Evaluating the Enforceability of a Premarital Agreement

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Premarital agreements are like parachutes. You never know if they will work until you hit the ground. Although premarital agreements are favored under the law, a one-sided agreement is risky. Enforceability depends on compliance with the California Premarital Agreement Act (the "Act"), which allows parties to make a valid premarital agreement provided they follow the rules. For premarital agreements executed after January 1, 2002, the Act provides that a premarital agreement will not be enforceable if: (1) The agreement was not made voluntarily; (2) The agreement is unconscionable and the disclosure requirements of the Act were not met; or (3) The agreement violates public policy.

Involuntary Agreement

All premarital agreements executed after January 1, 2002, are deemed to have been executed involuntarily, unless the court finds that the party had independent legal counsel (or properly waived that right); waited at least seven days before signing the agreement; had legal capacity to enter into the agreement; and did not act under fraud, duress, or undue influence. (Fam. Code, § 1615, subd. (c).) Therefore, the party seeking to enforce the agreement bears the burden to prove all of these elements or the agreement will be invalidated.

Independent Counsel or Waiver of Counsel

The court must find that the party against whom enforcement is sought was represented by independent counsel or, after being advised to seek independent counsel, expressly waived such representation in a separate writing. (*Id.*) The separate writing requirement means that the waiver of counsel may not be contained in the premarital agreement. The requirement that a party have "independent" legal counsel signifies that his or her counsel must be free of conflicts of interest. If one party is paying both attorneys, it could suggest a lack on independent counsel. The best practice is to give or loan funds to the party who cannot afford an attorney, and allow that party to make the payment directly to his or her attorney of choice. Another issue arises when a party suggests that the other party use a particular attorney. If a referral is given, it should be made to at least two attorneys to avoid the claim that the party was directed to use his or her fiancé's hand-picked attorney. Or, the unrepresented party can be directed to a list of certified family law specialists.

Full Disclosure to Unrepresented Party

If a party waives the right to counsel, the court must find that the party (a) was fully informed of the terms of the agreement and the rights and obligations he or she was relinquishing by signing the agreement; and (b) was proficient in the language in which the explanation of his or her rights was conducted and in which the agreement is written. (*Id.*) The advice concerning the effect of the agreement must be memorialized in writing and the unrepresented party must acknowledge that he or she received it. (*Id.*) Also, if the unrepresented party is not proficient in English, the explanation of the agreement must be translated into his or her language. Giving advise as to the legal effect of the agreement might create an attorney-client relationship with the unrepresented party, and will certainly invite claims by the unrepresented party that he or she was misled into signing the agreement. The best practice is never to draft a premarital agreement when the other party is unrepresented.

Seven-Day Waiting Period

The court must find that the party had at least seven calendar days between the date he or she was "first presented" with the agreement and advised to seek independent counsel and the time the agreement was signed. (*Id.*) It is not clear whether the seven-day period runs from the date the first draft of the agreement was presented, or from the date the agreement, in its final form, was presented. Until the rule is clarified, the most conservative measure is to count seven days from the date the final version of the agreement was presented. No substantive changes to the proposed agreement should be made within seven days of it being executed to ensure compliance with the rule.

When a wedding date is approaching, some lawyers have been known to engage in the sharp practice of demanding changes within the seven-day waiting period—setting up a later defense to the agreement. This can only be avoided by requiring that the agreement be finalized well before the marriage.

The Act does not address whether the seven-day rule applies to any disclosures exchanged between the parties. It makes sense to exchange the disclosures in sufficient time before execution of the agreement so each party has had an adequate opportunity to review them. The agreement should recite when the proposed agreement was presented and when the disclosures were exchanged, to avoid a dispute later on about when these events occurred.

No Fraud, Undue Influence, Etc

The court must find that the party did not act under duress, fraud, or undue influence, and that the parties had the capacity to enter into the agreement. (*Id.*) Fraud is the intentional misrepresentation or concealment of a material fact with the intent to deprive another party of a legal right. (Civ. Code, § 1572.) Duress exists when a party has been deprived of the free exercise of his or her will by signing an agreement under a threat to the safety of his or her person, family, or property. (Civ. Code, § 1569; *In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 743-744.) Undue influence occurs when one takes an unfair advantage of another's weakness of mind, takes "a grossly oppressive and unfair advantage of another's necessities or distress," or uses a confidential relationship for the purpose of obtaining an unfair advantage. (Civ. Code, §1575.)

No presumption of undue influence arises in the context of a premarital agreement because unmarried persons do not owe fiduciary duties to each another. (*Marriage of Bonds* (2000) 24 Cal.4th 1, 27–29.) Prospective spouses are not presumed to be in a confidential relationship with each other either. (*Id.*) Nevertheless, a confidential relationship may, in fact, exist if a party knows that the other party has reposed confidence in him or her. (Civ. Code, §1575, subd. (1); *Vai v. Bank of America* (1961) 56 Cal.2d 329, 388.) The parties should terminate or deny the existence of a confidential relationship prior to negotiating and executing the premarital agreement. (See *In re Marriage of Connolly* (1979) 23 Cal.App.3d 590, 600.)

If a de facto confidential relationship is established and a party obtained an unfair advantage in the agreement, a presumption of undue influence will then arise. (*Johnson v. Clark* (1936) 7 Cal.2d 529, 534-535.) Undue influence does not occur when a party uses powers of persuasion to negotiate an agreement, or when one party has a strong need to be married. For example, the mere fact that one party is pregnant with the other's child and is concerned about her financial security does not, by itself, create undue influence. (*In re Mariage of Dawley* (1976) 17 Cal.3d 342, 355.) Instead, as discussed, proof is required that a party took an "unfair advantage" of another's weakness of mind, or took a "grossly oppressive and unfair advantage of another's necessities or distress", or betrayed a trust. The overall fairness of the agreement, or failure of consideration, is not the test for its validity. (*Bonds, supra,* 7 Cal.2d at p. 28; Fam. Code, § 1611.) A court is more likely to find undue influence if threats were made to sign the agreement, or if there is a history of domestic violence between the parties, evidencing that the agreement was not freely and voluntarily made. (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1520-1521.)

To protect against undue influence claims, the recitals to the premarital agreement should set forth the age, health, education, and work experience of each party, their understanding of the English language, the length of their relationship, whether there has been any domestic violence, whether they are living together or have any children together, whether each party had independent counsel or waived that right, and any other fact bearing upon their relative bargaining power. The recitals can reflect whether the agreement was negotiated between the parties directly or through their respective attorneys. The recitals can also state, if true, that the wedding date could have been postponed to allow additional time to negotiate the agreement, but the parties elected to keep their wedding date. Counsel should maintain a file showing how long the negotiations took, how many drafts of the agreement were made, and which party requested each change.

Any Other Factor

Finally, the court may consider "any other factor" it deems relevant in determining whether the agreement was made voluntarily. (Fam. Code, § 1615, subd. (c)(5).) This catch-all provision is misplaced in the list of factors the court must find before a premarital agreement may be enforced. It poses great concern to spouses who seek to enforce an agreement because it appears to give the court discretion to invalidate the agreement on grounds not specified in the Act.

If the court does not make all of the findings listed above, the agreement shall be deemed to have been

executed involuntarily. Thus, as indicated above, it is the burden of the party seeking to enforce the agreement to establish each of the foregoing factors.

Unconscionability and Inadequate Disclosure

A separate defense is available under the Act for premarital agreements which were unconscionable when executed and the party seeking enforcement failed to comply with the disclosure requirements of the Act. (Fam. Code, subd. (a)(1).) The burden to establish this defense is on the party resisting enforcement of the agreement. (*Id.*)

Unconscionability. Proof is required of an absence of meaningful choice, together with contract terms that are unreasonably favorable to the other party. Unconscionability has procedural and substantive elements, both of which must be present. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071–1072; Civ. Code, § 1670.5.) Procedural unconscionability refers to oppression caused by unequal bargaining power and surprise due to hidden and unexpected provisions. Substantive unconscionability involves a one-sided, unreasonable agreement lacking in justification. The issue of unconscionability under the Act is to be decided as a matter of law as of the time the agreement was executed, except for limitations on spousal support which are tested at time of enforcement. (Fam. Code, § 1615, subd. (a)(2).)

Disclosure Requirements

In addition to unconscionability, the party seeking to invalidate the agreement must establish the following: (1) He or she was not provided a "fair, reasonable, and full disclosure" of the other party's property or financial obligations; (2) He or she did not voluntarily and expressly waive a disclosure beyond that which was provided; and (3) He or she did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party. (Fam. Code, § 1615, subd. (a)(2).) Proof of all of these elements is required or the agreement will be upheld. It is not sufficient, for example, to show that a failure to disclose if the party seeking to invalidate the agreement knew, or reasonably should have known, of the other party's finances. The best practice is to provide a full disclosure of all assets, debts, income, and expenses. The agreement should also state that the parties waive any disclosure beyond that which was provided. Otherwise, a party could claim he or she did not receive a "full" disclosure because, for example, real estate appraisals or business valuations were not obtained. The disclosures can be attached as an addendum to the agreement so there is no question what was provided.

Note that proof of unconscionability or lack of disclosure, alone, is not enough sufficient to avoid enforcement of a premarital agreement; instead, proof of both elements is required. (*Bonds, supra,* 7 Cal.2d at p. 15.) This implies that an unconscionable agreement may be enforced, provided there was full disclosure—and that a conscionable agreement is acceptable even if there was a failure to disclose. It is not clear whether the traditional contract defense of unconscionability remains a viable defense to a premarital agreement. Counsel should anticipate that a court of equity will find a way to avoid enforcement of an unconscionable agreement, perhaps as one of those "other factors" the court may consider in determining whether the agreement was executed voluntarily.

Violation of Public Policy

Some parties are concerned about ensuring moral or religious behavior by their soon-to-be spouse, and will insist on penalty provisions in the agreement for failure to adhere to their own personal standards of conduct. Such provisions are void against public policy, and may make the entire agreement unenforceable. (Fam. Code, § 1615, subd. (a)(7); *Marriage of Mehren & Dargan* (2004) 118 Cal.App.4th 1167, 1171–1172.) For example, a premarital agreement may not provide for liquidated damages for breach of a covenant to maintain marital fidelity. (*Diosdado v. Diosdado* (2002) 97 Cal.App.4th 470.) Agreements requiring domestic services or companionship are also void. (*Bonds, supra,* 7 Cal.2d at p. 25.) So are agreements requiring the parties to raise a child in a particular religion. (*Id.*)

Finally, premarital agreements which promote divorce are against public policy. (*Dawley, supra,* 17 Cal.3d at p. 352.) The promotive of divorce defense was developed before premarital agreements were recognized by the Act in 1986. It is questionable whether the defense is still viable since the Act provides authority for the parties to re-order their property rights upon dissolution in a premarital agreement. (Fam. Code, § 1612, subd. (a)(3); *Marriage of Bellio* (2003) 105 Cal.App.4th 630, 633, fn. 1 (raising but not deciding issue).) Public policy favors premarital agreements and realistic planning that takes into account the possibility of dissolution does not violate public policy. (*Id.* at pp.634-635.) Still, until this issue is clarified, it is wise not to include a provision requiring a lump sum payment to a spouse upon divorce unless it is

tied to money the spouse lost because of the marriage, such as the loss of the right to spousal support from a prior relationship.

Special Rules for Limitations on Support

Any provision in a premarital agreement regarding spousal support, including a limitation or waiver of it, is unenforceable if the party against whom enforcement is sought was not represented by independent counsel at the time the agreement containing the provision was signed. (Fam. Code, § 1612, subd. (c).) The Act requires the party to have counsel, and does not appear to allow for a waiver of that right. Furthermore, the spousal support provision will not be enforceable if it is unconscionable at time of enforcement. There is no way to predict what the circumstances of the parties will be at the time the parties separate and the spousal support is tested. The court could consider the length of the marriage, whether the parties have children, the age and health of the parties, the income and assets of each party, the martial standard of living, and the earning capacity of each party in determining whether the spousal support provision is unconscionable. The court will also consider whether the parties had unequal bargaining power and whether enforcement of the support provision would lead to an unexpected result.

The strengthen the agreement, the parties should acknowledge that there may be significant changes in their health and finances over the course of the marriage, that they might have children, and that they might have been married for many years and then divorce. This will establish their expectations when they made the agreement. Nevertheless, a court may be unwilling to enforce a waiver of spousal support when it would be inequitable to do so. Therefore, it may be better to limit spousal support rather than waive it outright.

In addition, child support may not be "adversely affected" by a premarital agreement. (Fam. Code, § 1612, subd. (b).) To avoid violating this rules, a premarital agreement should not address child support as there is no way to tell if guideline child support is being adversely affected until the court calculates it.

Amending a Premarital Agreement After Marriage

The Act provides that a premarital agreement may be amended or revoked after marriage "without consideration" by a signed writing. (Fam. Code, § 1614.) However, this provision of the Act predates the fiduciary statutes, which were created in 1993. Permitting an amendment to be made during marriage without consideration is inconsistent with the fiduciary duties married persons owe to each other. (Fam. Code, §§ 721 & 1100, subd. (e).) If a spouse obtains an unfair advantage in marital transaction, it will be presumed to be the product of undue influence. (*In re Marriage of Burkle (Burkle II)* (2006) 139 Cal. App.4th 712.) Although the Act does not require consideration for an amendment to a premarital agreement, an amendment which makes substantive changes to the rights of the spouses will not be enforceable without consideration. (See *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 997, fn.6.) Furthermore, there is a duty to disclose between spouses. For these reasons, amending a premarital agreement after marriage should be avoided.

Premarital Agreements Executed Prior to 2002

There is a question whether the 2002 amendments to the Act apply retroactively. The 2002 amendments added the requirements of independent legal counsel, "fair, reasonable, and full" disclosure, and the seven-day waiting period. The general rule is that all new Family Code sections are applied retroactively. However, there is an exception when the retroactive application of a new law will interfere with the rights of the parties. (Fam. Code, § 4, subd. (h).) It impermissible for a new law to retroactively impose duties on a party which did not exist under prior law. (*In Marriage of Walker* (2006) 138 Cal. App.4th 1408, 1427-1428; *In Marriage of Fellows* (2006) 39 Cal.4th 179, 189-190.) Indeed, the legislative history leading up to the 2002 amendments states that there is "no provision for retroactive application" of the proposed amendments. (Senate Judiciary Committee Analysis to Sen. Bill No. 78, (2001-2002 Reg. Sess.) 4/25/01, p.11.)

Voiding a pre-2002 agreement for failure to comply with the requirements of the 2002 amendments would appear to constitute a violation of due process, as the contracting parties could not have anticipated those changes in the law when the agreement was made. Parties to pre-2002 agreements have property rights that cannot be altered by a later-enacted statute. The legislature did not clarify existing law in enacting the 2002 amendments—it created new law. There was no requirement in the law before then for a seven-day waiting period, or that a party must be represented by counsel when limiting or waiving the right to support.

When the Act first became effective in 1986, it was applied prospectively to agreements made on or after the effective date of the Act. (Fam. Code, § 1601.) Since the Act itself was given only prospective effect when it

was first created, it makes little sense to apply the 2002 amendments, which made substantive changes to the Act, retroactively.

Amending an old premarital agreement to bring it in compliance with the 2002 changes to the law is not a practical solution for the following reasons:

(a) Sufficient consideration is required to validly amend a premarital agreement during marriage, even though no consideration was needed for the premarital agreement itself.

(b) The parties will have to incur legal fees to negotiate and prepare the amended agreement.

(c) One of the parties may not be willing to amend the premarital agreement to fulfill the procedural requirements of the 2002 amendments because he or she is no longer satisfied with the terms of the agreement, or is planning on a divorce.

(d) Requiring married persons to renegotiate the terms of their premarital agreement during marriage is an unnecessary intrusion into the private lives of the parties. Premarital agreements are supposed to provide certainty in the event of dissolution and avoid litigation. (See *Estate of Butler* (1988) 205 Cal.App.3d 311, 314-315; *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39, 53.) Legislation cancellation of agreements that were valid when executed frustrates the legitimate expectations of the parties, and constitutes a violation of due process. Therefore, the 2002 amendments should be applied prospectively only.

Conclusion

Compliance with the Act for post-2002 agreements will ensure the validity of those agreements. The challenge for counsel is to create an agreement that will survive a challenge many years in the future, when the circumstances of the parties may have changed dramatically from when they were married. A balance between protecting the rights of the client and providing an equitable result upon dissolution is the best way to pack the client's parachute. ■

Warning Signs of Tax Fraud and Bank Fraud in a Marital Dissolution Case (and the Dangers of Ignoring Them)

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You are walking out of the courthouse after a morning hearing and you turn on your cell phone. To your surprise, there are four missed calls in the last 30 minutes from your good client, John P. John is a successful businessman you have been representing in a contentious dissolution that has been going on for the last two years. This case has turned into a discovery nightmare and John's spouse, Jane, and her attorneys have been deposing everyone in sight and it appears an amicable settlement is unlikely.

The Search

You call John back and he is in a panic. He says that Agents from IRS Criminal Investigation and the FBI are searching his house and business and are taking all of his business and accounting records as well as all of the computers. He asks what should he do—and you are at a loss for words.

Over the last 15 years, you have developed a successful Family Law practice and have well-deserved reputation as a tough opponent who is not afraid to go to trial. Since becoming a Family Law Specialist five years ago, you are sought out by the community's well-to-do whose marriages are coming to an end and who seek to minimize the adverse financial consequences of the break-up.

After a moment of stunned silence, you tell John that you do not practice criminal law and that you will start looking for a good criminal defense attorney as soon as you get off the phone. You silently wonder if it would do any good to go over to John's business while the search is going on. You quickly dismiss that idea because you have no idea what you would do once you got there. You have never represented anyone in a criminal case and your last exposure to criminal law was during your first year of law school. As you are walking to your car, you begin to wonder—which Constitutional Amendment protects a person against unreasonable searches and seizures—is it the Fourth or the Fifth?

Once you get back to your office, you begin racking your brain on who you should call to represent John. Unfortunately, most of the criminal defense attorneys you know are state court practitioners and are not experienced in federal criminal cases involving the United States Attorney's Office, the IRS and FBI.

The Meeting with the Criminal Defense Attorney

After numerous telephone calls, you finally are able to arrange an afternoon appointment with a former federal prosecutor who is now in private practice, Angela R. Angela starts off the meeting by asking to see a copy of the Search Warrant and John hands it to her. Angela begins to read off the criminal offenses listed on the Search Warrant—Income Tax Evasion; Making and Subscribing to False Income Tax Returns; Structuring of Currency Transactions; Conspiracy and Bank Fraud.

Angela turns to John and asks him point blank if he receives large amounts of currency in his business. John hesitates for a moment and responds "a little, not that much." Angela hardly seems satisfied by this response and proceeds to grill John for the next 30 minutes on exactly how much currency was received by the business in each of the last six years; was the currency reported on the books and records of the business; and was the currency deposited into the business' bank accounts. Each time John gives a vague response or says he doesn't remember, Angela follows up with another even more pointed question. You think silently to yourself—Angela should have stayed a prosecutor. As the minutes go by and the questioning grows more intense, the amount of currency that John admits to receiving is growing and

growing and it becomes clear that these amounts never made there way on to the business tax returns. Angela would glance at you every once in awhile as if to ask—did you know this?

As you listen to John confess his guilt, a knot is developing in your stomach—you begin thinking back to the numerous interrogatories and countless document production requests by Jane's attorneys in the Family Law case requesting information and documentation relating to the business' receipt of currency and the payment of personal expenses by the business. At the time you first looked over the interrogatories and document production requests, you dismissed them as a serious case of overkill by attorneys who apparently did not have anything else to do.

The knot in your stomach does not get any smaller when you recall that John told you that the business did not really receive that much currency and that it was no big deal. You recall being a little concerned but hey—John is the one signing the verification, not you. You grimace when you recall that you had prepared responses to document production requests that stated unequivocally that no documents have ever existed relating to the receipt of currency by the business in the last six years. Is that response going to come back to haunt us?

You then begin to think back to all of those depositions of the employees of John's business—especially the people in accounting. Jane's attorneys (especially that one who did not seem to know much about Family Law) would ask question after question about the mechanics of how monies were received by the business and how they were recorded on the books and records of the business. You felt like you were in Accounting 101 and got so bored that you would write letters regarding other cases on your laptop as Jane's attorney would drone on and on. You had taken solace in the fact that you were earning your substantial hourly rate during these marathon depositions.

Angela begins to ask questions regarding loan applications by the business and if Jane's attorneys had made any efforts to obtain them. You respond that Jane's attorneys had obtained some but not all of them. Angela asks you if you had compared the amounts reported on the loan applications with the amounts reported on the tax returns. You respond no and she shoots back that it may be a good idea to do that as soon as possible. She explains that if the amounts on the loan applications don't match the amounts on the tax returns, John may be in a criminal "Catch-22" situation—either the tax returns are false (and he has committed tax evasion) or the loan applications are false (and he has committed bank fraud).

Angela suddenly switches gears and begins to ask questions about the attorneys who are representing Jane in the marital dissolution action. You respond that Jane was initially being represented only by Mary B., an experienced Family Law attorney who has an excellent reputation. However, about a year ago, another attorney, Mike L., was associated in as co-counsel with Mary B. When you mention Mike L.'s name, Angela looks at you and asks if you were aware that Mike L. is former federal prosecutor who used to try criminal tax cases. You cannot hide your surprise and sheepishly respond that you were not aware of that. John gives you a withering glance as if to say "why didn't you know"?

Angela explains that the Search Warrant for John's house and business had to be based upon a finding of "probable cause" by a United States Magistrate Judge and that this "probable cause" is usually set forth in an Affidavit prepared and signed by the investigating IRS or FBI Special Agent with the assistance of the United States Attorney's Office. Angela explains that since John did not receive a copy of the Affidavit at the time of the search that would indicate it has been sealed. Although the Affidavit is not available, it is Angela guess that sometime during the dissolution, Jane went to the United States Attorney's Office seeking immunity and is now cooperating with the federal authorities in their investigation of John and his business. With this piece of good news, the meeting comes to an end and another appointment is scheduled for later in the week.

A Time For Reflection

As you drive back to your office you realize you are totally exhausted. To put it mildly, this meeting did not go well and you wonder if John is going to fire you. You begin to look back on your representation of John over the last two years and wonder if there was any way you could have seen this coming? After several days of reflection and reviewing the file, you have come up with quite a laundry list of warning signs that you either totally missed or had dismissed as no big deal.

Warning Signs

1. Your Client Is Reluctant to Turn Over Documents Relating to Income of the Business

When you told John that the Family Code requires him to provide Jane with information and documentation relating to the income of the business, he would either ignore you or say he would get the records to you—and they would never come.

2. Your Client's Tax Returns Do Not Match His Lifestyle

When you saw John's personal tax returns for the first time, you quietly laughed to yourself—how could he afford his house, the place at the beach, the nice cars, and the trips to Europe on the income he was reporting.

3. The Business Tax Returns Do Not Match The Loan Applications

When Jane's attorneys went after the business loan applications; that was Warning Sign No. 3.

4. The Other Side Hires A Second Attorney For No Apparent Reason

When Jane hired a second attorney who apparently had no previous Family Law experience to act as co-counsel; that was Warning Sign No. 4.

5. Opposing Counsel Focuses Discovery on the Receipt of Currency, the Payment of Personal Expenses by the Business, and the Loan Applications

When Jane's two attorneys began to bombard you with interrogatories and document production requests regarding the receipt of currency, payment of personal expenses by the business and loan applications—their motives should have been clear—they are trying to prove that the tax returns are false.

6. Opposing Counsel Files Motions to Compel Relating to Information and Documents Relating to Currency

When John provided evasive responses to discovery and John produced practically no useful documents, opposing counsel filed motions to compel. You should have appreciated the significance of the motions to compel—the information contained in the motions has now become a matter of public record and anyone (including the IRS and FBI) has access to these documents. That was Warning Sign No. 6 and, more significantly, the dispute is no longer a private matter between John, Jane, and their respective counsel. In other words, the genie is out of the bottle and there is no putting him back.

What Could You Have Done Differently?

You are the type of attorney who learns from his mistakes and you vow to yourself that this will never happen again. You put together a checklist of the things that you have learned from John's case, which you intend to use with each new client from now on. It looks something like this:

Find Out if Your Client's Business Receives Large Amounts of Currency and Find Out Where It Goes: At the beginning of your representation, sit down with your client and have him explain in detail how his business works and make sure you understand the flow of money into and out of the business. Find out what your client's gross receipts were for each of the last six years and determine what percentage of the receipts were by check and what percentage was in currency. Do not blindly accept what your client tells you. If your gut is telling you that your client is not telling the truth, you better dig further and demand documentation that supports your client's contentions. If your client claims that all cash is recorded on the books and records have him show you the accounting records that support this claim.

If Your Client Is Reluctant to Turn Over Documents, Find Out Why: If your client is reluctant to turn over documents, you need to find out why. If he is concerned that these documents will prove he is a criminal, you better consult with a criminal defense attorney immediately because the marital dissolution action may become the least of his worries.

If Your Client's Tax Returns Don't Match His Lifestyle, You May Not Be The Only One Who Realizes That: When you see your client's tax returns for the first time and you wonder how could afford all of the houses, cars, and trips on the amounts he was reporting, you must ask your

client to explain this. If his explanation does not make sense, you should consider hiring a forensic accountant to determine what the truth really is. The bottom line is that if you don't buy your client's explanation, no one else will either.

Compare the Business Tax Returns With Any Loan Applications: If opposing counsel seeks discovery of he business loan applications, you need to immediately compare the amounts reported on the business tax returns with the amounts reported on the business loan applications.

If the Other Side Hires A Second Attorney, Find Out Why: If the other side hires a second attorney to act as co-counsel, you should check out the attorney's background to figure out why he or she is being hired.

If it Looks Like Your Client May Have Criminal Exposure, Tell Him: If and when you conclude your client may have committed tax fraud and/or bank fraud, you need to tell your client of your concern as soon as possible. Your client needs to understand the seriousness of the situation and what his rights are. Your client must also understand that a criminal investigation running parallel with a civil case presents a host of unique problems and issues that must be addressed.

Advise Your Client of His Fifth Amendment Privilege Against Self Incrimination: Your client needs to understand that anything he says in discovery in the marital dissolution case can be used against him if and when there is a later criminal prosecution and that he has a Fifth Amendment privilege against self incrimination. Finally, your client must be told that exercising the Fifth Amendment privilege may have negative ramifications in the marital dissolution action.

Explain To Your Client That Settlement Before the Commencement of Extensive Discovery May Be In His Best Interest: At the beginning of the representation, your client tells you that his spouse does not deserve a single dime and he wants to fight this matter to the death no matter how much it costs or how long it takes. Once it is determined that he has criminal exposure, you may want to advise him that that pursuing a "scorched-earth" policy may result in him being the one who is burned.

Conclusion

As a Family Law attorney, the next client who walks into your office seeking representation in their dissolution action may not completely forthright regarding the fact that he has committed tax fraud and/or bank fraud and that his spouse knows where all the skeletons are buried. The question is—will you find this out before the Feds are knocking at your client's door? ■