determination of the husband's motion to compel arbitration of the modification claim and to stay proceedings thereon. The parties married in 2002 and have 2 children. A May 2014 arbitration agreement submitted certain issues to a Rabbinic Court, which rendered a decision later incorporated into the parties' stipulation and December 2014 judgment of divorce. The stipulation provided for biweekly child support of $1,003. In December 2017, the wife filed a

Family Court petition seeking modification and enforcement of child support, prompting the husband's above-mentioned motion in Supreme Court. Finding that the stipulation was ambiguous as to whether the agreement to arbitrate child support modification issues before a Rabbinic Court was subject to a two-year limit, the Appellate Division determined that Supreme Court should have held a hearing to consider extrinsic evidence on that issue. However, the Second Department found that the stipulation did not require arbitration of child support enforcement issues.

II. CHILD SUPPORT

A. Imputed Income; Social Security Taxes

In Johnson v. Johnson, 2019 Westlaw 2127532 (3d Dept. May 16, 2019), the husband appealed from an August 2017 Supreme Court judgment which, after trial of the wife's December 2015 divorce action, awarded the wife $17,031, representing 50% of capital contributions from marital assets to 2 marital businesses and child support of $723.33 per month. The parties were married in 2003 and have one child born in 2002. The husband contended on appeal, among other things, that Supreme Court erred by imputing income for purposes of maintenance and child support, and in awarding the wife 50% of the contributions to the marital businesses. Supreme Court considered the wife's 2016 W-2 statements, which indicated that her 2016 gross income was $31,360, and the husband's 2016 tax return, which indicated that his 2016 reported gross income was $39,093. The court then imputed income to the wife based on her projected 2017 income of $57,200 and to the husband based on $60,282 he took from the marital businesses in 2016, less FICA taxes from the wife's and husband's incomes of "7.65% and 15.3% respectively" and concluded that the wife's CSSA income was $52,824.20 and the husband's CSSA income was $51,058.85, pro rata shares of 50.85% and 49.15%, respectively.

The Appellate Division held that "where as here, a party pays for personal expenses through a business account, the court has the authority to impute income" and may also do so "where there is clear and undisputed evidence of a party's actual income during the pendency of the proceeding." The Third Department noted that "the CSSA allows statutory deductions for FICA taxes 'actually paid,'" but Supreme Court reduced the husband's 2016 income by 15.3% and determined that his income was $51,058.85, despite the fact that the husband "actually paid" self-employment FICA taxes of $6,162 in 2016. The Appellate Division found that the wife's CSSA income was $52,824.40 as determined, the husband's CSSA income was $60,282, less $6,162, and that the combined parental income was $106,944, 49% attributable to the wife and 51% to the husband. The basic child support obligation (17%) is $18,180 and the husband's presumptively correct share is $9,272 per year or $773 per month. The Appellate Division found that: it was "not disputed that marital funds were used to create both businesses and that both were marital property"; "in the absence of any expert evidence, the court properly declined to value and distribute a share of the marital businesses" and there was "no abuse of discretion in the court's award to the wife representing her contributions from marital assets to start the businesses."

B. UIFSA – Modification – Choice of Law Clause Invalid

In Matter of Brooks v. Brooks, 171 AD3d 1462 (4th Dept. Apr. 26, 2019), the mother appealed from an August 2017 Family Court order denying her objections to a Support Magistrate order, which, upon her 2016 petition, modified a registered 2011 New Jersey judgment of divorce which incorporated an agreement permitting modification every two years and which stated: "notwithstanding the future residence or domicile of each party, this Agreement shall be interpreted, governed, adjudicated and enforced in New Jersey in accordance

with the laws of the State of New Jersey." The mother contends on appeal that Family Court improperly denied her objections, upon the ground that the Support Magistrate erred in applying New Jersey law in calculating the father's modified child support obligation for the parties' children. The Fourth Department reversed, on the law, granted the mother's objections and remitted to Family Court. Family Court concluded that pursuant to the choice of law provisions of Family Court Act §580-604, "the law of the issuing state (in this case, New Jersey) governs the nature, extent, amount and duration of current payments under a . . . support order [that has been registered in New York]." The Appellate Division noted that where, as here, the parents reside in this state "and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order," citing FCA §580-613 [a] and 28 USC §1738B [e][1] and [i]. The Fourth Department, agreeing with the mother, held that "New York law must be applied to determine the father's child support obligation here inasmuch as the statute further provides that '[a] tribunal of this state exercising jurisdiction under this section shall apply . . . the procedural and substantive law of this state to the proceeding for enforcement or modification' (Family Ct Act §580-613[b])." The Court further noted that the choice of law provisions of FCA §580-604 do not control "inasmuch as that section applies to proceedings seeking to enforce prior child support orders or to calculate and collect related arrears and does not apply to proceedings, as here, seeking to modify such an order." The Fourth Department concluded: "the Support Magistrate erred in determining that the choice of law provision in the separation agreement controls over the statute. Although courts will generally enforce a choice of law clause 'so long as the chosen law bears a reasonable relationship to the parties or the transaction' (citations omitted), courts will not enforce such clauses where the chosen law violates 'some fundamental

principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal' (citations omitted). *** Under New York law, child support obligations are required to be calculated pursuant to the Child Support Standards Act (citation omitted)" and parents are obligated until a child's age 21.

III. COUNSEL & EXPERT FEES

A. Agreement

In Wolman v. Shouela, 171 AD3d 664 (1st Dept. Apr. 30, 2019), the husband appealed from a January 2018 Supreme Court order which directed him to pay the wife's counsel fees in the sum of $325,000. The parties' agreement provides: "the Husband shall pay all of his and the Wife's reasonable counsel fees in connection with" his motion to modify visitation. The First Department affirmed, rejecting the husband's argument that he "was entitled to a hearing on the issue of reasonable counsel fees because the billing statements submitted in support of the wife's motion for counsel fees were not reasonably detailed." The Appellate Division found that Supreme Court, "being fully familiar with all of the underlying proceedings, appropriately determined that the fees sought were reasonable by reviewing the detailed billing statements and the motion papers *** [and] reflected a significant reduction to the amount originally sought by the wife." The First Department declined to consider the husband's arguments that "some billing entries were improperly or excessively redacted and that the charges regarding photocopying were not reasonable, because those issues were not raised before the motion court." The Court refused "to consider the husband's arguments, raised for the first time on appeal, that counsel fees should not have been awarded to the wife because her motion failed to comply with 22 NYCRR 1400.2 and 1400.3 and Domestic Relations Law §237(b)."

IV. CUSTODY & VISITATION

A. Hague Convention – Return to Habitual Residence

In Eidem v. Eidem, NY Law Journ. May 3, 2019 (S.D.N.Y., Sullivan, J., Apr. 29, 2019, Docket No. 18-CV-6153), the father was a citizen of Norway and the mother was born in NY, holding dual citizenship in Norway and the US. The parents lived together in Norway from 2005 to 2013 and married in June 2008. There were two children, born in August 2008 and December 2010. Among other things, the older child has special medical needs and the younger child "has had difficulties with verbal skills." The mother filed for separation in June 2013 and the parties were divorced in Norway in 2014. The parties had a written agreement providing for joint custody, "permanent place of abode" with the mother, and visitation to the father every other Wednesday and Thursday, alternate weekends from Friday to Monday, and alternating holidays. In the summer of 2016, the father signed "a letter of parental consent" allowing the mother to take the children to the US for 1 year, to return before the August 2017 start of school in Norway. The children had never traveled outside of Norway prior to the summer of 2016, except to visit Sweden. The father visited the children in NY in December 2016 and began coordinating the children's return to Norway in January 2017. The mother had decided by April 2017 that she was not returning to Norway and misled the father, by telling him that she had purchased return tickets for August 8, 2017. The father and paternal grandfather went to the airport, but the children were not on the flight; only after the plane landed did the mother admit that "she had lied about purchasing airline tickets and explained that she was going to keep the children in the United States." The mother then cut off all contact between the father and children. The father tried calling at least a dozen times, to no avail. The father filed his petition for return of the children on July 6, 2018 and the Court held a hearing on October 9, 2018. The mother brought

the children to the hearing, and to prior proceedings, for no apparent reason, and the Court "expressed concern that [the mother] was using the children to bolster her arguments regarding the traumatic effect of the litigation on them." The mother testified that a babysitter had unexpectedly cancelled the morning of the hearing; the mother's counsel then sought to withdraw and the Court held a hearing on October 17, 2018, at which time the mother "admitted she had perjured herself at the October 9 hearing." The mother's counsel was permitted to withdraw from representing her. Following post-trial submissions, the Court held a conference in November 2018, during which the mother stated that "she does not currently intend to return to Norway with the children if the Court orders their return to Norway." The Court postponed its decision due to surgeries upon the older child in late 2018 and through March 2019. The parties made further submissions in April 2019 as to their respective abilities to access and provide medical care for the older child and his ability to travel safely to Norway, and to attend to the children's other special needs. Finding, among other things, that "the last shared intent of the parties was clearly for the children to be habitual residents of Norway," and that "[n]early all the children's extended family resides in Norway, including their maternal grandmother and paternal grandparents," and rejecting the mother's "grave risk of harm" defense, the Court ordered the children to be returned to Norway no later than June 29, 2019.

B. Modification – Alcohol Use; Care of Child; Domestic Violence; Joint to Sole; Social Media and Texting

In Matter of Jennifer D. v. Jeremy E., 2019 Westlaw 2031519 (3d Dept. May 9, 2019), the mother appealed from a July 2017 Supreme Court order, which, following a hearing, modified a May 2015 consent order (joint legal custody and shared placement) so as to grant the father sole legal custody of a child born in 2009. The Third Department affirmed, noting that "it

was undisputed that the mother and the father were no longer able to constructively communicate regarding the child [,]*** transportation arrangements often resulted in verbal conflict and, although both parents supported counseling for the child, they could not cooperate and each separately arranged for the child to see different providers[,]" thus supporting Supreme Court's conclusion that "joint custody was no longer feasible ***." As to modification, the Appellate Division cited "the mother's transient living situation and persisting lack of employment" in support of the award of sole custody to the father, "noting that the mother "had moved at least six times since the prior order and did not have a lease agreement for her current residence, where she and the child shared a bedroom." The Third Department further found: "The mother did not dispute having made inappropriate posts to her social-networking account regarding alcohol and drug abuse and violence toward children. She further admitted to having sent affectionate text messages to her former paramour while he served time in jail for reckless endangerment related to his 2016 attack upon her." The Court noted the father's allegations that "the mother abused alcohol and drugs and failed to properly clean and clothe the child," and that "the mother's former paramour also testified on the father's behalf, alleging that the mother used drugs and alcohol in the presence of the child and did not care for the child." The father and his wife share a home where he has lived for 3 years, along with the child's paternal grandmother. The Appellate Division concluded that "a sound and substantial basis exists to support Supreme Court's determination that the best interests of the child are served by awarding sole custody to the father," along with visitation to the mother 3 weekends per month and in alternating weeks during the summer recess.

C. Modification – Dental Needs Not Addressed

In Matter of Kinne v. Byrd, 171 AD3d 1495 (4th Dept. Apr. 26, 2019), the mother

appealed from a March 2018 Family Court order, which modified a prior order by awarding the father primary physical custody of the child. The Fourth Department affirmed, finding that testimony established that "the mother failed to seek any dental treatment for the child until he was four years old and suffering from a severe toothache (citations omitted). When the child was eventually examined by a dentist in August 2016, it was determined that he was at high risk for tooth decay and needed tooth extractions, crowns, and 'pulpal therapy.' The mother nonetheless failed to seek any treatment for the child's pressing dental problems during the ensuing months. By the time the father became aware of the child's significant dental needs in May 2017, the child was suffering from a toothache that made it difficult for him to eat. We thus conclude that there was a change in circumstances based on the mother's demonstrated lack of concern for the child's dental needs and her failure to timely obtain necessary dental treatment (citation omitted)." The Appellate Division concluded that "Family Court properly determined that it is in the best interests of the child to modify the parties' existing custody arrangement by awarding the father primary physical custody of the child" and that the Court's decision was based upon a "careful weighing of [the] appropriate factors . . . , and . . . has a sound and substantial basis in the record."

D. Modification – Passport Authority; Visitation with Grandmother

In Cohen v. Cohen, 2019 Westlaw 2113003 (2d Dept. May 15, 2019), the father appealed from a March 24, 2014 Supreme Court order, which designated the mother as the sole custodial parent of a child born in 2001 for passport and travel purposes, and denied his motion to direct the mother to allocate 1/3 of the child's travel time to Israel to visiting with the paternal grandmother and to direct visitation between the paternal grandmother and the child when she visited the US. The parties were married in 2001 and entered into a consent custody order in

December 2011. The mother alleged that the father unreasonably blocked passport issuance for the child unless the mother agreed to have the child spend half of his time with the father's family members in Israel, while not contributing to the child's expenses. The Second Department affirmed, holding that the father "failed to make the requisite showing" to warrant modification of the prior order, while noting that the visitation schedule contained in the December 2011 consent order did not contain any provision for visitation with the paternal grandmother. The Court concluded that while the mother opposed the father's request to allocate 1/3 of the child's trip to Israel to visiting the paternal grandmother, "the record does not demonstrate that she refused meaningful contact between the paternal grandmother and the child."

E. Modification – Post-Petition Events; Treating Psychiatrist Testimony

In Matter of Lela B. v. Shoshanah B., 2019 Westlaw 2031412 (1st Dept. May 9, 2019), respondent appealed from a June 2018 Family Court order which, after a hearing, eliminated her Wednesday overnight visitation with the parties' child and modified the holiday and access schedule. The First Department affirmed, stating: "While the better practice would have been for the Family Court to appoint a neutral forensic given the circumstances of this case, including the different views as to the reasons for the child's psychological difficulties, it was not reversible error for the court to allow the child's treating psychiatrist to testify and make recommendations for modification of the access schedule (citations omitted). The treating psychiatrist had the relevant credentials, met with and interviewed both parents, and performed a thorough assessment of the child." The Appellate Division rejected respondent's argument that "the treating psychiatrist's neutrality was compromised because he had been retained by petitioner," noting "sufficient evidence in the record, in addition to the treating psychiatrist's testimony, to support the court's determination that Wednesday overnights were a cause of the child's

symptoms." The First Department noted that while "respondent's expert disagreed with, and criticized, the treating psychiatrist's separation anxiety diagnosis, his testimony was based solely on his review of trial transcripts, and he did not have the benefit of in-person interviews with the child or his parents." The Court found that Family Court's "determination to give greater weight to the treating psychiatrist's testimony is entitled to deference and should not be disturbed on appeal." The Appellate Division rejected respondent's argument "that the JHO erred in admitting evidence of events that postdated pleadings from 2014 and 2015," given that the hearing was held pursuant to its prior orders requiring a hearing, including a June 20, 2017 order, Matter of Lela G. v Shoshanah B., 151 AD3d 593 (1st Dept. 2017), and noting that "respondent herself relied on recent evidence about the child in support of her arguments."

F. UCCJEA – Home State Jurisdiction

In Matter of Nemes v. Tutino, 2019 Westlaw 1872475 (4th Dept. Apr. 26, 2019), the father appealed from a November 2017 Family Court order, which denied his motion to vacate a February 2017 order of the same court pursuant to CPLR Rule 5015(a)(4) upon the ground of lack of subject matter jurisdiction. The parties are the parents of a child born in New Jersey on February 18, 2015 and who lived with both parents in NJ until the mother relocated to NY on July 15, 2015, according to her petition for sole custody filed January 8, 2016. The father's cross-petition, also seeking sole custody, alleged that the mother moved to NY on an unspecified date in August 2015. The parties appeared in Family Court 6 times between February and November 2016. The father did not appear on the 7th court date and Family Court dismissed his cross petition for failure to appear and granted the mother sole legal and physical custody and visitation in NY as agreed, not to include overnight visitation. The Fourth Department reversed, on the law, granted the father's motion to vacate the February 2017 order and dismissed the

petition and cross-petition. The Appellate Division stated: "Instead of claiming home state jurisdiction under Domestic Relations Law §76(1)(a), the mother essentially argues that the court had subject matter jurisdiction over this proceeding under the safety net provision of section 76(1)(d), which confers jurisdiction to make custody determinations when, insofar as relevant here, no court of any other state would have jurisdiction under the criteria specified in [section 76(1)](a).' We reject the mother's reliance on section 76(1)(d). Under the special UCCJEA definition of 'home state' applicable to infants under six months old (Domestic Relations Law §75-a[7]; NJ Stat Ann §2A:34-54), New Jersey was the child's 'home state' between the date of his birth (February 18, 2015) and the alleged date of his move to New York (July 15, 2015). Because the UCCJEA confers continuing jurisdiction on the state that 'was the home state of the child within six months before the commencement of the proceeding' if a parent lives in that state without the child (Domestic Relations Law §76[1][a]; NJ Stat Ann §2A:34-65 [a][1]), it follows that New Jersey retained continuing jurisdiction of this matter until January 15, 2016, i.e., six months after the child's alleged move to New York on July 15, 2015 and one week after the instant proceeding was commenced on January 8, 2016 (citations omitted). Thus, New York lacked jurisdiction under section 76(1)(d) because New Jersey could have exercised jurisdiction under the criteria of section 76(1)(a) on the date of this proceeding's commencement (see NJ Stat Ann §2A:34-65[a][1] [identical New Jersey provision to Domestic Relations Law §76(1)(a)]). After all, section 76(1)(d) applies only when no state could have exercised jurisdiction under the criteria of section 76(1)(a) at the commencement of the proceeding, and that is simply not the situation here." The Court noted further: "Although this case reflects a fact pattern of first impression in New York (see B.B. v A.B., 31 Misc3d 608, 612 [Sup Ct, Orange County 2011] [so noting]), our interpretation of the interplay between sections 76(1)(a) and 76(1)(d) is

consistent with the Washington State Court of Appeals' decision in In re McGlynn (154 Wash App 1020 [Ct App 2010]). As far as we can discern, McGlynn is the only foreign case to squarely address the precise fact pattern at bar." The Court concluded: "Finally, the mother argues that the court had subject matter jurisdiction because 'New York was the state in which the child was present at the commencement of the proceedings.' But that contention is interdicted by Domestic Relations Law §76(3), which says that the subject child's '[p]hysical presence . . . is not necessary or sufficient to make a child custody determination.' Indeed, by examining the court's jurisdiction through the lens of the child's physical presence instead of his 'home state,' the mother would have us resurrect a jurisdictional modality that has been defunct for over 40 years."

V. DISCLOSURE

A. Denied – Agreement Not Set Aside

In Langer v. Langer, 63 Misc3d 1208(A) (Sup. Ct. Nassau Co., Dane, J., Mar. 26, 2019), the parties were married in December 1996 and entered into a written agreement in November 2013, following the husband's commencement of a divorce action in June 2013, which agreement resolved custody of 3 children (born in 1998, 1999 and 2000) and all financial issues. Both parties were represented by "seasoned matrimonial counsel." In July 2017, the husband filed his Compliant, an RJI and request for preliminary conference. The wife, who was a stay at home mother, moved in November 2018 for an order permitting her to serve disclosure demands covering the 5 years prior to November 2013 and the time period subsequent thereto. The husband cross-moved for, among other things, summary judgment, granting him a divorce and incorporation of the agreement, counsel fees and sanctions. The agreement waived the right to disclosure, provided for approximately $3.2 million dollars in equitable distribution to the wife,

$7,540 per month in child support, based upon the husband's stated income of $312,000 per year, and $12,500 per month in maintenance for 9 years. Supreme Court found that it must consider the grounds to set aside an agreement when determining the wife's requests for disclosure, and found on the facts presented that: (1) there was no duress or overreaching in the negotiation of the agreement; (2) that the husband's alleged failure to make full disclosure does not, standing alone, constitute fraud or overreaching; (3) while there is precedent to allow disclosure of a party's financial circumstances at the time of the agreement, the wife waived the same in the agreement; (4) in the absence of a statement of net worth from the wife, the Court could not find the maintenance provisions to be unfair, unreasonable or unconscionable; and (5) given the agreement's terms for child support, maintenance and equitable distribution, the Court could not say that the same was unconscionable. As to the parties' motions, Supreme Court, among other things: (1) denied the wife's motion for disclosure, unless and until the agreement is set aside (providing a good review of the law in this area); (2) extended her time to challenge the agreement to April 29, 2019; (3) directed that she answer Plaintiff's Complaint by the same date; (4) denied the husband's request for counsel fees, upon the ground that neither party had provided a statement of net worth; and (5) denied the husband's application for sanctions.

VI. EQUITABLE DISTRIBUTION

A. Business – Share of Capital Contributions

In Johnson v. Johnson, 2019 Westlaw 2127532 (3d Dept. May 16, 2019), the husband appealed from an August 2017 Supreme Court judgment which, after trial of the wife's December 2015 divorce action, awarded the wife $17,031, representing 50% of capital contributions from marital assets to 2 marital businesses and child support of $723.33 per month. The parties were married in 2003 and have one child born in 2002. The husband contended on

appeal, among other things, that Supreme Court erred by imputing income for purposes of maintenance and child support, and in awarding the wife 50% the contributions to the marital businesses. Supreme Court considered the wife's 2016 W-2 statements, which indicated that her 2016 gross income was $31,360, and the husband's 2016 tax return, which indicated that his 2016 reported gross income was $39,093. The court then imputed income to the wife based on her projected 2017 income of $57,200 and to the husband based on $60,282 he took from the marital businesses in 2016, less FICA taxes from the wife's and husband's incomes of "7.65% and 15.3% respectively" and concluded that the wife's CSSA income was $52,824.20 and the husband's CSSA income was $51,058.85, pro rata shares of 50.85% and 49.15%, respectively. The Appellate Division held that "where as here, a party pays for personal expenses through a business account, the court has the authority to impute income" and may also do so "where there is clear and undisputed evidence of a party's actual income during the pendency of the proceeding." The Third Department noted that "the CSSA allows statutory deductions for FICA taxes 'actually paid,'" but Supreme Court reduced the husband's 2016 income by 15.3% and determined that his income was $51,058.85, despite the fact that the husband "actually paid" self-employment FICA taxes of $6,162 in 2016. The Appellate Division found that the wife's CSSA income was $52,824.40 as determined, the husband's CSSA income was $60,282, less $6,162, and that the combined parental income was $106,944, 49% attributable to the wife and 51% to the husband. The basic child support obligation (17%) is $18,180 and the husband's presumptively correct share is $9,272 per year or $773 per month. The Appellate Division found that: it was "not disputed that marital funds were used to create both businesses and that both were marital property"; "in the absence of any expert evidence, the court properly declined to value and distribute a share of the marital businesses" and there was "no abuse of discretion in

the court's award to the wife representing her contributions from marital assets to start the businesses.

B. Conditioned Upon Get Delivery – Reversed

In Cohen v. Cohen, 2019 Westlaw 2112972 (2d Dept. May 15, 2019), the husband appealed from a second amended January 2015 Supreme Court Judgment, upon a July 2012 decision after trial and a March 2014 order, which directed him provide the wife with a Get prior to receiving any distribution of marital property. The Second Department modified, on the law, stating: "We disagree with the Supreme Court's determination directing the defendant to provide the plaintiff with a Get. Domestic Relations Law §253 does not provide that a defendant in an action for divorce, where the marriage was solemnized by a member of the clergy or a minister, must provide the plaintiff with a Get. Since the court should not have directed the defendant to provide the plaintiff with a Get, the penalties imposed due to the defendant's failure to do so must be vacated (citations omitted)." Note that this decision may be at odds with the Court's prior decisions in Pinto v. Pinto, 260 AD2d 622 (2d Dept. 1999) and Schwartz v. Schwartz, 235 AD2d 468 (2d Dept. 1997).

VII. PATERNITY

A. Equitable Estoppel – Against Husband

In Matter of Onorina C.T. v. Ricardo R.E., 2019 Westlaw 1925619 (2d Dept. May 1, 2019), the child appealed from a February 2018 Family Court order which, after a hearing, dismissed the mother's petition seeking to adjudicate Ricardo as the father of the child born in July 2012. The mother was married to Jorge at the time of the child's conception and birth. The mother's petition alleged that "the husband was the petitioner's sex trafficker and that she conceived the child while he was out of the country." The mother alleged that Ricardo, who is

named on the child's birth certificate, is the father, and that he has supported the child and raised the child as his own since birth. Ricardo testified that he began an intimate relationship with the mother in 2011 and when she informed him in October 2011 she was pregnant, she came to live with him. Ricardo testified that he was present for the child's birth and has raised the child from birth as his son. The husband testified that he returned to the US in September 2011 and had relations with the mother until November 2011, when she told him she was pregnant with another man's child, and she left to live with Ricardo. Petitioner and Ricardo requested that the husband be estopped from asserting paternity. Family Court found that the mother failed to rebut the presumption of legitimacy and dismissed her petition, without determining the issue of equitable estoppel. The Second Department reversed, on the law, granted the mother's petition and adjudicated Ricardo to be the father of the child. The Appellate Division held: "Even if the presumption of legitimacy applies, the Family Court must proceed to an analysis of the best interests of the child before deciding whether to order a test (citation omitted)." The Second Department agreed with Family Court that the mother "failed to rebut the presumption of legitimacy by clear and convincing evidence" but concluded that Family Court "should not have refused to consider the issue of equitable estoppel raised by the petitioner and Ricardo R.E. in response to the husband's assertion of paternity." The Appellate Division noted that whether equitable estoppel "is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, [it] is only to be used to protect the best interests of the child." The Second Department therefore determined that it is "in the child's best interests to equitably estop the husband from asserting paternity," given that, among other things, "Ricardo R. E. lived with the child since his birth, supported the child financially, was actively involved in his care, and established a loving father-son relationship with the child over the first

three years of his life before the husband asserted paternity." With regard to the husband, the Appellate Division found that he "was aware that he could potentially be the child's biological father before the child's birth, was not involved in the child's prenatal care or present at his birth, and had never met or attempted to contact the child after his birth. He was employed, but never paid child support, and provided no financial support." The Court concluded: "Genetic testing is not in the child's best interests (citations omitted). To permit the husband to assume a parental role at this juncture would be unjust and inequitable."

VIII. PROCEDURE

A. Discontinuance Vacated; Sanctions

In Verdi v. Verdi, NY Law Journ. May 6, 2019 (Sup. Ct. Suffolk Co., Joseph, A.J., Apr. 29, 2019, Index No. 291-2018), the parties were married in June 2016, had no children, and plaintiff filed a divorce action on January 19, 2018. A preliminary conference was held on October 15, 2018. A status conference was held on December 7, 2018 and the action was scheduled for trial on February 26, 2019. The preliminary conference stipulation and order stated that Plaintiff would serve a verified complaint "on or before November 1, 2018 and said date shall be the date used to determine the timeliness of a Notice of Discontinuance." Plaintiff filed a Notice of Voluntary Discontinuance on February 21, 2019, served the same by mail upon Defendant's counsel on the same date, and then also served the same Notice via fax at 4:06 p.m. on Friday, February 22, 2019, which the Court noted was "2 business days before trial." Defendant's counsel appeared on the trial date on February 26, 2019, and advised the Court that Defendant had not yet been served with a Verified Complaint, although the Court file contained a copy of Plaintiff's Complaint and an Affidavit attesting to service thereof upon Defendant's counsel on January 2, 2019. The Court then advised Defendant's counsel that under the

circumstances then existing, the CPLR 3217(a)(1) discontinuance was valid. Defendant filed a motion on March 13, 2019, seeking to vacate the notice of voluntary discontinuance, which Supreme Court granted, finding that the preliminary conference stipulation and order operated as a waiver of Plaintiff's right to discontinue by notice, once 20 days passed following November 1, 2018, and further determining that Defendant had shown that "discontinuing the action would cause economic harm to the Defendant as the 'cut off date' for equitable distribution would be extended." Supreme Court: set the action for trial on June 5, 2019; granted the Defendant an extension of time to answer the complaint (CPLR 3012[d]); and awarded Defendant $1,970 in counsel fees and expenses pursuant to 22 NYCRR 130-1.1(a), finding that "the filing of the Notice of Discontinuance by the Plaintiff was only undertaken to delay or prolong the resolution of this litigation."

B. Sanctions - Motions to Dismiss DRL 170(7) Complaint

In Patouhas v. Patouhas, 2019 Westlaw 2202430 and 2202428 (2d Dept. May 22, 2019), in two separate decisions, the Second Department, on its own motion, directed the parties to show cause why sanctions and/or costs, including appellate counsel fees, should not be awarded against the defendant-appellant husband *pro se*, on his appeals from: (1) a June 2016 Supreme Court order, which denied his motion to dismiss pursuant to CPLR 3012(d) for failure to serve a complaint; and (2) a March 2017 order of the same court, which denied his motion to dismiss pursuant to CPLR 3211(a)(2) [lack of subject matter jurisdiction]. The Second Department affirmed on both appeals. The wife served a summons upon the husband on March 1, 2016 stating DRL 170(7) as the ground for divorce and he served a notice of appearance and demand for complaint on March 10, 2016. The wife's attorney sent a letter on April 1, 2016, noting ongoing settlement discussion, and requesting disclosure. The husband moved to dismiss on

April 20, 2016 and the wife served her complaint on April 26, 2016. Supreme Court, as above stated, denied the husband's motion to dismiss, noting the short delay and that the wife had a meritorious cause of action. The husband thereafter moved to dismiss for lack of subject matter jurisdiction. The Second Department held that the wife's statement under oath as to the irretrievable breakdown of the marriage "concerns the merits of the divorce action, not the court's competence to adjudicate it."

IX. LEGISLATIVE AND COURT RULE ITEMS

A. Extreme Risk Orders of Protection & Firearms

New CPLR Article 63-A is added, CPL §530.14 is amended and Penal Law §265.45 is amended, **effective August 24, 2019**. Article 63-A creates a procedure for requesting and issuing temporary and final extreme risk protection orders and surrendering or removing firearms possessed by a person subject to such orders. CPL §530.14 is amended to provide that, before ordering the return of firearms to a person who had been subject to removal of firearms due to the issuance of an order of protection, a county licensing officer must provide notice and an opportunity to be heard to the District Attorney, the County Attorney, the protected party, and every licensing officer responsible for the issuance of a firearms license to the person. PL §265.45 is amended to include a person subject to an extreme risk protection order to the enumerated persons residing with a firearm owner, which triggers the requirement that the firearm owner's rifles, shotguns and firearms be securely locked in an appropriate safe storage depository or rendered incapable of being fired by use of a gun locking device appropriate to that weapon. A.2689/S.2451, Laws of 2019, Chapter 19, signed 02/25/2019.

B. Revenge Porn – New Crime and Private Right of Action

Passed Assembly and Senate on February 28, 2019: **If signed**, Penal Law §245.15 is

added, CPL §530.11 and FCA §812 are amended, and Civil Rights Law §52-b is added, effective 60 days after signing. New Penal Law §245.15 creates the new crime of "unlawful dissemination or publication of an intimate image," a class A misdemeanor. The amendments to CPL §530.11 and FCA §812 provide the family court and criminal courts with concurrent jurisdiction over proceedings that would constitute unlawful dissemination or publication of an intimate image between spouses or former spouses, parents and children or members of the same family or household, by adding the new crime to the list of family offenses. New Civil Rights Law §52-b creates a private right of action for an individual to pursue damages and injunctive relief against someone who unlawfully disseminates or publishes an intimate image. According to the memorandum in support of the bill: "The private right of action is designed to work in conjunction with the criminal law, and does not require that a criminal conviction or charge be obtained in order to proceed. An individual can also commence a special proceeding to obtain a court order to have an intimate image permanently removed from the internet." A.5981/S.1719C.

C. Statement of Client's Rights and Responsibilities – No Fee

Following the February 15, 2019 enactment of the revised Statement of Client's Rights and Responsibilities set forth in 22 NYCRR §1400.2, by an order dated April 16, 2019, the Appellate Division has amended, **effective June 1, 2019**, the version of the same statement for when the representation is without fee.

Dated: May 23, 2019

At: Albany, NY

Speaker Biographies

STACY PRESTON COLLINS, CPA/ABV, CFF

Stacy Preston Collins (scollins@finresearch.com) has focused on forensic accounting and valuation issues since 1993, and is a Managing Director with Financial Research Associates. Her work involves complex financial issues in matrimonial cases, shareholder disputes, estate planning engagements, and other matters. She is located at 286 Madison Avenue, Suite 1300, New York, NY 10017, phone number (646) 248-5650.

Ms. Collins has testified as a financial expert on business valuation and forensic accounting issues in several states. She has been appointed by the court as an expert in New York and New Jersey.

Ms. Collins graduated from Drexel University with a concentration in Accounting and Finance. She holds the Accredited in Business Valuation (ABV) and Certified in Financial Forensics (CFF) designations from the American Institute of Certified Public Accountants (AICPA).

Ms. Collins is past Chair of the AICPA's Family Law Task Force and is a former member of its Forensic and Litigation Services Committee. She has been on faculty for many years with the Family Law Trial Advocacy Institute (affiliated with NITA and the ABA) and the AAML's Institute for Family Law Associates. She lectures frequently on forensic accounting and valuation issues to lawyers, judges, and financial professionals. She is a Charter Member of the Forensic & Business Valuation Division of the AAML Foundation.

Ms. Collins is a contributing author to *Financial Valuation Applications and Models* (Third and Fourth Editions) and *Family Law Services Handbook*. She is a member of the "Panel of Experts" in the publication *Financial Valuation and Litigation Expert.*

STEPHEN GASSMAN is the senior partner in the firm of Gassman Baiamonte Gruner, PC, Garden City, N.Y. which limits its practice to matrimonial and family law. He is a graduate of the University of North Carolina and New York Law School.

Mr. Gassman is a Fellow of the American Academy of Matrimonial Lawyers; has served as President of the Bar Association of Nassau County, New York and Chair of the Family Law Section of the New York State Bar Association. He is a member of the statewide Matrimonial Practice and Rules Committee of the Unified Court System of the State of New York. He has also served as Chair of the Matrimonial & Family Law Committee of the Nassau County Bar Association, as President of the Nassau County Bar Association, and as an Adjunct Professor of Law at Touro Law School, teaching Advanced Family Law. Mr. Gassman has also served as a member of the Judicial Hearing Officer Screening Committee for the Second Judicial Department, a member of the Advisory Board of the Safe Center, and a member of the Law Guardian Advisory Committee for the Tenth Judicial District.

Mr. Gassman has co-authored with Timothy M. Tippins Evidence for Matrimonial Lawyers and Matrimonial Valuation. He has also co-authored with Rosalia Baiamonte the "Library of New York Matrimonial Law Forms", published by the New York Law Journal Press.

He has been a lecturer at matrimonial law seminars and symposiums conducted under the aegis of the New York State Bar Association, American Academy of Matrimonial Lawyers, "New York Law Journal", NYS Bar Association, American Bar Association, Nassau County Bar Association, Suffolk County Bar Association, Kings County Bar Association, Office of Court Administration - Judicial Seminars, Westchester County Bar Association, Appellate Division Second Department, Association of the Bar of the City of New York, New York County Lawyers Association, Matlaw Systems, New York State Trial Lawyers Association, Family Court Law Guardian Seminars - Tenth Judicial District; and numerous other bar groups.

Stephen Gassman has been listed in *The Best Lawyers in America* for over 30 years, and has been listed in *New York Super Lawyers* since its inception in 2007. He has been a guest and moderated television shows dealing with matrimonial law on Court TV and Lawline.

Additionally, Mr. Gassman has had bestowed upon him the award of "Distinguished Past President" by the Nassau County Bar Association, and the award as an "Education Partner" by Nassau Boces.

Mr. Gassman is the founder of the We Care Fund, the charitable arm of the Nassau County Bar Association, and was the first recipient of the award honoring extraordinary service to this charity, the award known as the Stephen Gassman Award.

Mr. Gassman is married and has three children and four grandchildren.

Charles P. Inclima

Mr. Inclima, of the Inclima Law Firm, PLLC located in Rochester, concentrates his practice in the areas of matrimonial and family law. He is a member of the Executive Committee of the New York State Bar Association's Family Law Section and a Past President of the Monroe County Bar Association. Mr. Inclima was also Chair of its Family Law Section and Dean of the Monroe County Bar Association's Academy of Law. He is a Fellow of the American Academy of Matrimonial Lawyers. He has recently completed his term as Chairperson of the Seventh Judicial District's Grievance Committee. He is the immediate past-Chair of the MCBA Communications Committee. Mr. Inclima is listed in The Best Lawyers In America, 13th and 14th editions, 2007 and 2008 and has been named to the 2007 and 2008 editions of New York Super Lawyers.

Mr. Inclima is a frequent lecturer for the New York State and Monroe County Bar Associations, has been a panelist for various programs of American Academy of Matrimonial Lawyers and he has made presentations to Judges and Court Personnel for the New York State Judicial Institute. He is a former Adjunct Professor at Rochester Institute of Technology.

Honorable La Tia W. Martin

Honorable La Tia W Martin graduated from the Boston University School of Management with a Bachelor of Science Degree. Thereafter, Justice Martin graduated from the Rutgers University School of Law. She has attended the John F Kennedy School of Government, Aspen Institute and National Judicial College. Her judicial career began with an appointment to the New York City Criminal Court in Manhattan to be followed by the elections to the New York City Civil Court and New York State Supreme. Justice Martin presided over the sole Matrimonial Part in the Bronx County Supreme Court. During 2006-09 Justice Martin was assigned to the Westchester County Supreme Court Matrimonial Part. In 2009 she was appointed to her current position of Supervising Judge of the Matrimonial Part in the Bronx County Supreme Court. Since 2009 she has been a member of the faculty of the Elizabeth Haub School of Law at Pace University (Commercial Law/Criminal Procedure). Justice Martin is the 29th President of the National Association of Women Judges. The Justice Academy for Young Women which introduced underserved yet outstanding female high school students to the legal profession
was established by Justice Martin.

Summer CLE, Saratoga, July 12, 2019

Michael Raymond

Michael Raymond is the Managing Partner of BST's valuation, forensic accounting and litigation support group. He is also a partner with the firm's Transaction Advisory Services team. He has more than 26 years experience in public accounting, primarily in the forensic accounting and litigation support area. He has been court appointed and qualified as an expert in courts throughout New York State and in London, UK.

Mike is a frequent author and speaker on accounting, tax, valuation and forensic accounting topics. He speaks regularly for the New York State Bar Association, the American Academy of Matrimonial Lawyers, the American Bar Association, Albany Law School, Siena College and many local bar associations.

Mike is a licensed CPA in the State of New York and is Accredited in Business Valuation (ABV) and Certified in Financial Forensics (CFF) by the American Institute of Certified Public Accountants (AICPA). He is a member of the American Institute of Certified Public Accountants and the New York State Society of Certified Public Accountants. Michael was awarded the Certificate for Educational Achievement in Business Valuation from the American Institute of Certified Public Accountants.

Pamela M. Sloan

Pam is a member of Aronson Mayefsky & Sloan, LLP, a New York City firm, whose practice is limited to divorce and other aspects of family law, including the custody and well-being of a separating couple's children, the identification, valuation and distribution of complex financial assets, the assessment of and entitlement to child and spousal support, the drafting of pre-marital and marital agreements, and the trying of cases when necessary to achieve the best result for the firm's client. Pam is a fellow of the American Academy of Matrimonial Lawyers and of the International Academy of Matrimonial Lawyers. She is a former Chair of the Family Law Section of the New York State Bar Association, a former Chair of the Matrimonial Law Committee of the New York City Bar Association, and a current member of the Association's Committee on the Judiciary.

Although AM&S's practice is focused primarily on the representation of high net worth individuals, Pam is committed to representing people from underserved communities in their family law matters. She also is involved in diverse community organizations. At present, she serves on the Board of Directors of Women's Housing and Economic Development Corp. (WHEDCo) in the Bronx and on the Board of Governors of Bishop Loughlin Memorial High School in Ft. Greene, Brooklyn.

Pam has been recognized by her peers for her skill and integrity: she received and maintains the highest rating from Martindale-Hubbell, she has been listed in the *Best Lawyers in America* since 2003 (Woodward/White), and since the inception of *New York Super Lawyers* (Law & Politics), she has been consistently named as one of New York City's top matrimonial practitioners, one of its Top 50 Women Lawyers, and one of its Top 100 Lawyers.

Honorable Jeffrey Sunshine, J.S.C., is an elected Supreme Court Justice. On June 1, 2018 he was appointed by the Chief Administrative Judge Lawrence Marks as the Statewide Coordinating Judge for Matrimonial Cases. He continues to be the Chair of the Chief Administrative Judge=s Matrimonial Practice Advisory and Rules Committee. He also serves as Chair Board of Advisors of the Center for Children, Families and the Law at the Maurice A. Deane School of Law - Hofstra University where he obtained his Juris Doctor degree in 1980. Judicial Assignments: Kings County Family Court 1998-2001; Richmond County Supreme Court January 2001 B February 2003; Kings County Supreme Court since February 2003.

A former President of the Brooklyn Bar Association, he served as Chair of the Family Law Section for over ten years. He was a member of the House of Delegates of The New York State Bar Association for many years and served as the Chair of the New York State Bar Association Special Committee on Judicial Discipline from 1996-1998. He is also a member of numerous other Bar Associations.

As a practicing attorney, he was a member of the Grievance Committee Second and Eleventh Judicial Districts and presently serves on the OCA Statewide Family Violence Task Force and the New York State Judicial Committee on Women in the Courts.

In 2003, he received the AEcumenical Award@ from the Catholic Lawyers Guild, Kings County, and in 2005, the Brooklyn Bar Association=s highest award, the AAnnual Award for Outstanding Achievement in the Science of Jurisprudence and Public Service.@ In 2009, he received the AIn the Trenches Award@ from the Lawyers Committee Against Domestic Violence. He was the sole recipient of the 2010 annual award of the New York Chapter of the American Academy - Matrimonial Lawyers. In 2015, he delivered the keynote address at the Annual Meeting of the Family Law Section of the State Bar. In March 2018, he was recognized by Hofstra Law School with a Distinguished Alumni On The Bench award. He also authored an article titled A2015-2016 Changes in Legislation and Rules for Matrimonial Matters@ which was published in the November 18, 2016 edition of the New York Law Journal. Over 110 of his decisions have been published and he has presented over 100 lectures/panels throughout New York.

He is married to the Hon. Nancy T. Sunshine, Esq., the County Clerk - Kings County.

6/18/18

Bruce J. Wagner is Chair of the Family Law Practice Group at McNamee Lochner P.C., Albany, NY, and is a principal and shareholder in that law firm. His primary areas of practice are matrimonial law and appeals. He is a 1982 graduate of Cornell University and a 1985 graduate of Albany Law School of Union University. In September 2002, he was appointed as a Town Justice in the Town of Schodack (pronounced sko'-dak), Rensselaer County, was thereafter elected to four 4-year terms, and chose not to run for a 5th term in November 2018, serving more than 16 years through December 31, 2018, and having also been designated on a regular basis as an Acting City Court Judge (Criminal, Civil and Traffic Parts) in the Third Judicial District. Mr. Wagner is immediate Past President of the Rensselaer County Magistrates' Association, having also served a prior two year term as President in 2010-2011, and is a member of the New York State Magistrates' Association. In October 2016, he was selected by his peers as a Diplomate of the American College of Family Trial Lawyers, a select group of 100 of the top family law trial lawyers from across the United States. He is listed in all editions 1999 through 2019 of The Best Lawyers in America (Woodward-White) and has a 2018 peer rating of AV® Preeminent™ in Martindale-Hubbell. Based on peer voting, Mr. Wagner has been named to all editions 2007 through 2018 of *Super Lawyers – Upstate New York*, and is included in the 2018 "Top 10" list for Upstate New York. He has also placed in the top 25 in the Hudson Valley for 11 of the last 12 years, including 2018. In October 2011, Mr. Wagner was named the Albany *Best Lawyers* Family Law Lawyer of the Year for 2012. Mr. Wagner was the subject of a profile entitled "From Constitutional Law to the Court of Appeals" in the 2011 New York-Upstate edition of *Super Lawyers*. From January 2005 to January 2007, he served as President of the 167-member American Academy of Matrimonial Lawyers, New York Chapter, which is part of a national organization of about 1,600 Certified Fellows. Mr. Wagner is also a Certified Fellow of the International Academy of Family Lawyers. He is a Past Chair (2010-2012) of the 2,700-member NYSBA Family Law Section, having previously served the section for 2 years each as Financial Officer, Secretary and Vice Chair. Mr. Wagner has served as a co-chair of the Continuing Legal Education Committee of the NYSBA Family Law Section since June 2000. Since 1998, he has been a representative from the 3rd Judicial District to what is now the Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee. In April 2015, he was appointed by the Chief Administrative Judge to the 3rd Department Judicial Hearing Officer Selection Advisory Committee. He is a member of the Rensselaer County, Albany County, New York State and American Bar Associations. Mr. Wagner is a frequent lecturer and author for continuing legal and judicial education programs which have been sponsored by the Albany, Broome, Columbia, Nassau, New York City, Onondaga & Oswego, Queens, Rensselaer, Schenectady and Westchester County Bar Associations, the NYS Bar Association, the American Academy of Matrimonial Lawyers, the Appellate Division (First and Third Departments), the NYS Judicial Institute (Judicial and Court Attorney Seminars), the Association of NYS Supreme Court Justices, the Rensselaer and Columbia County Magistrates' Associations, the Capital District Women's Bar Association Legal Project, and other organizations. He has taught at the Advanced Judicial Education Program for Town & Village Justices and at the Basic Certification Course for newly elected Town & Village Justices. Mr. Wagner and his wife, Janet, reside in Schodack and have two children, both of whom work at the same NYC hospital, one as a manager and one as a registered nurse. He has served as: an Assistant Scoutmaster or Committee Member of Boy Scout Troop 53, Castleton and as a Merit Badge Counselor for Twin Rivers Council, Boy Scouts of America, since 2002; a Sunday School Teacher for the First United Methodist Church, East Greenbush; an assistant coach for the East Greenbush Girls' Softball League; Conductor of the former Hendrick Hudson Male Chorus, East Greenbush (1989-2003 and 2011-2016); a co-Conductor of the Yankee Male Chorus (1994-2013); President of the Mohawk-Hudson Male Chorus Association (2008-2016); and Choir Director for the First United Methodist (2010-2017) and Holy Spirit (1984-1987) Churches, East Greenbush.