Family law as a training ground: the need for reevaluation

By Mark E. Minyard

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The Elkins Family Law Task Force (EFLTF) recommended that family courts be given "well qualified judicial officers." However, in practice, rather than assigning judges to the family law panel who have either family law or prior judicial experience, newly appointed judges, with neither family law experience nor any training in managing a calendar, are routinely assigned to a family law panel for their initial judicial assignment. Is this practice fair to family law litigants, to children, to judicial officers, or to the courts? As the system operates currently, family court is essentially the training ground where many new judicial officers cut their judicial teeth, typically for two years before being reassigned to a civil or criminal department. Shouldn't it be the other way around, as recommended by the EFLTF?

Respect

Should a family law litigant be treated differently than a corporation, an insurance company, or a person involved in an automobile accident? As Martin Luther King recognized and stated, "Justice delayed is justice denied." Being forced to wait months to obtain orders related to children, or for financial support to pay rent or buy food, is not what the EFLTF had in mind. Why is the family court the only court that is forced to treat its litigants with disrespect while litigants in other legal disciplines receive very different treatment. If family court was a business, it would have been forced into bankruptcy decades ago.

It is also of note that family law judicial officers are not afforded the same level of respect as are other judicial officers, which is puzzling. No area of law is more complex and divergent in its application than family law. Family law judicial officers should be given sufficient time on each matter to make thoughtful and judicious decisions, and not be forced to just get through their calendars.

Consequences of inaction has led to a multi-faceted crisis

The goal of the EFLTF was to improve the family courts to benefit those who pay for them, and to give the family courts parity of resources with other courts. As a result of the failure to implement EFLTF recommendations, family law litigants generally experience the following:

1. Initial RFOs are set five or six months after filing, there have been continuances of up to six months or more for temporary orders, and the time required to complete even a simple divorce has been far beyond any definition of reasonable.

2. Hearings and trials are often piecemealed into half-day fragments that are spread out over weeks, months and even years. The question that is often asked but never answered is "why can three or four consecutive trial days be devoted to a non-priority auto accident case with $500 of property damage and $2,000 of soft tissue injuries — no questions asked, while a lawyer handling a complex family law matter involving tens of millions of dollars may have to fight for four days of trial time?" What's more, such cases may be spread out for months into eight half-days. It's also not unheard of that a lawyer handling a custody case involving one parent's request to move a child across the country could take weeks or months, when one scheduled full day of trial could resolve the matter.

3. Substantial additional and unnecessary attorney's fees being incurred that would not otherwise be incurred, but for the multiple and long continuances and the piecemealing of the litigation itself, which often results in litigants losing their representation mid-way through a case, because of an inability to continue to fund the litigation.

4. Adverse Childhood Experiences (ACES) endured by children in high conflict divorces being prolonged and intensified due to the length of time required to complete a divorce. The State of California has described toxic stress as a public health crisis due to the serious health risks to children relative to the disruption of healthy brain architecture development and many other health risks.

5. Family court judicial officers are working far more than normal hours (for the same compensation as other judicial officers), which contributes significantly to their desire to leave a family court assignment.

6. A non-stop exodus of judicial officers from family court resulting in inefficiencies, and litigants not having access to experienced judicial officers. Two-thirds of the family law panel in Orange County has less than two years of family court experience. As a result, cases may end up being broken into several parts, where several judicial officers make important decisions that impact the lives of parents and their children. It was estimated by one Orange County family law judicial officer that the 2008 family law panel had close to 400 years of combined family law judicial experience and years of family law practice as lawyers. Commencing in January 2024, after anticipated retirements, the Orange County family law panel will have only a small fraction of that wealth of experience than it previously enjoyed.

7. Newer judges: By February, 2024, no judicial officer on the Orange County family law panel will have ten years of family law judicial experience, leading to minimal senior judicial mentorship.

Empowering family law attorneys: a legislative initiative

The family law bar associations, the AAML, the AFLCS and the AFCC should consider a collaborative effort to retain a lobbyist to develop a strategy for a legislative solution to the challenges in the family courts. The combined influence of these groups could raise public awareness, highlight the issues, and potentially influence legislative changes. Family courts touch a staggering portion of our society. At least 50% of the population access the family courts in one way or another, whereas only 10% access the civil courts and only a small fraction of the population find themselves in the criminal courts.

A realistic concern about efforts to improve the system is whether the cure could be worse than the disease, where due process is eliminated by moving to an administrative version of justice in the name of efficiency. Some will recall a time when a proposed change included a real threat to the essential concepts of due process. That change was in the form of a proposal called 'Family Law 2000.' 'Family Law 2000' would have taken the entire California family law system to a dispute resolution model, without the evidence code or due process, but for the vision and tireless work of Justice Sheila P. Sonenshine (Ret.) and the late Judge J.E.T. Rutter. It is hoped that, if changes are headed in that direction, groups like the AAML, the ACFLS, family law bar associations and family law judicial officers will be aggressively vigilant and actively oppose any attacks on due process in the family courts. One of the main objectives of EFLTF was to protect the due process rights of family law litigants in the same way they are protected in the criminal and civil courts.

This article is part three of a four-part series about recommendations for change to family law courts.

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PRACTICAL ETHICS

Reclaiming your books from unclaimed property

By David M. Majchrzak

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When the State Bar announced CTAPP and reinforced that lawyers needed to take good care of their trust accounts, licensees had a wide range of reactions. Some shrugged it off, confident that their books have always been in order and will continue to be. Others invoked the adage that they went to law school to avoid math and contemplated whether they should simply surrender their bar cards. And many had feelings that fell somewhere in between these extremes. One of the very good impacts of this was that a spotlight was shone on a fiduciary duty that could be given less attention simply because of the desire to focus as much time as possible on providing legal services to clients.

But as lawyers have worked hard to ensure their books are in order, it has been fascinating to learn that so many of them face a common theme: despite the effort to distribute funds to their proper owners, checks go uncashed. Whereas it could seem unthinkable to many that a check is not deposited almost instantaneously, it happens. And it probably occurs more frequently than what you would expect.

In the trust accounting arena, that leads to an awkward situation. Lawyers have some client ledgers with a zero balance that they have to keep at the ready—not merely preserving them in the archives for the five years after final distribution as required by Rules of Professional Conduct, rule 1.15—for monthly reconciliations. That is because the reconciliation process requires lawyers to determine what deposits have not cleared and what payments have not been cashed; and the trust account has not yet "zeroed out" for the clients where all payments have not been cashed.

Indeed, one of the benefits of monthly reconciliations is that it allows lawyers to determine relatively soon who has not received the money due them, even if payment has been tendered. That allows lawyers to follow up to determine why that has happened, whether it is because the check was not received, there is a dispute, or some other reason. Ideally, the situation can be rectified shortly within a few communications.

But that is not always the case. Sometimes people move and do not think to provide forwarding information to lawyers. Other times, they may intentionally decide to not open communications from lawyers or law firms. Regardless of the reason, however, lawyers should not simply sit on the funds indefinitely. Aside from requirements to escheat unclaimed property, it helps avoid a situation where so much time has passed that it becomes near impossible to figure out which money belongs to who. This is particularly the case for solo firms that are being wound down after a lawyer's passing, which can be disheartening to the family and loved ones left behind.

So what are lawyers to do once they determine a check or other form of payment from the account has not cleared in the expected time?

As a practical matter, the first step should usually be to reach out to the payor to find out why. In some cases, the lawyer may learn that the contact information is out of date. If new, forwarding information cannot be readily ascertained, there are plenty of options to locate those entitled to funds, whether that be online services, sophisticated locator services, private investigators, or otherwise.

But if a lawyer is unable to locate the payee, that does not mean they get to keep the funds. Per the State Bar's Client Trust Accounting Handbook, if you take steps to take care of balances and are still unable to pay out the funds, you should consider whether the unclaimed monies escheat to the state pursuant to Code of Civil Procedure section 1518.

That statute provides that certain tangible property and all intangible property escheats to the state if for more than three years after it becomes payable or distributable, the owner has not increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest in the property as evidenced by a memorandum or other record on file with the fiduciary. There are some statutory exceptions to this three-year rule, but they are less likely to apply in the context of a client trust account than other circumstances.

Indeed, the State Controller's Office offers a handbook for these situations. In pertinent part, that likewise provides, "Interest on Lawyers' Trust Accounts Attorneys and law firms (holders) are required to report and transfer to the State Controller's Office property held in Interest on Lawyers' Trust Accounts (IOLTA) for individual clients when there has been no activity on the property or contact with the owner regarding the balance for a period of three years." Providing additional incentive to timely address these issues, noncompliance may subject lawyers to penalties, including interest and fines.

There is, of course, less of a clear path when a lawyer cannot determine where the funds belong, and there are a number of reasons why that could happen – whether it is due to changes in the firm, money paid by third parties, or funds simply having been in the account for such an extended period. If every effort has been made to locate the owner of the funds and it cannot be ascertained, one option is to simply indicate on the holder notice report that it is unknown. Sending a cover letter to explain the situation may be helpful.

Ultimately, the escheatment process is not a simple one. It includes: filing a Universal Holder Face Sheet from the Unclaimed Property section of the Controller's office, providing a cover letter explaining IOLTA and the unknown source, and perhaps conducting the process through an alternate portal, which may necessitate assistance from someone from Unclaimed Property to walk you through the process. Fortunately, there are people available who will help you do that.

It is important to clean up accounts, and though there is a process in place lawyers should remember that escheating to the state should be a last resort. As always, the devil is in the details. Lawyers should first endeavor to find the people they are holding the funds for, as it is a fiduciary duty attorneys have been entrusted with.

By the Klinedinst PC Practical Ethics Team, with **David M. Majchrzak** *as lead author. The Klinedinst PC Ethics and Risk Management Team writes a monthly Practical Ethics Column to help California practitioners understand cutting edge ethics issues, manage risk and ensure compliance. More about the Team and the authors –* **Heather L. Rosing, Dave Majchrzak, Carole Buckner** *and* **Joanna Storey** *– can be found at https://klinedinstlaw.com/practice/legal-ethics-law-firm-risk-management.*