2011 SUMMARY OF ILLINOIS DIVORCE AND FAMILY LAW CASES AFFECTING §2-1401 PETITIONS, ADDRESSING ETHICS ISSUES

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Usage: Sol Rappaport, in a 2011 lecture for the Illinois Chapter of the AAML had stated:

> Words need to change. Language impacts perception and perception impacts language. The following words should be stricken from our vocabulary: Intact, visitation, visit, broken, residential. Instead, we should use the following. Live with, not visit. Parenting time, not visitation, former spouse, not ex-spouse.

Toward this end, I had used the phrase in my writing "ex-spouse." It was shorter. Now I try to use the term former spouse.

2-1401 Petitions

Johnson -- *Sua Sponte* Sanctions against Lawyers Due to Filing 2-1401 Motion

IRMO Johnson, 2011 IL App (1st) 102826

This case involved the issue of sanctions entered against a lawyer for filing a Section 2-1401 petition. The trial court granted the motion sanctions against petitioner and also sua sponte sanctioned two lawyers for filing the section 2-1401 petition. Following an evidentiary hearing as to the amount of respondent's attorney fees and costs, the trial court ordered petitioner to pay $56,000 and Berman and Meenan to pay $56,000 in sanctions. The lawyers sanctioned appealed and the appellate court reversed and remanded the matter.

The facts are that respondent filed a motion for summary judgment. In his motion, respondent contended that petitioner admitted in a deposition that she and her attorneys knew or should have known about the deal giving rise to 2-1401 petition (referred to as the Smuckers deal) before the divorce judgment was entered. The case is somewhat complicated in terms of the former wife's deposition testimony about what she and her lawyers knew and when they knew it. The appellate court stated:

> In her response to the summary judgment motion, petitioner admitted to seeing an article dated December 1, 2004, from The Cincinnati Post, titled "Smucker to close Calf. Plant." The article stated, "Smucker said it wants to sell its Orrville industrial bakery ingredients business to Baldwin Richardson Foods Co., a privately owned food company in Chicago. Terms were not disclosed for the deal, which is expected to close

> by the end of the year." Petitioner contended that the article reported only that Smucker "wanted to sell" the division to BRF, but did not disclose a finalized deal. Petitioner maintained that she did not learn of a finalized deal until October 2006.

The court granted the former husband's motion for summary judgment. The court stated that it was "uncontroverted that [petitioner] learned of the possible acquisition no later than December 1, 2004, through the online edition of the Cincinnati Post" and shared this information with her attorneys. The appellate court stated that, "Despite learning of the possible acquisition, petitioner voluntarily entered into the MSA based on a December 2003 valuation without an update or any additional discovery."

The key to the case was that the sanctions motion did not request sanctions against the former wife's lawyers. Ultimately the trial court awarded the former husband $112,000 in sanctions award to be divided equally between the lawyers and the former wife. The lawyers sanctioned each appealed and the appeals were consolidated. The lawyers pointed out that they were never given notice that they could be liable for sanctions. The appellate court stated, "The attorneys did not have the opportunity to raise an objection or otherwise contest the sanctions because the trial court issued its order and sua sponte sanctioned the attorneys." The appellate court concluded:

> While we make no finding as to whether Berman and Meenan's conduct was sanctionable, we hold that the trial court should have allowed the attorneys the opportunity to defend themselves before being sanctioned. We vacate the trial court's sanction order against Berman and Meenan and remand for an evidentiary hearing on whether sanctions are appropriate

***Streur* – Section 2-1401 Action Time Barred if Petitioner Aware of Possible Claim, but Fails to Bring Action within Two Years**

IRMO Streur, Official Reports, 2011 IL App (1st) 082326 (May 11, 2011)

The former wife appealed from a trial court's decision dismissing her Section 2-1401 action which alleged that former husband failed to: (1) disclose a retirement account in settlement discussions and; (2) that he represented that he would continue to fully disclose his income and assets, but failed to do so. Former wife also filed a petition for rule to show cause alleging former husband failed to a make a full and complete disclosure of his income in order to evade family support obligations. Her petition for rule to show cause was filed in June 2004 and contained essentially the same allegations as her subsequently filed 2-1401 action. She filed in November 2006. Therefore, the trial court dismissed the claim and the appellate court upheld the ruling because she clearly was aware of the potential claim early as 2004, but did not file it for over 2 years.

***Goldsmith* -- where a party forgoes formal discovery, there is no easy escape hatch for failing to engage in discovery and accordingly 2-1401 motion properly denied**

IRMO Goldsmith, 2011 IL App (1st) 093448 (August 26, 2011)

During the marriage the husband was a trader at the CBOT. According to the prenuptial agreement, the seat at the CBOT was non-marital and the husband's net worth was $3.351M. During the marriage, the husband's counsel disclosed his client's net worth to be $6.528M and the wife received $1.8M under the terms of the MSA. Before entry of the judgment, husband's counsel forwarded an unsigned affidavit from the husband disclosing his assets. The MSA contained a clause that read:

> WHEREAS, the parties acknowledge each of them has been fully informed of the estate, income, assets and liabilities of the other, and each is conversant with the

> estate, income, assets and liabilities possessed by the other. Each party represents and warrants they have made a full and complete disclosure of his or her property. In the event a court of competent jurisdiction subsequently determines either party owned or possessed property not disclosed during these proceedings, said property shall be distributed pursuant to the facts delineated in 750 ILCS 5/503.

The prove-up contained the following testimony from the wife based upon her counsel's questioning.

> Q. Miss Goldsmith, you have further entered into this settlement based upon various correspondence both with [respondent's counsel] and from [respondent] who purportedly disclosed all of his assets and the values of the same, is that correct?
> A. I'm relying that that information is correct.
> Q. And in reliance on it, you entered into this settlement agreement, is that correct?
> A. On reliance, I have.

The court then interjected:

> THE COURT: She said if it is all true. She understood that she could have [taken] discovery in this matter, correct?
> [Petitioner's Counsel]: Right."

The former wife filed a "Petition to Enforce Judgment or in the Alternative to Vacate the Judgment for Dissolution of Marriage," alleging she discovered her former husband concealed three assets worth nearly $2 million. The trial court granted summary judgment to the former husband based upon her failure to engage in formal discovery to determine her former husband's net worth. The appellate decision contains an excellent review of the law that applies to §2-1401 petitions. The former wife argued that the trial court erred in ruling as a matter of law that a showing of due diligence was precluded by her failure to enter into formal discovery. She claimed her reliance on the representations within the MSA were reasonable. Note that there was a clause within the MSA for later discovered property.

The major claim of the former wife was litigation that had involved the husband's seat at the CBOT and under the terms of the premarital agreement the trading activities were conducted under his non-marital trading account. The appellate court ruled that the settlement was non-marital (unless there was co-mingling), while the former wife urged that the issue should be an open one in light of the failure of her former husband to disclose the asset consistent with the representations in the settlement agreement.

The appellate court concluded regarding the “due diligence” issue in this case:

> The trial court properly concluded the petitioner did not act with due diligence in presenting her claims to challenge the judgment of dissolution of marriage, which incorporated the marital settlement agreement signed by the parties. The section 2–1401 petition was deficient as a matter of law, notwithstanding the petitioner 's contention that her reasonable reliance on the representation and warranty by the respondent of full and complete disclosure in the MSA constituted legal diligence.

Comment: The appellate court had pointed to the fact that the financial disclosure statement was unsigned. I believe this is a case where bad facts make bad law. The bad facts consist of the “unsigned” financial affidavit. The query is whether one should be able to rely upon a signed

financial affidavit where there was no formal discovery. Keep in mind that for hearings such as interim fee hearings, the parties in fact rely on the financial affidavits in the absence of good cause shown. There is language of this case that, taken out of context, is problematic.

Selected Bankruptcy and Divorce Cases

***Hall-Walker* -- Entry of a Status Continuance Order is a Violation of the Bankruptcy Automatic Stay**

In re Nancy Hall-Walker, Debtor, 2011 WL 652461.

Post-divorce, the former husband filed a Petition for Rule to Show cause against his former wife for her failure to carry out terms of their Marital Settlement Agreement which required her to refinance the mortgage on the former marital residence and remove his name within 90 days. The former wife was unable to refinance the loan and fell behind on the mortgage payments. She then filed for bankruptcy and during the pendency of that case, the trial court entered an order *continuing* the Petition for Rule to Show Cause for status in light of the bankruptcy proceeding. The bankruptcy court held the entry of such order was a violation of the automatic stay and that the former wife was entitled to actual damages and attorneys' fees. The Bankruptcy Court reasoned that the mandate of section 362(a) of the Bankruptcy Code operates to stay the continuation of all judicial proceedings which includes collection actions filed in state court. The Court also noted that because the former husband failed to file a proof of claim in the bankruptcy proceeding, he did not have an allowed claim that could be paid by the Chapter 13 Trustee. Finally, the Bankruptcy Court urged the need for a bankruptcy calendar in the Domestic Relations Division in the Circuit Court of Cook County similar to the bankruptcy calendar in the Law Division.

Note that 11 U.S.C. § 362(a) provides:

> [A] petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

11 U.S.C. § 362(k)(1) provides:

> [A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

The bankruptcy court stated:

> The Respondent's action in continuing the October 14, 2010 status hearing was a willful violation, as section 362(a) is clear: the provision operates to stay the continuation of all judicial proceedings which "includes the maintenance of collection actions filed in state court." Eskanos & Adler, P.C. v. Leetien, 309 F. 3d 1210, 1214 (9th Cir. 2002). The court in Eskanos was unequivocal in noting that "[A] party violating the automatic stay, through continuing a collection action in a

non-bankruptcy forum, must automatically dismiss or stay such proceeding, or risk possible sanctions for willful violations..."

The specific language of the decision stated:

> During a time when the Debtor should have been focused principally on her bankruptcy case in an effort to reorganize her debts, she was being summoned to Domestic Relations Court, accruing additional attorney's fees and facing threats of incarceration for her failure to refinance the mortgage.
>
> If the Respondent wished to continue with collection efforts on behalf of her client, she could have sought a motion to lift the stay under section 362(d). In addition, she could have filed a proof of claim on behalf of her client reflecting his contingent liability for the missed mortgage payments of $6,993.41. Pursuant to 11 U.S.C. § 101(5)(A), a claim includes a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, **contingent**, matured, disputed, undisputed, legal, equitable, secured or unsecured." (emphasis added).

Tutor **-- Interest on Property Settlements: Imposition of Interest Not Violation of Agreed Bankruptcy Order Providing for Terms of Payment of Lump-Sum Property Settlement Agreement**

IRMO Tutor, 2011 IL App (2d) 100187 (August 26, 2011)

The terms of the MSA had provided:

> "[Terry] shall receive a lump sum payment in the amount of $88,929.73 within 60 days of the date of this order which represents her 65% share of the remaining marital estate of $165,443.51 after $28,628.55 has been paid from the marital estate to pay off the marital debts."

The former husband failed to comply with this and then filed bankruptcy proceedings and the former wife filed an adversary complaint asking the court to declare the obligation non-dischargeable. The bankruptcy court found the marital property debt to be non-dischargeable. The February 2007 agreed order provided a payment schedule:

> (1) from February 15, 2007, through January 15, 2008, $300 per month, in addition to maintenance;
> (2) from February 15, 2008, $500 per month, until maintenance is terminated; and
> (3) from the termination of maintenance until the marital property debt is paid in full, $1,800 per month.

It then provided:

> In the event the Defendant, Brian Tutor fails to make any payment within 10 days of the date any installment payment hereunder is due, the terms and provision of this order providing for installment payments be and are hereby terminated instanter and Plaintiff, Terry Tutor, upon notice, shall be entitled to appear before the Circuit Court of the Sixteenth Judicial Circuit, Kendall County, Illinois to seek immediate enforcement of the terms and provisions of Article 5.1C of the Judgment for Dissolution of Marriage.

The bankruptcy judgment was entered April 2007 and in April 2009, the former wife "filed in the trial court a petition seeking postjudgment interest from the date of the entry of the agreed bankruptcy order due to "delay in paying the judgment." The former husband argued that his former wife's petition was barred by res judicata, accord and satisfaction, the bankruptcy court's discharge order and laches. The trial court denied this motion to dismiss and granted the former wife post-judgment interest per section 2—1303 of the Code of Civil Procedure (735 ILCS 5/2—1303).

The former husband's first contention was that statutory interest was improper because nothing in the agreed bankruptcy order required him to pay the same. The case first rejected the waiver argument because there was no explicit waiver: "Thus, the fact that the agreed bankruptcy order is silent regarding the issue of interest does not establish that the trial court abused its discretion by awarding interest." Next the case states, "Because the agreed bankruptcy order is silent regarding the issue of interest, nothing indicates Terry's intent to waive her right to such, including the language cited by Brian. The language cited by Brian introduces the schedule for payment and cannot reasonably be interpreted as a waiver of Terry's right to interest.

The court next rejected husband's *res judicata* argument because the agreed order entered in the bankruptcy court did not prohibit the wife from seeking enforcement of the obligation to pay the sums due to her. The husband further argued that since he was in full compliance with the terms of the Agreed Order and payment plan, there was accords and satisfaction and as such judgment interest should not be applied. But the the appellate court found that because there was no explicit reference to the husband's claims that he had fully complied with the Agreed Order in the record on appeal, there was no basis for the appellate court to determine he was in fact in full compliance with the order. Finally, the court rejected the husband's laches claim (that the wife should be allowed to wait two years to seek judgment interest and then seek it retroactively) due to Husband's failure to properly cite to the record the calculations of the cost to the Husband of the wife's delay in seeking interest.

Right to Counsel re Contempt Charges / Immunity of Counsel for Child

***Turner v. Rogers* - U.S. Supreme Court: Due Process Clause and Circumstances in Which There is a Right to Counsel in Matrimonial Proceedings**

Turner v. Rogers, 131 S. Court. 2507, June 20, 2011

The Fourteenth Amendment's Due Process Clause does not automatically require the State to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration. That Clause does not require that counsel be provided where the opposing parent or other custodian is not represented by counsel and the State provides alternative procedural safeguards equivalent to adequate notice of the importance of the ability to pay, a fair opportunity to present, and to dispute, relevant information, and express court findings as to the supporting parent's ability to comply with the support order.

The petitioner in *Turner*, Michael D. Turner, was jailed six times between 2003 and 2010 for accumulated child support payment arrears. The duration of Turner's jail spells ranged from one day to eight months. As we know, a person being in arrears on child support payments is not unusual: in 2008, 11.2 million U.S. child support cases had arrears due. The number of persons kept in jail or in prison for child support arrears is not generally tracked. Based on a publicly available collection of relevant data, an estimated 50,000 persons are kept in jail or in person on any given day in the U.S. for child support arrears.

During his most recent term in prison, Turner appealed his sentencing, claiming that he was entitled to counsel at his hearing. Before the case was heard by the South Carolina Supreme Court, however, Turner's sentence expired, and the South Carolina Supreme Court subsequently rejected the claim, distinguishing between civil contempt and criminal contempt, arguing that counsel was only required for the latter. Turner's pro bono counsel then appealed the case on Turner's behalf to the U.S. Supreme Court.

In a 5-4 decision by Justice Stephen Breyer, held that a state is under no obligation to provide free counsel to indigent defendants in civil contempt cases, especially if the plaintiff is not represented by counsel (as was the case in *Turner*.) However, the court held that the South Carolina courts were under an obligation to provide an alternative procedures to ensure a fair determination of the questions at hand. Since Turner did not have clear notice that ability to pay would be the critical question in this proceeding, nor was he provided with information that would have allowed Turner to disclose such information, the South Carolina courts erred in finding him able to pay and thus in civil contempt.

The Supreme Court ruled that because a contempt proceeding to compel support payments is civil, the question whether the "specific dictates of due process" require appointed counsel is determined by examining the "distinct factors" to decide what specific safeguards are needed to make a civil proceeding fundamentally fair. The factors include: (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirements]."

***Vlastelica* – Child's Representative Has Absolute Immunity for Work Within the Scope of His Appointment**

Vlastelica v. Brend, 2011 IL App (1st) 102587 (August 11, 2011)

The mother brought a three count complaint against Attorney Jeff Brend, the child's representative. The complaint alleged malpractice, intentional breach of fiduciary duty and intentional interference with the mother's custodial rights.. The trial court granted Brend's motion to dismiss finding immunity for work as a child's representative. The appellate court affirmed.

The argument by the mother's counsel is that Section 506 of the IMDMA does not provide for immunity. The appellate court found persuasive the following language of the Seventh Circuit Court of Appeals. It has held that guardians ad litem and child representatives are entitled to the same absolute immunity because they are "arms of the court." *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009). The *Cooney* court stated:

> "Guardians *ad litem* and court-appointed experts, including psychiatrists, are absolutely immune from liability for damages when they act at the court's direction. [Citations.] They are arms of the court, much like special masters, and deserve protection from harassment by disappointed litigants, just as judges do. Experts asked by the court to advise on what disposition will serve the best interests of a child in a custody proceeding need absolute immunity in order to be able to fulfill their obligations 'without the worry of intimidation and harassment from dissatisfied parents.' [Citation.] This principle is applicable to a child's representative, who although bound to consult the child is not bound by the child's wishes but rather by the child's best interests, and is thus a neutral, much like a court-appointed expert witness." *Cooney*, 583 F.3d at 970.

[Note that there was a non-published (Rule 23) *Cooney* decision from 2011, 2011 IL App (1st) 102129-U holding that trial court did not err when it found the trial court did not err when it found the plaintiffs' lawsuit barred by *res judicata* and absolute immunity plaintiffs' lawsuit barred by res judicata and absolute immunity.]

The appellate court stated:

> We agree with *Cooney's* characterization of a child representative as a "hybrid" of a child's attorney and a child's guardian ad litem who acts as an arm of the court in assisting in a neutral determination of the child's best interests. *Cooney*, 583 F.3d at 969-70. We also agree with *Cooney's* holding that to best aid the court in its determination of the child's best interests, the child representative must be accorded absolute immunity so as to allow him to fulfill his obligations without worry of harassment and intimidation from dissatisfied parents.

The appellate court also noted its decision in *Golden v. Nadler, Pritikin & Mirabelli, LLC*, No. 05 C 0283, 2005 WL 2897397, at *10 (N.D. Ill. Nov. 1, 2005), where the United States District Court held that the factors set forth by the U.S. Supreme Court to determine whether a person is entitled to absolute immunity strongly weighted in favor of granting child representatives absolute immunity. The court granted from *Golden* at length with approval:

> "Child custody battles can be emotionally charged, and child representatives in contentious cases may be subject to harassment and intimidation if they are not immune from suit. Further, the dissatisfied party can bring any concerns before the state court judge if the child representative has acted inappropriately. While in theory the process should not be adversarial because all parties in a custody proceeding should be concerned with the best interests of the child, in practice these proceedings are often adversarial because the parties disagree as to what those interests are. These factors show that absolute immunity is appropriate for child representatives involved in custody determinations." *Golden*, 2005 WL 2897397, at *10.

Conflicts of Interest:

***Newton* -- Where Conflict of Interest Exists the Fee Agreement is Void *ab Initio* and Cannot be Enforced in Bringing Contribution Petition or Petition for Interim Fees**

IRMO Newton, 2011 IL App (1st) 090683 (June 30, 2011)

Newton is difficult to fathom. And we as divorce lawyers can do so much better than this. I believe that it is best to start with what might have what might have motivated David Grund, *et al.*, to be held in contempt twice and take a care through two appeals with the end result that there were substantial delays in the underling case significant time spent by the firm with no prospect of getting paid. My suggestion for what motivated David Grund is the belief that in some high income cases a party may interview a number of lawyers trying to conflict out certain lawyers. [The decision is somewhat difficult reading because it involves David Grund and the husband's name is also David -- and the decision refers to the husband as David throughout.] This practice is more pervasive when dealing with law firm's who take extremely aggressive stances with the byproduct that attorney's fees often skyrocket in those cases. In any event, it appears that David Grund's point of view was that he had warned his prospective client in the initial interview essentially to provide no more information than would be public record. So, David Grund's testimony on the remand of the first appeal was:

> The court conducted a hearing as directed on February 25, 2009, and Grund testified that he told David that representation would not begin until David actually signed a contract, that no attorney-client privilege would attach during their meeting, and that David should not disclose anything to Grund that could not appear in answers to interrogatories or in the public record. Grund testified that David "volunteered some information," but Grund did not recall anything specifically. Grund denied taking any notes. Grund believed David never intended to actually hire him.

The decision, then states, however:

> Grund also denied giving [the husband] a business card with his private cellular telephone number, but was impeached by the production by [the husband] of Grund's business card with his cellular telephone number written on the back of the card. In rebuttal, [the husband] testified that Grund assured him everything they discussed was confidential.

A significant fact for both the trial court and the appellate court was that David Grund had warned the wife that there was a conflict of interest, but nevertheless, he drafted an engagement agreement which she signed. The appellate court noted Judge Jordan's findings that David Grund was essentially a bad witness:

> The court also specifically found that "Mr. Grund's credibility *** was diminished by his impeachment and general demeanor. His attitude on the stand was sarcastic, evasive, cavalier and argumentative ***."

There is conflicting language in the decision regarding whether a presumption that confidential information is given during an initial conference with a lawyer is irrebuttably presumed or rebuttably presumed:

> 'Once a substantial relationship is found between the prior and present representations, it is irrebuttably presumed that confidential information was disclosed in the earlier representation.' " *Franzoni v. Hart Schaffner & Marx*, 312 Ill. App. 3d 394, 403-04 (2000) *** See also *SK Handtool Corp.*, 246 Ill. App. 3d at 990 ("If such a relationship exists, it is presumed that the client disclosed confidential information to the attorney during the prior representation." *** Thus, there is an irrebuttable presumption that confidential information was disclosed during Grund's consultation with David. Thereafter, Grund was prohibited by Rule 1.9 from representing Hadley. The circuit court did not err in (1) finding that Grund had not rebutted the presumption; (2) in finding that Grund and Leavitt were disqualified; and (3) in entering the disqualification order.

Note that the *Franzoni* case regarding the irrebuttable presumption had cited previous case law: "For the court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule." *Ullrich*, 809 F. Supp. at 233, *** Note, though that the case essentially allowed Grunt to try to rebut the presumption -- which was consistent with the ultimate decision on the first Rule 23 appeal.

This decision has some excellent language when it addresses the standing of a law firm to seek a contribution petition even where the parties come up with a marital settlement agreement:

> Here, the petition for attorney fees was filed on January 22, 2009, during the pendency of the dissolution proceedings, and was still pending at the time the judgment for dissolution was entered. Thus, Grund and Leavitt have standing to seek fees under section 508.

Regarding the disqualification issue, the appellate court noted the language of Section 508(a)(1) through (5) sets forth the types of matters for which fees can be sought. Most importantly, Section 508(c)(3) describes what it takes to have an enforcement fee agreement and states:

> "(3) The determination of reasonable attorney's fees and costs either under this subsection (c), whether initiated by a counsel or a client, or in an independent proceeding for services within the scope of subdivisions (1) through (5) of subsection (a), is within the sound discretion of the trial court. The court shall first consider the written engagement agreement and, if the court finds that the former client and the filing counsel, pursuant to their written engagement agreement, entered into a contract which meets applicable requirements of court rules and addresses all material terms, then the contract shall be enforceable in accordance with its terms ...

The appellate court explained that:

> Here, Grund and Leavitt's contract with [the wife] did not meet the applicable requirements of our court rules, as it violated Rule 1.9, and therefore the contract was unenforceable under section 508 of the Act.

The appellate court then addressed Grund's argument that the Leveling provisions allow recovery for fees for good-faith unsuccessful positions. The appellate court stated:

> Further, it is arguable to what extent Grund and Leavitt's defense of the prior appeals regarding their disqualification was on behalf of Hadley, as opposed to being in their own interest to stay in the case and collect their fees.

The appellate court finally noted the provisions of the current Rules of Professional Conduct:

> Rule 1.18 provides guidance for attorneys who have an initial consultation with a prospective client, but then later desire to represent another party with conflicting, adverse interests. Under Rule 1.18, a lawyer who has had discussions with a prospective client shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter (Ill. S. Court. Rs. of Prof. Conduct, R. 1.18(c) (eff. Jan. 1, 2010)), except if:
>
> > "(1) both the affected client and the prospective client have given informed consent, or
> > (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom." Ill. S. Court. Rs. of Prof. Conduct, R. 1.18(d)(1), (d)(2) (eff. Jan. 1, 2010).

Committee comment 5 to Rule 1.18 provides how this result can be achieved:

> "[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter." Ill. S. Court. Rs. of Prof. Conduct, R. 1.18 (eff. Jan. 1, 2010), Committee Comment (5)."

This blueprint for representing a spouse after having an initial consultation with the other spouse should discourage the tactical "conflicting out" of divorce attorneys by wealthier spouses that Grund and Leavitt suggest is a pervasive practice in the area of divorce law.

Comment: It was curious to read this decision on the heels of the Rule 23 sanctions decision also involving David Grund's firm.

***O'Brien* - Petitions for Change of Judge are Based on Actual Prejudice Standard and Not Appearance of Impropriety Standard**

IRMO O'Brien, 2011 IL 109039 (August 4, 2011)

O'Brien serves as an instructive decision regarding applications for a change of judge. 735 ILCS 5/2–1001(a)(1) identifies specific situations where a substitution of judge may be awarded by the court with or without the "application" of either party. The circumstances listed in this subsection include: where "the judge is a party or interested in the action, or his or her testimony is material to either of the parties to the action, or he or she is related to or has been counsel for any party in regard to the matter in controversy." The Illinois Supreme court noted that the judge can grant relief under this section sua sponte. This, of course, is generally what occurs where the judge has a potential conflict of interest.

The Court next reviewed 735 ILCS 5/2–1001(a)(2)(ii) that allows each litigant as a matter of right one substitution of judge without cause and noted that the statute refers to this being made "on motion." Finally, the *O'Brien* court reviewed 735 ILCS 5/2–1001(a)(3)(ii) that allows *petitions* for change of judge for cause.

The Supreme Court addressed the importance of noting the difference between motions and petitions:

> We note that both the appellate court majority opinion and that of the specially concurring justice misidentify John's request for substitution of judge for cause as a "motion." See, e.g., 393 Ill. App. 3d 364, 371; 393 Ill. App. 3d at 395 (O'Malley, J., specially concurring). This court, too, has been guilty of the same imprecision, *** As noted, the statute contemplates the use of a "motion" when seeking substitution as a matter of right and the use of a "petition" for situations in which substitution for cause is sought. The inadvertent interchange of these words in substitution cases can lead to confusion since the requirements for substitution as of right differ from those for substitution for cause. ***. It is for this reason, therefore, that we take the opportunity to remind both bench and bar of the differences between the provisions of section

> 2–1001 and the need for care in labeling the requests for substitution brought under the various subsections of the statute.

Next, the Supreme Court noted that many but not all of the circumstances listed in subsection (a)(1) are also listed in Supreme Court Rule 63(c) such as:

> SCR 63(c)(1)(d): Judge has an interest in the proceeding;
> 63(c)(1)(e)(1): Judge is a party to the proceeding;
> 63(c)(1)(b): Judge has served as counsel for any party or may be a material witness;

Because the legislature incorporated some but not all of SCR 63 into Section 2-1001 of the Code, it reflects legislative intent.

Regarding the "for cause" section, the Supreme Court stated:

> Illinois courts have held that in such circumstances, actual prejudice has been required to force removal of a judge from a case, that is, either prejudicial trial conduct or personal bias. *** Moreover, in construing the term "cause" for purposes of a substitution once a substantial ruling has been made in a case, Illinois courts have consistently required actual prejudice to be established, not just under the current statute, but under every former version of the statute. The reason has been explained: "one may not 'judge shop' until he finds one in total sympathy to his cause. Any other rule would spell the immediate demise of the adversary system."

The next passage from the Supreme Court's decision is also instructive:

> With respect to bias based upon a judge's conduct during a trial, we have relied upon the United States Supreme Court's description:
>
> > " '[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.' (Emphasis in original.)" *Eychaner*, 202 Ill. 2d at 281 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).
>
> Thus, while most bias charges stemming from conduct during trial do not support a finding of actual prejudice, there may be some cases in which the antagonism is so high that it rises to the level of actual prejudice. Indeed, this court just recently reaffirmed its reliance on *Liteky* in *In re Estate of Wilson*, 238 Ill. 2d 519, 554-55 (2010). In any event, the law is clear in Illinois that when, as in this case, a substantial ruling has been made, substitution under section 2–1001(a)(3) may be granted only where the party can establish actual prejudice.

In light of the *Caperton* decision the former husband urged that the Court should adopt the appearance of impropriety standard to replace the prejudice standard. The Supreme Court rejected this:

> Addressing the issue squarely today, we reject John's invitation to replace the actual prejudice standard with the appearance of impropriety standard. To so hold would mean that the mere appearance of impropriety would be enough to force a judge's removal from a case. *** Adopting John's position would doubtless mean more for-cause petitions arguing "an appearance of impropriety," a much easier standard to meet than actual prejudice. An easier-to-meet standard would encourage the "judge-shopping" that our previous decisions carefully strove to avoid. And it is almost certain that judges in dissolution of marriage cases would see the greatest increase in judge-shopping since a cursory review of Illinois jurisprudence shows that, in civil cases, most for-cause substitution requests arise in divorce and custody cases.
>
> Additionally, John's argument overlooks that recusal and substitution for cause are not the same thing. *** Whether a judge should recuse himself is a decision in Illinois that rests exclusively within the determination of the individual judge, pursuant to the canons of judicial ethics found in the Judicial Code. All judges in Illinois are expected to consider, sua sponte, whether recusal is warranted as a matter of ethics under the Judicial Code. The Judicial Code, which is a part of our rules, says nothing that would give the impression that its provisions could be used by a party or his lawyer as a means to force a judge to recuse himself, once the judge does not do so on his own.

The Supreme Court then tried to put *Caperton* in context:

> The case did not involve the substitution of a trial judge. Rather, it concerned whether due process required that a state supreme court justice recuse himself from hearing an appeal involving a political backer who had contributed millions of dollars to that justice's election. As noted earlier, recusal and substitution for cause are not the same thing.

Attorney's Fees

Interim Attorney Fees

***Radzik* - Where No Affidavits or Affidavits Shown to be Outdated, Good Cause Shown for Evidentiary Hearing / IRA Exempt from Interim Fee Award**

IRMO Radzik, 2011 IL App (2d) 100374 (August 8, 2011)

The husband in this case was held in contempt for not liquidating his IRA to pay an interim fee award. He appealed and the appellate court reversed. After a lengthy expositions of the facts and background the case analysis begins in earnest at paragraph 45 of the decision. The appellate court found that the trial court abused its discretion in its November 2009 interim fee order requiring the husband's IRA to be liquidated. The appellate court pointed out that the second petition for interim fees contained no affidavit from the petitioner or her attorneys:

> As noted above, section 501(c—1) specifically requires that at least one affidavit be attached because, while the proceeding may be nonevidentiary, proof may instead be provided via the required affidavits. In addition, the local rules required that the petition contain a current financial affidavit and that other updated financial documents be produced at the hearing. 19th Judicial Cir. Court. R. 11.02.

Arguably, however, the trial court considered the first and second interim fee petitions together. The appellate court, though stated:

> We acknowledge that the addendum to the petition purported to incorporate the first petition, filed five months earlier (although it did not attach that first petition or the February 2009 financial affidavit) and that the first petition for interim fees included petitioner's financial affidavit and affidavits from petitioner's attorneys. However, even if the court considered both petitions and their exhibits together, the evidence to support petitioner's inability to pay and respondent's ability to pay was lacking. The petition alleged only generally that petitioner could not pay and that respondent had a substantial income and was "well able" to pay. As to petitioner's inability to pay, the financial affidavit was clearly outdated and inaccurate. *** In addition, and unlike the respondent in *Rosenbaum-Golden*, respondent here provided not just allegations, but evidence, in the form of eBay printouts, reflecting that petitioner's financial affidavit was likely an inaccurate picture of her current financial status. *** At a minimum, we think that good cause was shown to hold an evidentiary hearing. However, the court abused its discretion in determining that petitioner established respondent's ability to pay, because it received virtually no evidence regarding respondent's present ability to pay the amount that the court awarded.

An excellent discussion from the appellate court stated:

> In sum, we conclude that a court's knowledge of the case can stretch only so far. The Act permits nonevidentiary, summary hearings on interim fee petitions, but it does not obviate the need for proof. The Act requires the petitioning party, through the petition, affidavits, and any other relevant documents, to establish both his or her inability to pay and the responding party's ability to pay. While the court here might have been able to determine from its knowledge of the case that an interim fee award might be appropriate or that the fees that counsel charged (and, in turn, that petitioner requested) were theoretically reasonable, the record does not reflect that petitioner in any way established respondent's ability to pay the amount that the court, in fact, awarded. Thus, we reverse the November 6, 2009, interim fee award.

The appellate court -- for the purpose of the remand -- also addressed the question of whether an IRA can be required to be liquidated as part of an interim fee hearing. The appellate court concluded, "Specifically, we conclude that, while IRAs may be ordered liquidated to enforce support judgments, they remain exempt from judgments for interim attorney fees. [735 ILCS 5/12—1006]" The appellate court stated:

> We recognize that the foregoing case law holding that retirement accounts may not be ordered liquidated to satisfy attorney fee awards were all decided prior to the "Leveling of the Playing Field in Divorce Litigation Amendments" to the Act,

effective June 1, 1997, ***). We conclude that the 1997 amendments, while seeking to prevent the financially disadvantaged spouse from being "outlitigated" by the financially superior spouse, merely overhauled the methods by which and timing of when attorneys may obtain fees; they did not fundamentally alter any of the bases for the rulings in *Jakubik*, *Walsh*, and *Campbell* that section 12—1006 of the Code exempts retirement accounts from attorney fee awards. For example, petitioner has not shown, nor has our research found, that the 1997 amendments in any way added as an explicit exception to section 12—1006 interim or other attorney fee awards (*Jakubik*). The Act, as before the 1997 amendments, provides that an attorney may enforce an award in his or her own name (*Jakubik*, *Walsh*). And the 1997 amendments did not purport to alter the policy as expressed in *Jakubik* that the purpose behind section 12—1006's exemption is, in fact, to ensure that resources remain available to satisfy support obligations. Thus, the 1997 amendments did not alter the courts' conclusions in the foregoing cases that there is no authority for a trial court to order the liquidation and distribution of an IRA to satisfy an attorney fee award.

Final Fee Petition Against Former Client

***Baniak* - Time Frame Requirements under the IMDMA are Not Necessary for Subject Matter Jurisdiction and Filing of Late Fee Petition Acceptable Where Waiver**.
IRMO Baniak, 2011 IL App (1st) 092017 (August 9, 2011)
The judgment for divorce, incorporating the MSA, was entered October 31, 2008. Attorney Dean Dussias filed his petition for setting final attorney fees on December 1, 2008, a period of 31 days after the trial court entered the divorce judgment. On December 29, 2008, the trial court granted Dussias leave to withdraw as counsel for the former wife. On July 10, 2009, the trial court awarded $71,347 of attorney fees to Dussias. The former wife appealed and te appellate court affirmed.

Attorney Dussias former client claimed, among other things, that Dean's fee petition was not timely filed and that he did not first seek leave to withdraw as required by the statute.

The appellate court first quoted from the relevant law:

> Under section 508(c)(5) of the Act: "A [fee] petition *** shall be filed no later than the end of the period in which it is permissible to file a motion pursuant to Section 2-1203 of the Code of Civil Procedure." 750 ILCS 5/508(c)(5)
>
> Under section 2-1203(a) of the Code of Civil Procedure: "In all cases tried without a jury, any party may, within 30 days after the entry of the judgment ***, file a motion *** for other relief." 735 ILCS 5/2-1203(a).

Citing *IRMO Pagano*, 181 Ill. App. 3d 547, 554 (1989), the appellate court noted that: "Under section 2-1203(a) of the Code of Civil Procedure:

> "In all cases tried without a jury, any party may, within 30 days after the entry of the judgment ***, file a motion *** for other relief." 735 ILCS 5/2-1203(a)

The appellate court stated:

> However, 1964 amendments to the judicial article of the 1870 constitution radically changed the legislature's role in determining the jurisdiction of the circuit court. Thus, the legislature's power to define the circuit court's jurisdiction was expressly limited to the area of administrative review. Id. The current constitution, adopted in 1970, retains this limitation.

But after discussing this, the appellate court stated:

> Furthermore, Kristina has waived the issue of the failure of Dussias to comply with the time restrictions imposed by the legislature in section 508 by failing to object to Dussias' fee petition and participating in court-ordered dispute mediation and a subsequent hearing on the petition without an objection. *In re Marriage of Lindsey-Robinson*, 331 Ill. App. 3d 261, 265 (2002).

The *Lindsey-Robinson* was a case handled successfully by the *Gitlin & Gitlin* firm.

Regarding the next issue the appellate court stated:

> It is undisputed that Dussias' fee petition was filed while he was still the attorney of record for the appellant and before he had filed a motion to withdraw in violation of section 508(c). The appellant argues that since the petition was filed in violation of section 508 it was a nullity. Appellant also argues that the subsequent withdrawal by Dussias did not cure the premature filing.

The appellate court again found there to be a waiver:

> By proceeding without objection, the appellant waived any violation of the timing requirements of section 508(c) regarding the filing of the fee petition. *Lindsey-Robinson*, 331 Ill. App. 3d 261.

Contribution Petition

***Streur* – Party's Unsuccessful Sanctions Motion Counters Argument that Other Side was Overly Litigious / Former wife and Lawyer Granted Full Post-Decree Attorney's Fees**
IRMO Streur, Official Reports, 2011 IL App (1st) 082326 (May 11, 2011)
Award of $127,000 in attorney's fees proper and the court did not fail to take into consideration the former wife's "litigiousness" into consideration where the former husband had brought a sanctions motion that the appellate court did not believe was warranted. The appellate court noted that while the former wife did not succeed in bringing her 2-1401 petition, there was no evidence that she acted in bad faith in bringing her petition. Regarding ability to pay, even though the former wife was awarded 100% of fees owing, her income was her child support at $17,000 monthly, comparted to the former husband's gross income of $1.8 in 2006. In this case, the fact that the former wife was a lawyer (not practicing) did not affect the result.

***Rocca* – Former Client Cannot Waive Right to Contribution of Former Counsel In Proceedings Under IMDMA Including Parentage Proceedings – Note 2013 Case**

IRPO Rocca, 408 Ill. App. 3d 956 (2nd Dist., March 14, 2011)

The 2013 case is at www.illinoiscourts.gov/Opinions/AppellateCourt/2013/2ndDistrict/2121147.pdf The short synopsis of that 2013 case had stated:

The second case was an appeal on the remand where Attorney Landau appealed the court's decision both to hold an evidentiary hearing and to deny contributions, to deny his petitions for supplemental fees and appellate fees and to deny his motion for sanctions. The appellate court in that December 2013 case affirmed.

In the original 2011 parentage case, the father earned $125,000 annually and the mother's earnings were limited to social security disability. The mother's first counsel filed an interim fee petition that was continued several times. Counsel then filed a motion to withdraw. After he withdrew, he filed a petition for contribution and a petition for fees against his former client. About three months later, the parties executed a settlement agreement that provided in part:

> Attorney's Fees: Each party shall be solely and exclusively responsible for payment of any and all attorney's fees that have been, or will be, incurred by that party. Each party waives any right to a hearing on contribution to fees that he or she may possess against the other.

The former counsel was not given notice of the court appearance where the agreement was entered. One month after the settlement agreement was entered, former counsel petitioned for for attorney fees. The petition noted that, upon information and belief, the mother received SSD benefits and, for the entire 2008 calendar year, had been unemployed. Accordingly, he requested an "*award in full or a substantial contribution*" from the father toward his attorney fees. The father moved to dismiss the postjudgment motion arguing that it was untimely and all claims for contribution were waived in the settlement agreement.

In dealing with the incorporation by reference of the IPA of 1984 (§17 referring only to §508 and then the incorporation from §508 the interim fee provisions and the contribution provisions, etc.) the appellate court made a point that I have repeatedly made:

> However, section 508 of the Marriage Act, which addresses "attorney's fees; client's rights and responsibilities respecting fees and costs," cross-references other sections of the Marriage Act and, accordingly, consideration of the "relevant" portions thereof as applied to the Parentage Act becomes more complicated. Indeed, one court has referred to the process of turning to the Marriage Act to assess attorney fees and costs under the Parentage Act as a "tortuous path." *In re the Minor Child Stella*, 353 Ill. App. 3d 415, 418 (2004). [This case is variously sited as *Stella v. Garcia* or *Stella II]*.

Stella II had ruled that interim fees may be awarded in paternity actions using the same factors and procedures as in actions under the IMDMA. The first *Stella* case had ruled that there is no disgorgement in parentage cases (*Stella I*).

The appellate court focused on the *Lee* decision including the portion that commented that while fees are awarded to a client they "belong" to the lawyer. The court quoted at length from *Lee* and stated:

> We conclude, therefore, that a marital settlement agreement that purports to allocate attorney fees will not, as a general rule, extinguish the statutory right of a spouse's prior attorney to pursue an award of fees from the other spouse. Were we to hold otherwise, access to representation by many spouses would be seriously compromised and with it, the integrity of dissolution of marriage proceedings. We are cognizant that each party has the primary obligation to pay his or her own attorney fees. [Citations.] However, the reality is that many spouses would be unable to secure representation if the possibility that the attorney could seek fees from the other spouse could be so easily foreclosed by the parties.

But *Lee* expressly noted that it was not providing its opinion under the standards of the so called "Leveling the Playing Field" amendments. After reviewing the *Stella* decision, the appellate court concluded:

> In sum, and as previously mentioned, attorney fees, while awarded to the client, actually belong to the attorney. *Lee*, 302 Ill. App. 3d at 612. While a party may settle his or her claims, a party cannot waive something that belongs to someone else. There is nothing about the 1997 amendments to the Marriage Act that suggests that the holdings in *Heiden* and *Lee* were altered. Accordingly, we reverse the trial court's order dismissing Landau's petition for contribution on the basis that the parties waived contribution in their settlement agreement. The cause is remanded for the trial court to consider Landau's petition for contribution toward the $18,670.96 in fees that the court found reasonable.

Practice Tip: When the so called Leveling the Playing Field Amendments were enacted in 1997, I lectured on this topic and provided a sample two count form – one count being a petition for fees against the former client and the second being a contribution petition. I noted the pro and con of the argument that are generally presented in this case. My position was that a former client could not waive his former counsel's right to seek a contribution claim. This occasionally occurs, i.e., counsel has withdrawn and the parties assign the responsibility to pay the attorney's fees to a party who often has far less or perhaps no ability to pay the same. So, *Rocca* finally makes the same point I made 14 years earlier.

Defense of an Appeal

***Schnelli* – No Attorney's Fees for Defense of an Appeal Where Permanent Maintenance Award in Substantial Amount**

IRMO Schinelli, (2nd Dist., January 12, 2011).

This case is discussed above regarding dissipation and the 401(k) division in light of changed market conditions. The former wife sought attorney's fees for defense of an appeal in the amount of approximately $30,600. The appellate court noted that her petition was not supported by an affidavit of the lawyer's client. The trial court ordered the former husband to pay $15,000 toward the former wife's attorney's fees for the defense of the appeal. The trial court explained that if the former husband had appealed only the issue of supplemental maintenance, he would have prevailed and no contribution to fees would be warranted. [Regarding the supplemental maintenance issue in the first appeal the appellate court had reversed the cap for supplemental maintenance at income levels of

$650,000 and implemented a cap of $250,000. Note that the base maintenance obligation was $6,692 permanent maintenance.] Regarding the case on remand and the second appeal, the trial court reasoned that since the former husband had also appealed the award of permanent maintenance and dissipation, the trial court's contribution toward the former wife's appellate fees was appropriate.

The appellate court ruled that the trial court abused its discretion in ordering the former husband to pay $15,000 of his former wife's attorney fees. The appellate court reasoned:

> The record reveals that Bruce earned substantially more than Cecily. He earned approximately $200,000 a year while Cecily earned approximately $30,000 a year. However, in dissolving the parties' marriage, the trial court attempted to rectify this difference, ordering that Bruce pay Cecily permanent monthly maintenance of $6,692 ($80,304 a year). Thus, considering the combination of Cecily's annual salary and her maintenance award ($30,000 + $80,000 = $110,000) in conjunction with Bruce's salary and his maintenance obligations ($200,000 - $80,000 = $120,000), the parties' financial circumstances were substantially similar. Based on this fact, and because Cecily did not demonstrate that she was unable to pay her attorney fees, the trial court erred in ordering Bruce to pay those fees.

Instructively, the appellate court compared the *Minear* decision involving attorney's fees:

> In so ruling, we find Cecily's reliance on *IRMO Minear*, 181 Ill. 2d 552, 561 (1998), to be misplaced. In that case, the wife had monthly net income of $1,086 and also received monthly maintenance of $500 (for a total of $1,586 a month). The husband's monthly net income, after making the maintenance payment, was $2,563. At a hearing on her motion to have the husband pay her attorney fees, the wife testified that she could not pay her legal fees and that she could not afford to continue paying $675 in monthly mortgage payments. The trial court subsequently awarded the wife her attorney fees. In this case, Cecily's maintenance award was substantially higher than the wife's in *Minear*. Moreover, unlike the wife in *Minear*, Cecily did not provide evidence that she could not afford to pay her own legal fees. Further, Cecily acknowledges that her trial counsel pointed out at the hearing that "substantially prevailed" was not a question before the court. Indeed, section 508(a) of the Dissolution Act makes no reference to attorney fees being awarded to the party who substantially prevailed in previous litigation.

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