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Family Law News

this issue...

STATE BAR OF ARIZONA

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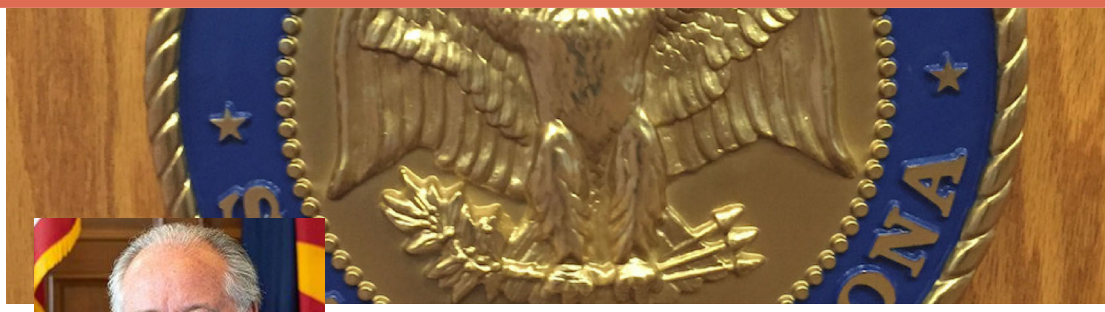


FROM THE BENCH

HON. BRUCE R. COHEN

HONORING KATHLEEN A. MCCARTHY, ESQ.

We have all suffered such a great loss.

Kathleen McCarthy was truly brilliant and made us all better lawyers.

I recall all the times from when I was practicing and would hear her case law updates. The first thing I did after leaving her presentation was to put my malpractice carrier on notice because of all the issues she saw and understood that the rest of us mortals would miss.

Her spirit was unshakable, even when she suffered unthinkable tragedies or confronted her illness. And I am now going to spend some time with my half full/half empty glass. In the half empty portion, I will allow myself to feel the sadness of losing her. In the half full portion, I will take joy in having had her as a colleague and friend for the past five decades. Rest peacefully, dear friend.

A CALL TO ACTION (AND A BLUEPRINT) FOR A PARADIGM SHIFT IN FAMILY LAW

Kathleen A. McCarthy, J.D.

Bruce Cohen has always inspired me in a big way. At the 2022 *For Better of For Worse* seminar, he played a clip from the movie *Jerry Maguire*. In it, Tom Cruise's character has an epiphany about a more loving, kind and inspired way to conduct business in a cutthroat profession. This inspired my own *Jerry Maguire* moment. After 45 years of deep saturation in family law circumambulating in my brain, sometimes day and night, I finally decided, if not now, when? It's time to express my truth – a truth that I know has resonated with at least some of you, and I hope will resonate with many more.

My Family Law Manifesto

March 29, 2022
Dedicated to The Honorable Bruce Cohen

This is what I know now:
That weird or even mean being (translation: our client's ex, or opposing counsel) are not to be summarily dispatched into a bin of soiled unmentionables - Undeserving of even the slightest investigation / Or even a mere chromatic flash of a thin finger.

While I may engage in the most acrobatic of argument / I must not forget that while my focus may be different than yours / It does not mean that you are wrong / After all, we are not mere mechanical turnstiles or robots just passing on the fear and pain.

Because:
We don't quell fear by fomenting more fear / We are better than that!
We don't solve problems by exploding with anger / We are better than that!
We don't heal pain by inflicting more pain / We are better than that!
These are all just needless distractions that help us kill our own pain - not our clients / And all we are doing is killing each other - not healing our clients, or us, for that matter.

Rather:
The real work is in understanding how our clients *and we attorneys* got here in the first place / In understanding how people get all matted and confused / Unable to find the meaningful threads of our own existence / Why our clients turn to us expecting a divorce and our magic wand to heal their misery / And how our egos have become corrupted by the false gods of winning and losing.

So let's not stay all wrapped up in our suit of professional cellophane / Pretending that we can take a dehydrated approach to the humans in our care / Instead, let us own our birthrights as problem solvers, / As counselors and teachers, as intermediaries, as emissaries / And as skilled guides who can find the commonality in this most complex of Venn diagrams.

In doing this, I am not suggesting that:
We cover ourselves in pollyanna bubble wrap / Or that we have to become easy roadkill for the other side / Or that we have to park our trust thermometers at the door.

Instead, let's remember that:

We are blessed to have a rich toolbox as our endowment / And a robust operating theater at our immediate disposal / We have the skills to get to the truth / We can cut past the lies through the crucible of skilled cross-examination / And through enormous effort, we have earned our ticket to access readily the halls of justice / We can wend our way through the libraries filled with sometimes byzantine legal knowledge and ponderous words / We have the luxury of attending seminars and learning endless ways to solve problems / We have the privilege of connecting with many like-minded colleagues who share our keen interests.

So, instead of aspiring to the highest rungs of lifeless acrimony / Let us be the neural neutralizers for pain and confusion / Let us bring the light to the murkiness of misunderstanding, confusion and fear / Let us resuscitate and heal our own life with the rich prose of kindness / Let us turn to the urgent task of raising everyone up / After all, we are, **AT HEART**, healers / It is time to start owning our Birthright!

AN INVITATION

There is an old saying: “tradition is peer pressure from the dead.” In a similar vein, much of family law practice has been inherited from the generations long past. Their approach may have served their culture and customs, but we are in radically different times. This demands a radical response.

Actually, it demands a quantum shift of consciousness. It won’t be easy.

Let’s face it. Many of us nurse deeply entrenched grudges whose origins are long forgotten – holloed out by time. We have habituated ourselves to respond to challenges with negativity: we raise our fists, bar our teeth, and activate our self-righteous gene. We send “nasty-grams” or worse. We talk “smack” about the other attorney. A quantum shift will require that we do the hard work of forgiving, we stop nursing grudges, and we adopt a more measured approach. It might even require that we talk to each other.*

I have had inspired conversations with many who would like to bring the practice of family law into the future: a kinder future, one that heals families; one that understands that the root of a host of misconduct is fear, stress, or trauma; and one that understands how to recognize and even treat it. This is an invitation to continue that conversation. In the meantime, may we all keep celebrating the miracle of life and the privilege of getting to be a family lawyer!

*Here is a challenge for all of us: call a nemesis of yours – today – and have a kind and human conversation.

By
DeShon Pullen, Esq.

By
Staci Maret, LP

WHY YOUR FIRM'S NEXT HIRE SHOULD BE

a Legal Professional

Legal Paraprofessionals have more experience than most first year attorneys plus it makes economic sense

B

BY NOW, EVERYONE IS AWARE OF ARIZONA'S NEW TIER of legal service providers - the Legal Paraprofessional ("LP"). On November 29, 2021, the first ten (10) LPs were approved for licensure by the Arizona Supreme Court's Board of Non-Lawyer Legal Services ("Board"). By December 2021, four (4) LPs were admitted to the State Bar of Arizona and started the practice of law without going to law school. Scary? Maybe. But wait, there's more...

HOW DID WE GET HERE?

In an effort to bridge the gap for access to justice, Arizona embarked on a mission to license professionals with specific experience and skill to provide legal services to individuals who may not otherwise afford representation.

Several years ago, the State of Arizona created the Legal Document Preparer license, which permits licensed providers to prepare legal documents without providing any legal advice or representation in Court. There is a substantial gap between the service provided by the Legal Document Preparer and the service provided by a lawyer. Many Arizonans were left to appear in Court without representation and expected to understand the process, rules, and law. This created frustration, not only for the pro per, but for the Court, the lawyer on the other side, and the justice system as a whole.

...a Legal Paraprofessional (LP)... is a professional with specific education and experience who is licensed to provide legal services in limited practice areas.

"IN AN EFFORT TO BRIDGE THE GAP FOR ACCESS TO JUSTICE, ARIZONA EMBARKED ON A MISSION TO LICENSE PROFESSIONALS WITH SPECIFIC EXPERIENCE AND SKILL..."

On November 21, 2018, then Chief Justice Scott Bales issued Administrative Order No. 2018-111, which established the Task Force on Delivery of Legal Services[1]. The task force recommended the state of Arizona develop a program to license non-lawyers, the "limited license legal practitioners," ("LLLPs")[2] who are qualified by education and/or experience, training, and examination.

After months of steering committee meetings, the program was approved. By June 2021, the first round of tests were administered to eager applicants. In order to apply for licensure, an applicant must pass two tests - the core knowledge test and the substantive law test.

The core knowledge test covers: Arizona Code of Judicial Administration § 7-210 (including sections of § 7-201 incorporated by reference), Arizona Rules of Professional Conduct, Arizona Rules of Evidence, the Arizona State Constitution, and the United States Constitution[3].

Applicants further test in the area of law for which they seek licensure. While applicants can apply for licensure in limited civil, criminal and administrative law, the first and most popular test was in family law.

The family law test covers: Arizona Code of Judicial Administration § 7-210, Arizona Revised Statutes Title 8 (Chapter 4: Department of Child Safety), Arizona Revised Statutes Title 13 (Orders of Protection), Arizona Revised Statutes Title 25 (sections relevant to the scope of practice defined in § 7-210(F)(2)(a)), Rules of Civil Procedure for the Superior Courts of Arizona, Arizona Rules of Family Law Procedure, and Arizona Rules of Protective Order Procedure[4] .

THERE ARE TWO TRACKS TO BECOME A LEGAL PARAPROFESSIONAL.

LP licensure has two tracks - education or experience. As the program is new, most of the LPs currently in practice obtained the license based on experience.

In order to meet the criteria to apply for licensure by way of experience, an applicant must have at least seven years of full-time substantive law-related experience within the 10 years preceding the application, including experience in the practice area in which the applicant seeks licensure and two years of substantive law experience in which the applicant seeks licensure[5].

Arizona Judical Branch

IN THE REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE DELIVERY OF LEGAL SERVICES, A LEGAL PARAPROFESSIONAL (LP) WAS CALLED A LIMITED LICENSE LEGAL PRACTITIONER (LLLP). THE RULES ADOPTED BY THE COURT RENAMED THESE PROVIDERS.

An LP is a professional with specific education and experience who is licensed to provide legal services in limited practice areas. This professional is often compared to a nurse practitioner in the medical field.

Picture of Legal Paraprofessional courtesy of: **https://www.azcourts.gov/cld/Legal-Paraprofessional**

Any complaints against Legal Para-professionals are received, investigated, and prosecuted by the State Bar of Arizona in the same manner as complaints against lawyers.

WHY SHOULD YOUR FIRM CONSIDER HIRING A LEGAL PARAPROFESSIONAL?

A. An LP's experience may be superior to a first year (or even 7th year) attorney!

LPs who are licensed in the "experience track" may have far more experience than most new attorneys:

(1) most LPs are experienced with client meetings; (2) preparing for non-evidentiary hearings; and (3) preparing cases for evidentiary hearings/ trials, including but not limited to, drafting pretrial motions, client preparation, submitting and admitting exhibits in Court.

B. It just makes economic sense!

My paralegal of 12 years, Staci Maret, was the second licensed LP in Arizona. Staci now has her own caseload and handles client needs at a much lower rate. Clients who could not previously afford our services are now receiving quality legal representation at a substantially reduced rate.

By hiring an experienced LP, your Firm too, can assist those clients who desperately need professional services at a rate they can afford - all while increasing your Firm's gross profits.

For those who are not comfortable with this new level of service, your Firm should consider attending the Board meetings or feel free to reach out to Firms who already provide these services. And - of course - Staci and I are always available to answer questions and assist. Let's all work together and expand the legal services available to lower income clients while increasing our bottom line! FL

FOOTNOTES

[1] Task Force on Delivery of Legal Services, *Report and Recommendations*, October 14, 2019 available at https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf

[2] Limited License Legal Practitioners was later changes to Legal Paraprofessional.

[3] Arizona Supreme Court Administrative Office of the Courts Certification and Licensing Division - Legal Paraprofessional Study Guide.

[4] Id.

[5] Arizona Code of Judicial Administration §7-210(E)(3)(C)(9).

By
Russell Wink

"I don't DO math!" Unfortunately, you **have to.**

Bobrow v. Equity

We all have to do at least a little math and inevitably you'll find yourself dealing with funny math handed down from the courts.

One of my favorite sayings from family law attorneys is, "I don't do math". Unfortunately, you have to. Whether equalizing accounts or calculating equity in an asset, we all have to do at least a little math. Beyond the basic addition and subtraction used when equalizing property and/or debts, you'll inevitably find yourself dealing with the funny math handed down from our courts; Like *Van Loan*, *Drahos* and *Barnette*, and *Valento*. The new rising star seems to be *Bobrow*.

Making a "Bobrow" claim isn't new, but now we have a cute name to assign to requests for reimbursement for expenses paid after the date of service. More math.

> Ideally, all divorcing couples would work together toward a mutually agreeable resolution of a failed marriage. A spouse who voluntarily services community debt and maintains community assets with separate property should not be penalized when a mutual agreement cannot be reached. When such payments are made, they must be accounted for in an equitable property distribution." *Bobrow v. Bobrow*, 241 Ariz. 592, at 596 (2017)

Unfortunately, we all know that we do NOT live in an "ideal" world, which is very obvious based simply on the fact the parties are getting a divorce. And then here we are again with that word, "equitable". Equitable just means "fair" or "impartial". Of course, everyone agrees that the distribution of property and debt should be "fair". They just don't agree on what "fair" looks like.

In reviewing the Court of Appeal's choice of wording in *Bobrow*, it is clear that they do not equate "fair" to mandatory reimbursement. Rather, the trial court only needs to "account for" reimbursement claims in its distribution of property. Of course, it may be "accounted" for by denying the claim, granting partial reimbursement, or full reimbursement.

Let's not forget that *Bobrow* was unique in that the parties had a prenuptial agreement that stated that Wife (who was ordered to reimburse Husband for the expenses) was not entitled to support in the event of dissolution. That puts a big wrinkle in figuring out what's "equitable".

Equitable just means "fair" or "impartial". Of course, everyone agrees that the distribution of property and debt should be "fair". They just don't agree on what "fair" looks like.

Despite the request for reimbursement being a property and debt claim, the Court also has discretion to offset any reimbursement award against a spousal maintenance claim that could have been made. For example: Spouse A earns $12,000/month, and Spouse B earns $3,000/month. After the date of service, the parties continue to live together and pay the community expenses as they had during the marriage, with Spouse A paying a majority of the expenses. At the time of trial, Spouse A makes a claim for reimbursement for half of the expenses paid. The rationale is that had Spouse B known that Spouse A was going to make a claim for reimbursement on these expenses, Spouse B would have requested temporary spousal maintenance and paid their half.

"DESPITE THE REQUEST FOR REIMBURSEMENT BEING A PROPERTY AND DEBT CLAIM, THE COURT ALSO HAS DISCRETION TO OFFSET ANY REIMBURSEMENT AWARD AGAINST A SPOUSAL MAINTENANCE CLAIM..."

The double-dip occurs when a party requests reimbursement for debts paid, but then also wants to use the date of service balances for division of those debts.

...where one party is claiming that the other party made the marital home so miserable to be in that it was effectively a "constructive ouster". This is an area where a substantial amount of monies could be at stake.

The superior court here did not apply a gift presumption and otherwise did not abuse its discretion in denying both parties' requests for equalization payments. Given the financial disparity between Husband and Wife at the time, the superior court had discretion to retroactively grant temporary spousal maintenance. See A.R.S. § 25-318 (2018); *Maximov v. Maximov*, 220 Ariz. 299, 301, ¶ 7, 205 P.3d 1146, 1148 (App. 2009) (citing Ariz. R. Fam. Law P. 81(A) (authorizing court to direct entry of judgment nunc pro tunc as justice may require)). The court's implicit finding that Wife would have been unable to share the expenses at issue absent spousal maintenance is supported by the record. Because the overall property allocation was equitable, we affirm the court's denial of Husband's request for reimbursement. *Barron v. Barron*, 246 Ariz. 580 (2018).

Based on the Court's language, it appears that the trial Court in *Bobrow* would have been fine if it had not called the payments a "gift", and instead simply denied the request and called it an "equitable distribution".

MORTGAGES AND RENT

Reimbursement claims for mortgage or rent payments get even trickier.

A paying spouse is generally entitled to reimbursement for the expenditure of separate funds on community debt. The reimbursement claim exists even if the paying spouse continues to occupy the marital property post-service. Yet a spouse who left the marital property may be entitled to an offset against such a reimbursement claim, but only if the occupying spouse ousted the leaving spouse from the marital property. If there was an ouster, the leaving spouse is entitled to an offset toward the reimbursement claim up to one-half of the fair market rental value of the home. But if there was no ouster, the leaving spouse is not entitled to an offset. *Ferrill v. Ferrill*, 253 Ariz. 393 (2022)

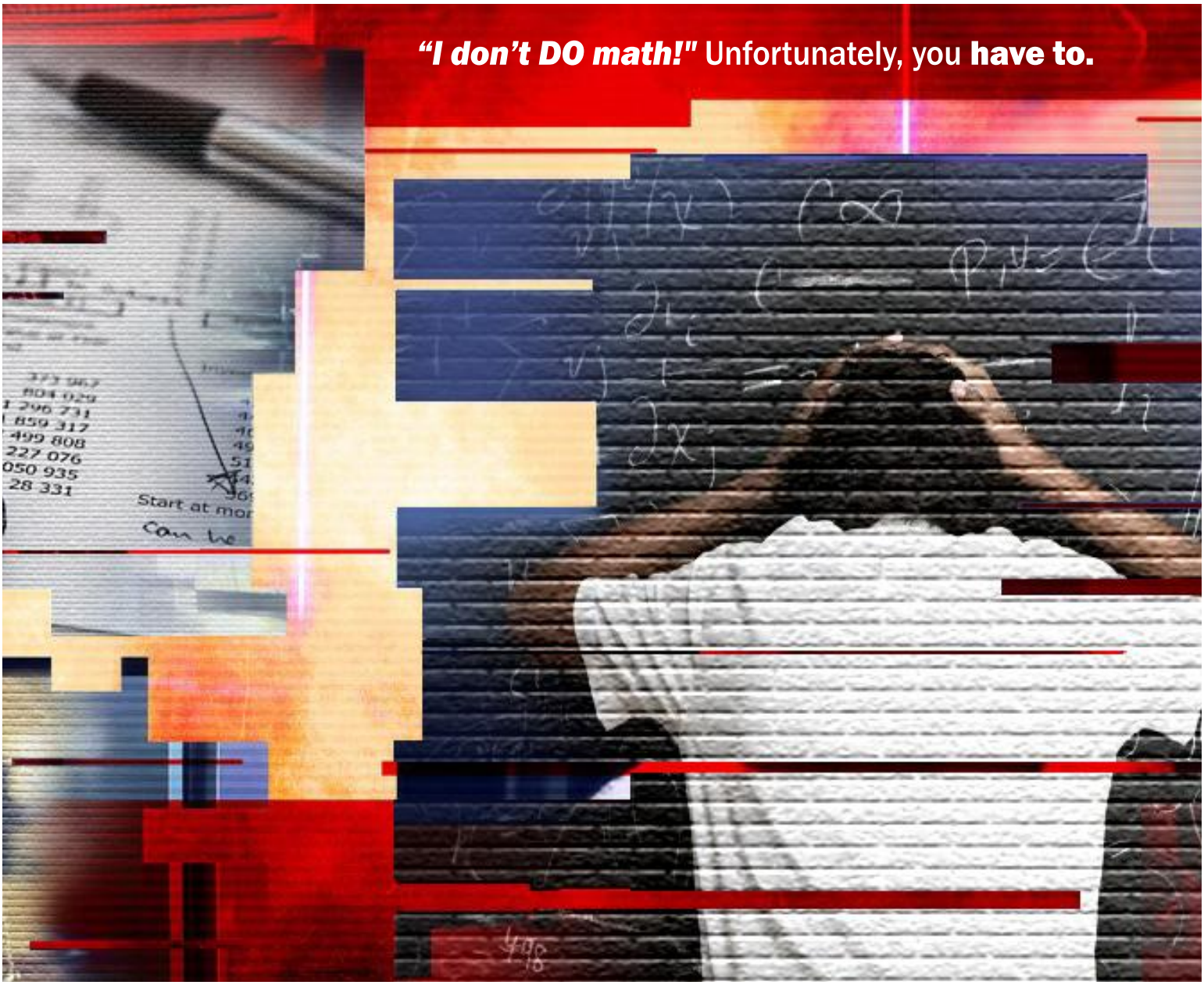
Whether there was an "ouster" or not is something that is a question of fact for the Court to determine. In some instances, it is quite obvious there was an ouster (Order of Protection) or not (moved in with new girlfriend/boyfriend). Typically, the Courts will see the occurrences where one

"IN SOME INSTANCES IT IS QUITE OBVIOUS THERE WAS AN OUSTER (ORDER OF PROTECTION) OR NOT (MOVED IN WITH NEW GIRLFRIEND/BOYFRIEND)."

party is claiming that the other party made the marital home so miserable to be in that it was effectively a "constructive ouster". This is an area where a substantial amount of monies could be at stake. If the divorce takes 10 months, mortgage payments of $2,000/month, your client could be on the hook for $10,000 at the end of the day and looking at you as to why you told them it was OK to move out of the house and get their own place.

DOUBLE-DIPPING

Lastly, beware the double-dip. The double-dip occurs when a party requests reimbursement for debts paid, but then also wants to use the date of service balances for division of those debts. If the other party is reimbursing for half the payments made since date of service, they also get credit for the new balance. The reimbursement payment should put the parties on equal ground and up to date on the payments, so the amount remaining to be divided should be whatever the new balance is. FL



PART ONE

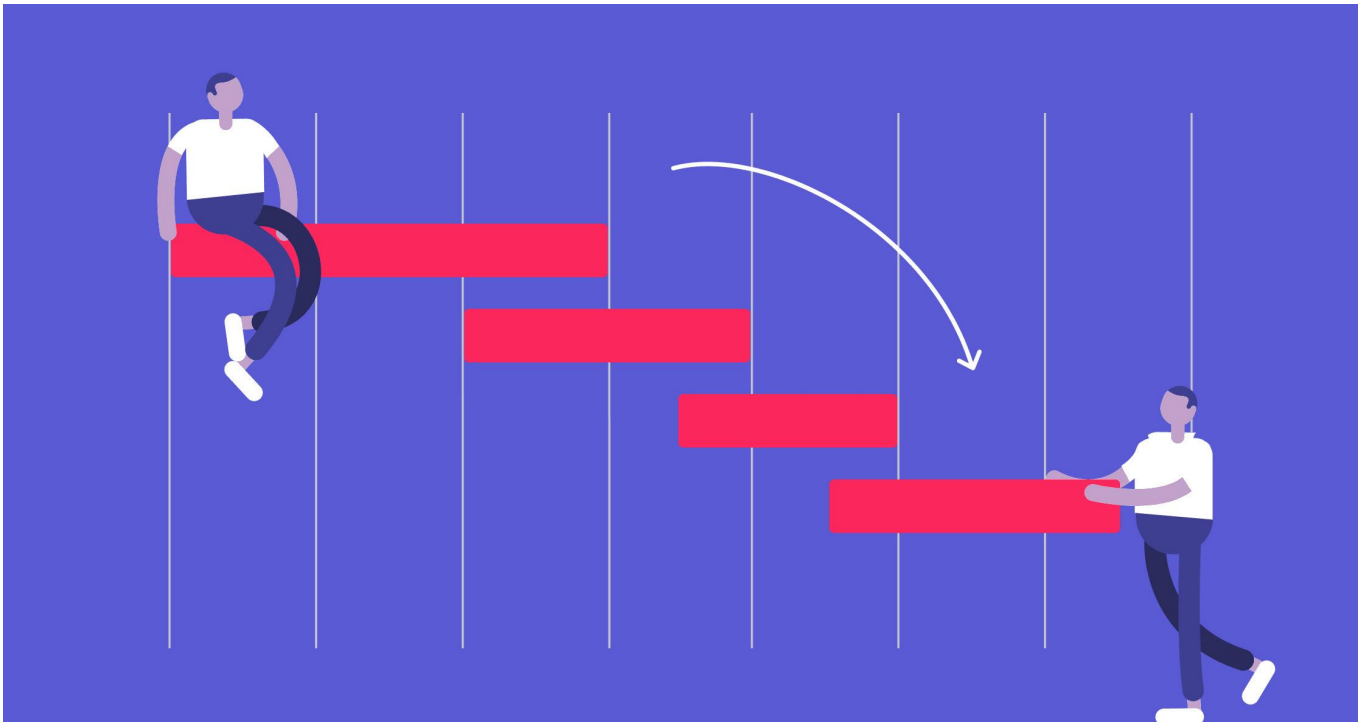
by **LYNTON KOTZIN,** CPA, ABV, ASA, CFA, CBA, CFF, CIRA

Top-Down Process: Understanding Business Valuation

A properly performed business valuation is a complex process that requires a systematic approach and incorporation of specific steps and analyses.

It is intriguing to consider the general impressions as to **the breadth of analysis** that is necessary **to value a privately held company**. In many instances, it is presumed that the **value** of a business can be **determined simplistically** or that the valuation of a specific business can be assessed by focusing on a narrow aspect of the company. However, **valuation** is a process that **requires consistent** application of an approach incorporating **specific steps** and analyses to comply with relevant professional standards. If the overall valuation **process** were **better understood** and each valuation is judged in the context of the overall process, this **helps lead to a more informed understanding** of the value conclusion and the quality and reliability of the underlying analysis. The **valuation analysis** goes through a process which **simulates** how **real-world buyers** and sellers would **arrive at a value** for the subject asset.

The Top-Down Approach is the process of making decisions based on a large number of criteria. During the valuation process, all areas of the business are analyzed to determine its worth and the worth of its departments or units.



There are a multitude of factors to consider when estimating the value of any business entity. These factors vary across valuation assignments depending on the unique circumstances of the business enterprise and general economic conditions that exist at the effective date of the valuation. Valuation is essentially a top-down process that starts with a broad analysis of the overall economic and industry trends and ends with an assessment of the reasonableness of the overall value conclusion. This philosophy is embodied in the most commonly used valuation guideline, IRS Revenue Ruling 59-60, which states that in the valuation of the stock of closely held businesses, certain factors are fundamental and require careful consideration in each case. The following factors provide a useful framework that can be applied to the valuation of an operating business in the context of a marital dissolution proceeding in Arizona.

Valuation is essentially a top-down process that starts with a broad analysis of the overall economic and industry trends and ends with an assessment of the reasonableness of the overall value conclusion.

VALUATION DATE

Selection of a specific valuation date may lead to different value conclusions, therefore it is important to carefully select the appropriate valuation date(s) at the beginning of an engagement. Due to recent Arizona case law[1] this issue appears to have assumed a higher level of importance and may require a detailed analysis and understanding of the timing and impact of specific events that may, in turn, have an impact on the underlying value of the company at different points in time.

Although this could be the focus of an entire discussion, this article presents a synopsis of the issues. Selection of a valuation date is ultimately a legal determination; it is my understanding that the court has wide discretion to choose a valuation date as long as the ultimate valuation conclusion results in an equitable allocation of value to the marital community. It is also important to provide specific analysis and rationale to assist the trier of fact in its determination as to why a particular valuation date would provide the most equitable result and allocation of value. The changes in specific industry factors, relevant company

trends, and specific community efforts between the different valuation dates cannot be ignored, because inclusion of these factors may be necessary to arrive at an equitable allocation of value.

STANDARD AND LEVEL OF VALUE

Different standards of value will lead to different value conclusions. It is therefore important to carefully define these items at the beginning of an engagement.

In marital dissolution cases the standard of value may be a significant issue, but this issue is sometimes overlooked. It is the author's understanding that the relevant standard of value to apply in a marital dissolution proceeding in Arizona is ultimately a legal determination. It is important to note that the controversy primarily involves the application of valuation discounts (including discounts for lack of control and discounts for lack of marketability) and the applicability of these discounts for marital dissolution purposes. These discounts may be significant and are typically magnified when the interest being valued is a non-controlling interest. The relevance of these discounts is an especially controversial issue in cases where there is no contemplated sale of a subject interest.

It is the author's understanding that Arizona law recognizes that the determination of whether to apply valuation discounts in valuing a business in a dissolution proceeding should be decided on a case-by-case basis, considering factors such as the minority shareholder's degree of control, lack of marketability, the likelihood of a sale of the interest in the foreseeable future. The Arizona courts have rejected a bright line rule that discounts can only be applied if there is an imminent sale of the company or ownership interest. Most valuation experts therefore provide value indications with and without the application of valuation discounts to assist the trier of fact with the quantification of the impact that the discounts will have on the ultimate value conclusion.

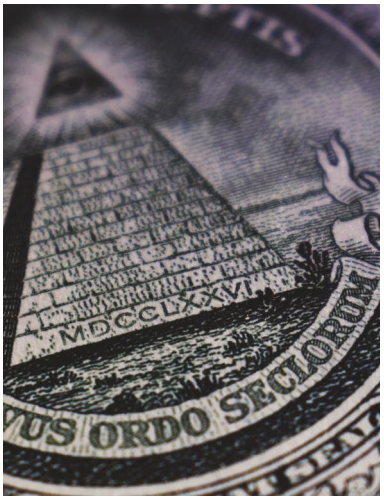
There are typically two standards of value that can be applied.

- ***Fair market value*** is a hypothetical concept and is defined as the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts. The objective of the fair market value standard is to determine a likely value at which a business or business interest may be sold. However, in the case of a non-marketable interest in a closely held business, the value is hypothetical, especially if there is no contemplated sale. Fair market value typically includes the application of discounts for lack of control and marketability.

It is the author's understanding that Arizona law recognizes that the determination of whether to apply valuation discounts in valuing a business in a dissolution proceeding should be decided on a case-by-case basis,...

The fair market value is the price an asset would sell for on the open market when certain conditions are met. The conditions are: the parties involved are aware of all the facts, are acting in their own interest, are free of any pressure to buy or sell, and have ample time to make the decision.

• ***Fair value*** (also sometimes referred to as ***investment value***) refers to a standard of value reflecting the value of a business to a particular investor without regard to a sale or exchange. It typically excludes application of discounts for lack of control and marketability and represents a pro rata percentage of the total value. This is also sometimes referred to as value to the holder and does not assume a hypothetical sale. It is typically more relevant for the value of a professional practice where there is no contemplated sale and, often, no market for that type of practice. Interestingly, in a national valuation treatise[2] it is stated that "Investment Value appears to be the predominant standard of value in Arizona." Fair value does not typically include the application of discounts for lack of control and marketability.



Fair value is defined as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between participants at the measurement date.

ECONOMIC AND INDUSTRY ANALYSIS

It is important to understand that no business can be valued in a vacuum, as the performance of a business is dependent on overall economic and industry conditions. Depending on the nature of the subject company, some aspects of the overall economy may be more relevant. For instance, for companies that operate in the construction sector, interest rates and demographic trends can significantly influence the outlook for the business. When determining value, a prospective investor will temper the use of historical and prospective financial information on the basis of anticipated general economic conditions as well as the outlook for the particular industry when determining value.

Knowledge of an industry's prospects and risks is also an integral aspect of the valuation process, as the performance of a business is dependent on relevant industry trends, conditions, and other external factors.

This is likely truer today than it was when Revenue Ruling 59-60 was issued, as the pace of change in the business world has accelerated tremendously, and technological advances can have a significant impact on the outlook for a company.

The business landscape is littered with companies that were once valuable industry leaders and are now obsolete due to significant changes in their respective industries. Examples include Eastman Kodak, Barnes & Noble, Blockbuster Video, and Toys "R" Us. The valuation analysis therefore needs to properly analyze and understand the industry including the future outlook, growth prospects, competitive structure, and any disruptive technologies that may significantly change the industry. FL

FOOTNOTES

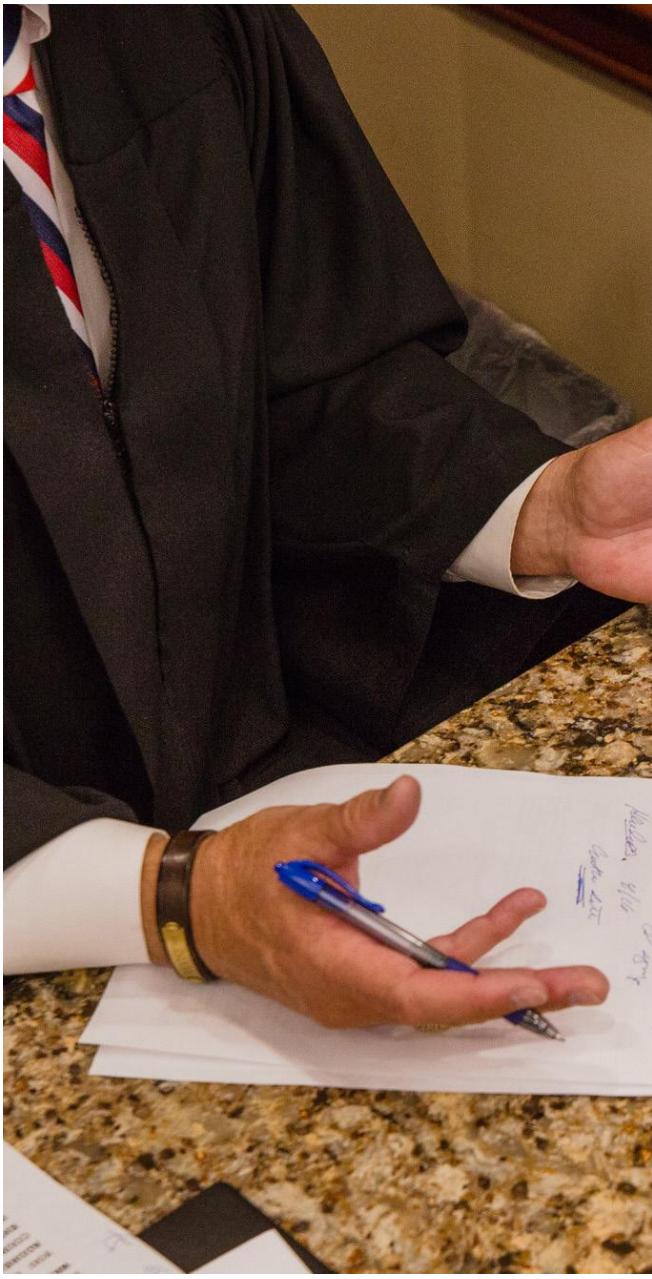
[1] *Meister v. Meister*, 252 Ariz. 391 (App. 2021).

[2] Standards of Value: Theory and Application, Second Edition, By Jay Fishman, Shannon Pratt, William Morrison, page 380.

RESOLVE TO RESOLVE WITH

Rule 76, Resolution Management Conferences

by **JULIE LABENZ**



It is the start of a New Year; it is a time for **reflection and resolve** in personal and business aspects of our lives. If one of your **intentions** is to **resolve your cases**, then a powerful tool for your repertoire can be found in the **Arizona Rule Family Law Procedure, Rule 76, Resolution Management Conference ("RMC").**

According to ARFLP Rule 76, the purpose of an RMC "is to facilitate agreements between the parties." Because an RMC only takes about 30 minutes, Judges are able to find time on their calendars for a RMC sooner than a contested hearing. Although RMCs do not take up much court time, they are extremely helpful to Judges as these conferences enable Judges to quickly identify and assess what issues have been resolved and what issues remain contested.

While courts generally schedule RMCs approximately 40 days after the filing of a Response to a Petition, ARFLP Rule 76 also allows the litigants to request an RMC. If an RMC is requested, then the Judge must set the RMC within sixty (60) days of the request. A litigant,

Because an RMC takes about 30 minutes, judges are able to find time on their calendars plus RMCs are extremely helpful... the conferences enable a judge to quickly identify and assess what issues have been resolved and what issues remain contested.

ATTORNEYS REQUESTING AN EVIDENTIARY HEARING CAN EXPLAIN IN THEIR MOTION THE SPECIFIC CIRCUMSTANCES SHOWING WHY AN RMC WOULD NOT SERVE THE INTERESTS OF EFFICIENCY AND REQUEST AN EVIDENTIARY HEARING.

therefore, can file a request an RMC along with a proposed Order to Appear, (either Form 12, Order to Appear or Pre-Judgment/Decree or Form 13, Order to Appear Post Judgment/Decree), and unless the court extends the time for good cause, the case must be set for an RMC within than sixty (60) days. Furthermore, if a Motion for Temporary Orders has been filed, then the court must set an RMC within thirty (30) days pursuant to ARFLP Rule 47.

According to ARFLP Rule 47, "the court ***MUST*** schedule a resolution management conference... not later than 30 days after the motion is filed... " [Emphasis added] or "[t]he court may extend the time frames set forth in (c)(1) for good cause." When filing an Order to Appear pursuant to ARFLP Rule 47, keep in mind that the proposed Order to Appear should include language providing the court with the option to set an RMC. The Court, based on the pleadings, decides whether to schedule an RMC prior to setting an evidentiary hearing on temporary orders. The Court can forego setting an RMC prior to an evidentiary hearing on a motion for temporary orders if the court "finds that the circumstances of a specific case demonstrate that a resolution management conference would not serve the interests of efficiency..."

To assist a judge in deciding whether to set an RMC or evidentiary hearing on a motion for temporary orders, attorneys requesting an evidentiary hearing be immediately set can explain in their motion the specific circumstances that show why an RMC would not serve the interests of efficiency and request that an evidentiary hearing be set. Interestingly, the basis for setting an evidentiary hearing prior to an RMC is efficiency rather than the best interest of the minor children.

ARFLP Rule 47 reaffirms ARFLP Rule 76(c)(3) in that at an RMC, unless the parties agree otherwise, no evidence will be taken. If there is agreement, at the conclusion of the RMC the Court can enter temporary orders or if there are still contested issues schedule an evidentiary hearing. The evidentiary hearing must be set no later than thirty (30) days after the conference unless the parties agree to a different time or different procedure (such as if the parties' request mediation or conciliation court).

... the meet and confer requirement does not apply if there's a no contact order between the parties, the parties have a history of domestic violence, or there's been an allegation of domestic violence between the parties and the alleged victim is self-represented.

Once the Court schedules an RMC, pursuant to ARFLP 76, the parties must fulfill certain obligations.

For example, no less than five (5) days before the RMC, the parties must "meet and confer" to work together to resolve as many issues as possible. However, the meet and confer requirement does not apply if there's a no contact order between the parties, the parties have a history of domestic violence, or there's been an allegation of domestic violence between the parties and the alleged victim is self-represented.

Additionally, no less than five (5) days before the RMC, each party must prepare and file a written resolution statement setting forth any agreements between the parties and each party's specific, detailed proposal to resolve all disputed issues without providing any arguments in support of their positions. The resolution statement must be substantially in the form set forth in Form 4 or 5, Rule 97, as applicable.

Finally, no less than five (5) days before the RMC, the parties are to comply with the disclosure requirements of ARFLP Rule 49.

...no less than five (5) days before the RMC, each party must prepare and file a written resolution statement setting forth any agreements between the parties and each party's specific, detailed proposal to resolve all disputed issues...

At the RMC, the Court must enter an order reciting what actions took place at the RMC, and as a result, a courtroom clerk should be present. The resulting RMC order controls the course of the case unless the Court modifies it by a later order.

AT THE RMC:

☐ the Court can order evaluations, assessments, appraisals, testing, appointments, or other special procedures to properly manage the case and resolve disputed issues. The Court can permit the amendment of pleadings.

☐ the Court can hold a mini-"pretrial" by setting a date for filing the pretrial statement (required in Rule 76.1); resolve any discovery and disclosure schedules and disputes and adopt any agreements of the parties regarding discovery and disclosure; impose time limits

on trial proceedings or portions of those proceedings and issue orders about managing documents, exhibits, and testimony; and the Court can refer the parties for settlement conference and order other alternative dispute resolution processes (such as conciliation court or mediation).

☐ if the parties agree or stipulate, without holding an evidentiary hearing on contested issues, the Court can enter binding agreements on the record under Rule 69 and enter temporary orders based upon the parties' discussions, avowals, and arguments.

☐ if the parties don't agree, the Court can determine the parties' positions on the disputed issues and identify those issues of fact and law that are still disputed; explore reasonable solutions to facilitate resolution of disputed issues; assist and schedule a trial (an evidentiary hearing), and any other necessary hearings or conferences.

☐ Finally (and my favorite), the Court has discretion to make such other orders ***as the Court deems appropriate.***

AS A JUDGE, I find RMCs to be an extremely useful tool as it allows me to meet with the parties, assess their positions, and create a plan of what needs to be done. In rural Navajo County, we do not have resources for conciliation courts, so our Judges also provide mediation services for one other. Before sending a case to mediation, however, we hold an RMC to determine if the parties are good candidates for mediation (especially before scheduling another Judge's time). A huge benefit of an RMC is that for some of the cases, where the parties agree, the case can get resolved at the RMC. Additionally, for cases where the parties are not in agreement, the issues can be narrowed down and pretrial issues can be addressed.

If one of your resolutions for the New Year is to resolve cases, utilizing a Rule 76 RMC will be a helpful way to achieve your goal!

In rural Navajo County, there are not the resources for conciliation courts, so the Judges provide mediation services for one another. Before sending a case to mediation, however, an RMC is held to determine if the parties are good candidates for mediation...

A HUGE BENEFIT OF AN RMC IS THAT FOR SOME OF THE CASES, WHERE THE PARTIES AGREE, THE CASE CAN GET RESOLVED...

ON THE FOLLOWING PAGES SEE:
RULE 47 - MOTIONS FOR TEMPORARY (C) SCHEDULING AND ARIZONA RULES OF FAMILY LAW PROCEDURE, RULE 76 - RESOLUTION MANAGEMENT CONFERENCE

Rule 47. Motions for Temporary Orders
Arizona Revised Statutes Annotated
Rules of Family Law Procedure

Arizona Revised Statutes Annotated
Rules of Family Law Procedure (Refs & Annos)
Part VI. Temporary Orders (Refs & Annos)

17B A.R.S. Rules Fam.Law Proc., Rule 47

Rule 47. Motions for Temporary Orders

Currentness

(a) Motions for Pre-Decree Temporary Orders. A party seeking temporary orders for legal decision-making, parenting time, child support, or spousal maintenance, or concerning property, debt, or attorney fees, must file a separate verified motion that states the motion's legal and jurisdictional basis and the specific relief requested. The motion must be filed either after or concurrently with the initial petition. The motion must include the following information and documentation, if relevant:

(1) *For Legal Decision-Making and Parenting Time.* A motion requesting temporary legal decision-making or parenting time must specify the court's authority to proceed under A.R.S. § 25-402 and must include a proposed parenting plan that specifically states the legal decision-making or parenting time for both parties.

(2) *For Child Support.* A motion requesting temporary child support must include a completed Child Support Worksheet that specifies the amount requested in accordance with the current Arizona Child Support Guidelines. The motion must include an affidavit substantially in the form set forth in Form 2, Rule 97 ("Affidavit of Financial Information").

(3) *For Spousal Maintenance.* A motion requesting temporary spousal maintenance must state the specific duration and amounts requested. The motion must include an affidavit substantially in the form set forth in Form 2, Rule 97 ("Affidavit of Financial Information").

(4) *For Property, Debt, and Attorney Fees.* A motion requesting a temporary order to exclude a party from a residence, to divide community property, or to order payment of debt, expenses, or attorney fees, must state the specific relief requested, the proposed division of property, the responsibility that each party would have to pay debts and expenses, and the income and assets that would be available to each party if the motion is granted. A motion for a temporary order requesting payment of attorney fees must state the specific amount of fees requested and must include an Affidavit of Financial Information.

(b) Order to Appear. Unless a local rule establishes a different procedure, the moving party must provide the assigned judicial officer with the original and one copy of an order to appear substantially in the form set forth in Form 13, Rule 97 ("Order to Appear"). The clerk will file the original Order to Appear when the assigned judicial officer signs it.

(c) Scheduling.

(1) *Generally.* Upon receiving a motion for temporary orders and the required supporting documents, the court must schedule a resolution management conference. No evidence will be taken at a resolution management conference unless the parties agree. The purpose of a resolution management conference is to facilitate agreements between the parties that permit the entry of temporary orders at the conclusion of the conference. If, at the conclusion of the resolution management conference, issues remain that require an evidentiary hearing concerning temporary orders, the court must schedule an evidentiary hearing on those issues. If the court finds that the circumstances of a specific case demonstrate that a resolution management conference would not serve the interests of efficiency, it may schedule an evidentiary hearing on temporary orders instead of a resolution management conference. The court must set the conference or hearing on a date not later than 30 days after the motion is filed.

(A) Disputed Issues of Fact. The court may not resolve disputed issues of fact at a pretrial conference or resolution management conference without the parties' agreement.

(B) Evidentiary Hearing. If all issues are not resolved at a pretrial conference or resolution management conference, the court must set an evidentiary hearing on a date not later than 30 days after the conference, unless the parties agree to a different time frame or procedure.

(C) Extensions of Time. The court may extend the time frames set forth in (c)(1) for good cause.

Rule 76. Resolution Management Conference
Arizona Revised Statutes Annotated
Rules of Family Law Procedure
Effective: January 1, 2023

Arizona Revised Statutes Annotated
Rules of Family Law Procedure (Refs & Annos)
Part IX. Pretrial and Trial Procedures (Refs & Annos)

Effective: January 1, 2023

17B A.R.S. Rules Fam.Law Proc., Rule 76

Rule 76. Resolution Management Conference

(a) Purpose and Setting. The purpose of a resolution management conference ("RMC") is to facilitate agreements between the parties. The court may, and on a party's request must, set an RMC. The court must hold an RMC not later than 60 days after a request is filed, unless the court extends the time for good cause, except as otherwise provided in Rule 47.

(b) Meet-and-Confer and Other Party Duties.

(1) *Generally.* Not less than 5 days before the RMC, the parties must:

(A) confer to resolve as many issues as possible. This requirement does not apply if:

(i) there is a current court order prohibiting contact between the parties, a history of domestic violence between the parties, or an allegation of domestic violence; and

(ii) the alleged victim of the domestic violence is self-represented; and

(B) each prepare and file a written resolution statement setting forth any agreements between the parties and a specific, detailed position that the party proposes to resolve all disputed issues in the case without argument in support of the position.

(2) *Form of Resolution Statement.* The resolution statement must be substantially in the form set forth in Form 4 or 5, Rule 97, as applicable.

(c) Court Action. At the RMC, the court may:

(1) enter binding agreements on the record under Rule 69;

(2) determine the parties' positions on the disputed issues and explore reasonable solutions to facilitate their resolution;

(3) enter temporary orders based on the parties' stipulations or, if the parties agree, based upon the parties' discussions, avowals, and arguments at the RMC without holding an evidentiary hearing on contested issues;

(4) order evaluations, assessments, appraisals, testing, appointments, or other special procedures to properly manage the case and resolve disputed issues;

(5) resolve any discovery and disclosure schedules and disputes and adopt any agreements of the parties regarding discovery and disclosure;

(6) permit the amendment of pleadings;

(7) assist in identifying those issues of fact and law that are still disputed;

(8) refer a matter for settlement conference;

(9) order other alternative dispute resolution processes;

(10) schedule an evidentiary hearing, a trial, and any other necessary hearings or conferences;

(11) set a date for filing the pretrial statement required in Rule 76.1;

(12) impose time limits on trial proceedings or portions of those proceedings, and issue orders about managing documents, exhibits, and testimony; and

(13) make such other orders as the court deems appropriate.

(d) Entry of Orders. The court must enter an order reciting the action it took at the RMC. This order controls the course of the case unless the court modifies it by a later order.

Credits

Added Aug. 30, 2018, effective Jan. 1, 2019. Amended Aug. 29, 2022, effective Jan. 1, 2023.
17B A. R. S. Rules Fam. Law Proc., Rule 76, AZ ST RFLP Rule 76
State Court Rules are current with amendments received and effective through 1/15/23. The Code of Judicial Administration is current with amendments received through 1/1/23.

OBJECTION MINUTE:

Three trial objections that family law practitioners often overlook.

by **MEGAN HILL**

Painting by Benjamin Robert Haydon
the National Portrait Gallery
The Anti-Slavery Society Convention, 1840
Oil on canvas, 117 in. x 151 in.

Family law attorneys are trial attorneys. We have a unique choice, though, about whether we want to have the entirety of the Arizona Rules of Evidence at our disposal in the courtroom. Because courtroom time is limited, attorneys want to make sure that any objections to the other party's questions are productive in terms of calling attention to material problems with the presentation of evidence. This article highlights three objections that are often underused in family law proceedings but, used appropriately, result in an effective and expeditious presentation of evidence.

1. Argumentative/Badgering.

Ariz. R. Evid. 611(a) directs the court to

> ...exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
>
> (1) Make those procedures effective for determining the truth;
> (2) Avoid wasting time; and
> (3) Protect witnesses from harassment or undue embarrassment.

If your cross-examination is subjected to a 611(a) argumentative objection, you may be able to rephrase your question to make the same point,...

ARGUMENTATIVE QUESTIONS typically have two characteristics. First, they are not intended to elicit new substantive information from the witness. Second, they challenge the witness on an inference that can be made by the trier of fact from testimony that already in the record.

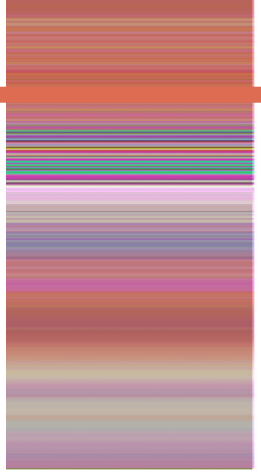
Although our clients may expect attorneys to engage in a spirited debate with the witness where there is a clear "gotcha" moment, most such exchanges are neither well-controlled nor successful and can lead to your client being angry with you if you do not object to argumentative questions.

Argumentative questions typically have two characteristics.[1] First, they are not intended to elicit new substantive information from the witness. Second, they challenge the witness on an inference that can be made by the trier of fact from testimony that already in the record.

Take, for instance, the scenario where a mother testifies that she was unaware that her son was allergic to peanuts. On cross-examination, opposing counsel establishes that mother was aware that the child had been to the emergency room earlier in the year for an allergic reaction from birthday party candy. The argumentative and objectionable question is "How can you expect this Court to believe that you did not know that your son was allergic to peanuts before letting him go on a field trip to the peanut butter factory?"

If your cross-examination is subjected to a 611(a) argumentative objection, you may be able to rephrase your question to make the same point, but bear in mind that you should have a relevance response ready to establish that your question is likely to elicit relevant substantive information.

Badgering a witness can include not only an explosive and physical style of cross examining a witness, but it can encompass behaviors such as eye-rolling and shouting.[2] If your witness is handling him/her/themself well in the face of such intimidation tactics, then by all means, let your witness's conviction impress the judge and perhaps add a smidgen of credibility. But if these tactics are working and



your witness is having a difficult time, object. It's an easy argument that there is no substantive information to be gained and that the questions themselves are a waste of time.

2. Nonresponsive Answers. This is the objection to use when you ask a witness a question and they answer a different question. It's self-explanatory why an attorney might object as non-responsive. You should consider a motion to strike the nonresponsive answer if there is information in it that you are not planning to elicit into the record yourself or are not willing to concede is relevant.

...do not forget that impeachment has its limits, and it is helpful to read Rule 609 if you want to use a criminal conviction to impeach a witness.

But there's also a strategic move for objecting to a nonresponsive answer. This objection gets the judge involved with managing your witness without you having to get into an obvious, direct, power struggle by saying "you can stop now" or "that's not what I asked you." A witness who repeatedly receives instructions from the judge about nonresponsive answers is going to then irritate the judge at least as much is the examining attorney. Additionally, asking the judge to rule on the objection in lieu of taking on the witness yourself allows you to remain calm. Given that judges repeatedly give feedback that it irritates them to see attorneys arguing with or being too aggressive with a witness, a few well-placed objections to nonresponsive answers by a difficult witness can address those judicial concerns.

3. Improper Impeachment with Criminal Convictions

I once was in a temporary orders hearing regarding spousal maintenance where the opposing counsel asked my client "You have a criminal record, don't you?" I objected, but my client still answered "no." The opposing counsel then attempted to impeach my client with a *misdemeanor criminal speeding conviction* from a year or two before. My objection was sustained at this point, and my client's lead foot was not permitted to be used as evidence that he lied about his expenses on his financial affidavit (I don't think there was a dispute about his vehicle insurance premium).

Although the above is perhaps an extreme example, do not forget that impeachment has its limits, and it is helpful to read Rule 609 if you want to use a criminal conviction to impeach a witness. Specifically, you may only use a criminal conviction to attack a witness's character for truthfulness - it is not just to show that the witness is kind of a bad dude. Additionally, there are limits on what kind of convictions can be used. The crime must have been punishable by more than one year in prison or be a crime that the court can readily determine have elements that required proving that the witness committed a dishonest act or false statement. Moreover, a conviction hat is over ten years old is subject to additional limitations. Juvenile adjudications are generally not going to be admissible in family law matters to impeach a witness. Realistically, most judges will be able to catch the improper impeachment attempt and disregard it, but your client will appreciate it if you protect them and shut the tactic down. FL

FOOTNOTES

[1] *Carlson, R. et. al.,* Objections at Trial (10th Edition), National Institute for Trial Advocacy (2020), *citing* Goff, *Argumentative Questions, Counsel, Protect Your Witness!,* 49 Cal. St. B.J. 140 *(1974).*

[2] *Carlson, R. et al.,* Objections at Trial (10th Edition), National institute for Trial Advocacy (2020) *citing,* Daniel J. Capra & Ethan Greenberg, *The Form of the Question: Text, Materials and Exercises on the Evidentiary Rules of Form* (192-193) (2016).

IMPORTANT DATES

Dec. 5, 2023	**Waste Not, Want Not:** Presenting Claims When Community Funds are Used in Ways that Don't Benefit the Community
Dec. 8, 2023	**On the Record:** Decoding the Family Law Appellate Process, Caselaw, and Rule Changes
January 19-21, 2024	**41st Annual Conference of the Arizona AFCC** (Sedona, AZ)
February 1, 2024	**Membership Fee Statements Due**
February 8-9, 2024	**Family Law Institute** featuring **For Better For Worse**
July 7-10, 2024	**CLE by the Sea** (Coronado Island Marriott Resort & Spa)

Want to contribute to the next issue of Family Law News?

… If so, the deadline for submissions is January 12, 2024.

Would you like to…

- Express yourself on family law matters?
- Offer a counterpoint to an article we published?
- Provide a practice tip related to recent case law or statutory changes?

WE WANT TO HEAR FROM YOU!

PLEASE SEND YOUR SUBMISSIONS TO:

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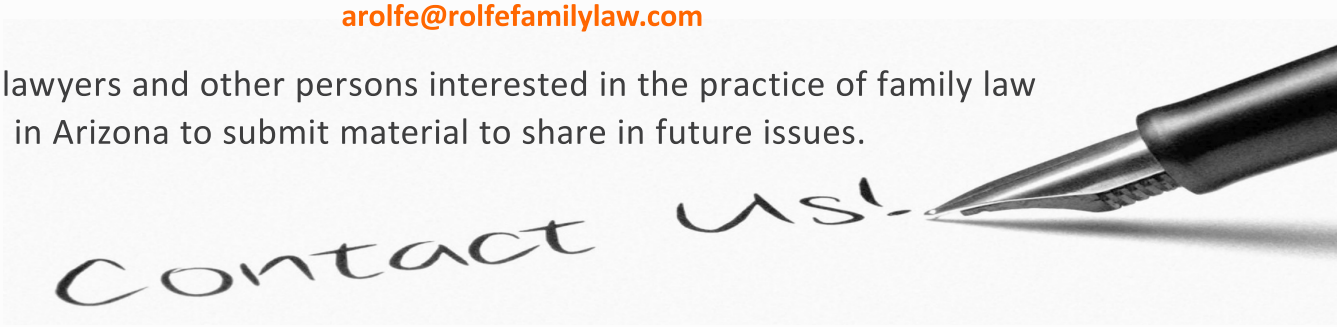
We invite lawyers and other persons interested in the practice of family law in Arizona to submit material to share in future issues.



We reserve the right to edit submissions for clarity and length and the right to publish or not publish submissions. Views or opinions expressed in the articles are those of the author. The Council invites those with differing views and opinions to submit articles for the newsletter. Thank you from the Family Law Executive Council and the State Bar of Arizona.