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2021

Family Law News

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STATE BAR OF ARIZONA

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ANNIE M. ROLFE
FROM THE EDITOR

SUPPORTING ONE ANOTHER

KNOWING YOU ARE NOT ALONE HELPS WHEN YOU ARE STRUGGLING. SO WHY DON'T WE TALK ABOUT THIS STUFF?

I SAT DOWN TO WRITE THIS and all I could think was, "why would anyone want to hear from me?" I am going to be honest: life is a struggle right now. I'm not sure that I have anything positive to add to this conversation. I pretty constantly refer to myself as Debbie Downer. But hey, my therapist says I'm funny. But then I got to thinking, none of us like to talk about when we are struggling. I don't know about you, but when I have gone through some of the darkest times in my life the only thing that has pulled me through is knowing that I am not alone. For example, did you know that 1 in 3 pregnancies ends in miscarriage? Neither did I, until I had my first miscarriage. Then I learned how many of my friends had had miscarriages. My interpretation of this information was, "I don't suck. Growing a child is hard," and somehow this made me feel a little better. Also, why don't we talk about this stuff and support one another?

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So, in that spirit, here it goes.

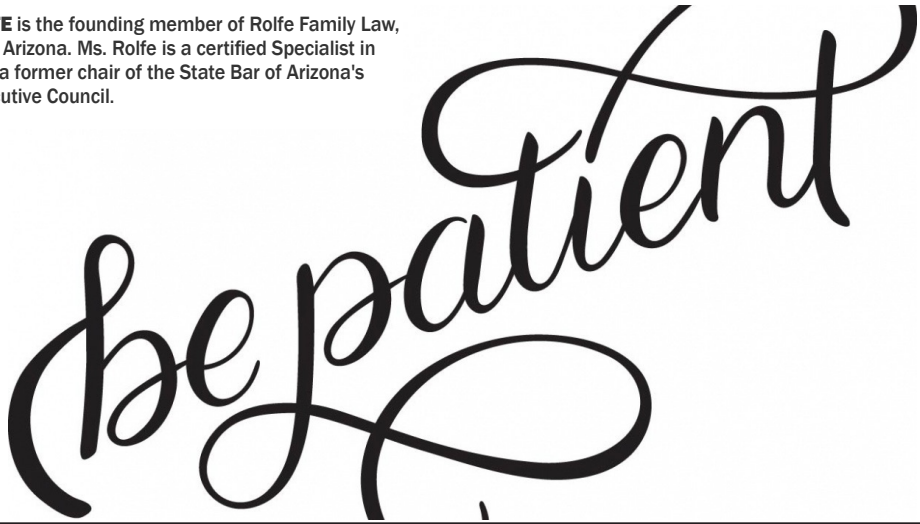
COVID life sucks.

I am a wife, and a mom, and a daughter, and an attorney, and a business owner. Oh, I guess I am also my own person... but I all too frequently overlook that. (Seriously, I only added "person" when I edited this article.) Pinterest and social media tell me that I have to be great at all of it. I generally feel like I am barely holding it all together.

Then comes COVID.

As an attorney, my workload initially soared. I often joke that this is because all of my clients were home with nothing to do, so they assumed that I had nothing better to do than work on their case, with no real consideration for what my work life actually looked like. Meanwhile, my staff and I were all working in different locations and the division of labor was a bit of a cluster for a while. Okay.... It's still difficult. In the middle of this, my long-time paralegal moved on, which hurt both professionally and personally (I know we are supposed to be robots or something, but...). Then my clients complained because I worked slower doing the work of two people and then I worked slower training a new paralegal (who is amazing!). When clients complain, what do they want? Besides perfection, they want discounts. See worries as a business owner. Things have slowed a little now. On one hand, it's nice because I feel like I can maybe focus on some other aspect of my life, but the business owner in me worries if there will be enough work next month, or the month after.

As a business owner, I live in this constant state of panic. Will I have enough work tomorrow? It's time to replace the server... can I afford it? The copier contract is up... do we soldier on without service? Or rent a new one? Did I miss the PPP deadline? How do I get PPP forgiveness? Am I handling a potential COVID outbreak correctly? It's a new year, which means renewing health insurance, and they increased the rates by 50% - what do I do? Meanwhile, I have to worry about all of this AND it cannot affect my output as an attorney because my clients and opposing counsel are getting annoyed that I am not immediately responsive and I need to bill and collect so that I can actually pay all of these bills and keep my staff employed.



Then I go home. My kids are struggling. They

are 14, 11, and 7. We moved in August, so they are at new schools with new/no friends and attend most days online. They are all struggling with anxiety and depression to varying degrees. Two are experiencing it in forms of anger. One periodically just shuts down from the stress and does NOTHING. I'm pretty sure that my older children are expected to accomplish the same or similar work that they would have to accomplish if we weren't in COVID, and that seems crazy to me. There is NO CONFIDENTIALITY in my house, so I generally work from the office. Any time I am home, the 7-year-old is still pretty attached to me, but now she can read over my shoulder. Bad combination in my line of work. That means that my kids are attending online school at home, where their dad is also working from home as a teacher. Bless him for (1) being awesome, (2) being a teacher, and (3) working from home. The oldest is self-regulating enough to handle mostly online school. The other two – not so much. When I get home, my husband and I spend a significant amount of time trying to help the younger kids (1) focus and (2) learn the material. It doesn't always go well. In addition, we need to grocery shop, cook dinner (where at least one kid tells me Every. Single. Night. how "disgusting" dinner is... that's when I remind them that they are welcome to cook instead), play taxi cab, try to do something where we aren't only yelling at each other... and so on.

MOST OF THE TIME, WE ARE TAGGING EACH OTHER IN AND OUT LIKE A BAD WRESTLING MATCH SO THAT WE CAN PRESERVE OUR OWN SANITIES.

I cannot vent to my family. My immediate family is living it with me. My parents always fall back on telling me that I am not strict enough. I should take away electronics. I should take away activities. On one hand, I get it. On the other hand, electronics and activities are currently my children's only social and physical outlets and if I take that away, then how much more will their mental health suffer? Just FYI, most of the electronics in my house ARE currently locked away. I've got a few great friends and a therapist, and then I feel guilty spending the time talking to them because there is so much else to do!

As a wife, my husband usually only gets the bits of me leftover. I don't feel good about that, but we both acknowledge that there's not a lot left to give right now.

Sometimes we cook dinner together. Sometimes we can sit on the couch and watch a show together. Last night we went on a walk with the littles. Most of the time, we are tagging each other in and out like a bad wrestling match so that we can preserve our own sanities.

During COVID, I have experienced the most trying times I have ever experienced as a wife, mom, and person. There are days where I literally have nothing left to give, and where I dream of just getting in the car and driving until I run out of gas. And, in the spirit of this article I will let you know that one day I did just that (with the family in tow). I happened across a lake that I never knew was there. We stopped long enough to let the kids look at the lake and use the restroom, when we came back to the car to find we were getting ticketed for not paying the cash-only parking fee. While I drove home in tears because the ticket was the straw that broke my back that day, that ticket is nothing in terms of what we as a family have faced during this past year.

See... Debbie Downer strikes again.

I have written all of this to assure you that, if you are struggling: **YOU ARE NOT ALONE** and **IT IS NOT YOUR FAULT.**

If you have actually managed to keep your head above water in these crazy times, please don't assume everyone else is. Also, your new hobby (e.g. woodworking, crochet, quilting, masterchef-style cooking...) is ***AMAZING!*** Please make me something pretty/yummy.

For all of us, let's continue to show patience and kindness towards one another. FL

for Our Family Law Mediators

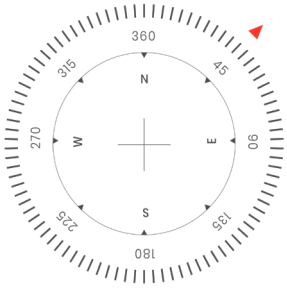
Navigating Clients THROUGH A Successful Mediation

A MEDIATOR'S PERSPECTIVE

by **PAMELA A. LIBERTY**

Mediation isn't right for every couple, but for most it provides a good alternative to litigation. ***Still, it is not without its difficult moments.***

A Mediator's perspective of a few ways to avoid, or at least soften, some of the potholes on the path to a successful mediated divorce.

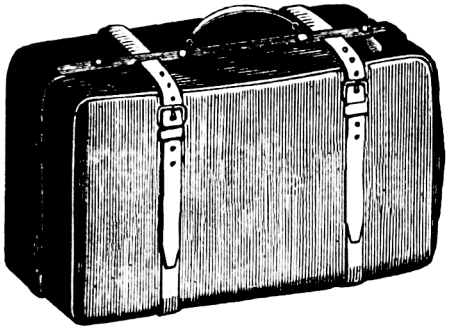


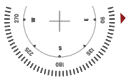
MEDIATION CAN BE A BETTER, FASTER, less costly and less spiritually damaging way of assisting a parting couple through the process of divorce. Still, it is not without its difficult moments. As a veteran family law mediator, allow me to share a few of the ways I have learned to avoid, or at least soften, some of the potholes on the path to a successful mediated divorce.

UNDERGO A PARADIGM SHIFT IN YOUR THINKING.

If you are an experienced domestic relations litigator new to mediation, your first task will be to pack up everything you know about the correct way to do things and put that suitcase on a shelf. Recognize that you are steeped in a highly-particularized culture, shaped by statutes and case law and reinforced by your peer group: lawyers and judges. Accept that this is just one way of thinking about how family law issues should be resolved. The fact is, each couple you meet with may have their *own* understanding of what makes sense for their family, and you may be the one who needs reorienting. Example: In one of my early cases, a long-term unmarried couple with three children decided that the fair way to divide income after separation was to equalize their after tax earnings, so that each parent had the same number of disposable dollars to spend on the kids. I explained that this was *not* how it is done; that we have *guidelines* based on a carefully considered income-sharing model. We have *committees* that research the amount intact households at various income levels spend on their children and allocate that number between households. I ran the guidelines for them - taking extra care to explain the logic behind each step of the process--which resulted in a monthly obligation far smaller than these parents had reached using their own formula. "So," said father, "if we use your number, I will be able to buy extras for the kids and take them on vacation, but their mother will not?" They desired no further "education" about my guidelines.

Pack up everything you know as a domestic relations litigator and recognize that you now will be shaped by statutes and case law and reinforced by your peer group: lawyers and judges.



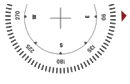


GETTING THROUGH THE DIFFICULT MOMENTS.

What should a mediator do when a couple is not so like-minded, when one of the participants, who had previously seemed so reasonable, now says things like: "I want the antique roadster, not because I ever once got behind the wheel, but because you *love* it!" Or, "I will *not* give up the house, even though it's under water - and I frankly can't

Guide your clients through those rough waters, demonstrating confidence that a smoother journey lies ahead.

afford it - because I don't want her bringing *him* inside those four walls *ever!*" One of the most useful metaphors I learned in mediation training was that of the white water rafting guide. The guide pilots the raft and its occupants through the winding river, and while most of the trip is pleasant and calm, periodically the water gets choppy and raft feels as if it will capsize. The role of the river guide is not to panic, but to guide the raft through those rough waters, demonstrating confidence that a smoother journey lies ahead. It is not necessary or helpful to shame the irrational actor, undercut his stated position or challenge his motives. It is only necessary to steer the discussion in such a way that both parties can continue to feel safe and heard until rationality is restored. The trick is to know when to avoid interpreting words literally and recognize them for what they are - a reaction born in pain that will subside with a bit of time and patience.



BREAKING THROUGH AN IMPASSE.

One of the benefits of litigation is the pressure it puts on the parties to either decide matters themselves or hand control over to some person in a black robe. When you don't have that looming presence, how do you help two people with divergent views compromise? It is useful to draw a distinction between a party's "position" and his "interests." For example, her position may be that she wants sole legal decision-making. Her interest, however, may be that she wants to ensure that the children attend a particular high school. When the positions of the parties diverge, the conversation should switch to why a party takes a particular position. Sometimes, the parties themselves may not have delved into their own motivations deeply enough to

Steer the discussion in such a way that both parties can continue to feel safe and heard.

know why it is that a particular position feels more comfortable to them. Often, interests can be reconciled in instances where positions cannot. If disagreement persists, it may be useful to get an outside perspective. For example, if one party wants more spousal maintenance than the other is willing to pay, and compromise appears unlikely, I often times urge the couple not to abort mediation, but to meet with an experienced family law attorney (and I provide a list of experienced, trusted colleagues, familiar with mediation) to get confidential legal advice. I ask them to fully brief the attorney on the facts that support and detract from that party's position and to then pose these three questions: (1) what are the chances that I will be successful in court on the position I am taking; (2) what are the chances that my spouse's position will win the day; and (3) how much money will it cost us both to litigate this issue? One mediator told me that she directs the couple to bring up photos of their children on their phones or computer screens and then asks if they would rather invest their resources putting these children through college, or the children of their divorce attorneys through college.

One mediator told me that she directs the couple to bring up photos of their children on their phones and then asks if they would rather invest their resources putting their children through college, or the children of their divorce attorneys through college.

TERMINATING MEDIATION.

Mediation depends on a certain level of honesty and integrity on the part of the participants. In my practice, I outline certain expectations in my Advance Fee Agreement, including the requirement that each party will be transparent and cooperative regarding the production of documents. I also file the Petition at the first meeting and review the Preliminary Injunction in detail - both in person and in writing. And, before filing the Petition, I assist the couple in reaching agreement about how parenting time, the division of income, and payment of joint expenses will be handled over the course of the two to three months that mediation is in progress, and I confirm those agreements in writing. If a party violates the Preliminary Injunction in a substantial way, for example, by hiding, giving away, transferring or destroying assets, and refuses to immediately correct the breach, I will terminate mediation and provide the couple with a list of referral attorneys. If one participant consistently refuses to produce documents over the objection of the other, I will terminate mediation. While mediators do not and cannot issue subpoenas, take depositions or engage in other fact-finding missions, neither should we allow mediation to become the poor stepchild of litigation, where the parties are required to accept the allegations of the other on faith. For every financial fact, there is a paper trail, and if one party wants to see that paper trail, the mediator should support her right to do so. Finally, although I have found this to be rare, there are times when the negotiating strength of one party is so out of proportion to that of the other, it feels unethical to proceed. This nearly happened in a case where the skill

"...my role is to give them feedback about their agreements, but that the gold standard for me is NOT what a court might do, it is what the two of them believe is fair and reasonable,..."

of the husband was worthy of some kind of award. He started out with a completely unreasonable position and moved incrementally toward the middle, insisting that it was only fair that his wife also make concessions (even though her requests were already minimal). When I attempted to insert some perspective, he at first complemented my skill as a mediator and then suggested that I was biased against him, then again praised my legal knowledge (think: kiss, kick, kiss). He continued to whittle away at what little his wife was asking for until I told them both that I could not proceed further - that husband had managed the mediation brilliantly but that I would feel soiled if I presided over a result that was so one-sided. At that point, he revealed to me that he was a retired union negotiator and seemed pleased that I recognized his aptitude in the area. Eventually, the couple agreed to a result I could sign off on and still sleep that night.

PROTECTING YOURSELF.

There are two kinds of mediation: facilitative (where agreement is the sole desired outcome) and evaluative (where the mediator uses relevant knowledge to assist in the process). If you are an experienced family law litigator and you advertise your services by emphasizing your bona fides in this area of the law, people are likely choosing you because of your training and experience. They likely expect you to course correct if they go too far afield of what might happen if their case were decided in a courtroom. This puts you in the category of an evaluative mediator, and the couple employing your services has the right to assume that you have useful background to bring to the table. When I first meet with clients to explain the mediation process, I tell them that my goal for them is to resolve all issues based on *informed* agreement. I explain that I consider it my role to give them feedback about their agreements, but that the gold standard for me is NOT what a court might do, it is what the two of them believe is fair and reasonable, after having been informed of how a court might address a particular situation. For example, if the couple has decided to value wife's Arizona State Retirement System pension by using the total of the employer and employee contributions, I will let them know that a court would likely honor the opinion of an actuary, who would calculate the future income stream of that defined benefit pension in today's dollars, and that the actuarial value is likely to be higher than the sum of the employer and employee contributions. If the couple rejects that advice, I will certainly not try to persuade them otherwise, but I will outline both my advice and their decision in the follow up letter that I send after every mediation session.

If you advertise your services by emphasizing your bona fides as an experienced family law litigator, people will then choose you because of your training and experience. They likely expect you to course correct if they go too far afield...

In those session letters, I will also remind clients, even if they have reached a partial verbal agreement as to the division of certain assets, not to divide the asset at that time, but to wait until a final, written agreement has been signed by both parties. If there is a good reason to split an asset before the Marital Settlement Agreement is fully executed (say, the balance held in savings account), I will prepare in Interim Agreement for the parties to sign, making it clear that this asset has now been divided, that each party takes his/her share of the asset as his/her separate property, and that there is no need for further accounting with respect to that particular asset only. That way, if mediation breaks down, one spouse will not be able to spend his share of the savings account proceeds and also demand half of what remains of the other party's share.

I never, ever discourage a party from seeking legal advice at any point during mediation. In fact, every session letter reminds participants that no agreement reached in mediation is binding until it has been reduced to writing, both participants have had the opportunity to review the written agreement with the attorney of his/her choice and the agreement is signed by both of them. And remember, once a mediator, always a mediator. If later disputes or enforcement issues arise, the mediator can offer to mediate these matters, but cannot offer legal advice to either party individually.

Remember, once a mediator, always a mediator. If later disputes or enforcement issues arise, the mediator can offer to mediate these matters, but cannot offer legal advice to either party individually.

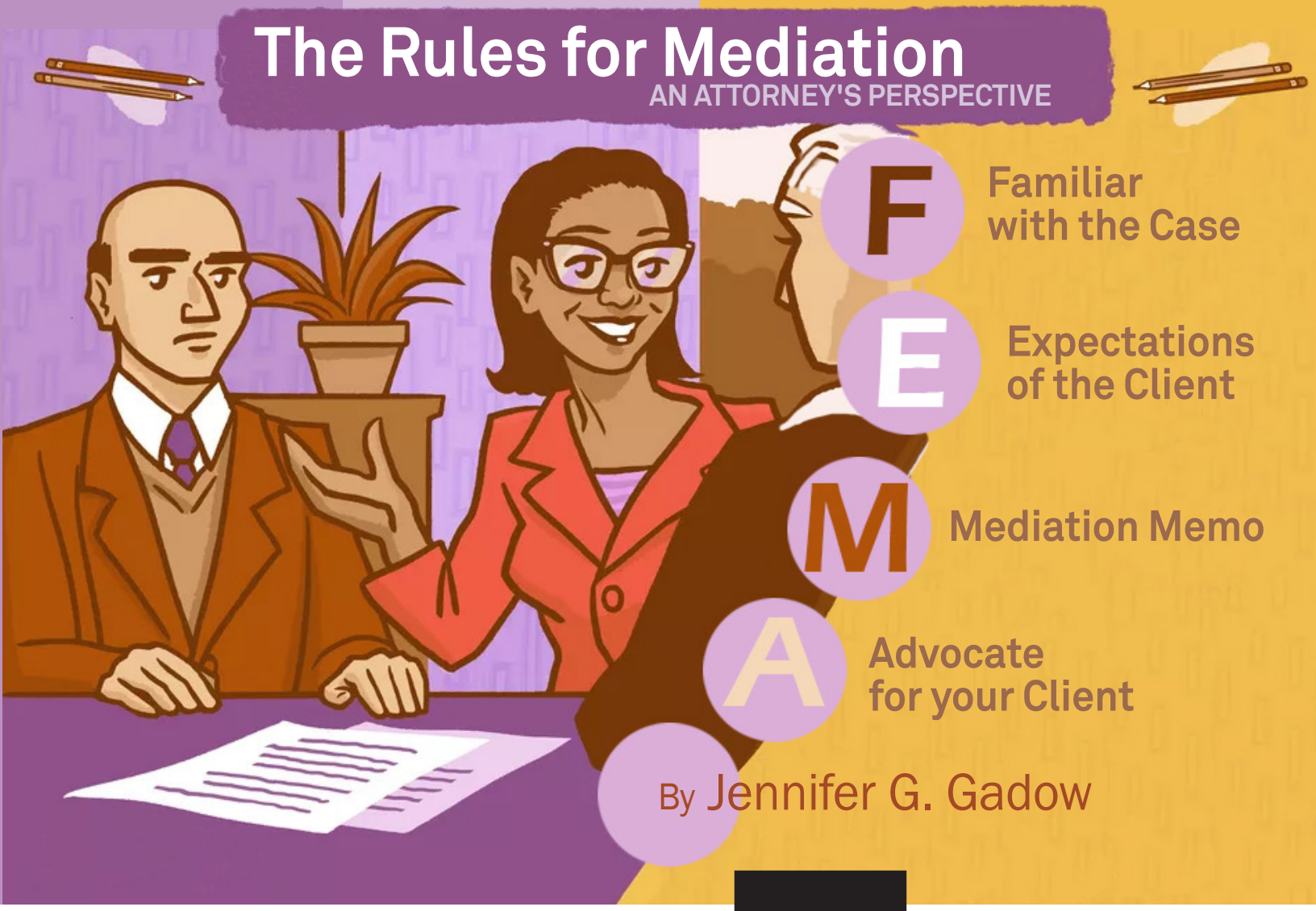
"...no agreement reached in mediation is binding until it has been reduced to writing,..."

Mediation isn't right for every couple, but for most it provides a good alternative to litigation. It is also rewarding for practitioners, as it calls on us to employ some of our best qualities (creativity, compassion and patience) to help bring out the best in the clients we serve. I hope these tips prove useful to those family law practitioners who wish to expand their practice to include this non-adversarial form of dispute resolution. FL

PAMELA A. LIBERTY is a certified specialist in family law listed in Best Lawyers in the area of family law mediation. She is a former fellow of the Academy of Family Law Mediators and the American Academy of Matrimonial Lawyers

The Rules for Mediation

AN ATTORNEY'S PERSPECTIVE



By Jennifer G. Gadow

Much has been written, analyzed and presented about "helpful hints" that can lead to a productive mediation. Through review of those materials, speaking with seasoned mediators, and reflecting upon my own experiences in mediation, I have summarized all you need to know to create a successful and comfortable mediation with your client into one guiding term – FEMA.

FAMILIAR WITH THE CASE

The first key to a productive mediation is to be **F**amiliar with your client's case inside and out. Any good attorney in a mediation is expected to know and comprehensively understand both the facts of the case and the applicable legal theories. But, to become a true *Mediation Rock Star*, you must also know and understand the intricacies and dynamics of the parties' relationship. You might ask – if Arizona is a no-fault divorce state, then why is this important? Because the right answer at the wrong time is still the wrong answer. This bears repeating: **the right answer at the wrong time is the wrong answer**. If you represent a wife who had believed she was in the perfect relationship until she recently and suddenly discovered that her husband had been cheating on her, she will not likely be ready to skip down the path of a happy mediation and divorce. She will need some time to process and

grieve the destruction of the world she knows. Forcing a client to make decisions about their new future when they have not yet properly accepted that there is a new future will not end well for either of you. This is not to say you must wait months for your client to attend therapy and heal before trying to resolve the matter; but perhaps talking about a day-long mediation in the initial consultation is not the best sales pitch. Mediation is best held when the client sees the benefit to resolving an issue on their own terms, rather than in a public courtroom by a total stranger. Once your client is able to clearly see that benefit – even if only as to one issue in the case – you can then start to promote the benefits of a comprehensive resolution through mediation.

Being familiar with your client's case is also crucial when it comes to selecting the proper mediator. Too many attorneys suggest names of mediators based solely upon price and availability. This may be a good method when selecting a new car, but it certainly should not be how you help a client plan for their entire future. Using the right type of mediator can ensure success. There are many different styles of great mediators – and the more familiar you are with the case, the better fit you can find in a mediator. If you represent the wife who is dealing with an unfaithful spouse, she may need to tell her story and position herself as the wounded party if there is going to be any progress. Such a case requires a mediator who would allow the time to hear and understand the history of the relationship. In some instances, taking 30 minutes at the beginning of a mediation to permit your client to cry or express anger can move everyone toward a complete resolution by the end of a day. However, if you represent a client who is "all business" and presents you with charts and graphs of how the assets are to be divided, using a mediator who asks for the backstory will result in an unhappy client who thinks mediation is a waste of time and money. In this case, you will need a mediator who works well with spreadsheets and presents with an attitude of wanting to roll up the sleeves and get the job done. Sometimes using a mediator who is a former judge is essential. You may need the authority of the mediator to inform the client as to what is likely to happen in court. This can be a powerful tool. Selecting a mediator who has experience as a family law practitioner and can share those experiences, or someone who has a degree in child psychology or social services can also be key to obtaining an agreement in certain circumstances. The bottom line is that the selection process of the mediator can be the turning point on whether you are able to resolve the case or are just going through the motions of alternative dispute resolution. A great lawyer and *Mediation Rock Star* uses every opportunity for success in a case including the selection of the perfect mediator for the particular facts of the case.

"... TOO MANY ATTORNEYS SUGGEST NAMES OF MEDIATORS BASED SOLELY UPON PRICE AND AVAILABILITY. THIS MAY BE A GOOD METHOD WHEN SELECTING A NEW CAR, BUT IT CERTAINLY SHOULD NOT BE HOW YOU HELP A CLIENT PLAN FOR THEIR ENTIRE FUTURE."

... she will need some time to process and grieve the destruction of the world she knows.

As you prepare for the actual day of mediation, you must know (and acknowledge) both the weak and strong arguments of your case. Once you understand the arguments, the client needs to know and understand their strengths and weaknesses before mediation begins. This will assist the client in recognizing when a particular offer is good or bad. If you do not know all of the facts of the case, it is impossible to properly advise a client on how to respond to an offer. For example, nothing can be more frustrating (and embarrassing) than when you are arguing to divide an opposing party's retirement account and you find out, for the first-time and during mediation, that the account was earned prior to the marriage. If you are truly

familiar with the case, these sorts of avoidable errors will never happen.

Being familiar with your case also means having previously reviewed all documentation necessary to resolve the entire case. Mediation is **NOT** the place to review discovery for the first time, or request items of discovery from the other side. Mediators do not like being the "go between" in discovery. Despite this, however, often during mediation the opposing attorney or party will relay that he or she has not received certain documents. The best way to avoid this is to have your Bates Log at your fingertips to point out when and where certain items were previously disclosed. I have presented on the need for a Bates Log to track both incoming and outgoing discovery at previous seminars. A Log will provide you with the date a document was disclosed, the Bates numbers of the record and the name of the disclosure vehicle it was disclosed in (such as 11th Notice of Disclosure or Answers to Uniform Interrogatories). And with remote work and Zoom mediations now being the norm, there is another way to streamline the process. You can add a hyper link to the log itself so that you can simply click and be taken directly to the disclosed item.

A Log will provide you with the date a document was disclosed, the Bates numbers of the record and the name of the disclosure vehicle it was disclosed in...

This type of organization also will put your clients at ease during a mediation, knowing that you have all of their documents available at the click of a button.

When you know the case as well as your client, you are ready for a mediation. This knowledge will streamline the process and give the client a sense of comfort during a very difficult time.

Bates Range	Description	Disclosed By	Date	Link
A.S.(O) 002325-002347	Response to Subpoena Duces Tecum issued to Surgery Center	NOD13	9/9/2020	DISCLOSURE\NOD13.pdf
A.S.(O) 002348	Surgery Center, L.L.C. Q3 2020 payment	NOD14	10/26/2020	DISCLOSURE\NOD14.pdf
A.S.(O) 002349	School District Leave Request	NOD14	10/26/2020	DISCLOSURE\NOD14.pdf
A.S.(O) 002348-002349	CV Expert	NOW2	11/20/2020	DISCLOSURE\NOW2.pdf
A.S.(O) 002352-002373	Report of Expert	NOD15	12/7/2020	DISCLOSURE\NOD15.pdf

EXPECTATIONS OF THE CLIENT

Chances are, you have done a lot of mediations. But more often than not, our clients have never done one. Their idea of what happens in a mediation is based upon watching Suits or LA Law. This can give the client very unrealistic and unreasonable expectations as to how their mediation will unfold. But if a client knows what to **E**xpect during the mediation, they can focus more on settling the case and less on adjusting their expectations.

One of the first worries a client has will often be whether they will be required to sit face to face with their spouse. This can create tremendous anxiety. If your particular mediator uses a caucus approach where the parties are not in the same room, let the client know that. It can allow them to relax a bit. If, however, the mediator wants to start with all parties in the same room, let the client know that you will be by their side the entire time, and that they are not even required to look at or speak to their spouse. Their focus can then be on the mediator.

I have had several clients express concern when the mediator is meeting with the other party for an extended period of time. When this happens, it is natural for the client to

"... OUR CLIENTS HAVE NEVER DONE A MEDIATION. THEIR IDEA OF WHAT HAPPENS IN ONE IS BASED UPON WATCHING *SUITS* OR *LA LAW*. THIS CAN GIVE THE CLIENT VERY UNREALISTIC AND UNREASONABLE EXPECTATIONS..."

believe the mediator is just socializing with the other side or "getting sucked in by his/her lies." It is important to let the client know to expect long periods of time when the mediator will be working with the other side. This is a part of the process. It can also be helpful to keep track of the time the mediator is in each room. For the client, time with the mediator in your room seems to pass very quickly because he or she is "working" on the case. But time passes much more slowly when the mediator is not present. I can calm my client if I am able to point out that the mediator was in our room for 1 hour and it has only been 45 minutes since the mediator left.

Other important expectations to inform the client of include non-legal information and details such as what to wear and how lunch will be handled. I have had clients dress provocatively just to "show off" to their soon-to-be ex-spouse; a simple reminder that they might not even see or be in the same room as the other party can limit that temptation. My clients also appreciate a reminder to bring a sweater or jacket – being cold and uncomfortable during a mediation is less than ideal. Remember that nerves and anxiety can make someone cold. Snacks brought from home are also a good idea. Although mediators may provide lunch, a bowl of candy for a snack will not help the client focus late in the day. Again, the more comfortable the client is during the process, the more likely there will be a settlement. I also try to remind my client to get up and walk to the restroom at least once every few hours. The leg stretching, blood flow and simple change of scenery can be a much-needed break.

Do not wait until the mediation for the mediator to tell your client that their husband's weekly golf game and accompanying expenditures does not rise to the level of a legal waste claim.

"OTHER IMPORTANT EXPECTATIONS TO INFORM THE CLIENT OF INCLUDE NON-LEGAL INFORMATION AND DETAILS SUCH AS WHAT TO WEAR AND HOW LUNCH WILL BE HANDLED."

Regarding the legal expectations: by the day of the mediation, you should have already met with your client to go over the entire case. I call these meetings "strategy sessions." This is the time and place to discuss every aspect of the case with the client. This means giving your client the good news and the bad news about their expectations. Do not wait until the mediation for the mediator to tell your client that their husband's weekly golf game and accompanying expenditures does not rise to the level of a legal waste claim. If a client hears that for the first time in mediation, you have lost your leverage with, and trust from, the client. If, however, the client has already heard about a weak waste claim from you, and they hear it again from the mediator, you look even more persuasive. The client should never hear anything new about the strengths and weaknesses of their case during the mediation – the mediator should simply supplement what they have already heard.

Specific preparations for known areas of dispute can be especially crucial. For example, when making a claim for spousal maintenance, clients often believe they are entitled to an award based solely on that they stayed home with children for a period of time, that their spouse earns more

money than they do, or that they have been married for a long period of time. Manage your client's expectations by taking the time to educate them about the law. Your client should go into mediation understanding the statutory factors which qualify them (or their spouse) for maintenance. The mediator should not be tasked with providing this education. It is an inefficient use of time and very expensive.

Another necessary discussion which should be had prior to mediation is understanding the different nuances of legal decision-making. A client should already know the difference between joint and sole legal decision-making authority, and that decision-making is separate and apart from parenting time. They should also be familiar with all options for alternative dispute resolution including private mediation, Conciliation Services and a Parenting Coordinator. These are the basics, and you do not want the mediator to spend their time and your client's money discussing them with the client. If the mediator is informing the client of these options, you are not effectively fulfilling your responsibility as their counselor-at-law.

It is also important to let the client know what happens at the end of a mediation. They need to understand the three possible outcomes: 1) a full settlement; 2) a partial settlement; and 3) no settlement at all. Tell the client that regardless of the outcome, they will not walk away from mediation divorced that day. It is your job to let them know the next steps following each outcome.

If there is a full settlement, the client should already know what a Rule 69 Agreement entails. To help them understand, perhaps show them the exact rule. The client should have already been informed by you (prior to the day of mediation) of the binding nature of the Agreement and their inability to have "buyer's remorse" the day after mediation. You are asking for a Bar complaint if the client hears for the first time the uphill battle that will come when he/she asks to set aside a Rule 69 Agreement a week after they went home, and their new significant other told them it was a terrible agreement. When a mediation agreement is being drafted with settlement terms, the client should already know how important and legally-binding the agreement is from the moment it is signed.

If there is a partial agreement, the client should already understand that the mediation was successful, in that it allowed a more focused approach on the unresolved issues. Too often clients can feel that mediation was a failure if it did not settle everything. But just as a divorce is a process, mediation is as well. A partial agreement can lead to a full agreement in the weeks following the mediation.

Finally, the client should also understand the benefits of mediation even if it did not result in any agreements. This conversation should happen well prior to the mediation. Mediation helps to focus the client on what is important, gives insight into what is important to the other party and allows the mediator to act as a third party to assess the demeanor of the parties. These are essential pieces of information if a trial is in the future. If the mediator did not like your client for some reason, the client needs to understand why. Such feedback can help how the client is ultimately perceived by the judge.

The bottom line is that you do not want your client to have any surprises during the mediation as it relates to the process. This is a scary time for clients and the more information you can provide them on even the most basic parts of the actual day of mediation, the more easily they can settle down and focus on the case at hand.

MEDIATION MEMO

The mediation **M**emo is the lifeline of the mediator, as it is the ONLY information they receive about the case. Mediators do not have access to the court file. And even if they did, they would not review it - that is not their job. You are responsible for providing the mediator with the information they need. The more comprehensive a mediation memo is, the more educated the mediator

is about the case and the more the mediator can help to create an agreement which will be satisfactory to everyone involved.

Start with the basics. A memo should let the mediator know how long the parties have been married, how long have they been living apart, how old they are, how many children they have, what they do for a living, and what temporary orders are in place. Without this information, the mediator must spend valuable time during the mediation catching up on the basics, which translates into a waste of time and money for your client. Additionally, the mediator will have instant credibility with a client if they are able to walk into the room, name their children and engage in conversation about the struggles of the client's job or other personal information. It shows the client that the mediator has spent the time to truly know them and their case in advance. Judges rarely have time to do this - but mediators can take the time to do it. The more basics you can provide to the mediator, the better foundation you are providing for the entire day.

A memo should also be specific about the assets and debts to be divided. Positions such as "each party should keep their own bank account" tells a mediator nothing. If, during the mediation, it is discovered that Wife's account has $3,949 in it and Husband's account has $5, there might be a problem. If, however, you inform the mediator of the exact value of the accounts, it might make it clear that the balances are similar and little time need be spent on that issue. When comparing two specific mediation memos, the mediator may find areas of agreement and the day can begin with a list of resolved matters. Now, you are off to the races for the hard stuff. But you have momentum.

The more basics you can provide to the mediator, the better foundation you are providing for the entire day.

Finally, do not be so general in the mediation memo such that you force the mediator to create the answer. You want to be the developer of the solution and use the mediator to help fashion the answer into a palatable solution for the other side. I am reminded of Judge Bruce Cohen expressing constant frustration at receiving pretrial statements asking that the assets and debts be divided *"fairly and equitably."* He has had to hold back the desire to respond that such position is *"too bad"* because he was planning on being

"arbitrary and capricious." Such generalities do not work. They may sound fancy for the client, but they do nothing to move the case forward. If you are seeking spousal maintenance, identify the amount and duration. You can even go one step further to let the mediator know how you arrived at that figure. If you point out that your client's needs total $8,000 per month and he earns $3,000 per month while his wife's needs are similar, yet she earns $20,000 per month, you have provided a reasonable position that the mediator can work with. If the memo fails to provide any basis for the requested amount, you can certainly expect that the mediator will spend a lot of time in your room gathering this information. Personally, I would rather the mediator be spending that time in the other party' room convincing them that the request is reasonable.

The mediation memo is not a place for a data dump on the mediator, however. Asking for a sum certain of spousal maintenance and simply attaching both parties' Affidavits of Financial Information, three years of tax returns, and a year's worth of paystubs and expecting that the mediator will review all of it will likely land you on the mediator's naughty list come Christmas time. You can attach the documents, but just as a judge asks to be spoon-fed the information, so should a mediator. The memo should identify the parties' incomes and financial needs - not send the mediator on a scavenger hunt through exhibits to find it.

Mediation memos are confidential and will never be seen by the other side. Thus, there is nothing wrong with identifying the positions which are negotiable to your client and those which are not. It is acceptable to suggest that a particular argument is a good leverage point since it means little to your client but everything to the opposing party. You can even acknowledge the weak legal or evidentiary arguments of your case. This information will not hurt you. Instead, it allows the mediator (who is the only omniscient person in the mediation) to help recommend solutions that may satisfy the wish list of both parties. This is the only time in a case that someone can review both parties' arguments from a neutral perspective and not have to render a decision in front of everyone. Take advantage of this unique opportunity to ask the mediator to provide input. You can even request such feedback within the memo.

I have also found it useful to include a brief paragraph in the memo about the dynamics of the case and who wants the divorce. This is especially helpful if I am representing a "heartbroken spouse." If my client found out about an affair that had been going on for several years, I want the mediator to know that going into the meeting. This will help explain why my client is not likely to simply "accept" their spouses claim that the community savings account was used to pay taxes. Documentation of claimed expenditures will be important.

ADVOCATE FOR YOUR CLIENT

Attorneys will often claim that they enjoy mediation over litigation because it is less adversarial. While I agree that it is not as adversarial, that does not mean you do not have the obligation to **A**dvocate for your client during mediation. A client can feel as though they are being ganged up on if the mediator is suggesting a solution which the client does not like after speaking with their spouse. You must walk a fine line between guiding your client towards a reasonable resolution while still maintaining your role as their advocate. The real trick is to be creative in maintaining the goals of the client while understanding the opposing party's most recent offer. Remember, your job is to follow the wishes of your client during a mediation, so you may find yourself telling the client that you do not think a certain

"MEDIATION MEMOS ARE CONFIDENTIAL AND WILL NEVER BE SEEN BY THE OTHER SIDE. THUS, THERE IS NOTHING WRONG WITH IDENTIFYING THE POSITIONS WHICH ARE NEGOTIABLE TO YOUR CLIENT AND THOSE WHICH ARE NOT."

offer will be accepted but making sure the mediator knows that the offer needs to be made on behalf of the client. While the mediator is making an offer to the other side that you are certain will be rejected, you should continue to work with your client to create an alternative, "just in case" offer.

Advocating during a mediation can often translate into selling your client on a particular proposed resolution. It can be a helpful tool to remind your client of the benefits of settling a case in mediation and on terms that they help to create because it promotes more compliance with the terms in the future. Discuss with your client the potential costs (both financial and mental) of an appeal, should the matter proceed to trial and the client is awarded everything they want. Sometimes you can win too big, at the expense of years of costly litigation in the future. Clients rarely see the downside of winning big at trial - television shows never reveal that.

Spousal maintenance cases can often be resolved during a mediation by creating a non-modifiable award. A large part of advocating for your client is securing a sure thing for the client over a period of time versus a potential for future modifications in maintenance if a judge enters a decision. Similarly, parenting plans can be much more specific in a mediated resolution.

> **"IF YOU ARE ADVOCATING FOR YOUR CLIENT THROUGHOUT THE DAY, YOU SHOULD BE CONTINUALLY DRAFTING AND REVISING LANGUAGE FOR AN AGREEMENT AS THINGS PROGRESS."**

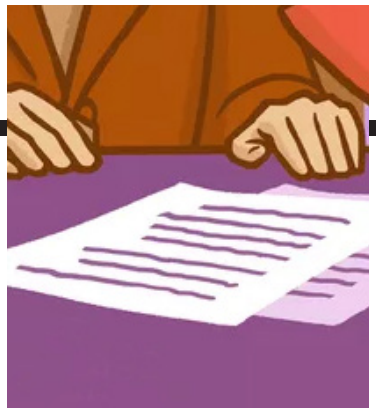
A judge is unlikely to care that Mother's family tradition is to celebrate Christmas on the 24th. Instead, the judge will likely take the easier route and simply alternate the 24th and 25th between Mother and Father. There are always numerous advantages to a mediated resolution which are particular to your client. If you know those hot buttons for your client going into a mediation, you can use those to further advocate for a resolution that fits.

Advocating during a mediation can often translate into selling your client on a particular proposed resolution.

Once the client agrees to a particular resolution, the advocacy really begins. It has been a long day. You have been in mediation for six hours and finally have an agreement. There is only one thing left to do - draft the Rule 69 Agreement. Now, your work really begins. The client is tired, happy to be "done" and relies on you to dot the i's and cross the t's. It is imperative that you take the time and effort to ensure the agreement has the language that is needed to get you to the finish line. For example, if the spousal maintenance award is being secured by a life insurance policy, do not simply recite that general provision in the agreement. Take the time to insert into the agreement the name and face value of the policy, include what happens to any excess monies after the maintenance is satisfied, and grant to your client the ability to communicate directly with the policy provider to verify coverage. If you are familiar with your case, you will already have this information at your fingertips. In fact, if you prepared a thorough mediation memo, the language you want should already be in the memo and it is a quick copy/paste away from incorporating it in the Rule 69 Agreement. If this was not a part of your original plan, you can take advantage of the down time in a mediation to begin drafting the language you want in an ultimate agreement. If you are advocating for

your client throughout the day, you should be continually drafting and revising language for an agreement as things progress. Although the client has moments where there is little to do, you should be drafting and redrafting throughout.

FEMA sounds like four easy steps to a great mediation. However, mediation is hard, and requires a lot of work and tremendous attention to the case. When it is all said and done, the time, costs and effort of a mediation can be comparable to that of a trial. However, the results can be much more thorough than anything a judge can and will do. Mediation enables the client to be the creator of a resolution and plan for their future life, rather than having it handed to them in a minute entry. By keeping FEMA in mind when starting and operating through the mediation process, you are headed for a successful case and a very happy client. FL



FEMA - The Rules for Mediation

SOUNDS LIKE FOUR EASY STEPS. HOWEVER, MEDIATION IS HARD, REQUIRES A LOT OF WORK PLUS TREMENDOUS ATTENTION TO THE CASE.

FAMILIAR W/CASE

Key to productive mediation

Be Familiar with your client's case inside and out. Any good attorney in a mediation is expected to know and comprehensively understand both the facts of the case and the applicable legal theories. But, to become a true *Mediation Rock Star*, you must also know and understand the intricacies and dynamics of the parties' relationship.

EXPECTATIONS

Clients know what to expect

You have done a lot of mediations, your clients probably have not. Their idea of what happens is based on watching Suits or LA Law. These shows give clients unrealistic and unreasonable expectations as to how their mediation will unfold. But if a client knows what to Expect, they can focus more on settling the case and less on adjusting their expectations.

MEDIATION MEMO

The lifeline of the mediator

The mediation Memo is the lifeline of the mediator, as it is the ONLY information they receive about the case. Mediators do not have access to the court file. You are responsible for providing the mediator with the information they need. The more comprehensive a mediation memo is, the more educated the mediator is about the case.

ADVOCATE FOR CLIENT

Following client's wishes

Attorneys will often claim that they enjoy mediation over litigation because it is less adversarial. True, it is not as adversarial, but that does not mean you do not have the obligation to Advocate for your client during mediation. You must walk a fine line between guiding your client towards a reasonable resolution while still following the wishes of your client.

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By
Claudia D. Work

2020 Economic Impact Payments:

What Family Law Practitioners Need to Know About Stimulus Payments

> ...most of the questions my family law colleagues and I are fielding from clients revolve around the "free money" received in 2020 and early 2021.

TAX SEASON IS HERE and besides the annual "fight to claim the children," most of the questions my family law colleagues and I are fielding from clients revolve around the "free money" received in 2020 and early 2021. Because most of us went into family law so that we wouldn't have to understand the byzantine tax codes, I sought out a tax expert to provide answers to the most pressing questions about "stimulus payments."

WHAT EXACTLY ARE STIMULUS PAYMENTS?

ANSWER: The 2020 Recovery Rebate Credit (stimulus payments) were created out of two pieces of legislation. The Cares Act signed into law on March 27, 2020 and The Consolidated Appropriations Act of 2021 signed into law on December 27,2020. The legislation allowed the issuance

of Economic Impact Payments (advance payments) based on 2019, 2018 tax return data as well as other sources.

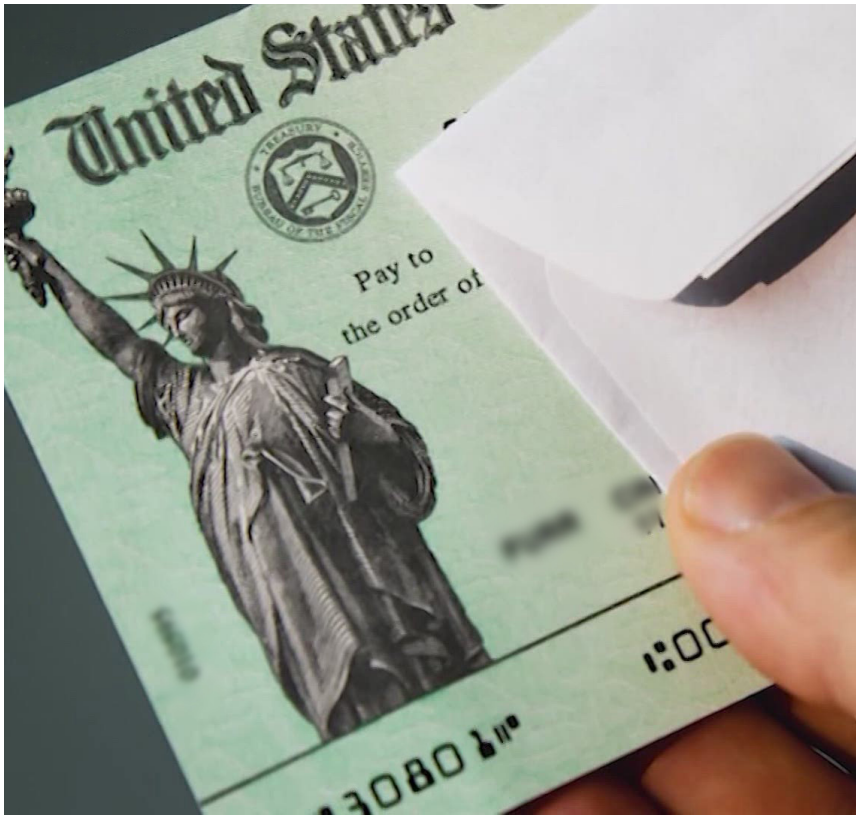
The total 2020 Recovery Rebate equals:

- $1,800 ($3600 MFJ)
- $1,100 times the number of qualifying children (less any phase out amounts)
  - ~ IRC section 24(c) (generally dependent children under age 17)

- Less any phase out due to Adjusted Gross Income (AGI) exceeding thresholds
  - ~ $150,000 MFJ or Qualifying Widow
  - ~ $112,500 Head of Household
  - ~ $ 75,000 Single or MFS

- Less any 1st and 2nd round economic impact payments
  - ~ If unsure of the amount the taxpayer should request a 2020 IRS Record of Account Transcript
  - ~ You do not reduce the payment by any offset for delinquent child support.

- Not to go below zero
  - ~ Meaning no repaying of advance funds will be required if 2020 AGI is over the thresholds or a qualifying child dependent is not claimed on the taxpayer's 2020 tax return. Unless fraud was committed.



... no repaying of advance funds will be required if 2020 AGI is over the thresholds or a qualifying child dependent is not claimed...

"IF UNSURE OF THE AMOUNT THE TAXPAYER SHOULD REQUEST A 2020 IRS RECORD OF ACCOUNT TRANSCRIPT"

The IRS sent out the child dependent payments based on previous tax returns. A qualifying child for 2020 is:

- Generally under 17 years of age
- The taxpayer's son, daughter, stepchild, eligible foster child, brother, sister, stepbrother/sister, half-brother/sister, or a descendant of any of them
- Claimed as a dependent
- U.S. Citizen, U.S. national, or U.S. resident alien
- Has a valid SSN or Adoption Taxpayer Identification Number

IF A MARRIED COUPLE FILED JOINTLY FOR 2019 BUT DIVORCED IN 2020, AND ONE OF THE SPOUSES RECEIVED THE STIMULUS PAYMENT FOR BOTH OF THEM, DO THEY HAVE TO SPLIT THE PAYMENT WITH THEIR EX?

ANSWER: Regarding the advance payments received in this situation: The IRS generally considers tax refunds part of marital assets to be divided equally between married taxpayers. If one received payments in 2019 or early 2020 (advanced payments) and a divorcing taxpayer refuses to split the money, a court may have to order restitution. At this time, tax professionals are still waiting for further guidance. Regardless of who received the money, the taxpayer reconciles the payment on their 2020 return. If unsure, they should request an IRS transcript for 2020 to determine if they IRS issued any advance payments in the taxpayer's SSN.

...a divorcing taxpayer refuses to split the money, a court may have to order restitution.

LET'S GO THROUGH SOME OTHER COMMON QUESTIONS. HOW ARE THE STIMULUS PAYMENTS TREATED UNDER THE FOLLOWING SCENARIOS?

A. Parent A received the stimulus checks because they were allowed to claim the child on their taxes in 2019, but Parent B is allowed to claim the child for 2020.

ANSWER: The parent allowed to claim the child in 2020 is due the money and will reconcile any advance payment they received. Any money that was wasn't issued to the parent claiming the child in 2020 will get a credit on their 2020 tax return. The parent that claimed the child in 2019 but not in 2020 who got an advance payment will not have to return the money provided separate returns were filed for 2019 and 2020.

B. The spouses filed married filing jointly for 2019 but divorced in 2020 and will be each filing single.

ANSWER: When the IRS issued advanced payments, they recorded the payments to each individual. Each would reconcile the payment they received, even if payments were combined when issued.

C. What if then married spouses received stimulus payments for their 2 children, but in 2020 each will be filing single claiming one child?

ANSWER: If a qualifying child is still a dependent in 2020, then the taxpayer that claims the child as a dependent on their 2020 tax return is entitled to the money and must reconcile any payments issued on their 2020 return. Either parent can claim the child on a separate return if only one claims the child. When more than one parent claims the child then special rules apply:

- The parent with whom the child resided the most nights with (custodial parent)
- If the amount of time is equal, then the tiebreaker is the parent with the highest AGI
  - ~ If the higher AGI parent agrees to release the dependency status, then a written agreement is suggested.

> **"IF THE AMOUNT OF TIME IS EQUAL, THEN THE TIEBREAKER IS THE PARENT WITH THE HIGHEST AGI"**

D. The party receiving the stimulus payment over withheld and has a federal tax refund calculated for 2020.

ANSWER: They will receive a refundable credit if an advance payment has not been issued.

E. The party receiving the stimulus payment under withheld for tax year 2020.

ANSWER: Any credit that was not paid as an advanced payment will be deducted from the amount owed.

IS THERE ANY OTHER INFORMATION THAT FAMILY LAWYERS SHOULD KNOW ABOUT STIMULUS PAYMENTS?

ANSWER: The IRS has recorded the advance payments on taxpayer's transcript records. It is well advised that divorcing taxpayers who are unsure if an advance payment was made request an IRS Record of Account Transcript for 2020. This will prevent an IRS correction notice at a future date. Tax professionals and attorneys can request transcripts with a signed IRS form 2848/8821 or taxpayers can visit: https://www.irs.gov/individuals/get-transcript. FL

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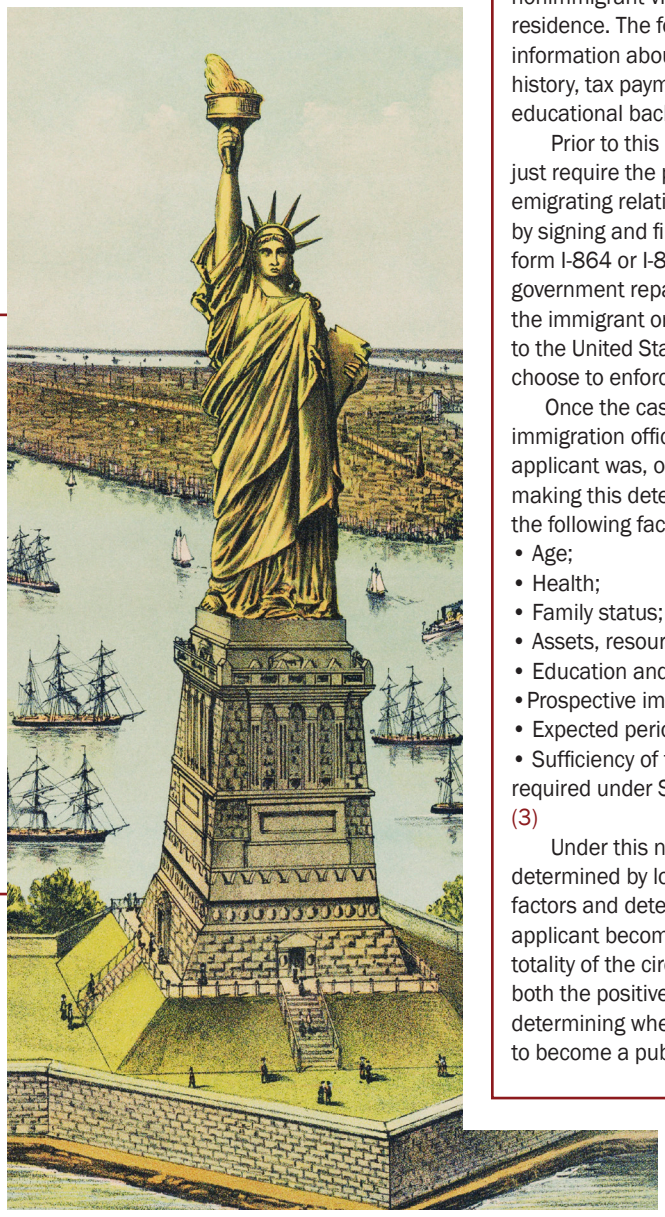
by Erena Baybik

THE PUBLIC CHARGE LAW AND ITS IMPACT ON FAMILY COURT:

On October 15, 2019, the Trump administration passed the Public Charge Law, which expanded the grounds of inadmissibility to any foreign national applying for most kinds of nonimmigrant visas or lawful permanent residence status to the United States.

WITH LIMITED EXCEPTIONS (1), this new final rule makes any immigrant potentially inadmissible if they have, or are likely to, receive certain government benefits from any local, state, or federal government agencies in the United States. (2) After a great deal of litigation, the U.S. Supreme Court upheld the Trump Administration's final rule, making it effective as of February 24, 2020.



BACKGROUND ON THE NEW RULE:

The concept of becoming a "public charge" when applying for immigration benefits to the United States is not a new concept and has been referenced in U.S. immigration laws since the conception of the U.S. immigration system back in the 1800's.

No prior administration, however, has ever sought to expand on this requirement to the extent that the Trump Administration has. It was under his administration that the United States Department of Homeland Security (USDHS) published this new final rule providing a detailed procedure for determining if an immigrant or certain nonimmigrants attempting to come to the United States are at risk of becoming a "public charge," and are thereby inadmissible.

ERENA BAYBIK has been practicing immigration law for 16 years and has been more recently practicing in the area of family law. She is licensed in Arizona and New York. Erena graduated from New York Law School in 2001 and earned a Master's Degree in Comparative Law from Moscow State University in 2004.

IMPLEMENTATION OF THE NEW RULE:

Pursuant to the new final rule, all applicants now need to file a United States Citizenship and Immigration Services (USCIS) form I-944, Declaration of Self-Sufficiency, alongside their applications for nonimmigrant visas or applications for permanent residence. The form queries more detailed information about the applicant's employment history, tax payments, insurance coverage, educational background, and credit information.

Prior to this change, the U.S. government would just require the petitioning relative to sponsor their emigrating relative or nonimmigrant visa applicant, by signing and filing an affidavit of support on USCIS form I-864 or I-864EZ, guaranteeing to the federal government repayment for any government benefits the immigrant or nonimmigrant receives after coming to the United States, should the federal government choose to enforce the signed Agreement.

Once the case goes for interview, the interviewing immigration officer must determine whether the applicant was, or will, become a public charge. In making this determination, the officer must consider the following factors about the applicant:

- Age;
- Health;
- Family status;
- Assets, resources and financial status;
- Education and skills;
- Prospective immigration status;
- Expected period of admission; and
- Sufficiency of the Form I-864 or I-864EZ (when required under Section 212(a)(4)(C) or (D) of the INA (3)

Under this new final rule, inadmissibility is determined by looking at the above-referenced factors and determining the likelihood of the applicant becoming a public charge based on the totality of the circumstances. The officer must weigh both the positive and the negative factors when determining whether someone is more likely than not to become a public charge.

RELEVANCE TO FAMILY COURT:

Whereas before the I-864, affidavit of support form, was often used in family courts to argue for spousal maintenance if the immigrant-spouse was not able to work or sufficiently support him or herself, and was in danger of becoming a public charge if the court did not grant spousal maintenance.

Now with the new public charge law, including the new Declaration of Self-Sufficiency, as filed on USCIS form I-944, and the supplemental documentation that is required to be submitted when filing it, family lawyers can now subpoena these records and argue that the immigrant-spouse is not necessarily qualified for spousal maintenance since they have declared themselves self-sufficient to USCIS and have submitted evidence to prove it. FL

NOTES:

1. The final rule does not apply to:

- U.S. citizens, even if the U.S. citizen is related to a noncitizen who is subject to the public charge ground of inadmissibility; or
- Aliens whom Congress exempted from the public charge ground of inadmissibility, such as:
- Refugees;
- Asylees;
- Afghans and Iraqis with special immigrant visas;
- Certain nonimmigrant trafficking and crime victims;
- Individuals applying under the Violence Against Women Act;
- Special immigrant juveniles; and
- Those to whom DHS has granted a waiver of public charge inadmissibility.

2. The Statutory Basis of the Inadmissibility on Public Charge Grounds Final Rule: Immigration and Nationality Act of 1952 (the INA, or the Act), as amended.

Section 212(a)(4) of the INA (8 U.S.C. § 1182(a)(4)): *"Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible[...] In determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's-(I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills . . . ."*

Section 213 of the INA (8 U.S.C. § 1183): *"An alien inadmissible under [section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4)] may, if otherwise admissible, be admitted in the discretion of the Attorney General (subject to the affidavit of support requirement and attribution of sponsor's income and resources under section 1183a of this title) upon the giving of a suitable and proper bond . . . ."*

Section 214(a)(1) of the INA (8 U.S.C. § 1184(a)(1)): *"The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States."*

Section 248(a) of the INA (8 U.S.C. § 1258(a)): *"The Secretary of Homeland Security may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status and who is not inadmissible under section 1182(a)(9)(B)(i) of this title (or whose inadmissibility under such section is waived under section 1182(a)(9)(B)(v) of this title) . . . ."*

8 U.S.C. § 1601 (PDF) (1): *"Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes."*

8 U.S.C. § 1601 (PDF) (2)(A): *"It continues to be the immigration policy of the United States that – aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations."*

8 U.S.C. § 1601 (PDF) (2)(B): *"It is also the immigration policy of the United States that "the availability of public benefits not constitute an incentive for immigration to the United States."*

3. Immigration and Nationality Act Section 212(a)(4)

Legal Decision-Making and Parenting Time

Backstrand v. Backstrand, No. 1 CA-CV 19-0742 FC, 12/24/2020

Q: Must the trial court find a change of circumstances detrimental to a child's welfare before considering modification of parenting time or legal decision-making?

A **COURT MAY MODIFY A PARENTING** plan only if it first finds a material change of circumstances since the last court order. The superior court is vested with broad discretion to decide whether a change of circumstances has occurred. *Pridgeon v. Superior Court,* 134 Ariz. 177, 179 (1982). If the court makes such a finding, then it may determine whether a change in the parenting plan will be in the child's best interests, referring to 25-403A.

A court may modify a parenting plan only if it first finds a material change of circumstances since the last court order.

The trial "court's only task at this initial stage is to determine whether (1) a change of circumstances affecting the child's welfare has occurred and (2) whether the difference is material, or, in other words, whether the change justifies departing from the principles of *res judicata* underlying the order currently in place." The appellate court rejects the contention that the trial court cannot modify parenting time unless the change is detrimental to the child's welfare.

Ball v. Ball, No. 1 CA-CV 19-0787 FC, 12/10/2020

FACT: The parties divorced with two minor children. They filed a parenting plan which stated that either parent may take the minor children to a church or place of worship of his or her choice during parenting time (first clause) and both parents agree that the minor children "may be instructed" in the Christian faith (second clause). Approximately one year later, Father joined The Church of Jesus Christ of Latter-day Saints and the children occasionally joined him at meetings. Mother petitioned to prevent the children from attending, claiming Father's Church was not Christian.

The trial court interpreted the parenting plan to state that the children shall only be instructed in the Christian faith and that Father's church was not Christian within the meaning of the parenting plan.

HOLDINGS:

1. The reference to "Christian" in the parenting plan's second clause did not abrogate Father's right under the first clause to take the children to a place of worship of Father's choosing. Included in the court's reasoning is discussion of the permissive word "may" in the second clause, and that it should be interpreted as mandatory.

2. The trial court violated the First Amendment of the United States Constitution when it ruled that Father's Church is not Christian or part of the Christian Faith. The trial court is required

to abstain from handling claims once it becomes clear the dispute concerns an ecclesiastical matter. "The Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, 'preclude civil courts from inquiring into ecclesiastical matters.' *Ad Hoc Comm. of Parishioners of Our Lady Sun Cath. Church, Inc. v. Reiss,* 223 Ariz. 505, 510, ¶ 12 (App. 2010)."

Community Property

Stock v. Stock, No. 1 CA-CV 20-0015 FC, 12/29/2020

Q: Does the community have an interest in the purchase of pre-marital service towards retirement?

THE COMMUNITY IS ENTITLED TO REIMBURSEMENT for community funds used to purchase a credit for Husband's pre-marriage federal service. Wife, in turn, is entitled to receive her portion of that reimbursement plus interest from the time of purchase. The community, however, did not acquire an ownership interest in retirement benefits attributable to Husband's pre-marriage service.

Q: Does a payable-to-the-estate provision modify the Decree if it is not specifically set forth in the Decree?

THE PAYABLE-TO-THE-ESTATE PROVISION in the post-decree orders did not modify the decree. Upon dissolution, Wife's community share became her "immediate, present, and vested separate property interest" to be disposed of as she wished. *Koelsch v. Koelsch*, 148 Ariz. 176, 181 (1986).

Procedural Issues

Solorzano v. Jensen, No. 1 CA-CV 19-0772 FC, 12/29/2020

Q: Can the court determine credibility without in-person testimony?

FACTS: THE TRIAL COURT SET THE ISSUE OF CHILD SUPPORT FOR AN EVIDENTIARY HEARING. At the hearing, the court proposed that counsel submit the matter on briefs. The parties agreed to file simultaneous briefs with party affidavits and supporting documents in lieu of live testimony. In ruling, the trial court found that Father did not provide documentation supporting some claims and was "not credible," in that he was attempting to hide some income. The trial court denied Father's request for post-trial relief to allow testimony to resolve the issue of credibility. Father appeals.

Distinguished from *Pearson*. Mother "cites Pearson v. Pearson, 190 Ariz. 231, 234 (App. 1997), where we held a party who had agreed to proceed 'by avowal' could not later challenge the sufficiency of the evidence on appeal. The issue here, however, is not the sufficiency of the evidence, but rather, the court's credibility assessments. See *Volk v. Brame,* 235 Ariz. 462, 467, ¶ 16 (App. 2014) (stating that courts may not conduct a 'trial by affidavit' if the 'affidavits are directly in opposition upon any substantial and crucial fact relevant to the grounds for modification' (quoting *Pridgeon v. Superior Court,* 134 Ariz. 177, 181 (1982))). Indeed, we stated in *Pearson* that '[p]roceeding by avowal does not allow the court to evaluate the demeanor and credibility of the witnesses,' which the court necessarily did in this case. See *Pearson*, 190 Ariz. at 234."

HOLDING: "In increasing Father's monthly child support obligation to $815 from $450, the superior court found Mother more credible than Father, yet it did so without seeing and hearing either testify. The result was that there was no adversarial check on the information on which the court ruled. See *Volk*, 235 Ariz. at 469, ¶ 24. We therefore conclude Father was prejudiced, vacate the child support order and associated attorneys' fees award, and remand for an evidentiary hearing. See id. at 470, ¶ 26 ('Due process errors require reversal only if a party is thereby prejudiced.')."

Moreno v. Beltran, No. 1 CA-CV 20-0125 FC, 12/15/2020

Q: Is a ruling on an order of protection appealable without regard to certification under ARCP 54(b) or ARFLP 78(b)?

CONSISTENT WITH ARIZONA RULE OF PROTECTIVE ORDER PROCEDURE ("ARPOP") 42, a ruling on an order of protection is appealable without regard to Arizona Rule of Civil Procedure ("ARCP") 54(b) or (c) or Arizona Rule of Family Law Procedure ("ARFLP") 78(b) or (c). FL

HOT TIPS CORNER

Be cautious about the use of broad language when preparing a decree. Remember that a court cannot reallocate property that was already divided by decree. Pursuant to A.R.S. § 25-318(D), the superior court only has the authority to divide property "for which no provision is made in the decree." Don't use language like, "Any and all accounts in Husband's name…" or "Any and all accounts in Husband's name which have been disclosed to Wife…" unless you really mean it. In *Wright v. Wright,* No. 1 CA-CV 19-0519 FC (9/22/2020) (Memo decision), the Court applied this language to the children's 529 accounts, in addition to the parties' common bank accounts.

Courtesy of **Annie M. Rolfe** with Rolfe Family Law, PLLC

Consider requesting an IRS Wage and Earnings Statement from opposing party. It can be downloaded for free from the IRS website and contains information regarding all earnings that a third-party reported to the IRS. No more chasing around for W-2s, 1099s, and K-1s!

Courtesy of **Megan C. Hill** with The McCarthy Law Firm

I have previously suggested a bates log in Excel to identify the "what, when, and how" of every disclosure in a case. Now, step it up a notch with electronics. When you reference a document an item was disclosed by (such as Notice of Disclosure 14), you can create a hyperlink that will take you directly to that document for even easier reference. Here is how to do it: On the bates log worksheet, click the cell where you want to create the link. Go to the "Link" group on the Insert tab, then click "Insert Link." You then choose the file you want to link. You can also right-click the cell and then click "Link" on the shortcut menu, or you can press Ctrl+k.

Now your bates log can look like this:

Bates Range	Description	Disclosed By	Date	Link
A.S.(0) 002349	Unnamed Unified School District Leave Request for the date October 12, 2000	NOD14	10/26/2020	DISCLOSURE\NOD14.pdf
A.S.(0) 002348-002349	CV Expert	NOW2	11/20/2020	DISCLOSURE\NOW2.pdf

When you need to look at a particular document, it is just a click away!

Courtesy of **Jennifer G. Gadow** with Fromm Smith & Gadow, P.C.

CASE LAW UPDATE

The Family Law Section regularly prepares a summary of recent Arizona family law decisions. Summaries are located on the Section's web page at:
https://www.azbar.org/for-lawyers/communities/sections/family-law/case-law-updates/

IMPORTANT CLE DATES

March 22-26, 2021	**Destination CLE Hawaii**
May 26, 2021	**Indian Child Welfare Act (ICWA) Update (GoToWebinar format)**
July 7-10, 2021	**CLE by the Sea**
August 1, 2021	**Legal Specialization Applications Due**
October 1, 2021	**Late Legal Specialization Applications accepted**

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

… If so, the deadline for submissions is April 16, 2021.

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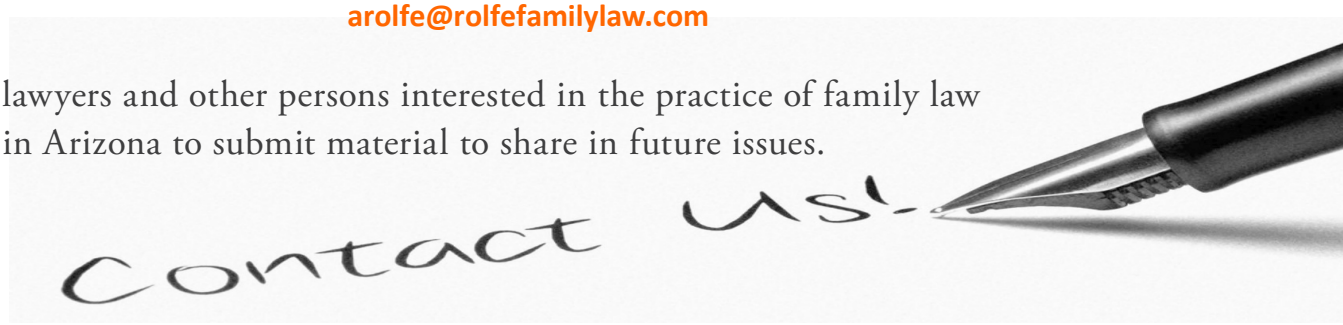
We invite lawyers and other persons interested in the practice of family law in Arizona to submit material to share in future issues.



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.