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FAMILY LAW

The newsletter of the ISBA's Section on Family Law

Message from the Chair

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By Gregory A. Scott

It doesn't take long for an attorney practicing in the area of family law to be confronted with difficult situations concerning a client's visitation with his or her children. A common problem for attorneys is a situation in which both parents are good parents.

One of the reasons many attorneys shy away from the practice of family law is that family law involves individuals going through emotionally difficult decisions and experiences. It is very hard for a parent who has been an active day-to-day parent to suddenly be told that even though they saw their children on a daily basis, interacted with their children and actively participated in parenting with their children, he or she is now going to be relegated to seeing their children based upon the standard, usual and customary visitation times. One of the hardest questions to answer posed by a good parent is why they cannot see their children more frequently.

Standard visitation varies in counties between judges and varies between different areas of the state based upon what is customary in that area. The family law attorney and his or her client have to analyze whether or not it is worth the expense and the energy to attempt to convince a Court standard visitation is not in the best interests of the children. Sometimes it is lost in the process that each family's dynamic is unique; a parent's relationship with each child is different; and it is not unusual to find families with several children to have one or two of the children with stronger relationships with one parent as opposed to the other.

A family law attorney in addressing the issues of visitation with his or her client and/or the Courts faces many obstacles. One of the obstacles an attorney must address is the conventional wisdom that is espoused by psychologists and counselors as to what they and their professional deem "best" for children of separating parents whose marriage is dissolving. Over the years many psychological models have been revised as the thinking and experiences of children and their parents have not always fit the models or established practices from the past. As attorneys, we have to advise our clients of the tendencies of judges. As we all know, judges see many cases each year and it is not unusual for a judge to fall into a pattern of what he or she thinks is best based upon what has worked in the past. However, just telling your client this is what the judge has done in the past and this is what is usual and customary is not always the best answer.

Good family law attorneys truly care for their clients, their families and the results which the client will live with when the dissolution process is over. Effort must be made to attempt to address the relationships between the parents and the children and try to maintain that relationship in constructing visitation arrangements. Remember that your client is going through the emotional process of being told that for whatever reason, he or she is not going to be the primary custodial parent. That is a very hard realization for most clients.

Matters are also complicated by the fact that parents who are at war with each other, or even if they are trying to cooperate, many times engage in alienating activities towards the other parent. Many children find themselves in the position of being requested to choose a parent or to align with a parent as the dissolution proceedings progress. Good parents often find themselves in the situation where an action is filed and suddenly the child that was very close to them is now treating them as if they are a stranger. All of us who practice in the area of family law have horror stories concerning one parent's attempt to get even or to manipulate the children to ensure that they are deemed to be the "custodial" parent when the dissolution proceedings end. Unfortunately, parents that are willing to manipulate their children have no idea how they harm their children, both now and for many years to come.

Visitation trends are changing. Courts are more amenable to visitation arrangements that are not the standard every other weekend, one night per week and alternating holidays. Broadening the visitation model to include additional time with the non-custodial parent is something that attorneys and Courts are experimenting with in attempting to meet the needs of non-custodial parents who wish to remain active as parents and to see their children on a more regular basis.

A complicating factor to be addressed in the overall equation is the effect of the additional time with the non-custodial parent on the issue of support. It is not unusual for the non-custodial parent to ask his or her attorney why they must pay the full amount of support when they have the children almost half the time or half of the time. The issue of support often complicates a custodial parent's desire

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to be cooperative on visitation requests as they soon become fearful that they will lose their basis of support for the children. As with all areas in family law, issues are not limited to only one decision. Visitation affects the decision as to who is the custodial parent. Visitation affects support issues. Visitation affects the emotional issues of the parents and the children.

A family law attorney must also contend with the Court's and Judge's opinions with regard to what he or she believes is best for the child or children. Many times in order to change a Judge's opinion, a family law attorney must exert substantial effort to show the Court the type of relationship the Court is dealing with and why the visitation arrangement being presented is best for the child and the parents. The easiest thing is to do is tell your client to take the standard, usual and customary visitation and live with it. However, most clients are now more active in what they believe is fair and we are seeing a trend where children want to spend more time with both parents. There are no simple solutions to this problem.

The Family Law Section Council is in the process of putting together a seminar that will be presented in February, 2008, addressing issues concerning visitation, and will be presenting speakers addressing practical, psychological and emotional affects of different visitation situations. I encourage all of you to attempt to participate in this seminar and if you have areas concerning custody and visitation you would like us to address in the seminar, you can feel to e-mail them to the members of the Family Law Section Council in your area, or if you are unaware of any of them, to e-mail them to me. I will pass them on to the Continuing Legal Education Committee.

As custody and visitation arrangements change in the future, I encourage the family law attorneys and Judges who must rule on these issues to remain open minded, to examine the particularities of each client's case and continue to attempt to provide a model that will meet the elusive "best interests" of the children goal.

Obtaining law enforcement records: Remember the *Daniels* case

By Matthew A. Kirsh and Amy K. Anderson

Imagine you represent children whose mother is accusing the father of sexual abuse. The children are giving you a story that indicates the father, but in many respects is difficult to believe. At the mother's request, the children have been interviewed by DCFS and the state's attorney. You want to find out what the children have been telling the state. You send subpoenas to the state's attorney's office and DCFS and are met with an objection stating that they will produce no records because compliance with the subpoena will interfere with an "ongoing investigation." If you challenge the state's assertion, you may not be precluded from obtaining the records.

As practitioners in the area of family law, the most difficult cases are those involving allegations of abuse of children. Often times in addition to the custody proceedings in the domestic relations case, there is a parallel criminal investigation of the alleged perpetrator. Obtaining the information gathered by law enforcement authorities is crucial to allow the family court to make an informed determination as to the best interest of the children.

Unfortunately, experience tells us that as a general rule the police and state's attorney's office do not want to share their information. Law enforcement officials, sometimes with good reason, fear that the obtaining of investigatory material for the purposes of a civil case could interfere with an ongoing criminal investigation. While involved in a recent case, our office ran head long into the law enforcement "wall of silence" and in the process re-discovered some case law of which all family law practitioners should be aware. The case of *In Re the Marriage of Daniels* both creates and defines the "limited law enforcement investigatory privilege." 240 Ill. App. 3d 314, 607 N.E. 2d 1255, 180 Ill. Dec. 742 (5th District 1992).

The *Daniels* case was a post decree situation in which the custodial mother was shot and wounded by an unknown assailant. The father alleged that the mother was a drug user and drug dealer, that the assailant would return and the children would be in the line of fire. The mother alleged that the father or his brother was the shooter. During discovery, the father attempted to obtain the Illinois State Police files and depose the investigating state trooper. After being held in contempt of court for not complying with the court's order concerning disclosure of information, the Illinois State Police appealed and as a result we now have the limited law enforcement investigative privilege.

The *Daniels* court began its analysis by stating the well accepted principle that privileges are not favored because they are in derogation of the search for truth and that the person asserting the privilege has the burden of showing facts which rise to the privilege. The court makes an analogy to the Federal and Illinois Freedom of Information Acts. The Illinois Freedom of Information Act (5 ILCS 140/7 (1) (c) creates the following exception to obtaining information under the Illinois Freedom of Information Act:

> Records compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body, but only to the extent that disclosure would: (i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforce-

ment or correctional agency; (ii) interfere with pending administrative enforcement proceedings conducted by any public body; (iii) deprive a person of a fair trial or impartial hearing; (iv) unavoidably disclose the identity of a confidential source or confidential information furnished only by the confidential source; (v) disclose unique or specialized investigative techniques other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct; (vi) constitute an invasion of personal privacy under subsection (b) of this Section, (vii) endanger the life or physical safety of law enforcement personnel or any other person or (viii) obstruct an ongoing criminal investigation.

While the *Daniels* court is very clear in stating that the Freedom of Information Act is not dispositive on the issue of whether investigatory information must be produced, the FOIA is a clear statement of public policy.

In deciding whether to uphold a claim of law enforcement investigatory privilege, the court must balance the law enforcement agency's interest in proceeding unhindered in their criminal investigation and a civil litigant's right to discovery.

Once the law enforcement agency asserting the privilege makes a threshold showing that invoking the privilege may be appropriate, the court must conduct a balancing test. The *Daniels* court outlined ten factors which the court should consider when deciding whether to uphold the claim of privilege. The factors are:

1. The extent to which disclosure will thwart governmental processes by discouraging citizens from giving the police information.
2. The impact upon persons who have given information of having their identities disclosed.
3. Degree to which government self evaluation and consequent program improvement will be chilled by disclosure.
4. Whether the information sought is factual data or evaluative summary.
5. Whether the party seeking the discovery is an actual or potential defendant in any criminal proceedings either pending or reasonably likely to follow from the incident in question.
6. Whether the police investigation has been completed.
7. Whether any disciplinary proceedings have arisen or may arise from the investigation.
8. Whether the plaintiff's suit is not frivolous and brought in good faith.
9. Whether the information sought is available through other discovery or from other sources.
10. The importance of the information sought to the plaintiff's case.

The *Daniels* court and other courts have placed greater weight on whether the criminal investigation is ongoing.

Courts and some lawyers have a tendency to assume that an on-going police investigation is by its very nature more important than a civil proceeding. This is simply not true. The goal of the criminal justice system is to obtain a conviction and not necessarily to protect the children. The stated goal of the Illinois Marriage and Dissolution of Marriage Act is to protect and promote the best interest of children. The interest of the civil court in a domestic relations case and the criminal court in a criminal prosecution are completely different and, despite what the state's attorney's office may tell you, neither is more important than the other. All practitioners in the State of Illinois should be aware of the *Daniels* case and be prepared to challenge law enforcement's refusal to provide necessary and relevant information.

Hello, young lawyers

By Rory T. Weiler, St. Charles, Illinois

Experienced practitioners will agree that one of the most overlooked elements of the practice of law, and certainly one topic none of us heard much, if anything, about in law school is the art of client selection and management. One of the most difficult things we as attorneys do, especially attorneys in solo and small practices is pick and choose the cases we take on a daily basis. Quite apart from the ethical constraints we face,[1] the economic pressures of the practice, our natural desire to help and the commonly held perception among the public that "you're a lawyer, fix it," all combine to make the selection of a client nearly as difficult as the legal issues presented by the client's case. These pressures are compounded by the increasingly more common practice paradigm that finds many new attorneys hanging out shingles immediately out of law school, without the benefit of an "apprenticeship" in the law with other lawyers in a larger firm. Make no mistake about it: the skillful selection of clients and the successful management of client demands can make the difference between a successful and satisfying career in the law and a daily dose of misery and misanthropy.

Cases and clients that generally cause practitioners the most problems fall into two categories: the familiar and the unfamiliar. Avoiding descent into these two problematic areas requires not only discipline but intestinal fortitude, both of which can be in short supply when the economic pressures of running a business, meeting payroll, covering the overhead and supporting one's family hitch themselves to the attorney's natural inclination to try to help people with problems out of whatever jam they find themselves. This dynamic is exacerbated when the client is "familiar," that is to say, family and friends.

There is, of course, no way to completely avoid hearing about the legal problems and issues of family and friends. This is the price we pay for all the kind words and mother-love we rev-

eled in as we worked our way through college and law school. Assuming responsibility for the legal problems and issues of friends and loved ones, is, however, to be avoided at all costs. No matter how simple these cases appear at first blush, they will invariably morph into an economic and emotional black hole, and, from the practitioner's standpoint, there is no upside. These cases usually involve areas of law you are unfamiliar or less practiced in, and almost invariably, in a county or jurisdiction you've only heard about in travelogues.

Worse, the case might involve an area of the law in which you are accomplished or concentrated in, and you might have to give your "client" some unpleasant advice about the realities of his or her case. In short, familiarity will breed contempt, and even if you don't particularly enjoy spending Thanksgiving at cousin Bob's, imagine how unpleasant the holidays will be if cousin Bob regales the rest of the relatives with his analysis of your performance in his case. As hard as saying no might seem,[2] it pales when compared to the problems you'll experience when you say yes.

Obviously, recommending that attorneys not handle matters for family and friends is tantamount to recommending that the moth fly away from the flame. We simply can't (or won't) help ourselves. It does, however, get easier over time, when we, as detective Harry Callahan advised, get to "know our limitations." Avoiding the unfamiliar, on the other hand, is not only easier, but the kind of self-defense mechanism we all need to learn to have long and happy careers in the law. Unfamiliarity generally presents itself in two types of ways: geographic unfamiliarity and subject matter unfamiliarity. Geographic unfamiliarity involves taking a case you are well suited to handle. The only problem is, the case is pending in, or needs to be filed in, a jurisdiction in which you rarely, if ever appear.

There are a myriad of reasons to decline these cases, and they have nothing to do with older colleague's war stories and anecdotes about getting "back-doored." No doubt these things occurred back in the day, but in today's practice, most of us are treated respectfully and professionally wherever we might appear. There are, however, nuances, custom and practices in every jurisdiction. If you're not familiar with them, do you want to invest the time to learn? If not, you are likely doing your client a disservice. Also, how are you going to charge the client for the travel between your office and this far flung outpost of justice? Indeed, the major reason for avoiding these engagements is strictly economic. Think not about what you will earn on this case, but rather what you will lose in travel time, the ability to handle other matters, and the impact scheduling one case far away will have on your regular daily practice and your ability to deal with matters on your "home court." Cold as it may sound, as a businessman you must consider the profitability of the engagement as well as your legal ability to handle the matter.

Similarly, accepting an engagement involving subject matter with which you are unfamiliar is always troublesome. You might say, I'm an attorney, and I've handled family law cases before. What's the big deal? Every case, in every area of the law, presents different types and levels of complexity. Are you really competent to handle a child custody case just because you've filed a few divorces? Can you really prepare that Qualified Domestic Relations Order for the BP exec who has a pension plan benefit earned in the UK? Is that a problem? Chances are, if you don't know what questions to ask, you're going to have a hard time coming up with the right answers. First of all, whether because of your unfamiliarity, or in spite of it, these cases tend to take more time and effort than you first thought. Also, taking a case at the edge of your skill level will require more time, effort, diligence, care and patience. You might not be able to bill the client for this. When economic pressures come into play, corners get cut and that invariably leads to bad results for the client, or, worse yet, actionable mistakes by the practitioner.

Clearly, you can't turn down every new client who presents with a unique situation, or one that will require you to invest time and effort for which you might not be compensated. As a new attorney, nearly every case involves some "on the job" training. Fortunately, there are more resources for the new lawyer today than there have ever been. The Illinois State Bar Association, for instance, offers a mentor center[3] which matches young lawyers with more experienced lawyers in the field and in the same general geographic location. Many local bar associations in northern Illinois have similar types of services. Join the ISBA Family law listserve, www.isba-family@list.isba.org. This open internet forum is a great tool for answers to questions from the substantive to the sublime, and the listserve constitutes a sounding board of family law practitioners from Cairo to Kenosha. Consider bringing in co-counsel to assist you in handling the matter,[4] or rely on the advice of a more experienced colleague in the field with whom you are acquainted. In short, there is a wealth of resources, which you can, and should utilize.

Having made the decision to undertake the engagement, how then does one go about generating a satisfied client? There are certain legal and practical do's and don'ts in dealing with clients, and they all begin with your client's expectations. Managing a client's expectations is imperative to building a successful practice and maintaining your own mental health. Remember, building a successful practice requires the good will generated by satisfied clients. The prevailing public sentiment, of course, is "you're the lawyer, fix it." It is at this point that you must be (sometimes brutally) honest with the client. Be reasonable, realistic and conservative in your assessments, and resist the temptation to say, "I'll get it done," so that the client's checkbook is produced. Some times, you simply can't "fix it." You're better off telling the client that and letting him walk out the door, than you are commencing the engagement with unrealistic expectations on the part of the client. Just as satisfied clients generate good will and referrals, dissatisfied clients can hurt your practice.

Keep in mind that no lawyer ever got in trouble by promising too little. Avoid the urge to tell the client what he wants to hear in order to "seal the deal." Clients, like most humans, hear what they want to hear and have a keen memory for that which they desperately wish to hear. Therefore, a realistic appraisal of the client's case, and a conservative approach to potential outcomes will more often enable you to point to an "overachievement," and avoid uncomfortable explanations about why unrealistic expectations were not met. Use your initial interview to establish the client's short and long term goals, and discuss strategies for achieving them. In the field of family law, perhaps more so than any other area of practice, cases can drift aimlessly, or be sent down litigational blind alleys, unless the client and counsel

have some idea of what they are working to achieve. In the end, honesty is always the best policy, even if it means, and perhaps especially when it means, you are not retained.

Once the client retains you, a written engagement agreement is an absolute must "do."[5] There being no substitute for diligence, be sure that the client signs and returns the engagement agreement to you. Also, be mindful of the different kinds of retainers. Recently, in *Dowling v. Chicago Options Associates, Inc.*, 2007 Ill. Lexis 856, (May, 2007), the Illinois Supreme Court defined the three[6] kinds of retainers lawyers can accept, and the ethical requirements imposed upon attorneys based upon the type of retainer received. A petition for rehearing remains pending, and might result in changes to the decision. But in the interim, every Illinois lawyer needs to be familiar with this decision, as it directly impacts the business part of the attorney-client relationship. A written engagement agreement can also be used to spell out the client's goals, and confirm some of your initial advice to the client.

Probably the most critical aspect of your relationship with your client is communication. Mary Robinson, former administrator of the Attorney Registration and Disciplinary Commission recently[7] reported that of the approximately 6,000 complaints received annually by the ARDC, 1400 include allegations of communications problems. The lesson to be learned here, is that you can't provide your client with too much communication.[8] Copies of pleadings and correspondence should be provided to the client. Some attorneys will provide the client with a folder or binder at the time of engagement to keep these and other documents together. Inform your client of telephone conversations and conferences with opposing counsel, and the substance of these conversations. Lastly, RETURN YOUR PHONE CALLS! You will find that it is the single best way to maintain a happy and satisfied client.

Always keep in mind that the case is the client's, not yours. Quite apart from insuring satisfied clients, communication is necessary because your role is to give advice, not make decisions. An uninformed client cannot make an informed decision about how to proceed with his divorce. All settlement proposals, no matter how ridiculous you professionally deem them to be, must be communicated to the client. It is your duty to tell the client of all settlement proposals, because the client might just decide to ignore your advice and enter into a bad or disadvantageous agreement. You cannot and must not actively interfere with the client's decision. Be sure the client is completely and adequately informed of your advice and his or her options, but do not make decisions for the client. Remember, this is America, and people have the right to make bad choices.

The keystone of communication, and the attorney-client relationship itself, is honesty. Engaging in dishonest conduct toward the client is, of course, inexcusable and will invariably be punished. Blaming the court or opposing counsel for our own shortcomings is an easy and insidious habit to fall into, particularly when you are practicing in jurisdictions or practice areas in which you are unfamiliar. It is important, not just for your relationship with this client, but for your professional reputation and mental well being, that you be truthful and take responsibility for your own actions. If you blew it, you have to admit it, and do what you can to make it right. Obviously, if the mistake rises to an actionable level, you must withdraw and advise the client to seek independent legal counsel. The truth, painful though it might be, is actually much easier to deal with than a myriad of excuses created to absolve the attorney from responsibility for the outcome.

We are, of course, in a result oriented business, and sometimes, our best efforts notwithstanding, we don't achieve favorable results for our clients. Perhaps the hardest part of client management is personally coming to the realization that your best isn't always good enough, and being comfortable enough in your career to let the client know that. We all win some we shouldn't and lose some we shouldn't, and in a world where the public perception of our legal system is based upon Boston Legal, the temptation is great to blame the judge, or opposing counsel, particularly when we know that the result in part is attributable to something we should or should not have done. It is incumbent upon us to explain to the clients that art does not mirror life, and the system in which we function bears no resemblance to the one they watch on television. Regardless of the outcome, the client is entitled to a truthful and dispassionate explanation. The judge is friendly with opposing counsel is not such an expla-

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nation.

Comments that imply dishonesty or incompetence on the part of the court or opposing counsel not only diminish the public's confidence in the fairness of our system, but reflect negatively upon us as individuals for being a part of that system. As attorneys, each of us owes a duty to preserve the dignity of the forum, and to promote faith in the fairness of our system. It is to be hoped that some of the concepts in this article will enable all of us to fulfill that duty.

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1. Ill. Sup. Ct. R. Prof'l Conduct 1.1(b): "A lawyer shall not represent a client in a legal matter in which the lawyer knows or reasonably should know that the lawyer is not competent to provide representation without the association of another lawyer who is competent to provide such representation."

2. Try these: I don't practice in that county; oh, I never handle those cases, they require special training/expertise; of course I could help you, but you'd be better served by someone who practices in that area; let me give you the name of a friend of mine. . .

3. Go to the Association's Web site, <www.isba.org> and look for the link to the mentor center.

4. Remember that utilization of co-counsel requires the consent of the client. Ill. Sup. Ct. R. Prof'l Conduct 1.1(c).

5. 750 ILCS 5/508 governs the use of written engagement agreements, and the required contents of same.

6. Classic, Security and Advanced Payment. In the author's experience, many attorneys receive what would be defined as "advanced payment" retainers, i.e., those immediately deposited into the attorney's general account, for use by the attorney, subject to the obligation to refund to the client unearned or unused funds. The *Dowling* decision imposes specific requirements for the acceptance of these advanced payment retainers and terms required in the written engagement agreement. It is a must read for all.

7. Kane County Bar Association Bar Briefs, September, 2007. Available at <www.kanecountybar.org>.

8. In fact, Ill. Sup. Ct. R. Prof'l Conduct 1.4 requires that you keep the client "reasonably informed" and that you "promptly" comply with client requests for information.

The top 10 things they did not teach me in law school

By Dennis A. Norden

Upon starting the actual practice of our profession, nearly every attorney begins to realize how little he or she knows. Here is a list of some of the things I had to learn, in many instances, the hard way.

10. Be very wary of the opposing counsel or client who addresses you as "counselor." For some reason, these people are not to be trusted.
9. Return phone calls to other attorneys at 11:30 a.m. and at 4:30 p.m. This is when you are most likely to actually make contact.
8. Do not let yourself be a prisoner to the idea of the "billable hour." Charge flat fees, whether it is litigation or transactional. Most clients hate getting charged for a phone call. Nearly all clients want to know at the onset what it is going to cost.
7. If you practice in a true partnership, whatever form it may take, remember that there is no "fair" way of allocating compensation among partners. Everyone thinks that they are under-compensated: the rainmakers, the transactional lawyers, the big fee contingency folks. I once knew of a two-lawyer firm that broke up whenever either of them would take in a big probate case.
6. Learn to work with other professionals, such as certified accountants, investment brokers, insurance people. Develop mutually "safe" relationships with these folks. They can and will be great sources of new business for you. You should not be afraid to refer business to them, either. Do not always insist on acting as quarterback of a professional network working together for the same client. Sometimes it is appropriate to be the leader, sometimes not.
5. When a legal question arises, read the statute books first. It is amazing how many answers are there.
4. Be available. In today's era of cell phones and e-mail, there is no excuse for not promptly returning phone calls from clients. I have found that availability is one strong trait of every great lawyer I have known.
3. Always, always tell the truth. There are times that call for silence, but never knowingly make any misrepresentation to anyone, whether to a judge, client or opposing counsel. Your credibility as a lawyer is the most important thing about you.
2. In any dispute, keep your hands on the money for as long as possible. Once you lose control of it, you lose any negotiating position you may have had.
1. Maintain a balance in your life. This is a very hard lesson to learn. Make sure there is time for your family and friends. Take time for yourself, too. My former partner used to say, "Thank God it's Friday, there's only two more days to work this week." Don't let this happen to you.

Dennis A. Norden is Senior Vice President and General Counsel of Attorney Title Guaranty Trust Company whose headquarters are located at 33 North Dearborn Suite 1220, Chicago, Illinois 60602. Mr. Norden is also a member of the Business Advice and Financial Planning Section Council.

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