CHAPTER 6

ENHANCING CIVILITY AND MAINTAINING PRIVACY FOR YOUR CLIENTS

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§6.1 INTRODUCTION

The two topics covered in this chapter address concerns about problematic attorney behavior and its impact on clients, practitioners, and our larger communities. Few practices impact a client's experience of the law more than lack of civility or a breach of privacy. Observing the rules and practices discussed in this chapter will go far to improve your client's experience with the legal system and satisfaction with your representation. In addition, it will make your experience of practicing law more enjoyable and much less stressful.

§6.2 CIVILITY OF COUNSEL IN FAMILY LAW

Civility in family law practice is discussed below.

(1) Why civility matters in family law

Why does civility matter in family law? Almost everyone in America is affected in some way by divorce or another family law proceeding. As family law attorneys, our actions and our attitude have an enormous impact on individuals and sometimes entire communities of people. Because the people who seek our services are often in crisis, we have an incredible opportunity to use our knowledge and expertise to be helpful to others. At our best, we can be instrumental in helping a family create a new and workable arrangement going forward after the serious disruption of a separation or divorce. At our worst, we can fuel existing tensions, create unnecessary conflict, and wreak untold heartache on entire families, who may never heal.

We are dealing with two of the most critical features of these individuals' lives: their children and their money. Because of the highly personal nature of our work, we aren't just called upon to be legal technicians. We are also called to be counselors and wise practitioners. To meet this challenge we need "soft skills" to help us work effectively with the range of human emotions and the family dynamics that are often involved in a family law proceeding. Having some of these skills, which we often aren't taught in law school, will go a long way toward helping us establish a civilized approach to the practice of law.

Many attorneys and clients erroneously believe that "being aggressive" is a necessary and effective tactic. One panel of experienced jurists speaking at the author's Seattle University School of Law class uniformly agreed that aggressive, contentious attorneys *do not* get better results for their clients. If you factor in the damage to adults' personal relationships and the harm to children from aggressive litigation, the costs of this approach are hard to justify, even if the financial result were beneficial.

As anyone familiar with family law knows, the only guarantees from aggressive and uncooperative tactics are high stress and even higher legal fees. Only when clients see their legal fees spiraling out of control while their relationships with their spouse, partner, and children are falling apart do they begin to question these kinds of tactics. This may be too late, however, after family resources have been consumed by legal fees and personal relationships have been harmed, often never to be repaired.

It is important to recognize that civility is not synonymous with agreement. In this era of increasing use of alternative dispute resolution models, we sometimes fall to the extreme of thinking we can't or shouldn't disagree at all. That misses the point. Our clients do disagree. They see the facts differently most of the time. It is how we handle this disagreement that matters. We can disagree and still advocate for our clients in a reasonable, well-informed, professional, and respectful manner. Or we can make extreme statements, take extreme positions, file frivolous motions, and behave in an insulting manner to the court, other attorneys, and

individuals involved in the court process. This chapter seeks to shed light on how we can be effective, respectful advocates for our clients.

(2) How civility benefits the lawyer and the legal profession

Nothing has caused more concern in the legal profession than the decline in professionalism and civility among lawyers. Allegations of overzealous, unethical, or just plain obnoxious tactics are noted with regularity in periodicals and are a frequent topic of attorney conversation. The reputation of the legal profession continues to suffer as new and more disturbing anecdotes of unprofessional conduct are circulated in the media.

This isn't just a problem of our reputations. Engaging in or being subjected to uncivilized behavior can actually affect your mental and physical health and longevity. Some of the serious mental and physical health effects lawyers experience as a result of uncivilized behavior are discussed in the article by Cynthia L. Alexander and G. Andrew H. Benjamin, *Civility Is Good for Your Health*, WASH. ST. B. NEWS, Apr. 2011, at 33.

Aside from the obvious benefits to clients, we have learned that civility is good for our own mental and physical health and will contribute to our enjoyment of our work. Representatives at the Washington State Bar Association Lawyer's Assistance Program report that one of the main reasons attorneys need mental health support is to learn to manage the stress of conflict that often is a result of incivility in practice. Much of this stress derives from not knowing how to confidently respond to aggressive actions by another attorney. Effective communication and conflict-management skills, discussed below, give us the means to prevent and manage difficult interactions with other attorneys and pro se litigants.

If you are one of the many attorneys whose practice seems filled with conflict or who feels overwhelmed by the conflict surrounding you, do yourself a favor: concentrate on developing effective communication skills to help you confidently manage interactions with other attorneys. This will also allow you to help families move forward with their lives because they are struggling with the same challenge. These same skills will not only reduce stress in your practice but will also allow you to actually enjoy helping others—the reason most of us went to law school in the first place. Cultivating effective communication skills and a civilized practice will help you accomplish all of this.

If you find yourself struggling with the demands of the legal profession, in addition to learning effective communication and conflict management skills, use outside assistance to learn how to manage stress. As mentioned above, the Washington State Bar Association provides services to support members who are struggling with personal and professional issues. The Lawyer's Assistance Program offers individual counseling, a work-life balance group, and a job search group, all of which help lawyers come together and provide mutual support within the profession. The program has three psychologists on staff to help lawyers deal with the unmanaged effects of stress that can come from the practice of law in general and from rude and

uncivilized behavior in particular. For further information, see *Lawyer's Assistance Program*, WASH. ST. BAR ASSOC, *http://www.wsba.org/Resources-and-Services/Lawyers-Assistance-Program*.

In addition to improving your own quality of life, learning the "soft skills" discussed in this chapter will allow you to feel the satisfaction of actually helping your clients. It is enormously satisfying to be able to not only address our clients' legal challenges but also feel we have contributed to the future quality of their lives by conducting ourselves in a civilized manner and encouraging them to avoid unnecessary conflict by doing the same.

(3) General rules and guidelines for professionalism

Rules and guidelines related to civility and professionalism are discussed below.

(a) Washington's Rules of Professional Conduct; other state resources

There is no specific rule among the Washington Rules of Professional Conduct (RPC) that addresses civility or professionalism in detail. It is, however, an unwritten expectation that attorneys will behave in a civil and professional manner. The principles described in the preamble to the RPC describe what is expected of attorneys. These include the lawyer's obligation conscientiously and ardently to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system. RPC, Preamble ¶[9]. In addition RPC, Preamble ¶[1] states: "A lawyer...is...a public citizen having special responsibility for the quality of justice." RPC, Preamble ¶[5] also guides us: "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."

The Washington State Bar Association Creed of Professionalism states: "In my dealings with lawyers, parties, witnesses, members of the bench, and court staff, I will be civil and courteous and guided by fundamental tenets of integrity and fairness…. I will endeavor to resolve differences through cooperation and negotiation, giving due consideration to alternative dispute resolution"; and "I will conduct myself professionally during depositions, negotiations and any other interaction with opposing counsel as if I were in the presence of a judge."

Some RPC, however, do relate to civility. RPC 8.4(g) prevents a lawyer from engaging in discriminatory acts prohibited by state law based on sex, race, creed, religion, color, national origin, disability, sexual orientation, or marital status. RPC 8.4(k) incorporates the Oath of Attorney, which is required for all attorneys in Washington under APR 5(e). The oath states in relevant part: "I will abstain from all offensive personalities and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged." This rule, then, comes the closest to requiring civil behavior, by prohibiting attorneys from offensive behavior and gratuitous, irrelevant, negative statements about parties or witnesses.

Some other rules bear on civility in a less direct way: RPC 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client,"); RPC 3.4(e) ("A lawyer shall not…allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence…."); RPC 3.5(d) ("A lawyer shall not…engage in conduct intended to disrupt a tribunal."); RPC 4.4(a) ("[A] lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person…."); RPC 8.4(c) ("It is unprofessional conduct for a lawyer to…engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"); and RPC 1.3 cmt.[1] [Wash. rev.] ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.").

Attorneys sometimes justify unprofessional conduct as part of their duty to "zealously" represent their clients. However, the word "zealous" does not appear in the Washington Rules of Professional Conduct. An attorney's duty to diligently represent a client must always be within the bounds of the rules of the court, as well as the RPC. Zealous representation does not justify aggressive and offensive conduct.

In addition to the RPC, practitioners can find guidance in a number of other state resources, including the following:

(1) In 2001, the Washington State Bar Association (WSBA) adopted the CREED OF PROFESSIONALISM (see Appendix A on the CD accompanying this deskbook; also see *http://www.wsba.org/lawyers/groups/professionalism/creed.htm*), with the intent to create a statement of professional aspiration.

(2) WSBA's COURTROOM DECORUM AND PRACTICE GUIDELINES (see Appendix B on the CD accompanying this deskbook) have been adopted by the Superior Court Judges Association, the District and Municipal Court Judges Association, and the Washington Administrative Law Judges Association.

(b) Local court rules; other local resources

Practitioners should also become familiar with local court rules that relate to civility, conduct, and professionalism. Many jurisdictions have adopted local rules addressing professionalism. *See, e.g.*, Island County LCR 81; San Juan County Superior Court LCR 81; Snohomish County LR 37(f); Spokane District Court LR 43.1; Spokane County LCRLJ 43.1; Whatcom County LCR 77.1. The Spokane County Bar and Tacoma-Pierce County Bar each adopted a Code of Professional Courtesy, in 1989 and 1994, respectively.

A good example of the scope of local rules can be found in the rules for the United States District Court for the Eastern District of Washington. See E.D. WASH. R. 83.1, entitled "Courtroom Practice and Civility," adopted in September 1996. E.D. WASH. R. 83.1(k), for example, sets forth very specific standards for counsel. These standards, such as being punctual, honest, and loyal, may seem obvious, but the court evidently saw a need to memorialize these fundamental requirements for attorneys.

In addition to formal local rules, a number of bar associations and other organizations have published formal guidance for attorney behavior. An example of these is the King County Bar Association's GUIDELINES OF PROFESSIONAL COURTESY (see Appendix C on the CD accompanying this deskbook), revised in 1999. These guidelines are a statement of principles intended to guide individual conduct beyond the minimum requirements for lawyers found in the Rules of Professional Conduct. It is a good practice to adhere to these guidelines whether or not opposing counsel does.

(c) ABA Model Rules of Professional Conduct

The American Bar Association adopted the Model Rules of Professional Conduct (MRPC) in 1983, which were last amended in 2009. *See* Elizabeth Bennet et al., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (2011). Two of those rules bear on civility in practice: MRPC 4.4, Respect for the Rights of Third Persons; and MRPC 8.4, Misconduct, which concerns the practice of law but also attorney behavior outside of representing clients. For more detailed information, see *Center for Professional Responsibility*, AMERICAN BAR ASS'N, *http://www.americanbar.org/groups/professional_responsibility.html.*

(d) Other guidelines and resources

An important study by the Committee on Civility of the Seventh Federal Judicial Circuit, and published as an Interim Report in December 1991, highlighted issues for all attorneys to consider. It still has relevance today. *See* REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT *in* Ronald S. Katz, *Ethical Concerns: Ad Hominem Attacks,* C695 ALI-ABA 351 (1991). The report summarized the participants' perceptions that the decline in professionalism was related to broad changes in how law is practiced. An increasing population of attorneys means less collegiality and less-frequent contact, with fewer opportunities or incentives to build personal relationships with other attorneys. The prevalence of large firms with an emphasis on billable hours means less attention to training new attorneys in ethics, professionalism, and civility. More case filings and litigation and less emphasis on avoiding conflict increase the level of uncivil and unprofessional conduct. The participants in the study noted that greater competition for clients may encourage more aggressive behavior intended to impress a client with "hardball" tactics, but such behavior does not necessarily lead to better results for the client, as discussed above.

The report made several recommendations to enhance civility and raise the level of professionalism that attorneys should implement:

(1) more emphasis on the development of civility and professionalism in law schools;

(2) further "hands-on" training in these areas in law firms, with increased mentoring by experienced practitioners (who have seen how damaging aggressive tactics can be to one's reputation);

(3) clear communication by all lawyer-employing entities (government, public interest,

and private practice) regarding their expectations of civility and professionalism;

(4) less reliance on the threat of sanctions as a standard reaction to difficulties between attorneys;

(5) consistent and early attention paid by the judiciary to high-conflict situations (Bill Eddy of the National Conflict Resolution Center in San Diego, California, has developed a judicial education curriculum to help judicial officers identify high conflict litigants and offer effective judicial intervention.);

(6) participation by attorneys in peer support groups, similar to England's Inns of Court; and

(7) inclusion of civility and professionalism standards in the Rules for Professional Conduct.

In addition to the recommendations of the study discussed above, the American Bar Association has placed a number of resources on its website to help practitioners with questions about professional conduct:

(1) The American Bar Association website provides a Center for Professional Responsibility section on professionalism, where lawyers can find additional guidelines: *Center for Professional Responsibility*, AMERICAN BAR ASS'N, *http://www.americanbar.org/groups/professional_responsibility.html.*

(2) The American Bar Association lists civility guidelines of various state bar organizations and national courts on its website: *Professionalism Codes*, AMERICAN BAR ASS'N, *http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html.*

(3) The American Bar Association lists a variety of articles of interest discussing civility on its website: *Professionalism Articles*, AMERICAN BAR ASS'N, *http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/prof_articles.html.*

In addition to these guidelines and articles, practitioners are encouraged to participate in the seminars on the topics of professionalism and civility offered by the various bar associations and private CLE presenters.

(4) Professionalism in family law

Civility between counsel is particularly important in family law because of the impact family law attorneys have on the lives of not just the client, but also all of the client's family members. Practicing in a specialized area representing numerous clients over time means that family law attorneys often have repeated cases with each other. If an attorney is abusive or unprofessional in one case, that reputation will be remembered by attorneys in the next case. The same dynamic applies to frequent appearances on the family law motions calendar before a limited number of commissioners or judges: unprofessional attorneys are soon known for their tactics and shortcomings rather than for the validity of their arguments and the quality of their representation. For example, attorneys who regularly file "emergency" motions, personally

attack other attorneys, or take extreme, legally indefensible positions will appear before a limited number of trial judges, who will remember how they behaved in the past both in and out of the courtroom. Judges and their staff have enormous workloads and do not appreciate having to handle petty disputes, such as discovery disputes between counsel, particularly on issues that professionals should be able to resolve themselves.

If an attorney in a family law case is generating unnecessary conflict with no legitimate purpose, practitioners might consider asking the court to "supervise" the attorney's conduct through the imposition of CR 11 sanctions. Some judges are known for liberally ordering CR 11 sanctions against attorneys for unprofessional conduct, but most judges are reluctant to do this.

Although there are few jurisdictions that have specific rules to guide family lawyers, there are a number of good resources that can provide guidance. These include the following:

(1) The ABA Section on Family Law addresses the importance of family law attorneys' civility toward each other, clients, and third persons in ABA Section on Family Law, CIVILITY STANDARDS (2006), *http://www.abanet.org/family/reports/standards_civility.pdf*.

(2) The Massachusetts Bar Association (MBA) provides a set of guidelines for family law attorneys as an educational tool to promote respectful client representation and to encourage attorneys to treat each other respectfully. *See* Mass. Bar Ass'n, CIVILITY GUIDELINES FOR FAMILY LAW ATTORNEYS (June 2006), *http://www.massbar.org/media/300168/civilityguide6-06.pdf.*

(3) The American Academy of Matrimonial Lawyers addresses civility in American Academy of Matrimonial Lawyers, *Professional Cooperation and the Administration of Justice*, *in* BOUNDS OF ADVOCACY (Nov. 2000), *http://www.aaml.org/library/publications/19/bounds-advocacy/7-professional-cooperation-and-administration-justice.*

For additional discussion on this topic, see Barrie Althoff, *The Ethics of Incivility*, WASH. ST. B. NEWS, July 1999, at 50. The WASHINGTON STATE BAR NEWS also devoted an entire issue to professionalism and civility. *See* WASH. ST. B. NEWS, Aug. 2008, *http://www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/Bar-News/~/media/Files/News_Events/Publications/Bar%20News/2008%20Full%20Issues/200808AugustBarNews.ashx.* For additional ethics articles that have appeared in the WASHINGTON STATE BAR NEWS, see *Bar New Archive*, WASHINGTON STATE BAR ASSOC., http://www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/Bar-News/Bar-News-Archive.

(5) Specific behaviors to avoid

This section discusses some problematic behaviors you should avoid in practice.

(a) Initiating the legal proceeding by service of process

Attorneys often fail to tell clients that there are alternatives to serving the spouse or partner through a process server. Surprising the spouse by having a stranger approaching the

individual is not a friendly way to initiate a family law process. It starts the case off in a hostile manner. Unless there is an emergency or another legitimate reason for not talking to the spouse in advance, clients should be informed about alternatives to initiating the action through service of process. If the case must be litigated, asking the spouse beforehand to accept service of process establishes a more respectful approach.

(b) Involving third parties in the legal proceeding

It is important for clients to understand that when we ask a family member, neighbor, therapist, or friend to write a declaration or testify in court, we are jeopardizing that person's future relationship with the spouse or partner. Especially in the case of family members, it is important to look for alternative sources of information. It is also important to carefully assess how important the family member's information is to the ultimate issues. Children have relationships in the future with relatives from both parents' families, and if there are strong negative feelings as a result of family members' court testimony, it will adversely impact the child in particular, but also the whole family dynamic. There will be sporting events, graduations, weddings, and other hopefully joyful events that may be ruined by bad feelings created by involving family members and other close individuals in the court process.

(c) Engaging in high-conflict client and attorney behavior

One of the most difficult aspects of family law arises when the opposing party engages in high-conflict behavior, such as making insulting statements in court pleadings, showing pleadings to children or third parties, repeating unfounded accusations or details of indiscreet behavior to others, calling a person's workplace, or not complying fully with court orders. The client's first reaction might be to demand that the attorney make the opposing party stop or perhaps to retaliate by engaging in the same sort of behavior. It is always better to advise a client to "take the high road."

Making highly negative accusations in court pleadings should be strongly discouraged. Let the facts speak for themselves. Saying someone has "mental health issues" when the individual has no formal diagnosis is an example. Just tell the court what the person did, and let the court draw the conclusion. Similarly, accusing someone of "being threatening" or having "violent tendencies" when the person has never engaged in violent behavior is inflammatory. Again, tell the court what the person did.

Negative criticisms and pejorative judgments about the other party in court pleadings are not only unnecessarily inflammatory, they can also create irreversible mistrust between the parties. Courts also find unpersuasive extreme statements, like calling someone a "liar," and opinions, such as saying "he doesn't really care about our children." Escalation of hostility between the parties may give clients some short-term satisfaction as they vent their anger, but it almost always backfires and ends up hurting them in the long run. It certainly will not be viewed

sympathetically by the court. Coaching clients to maintain a civilized tone in a family law case can go a long way toward reducing conflict between the parties. Clients will thank you for this advice when the crisis stage of a dissolution is over.

People involved in determining the outcome of a case, including judges, parenting evaluators, guardians ad litem, and law enforcement personnel, are heavily influenced by their overall impression of each client. Actions such as hiding or destroying documents, incomplete or false disclosure, harassment, or intransigence will influence those impressions negatively.

The attorney should be able to decide if the client's request for relief is reasonable or justified and, if not, to advise the client accordingly. It is also important to avoid giving the client unreasonable expectations of perfection from the legal system. Neither the attorney nor the legal system can make the client's spouse stop being who they are. The court will not necessarily detect, assign blame, or punish parties for their transgressions, which can be very frustrating to a client. However, the client's position will be much stronger if the court does not identify the client as the source of conflict.

Attorneys should avoid taking on family law cases when it is clear that the client's objectives are either vindictive or unreasonable. If someone comes to you wanting a modification of a parenting plan after the individual has already filed two modification actions that were dismissed for lack of adequate cause, do not participate in the action if the request for modification is based on similar facts. Likewise, when you have an angry client, don't "act out" their anger for them by engaging in aggressive tactics or taking unreasonable positions. When other attorneys ask for a continuance or for extra time in responding to discovery, be reasonable. Try to establish a good working relationship with other family law attorneys. In this way you can model for your client a civilized approach to solving problems.

(d) Asking for unnecessary orders shortening time

One practice that is frequently abused in family law is the order shortening time. Some attorneys practice as if every issue must be resolved immediately, even innocuous issues such as temporary possession of personal property or taking the children on vacation several months hence. Attorneys who practice this way may want to show their clients that they can be aggressive and not wait the required time for noting motions. The end result is unnecessary costs for extra motions and appearances, unnecessary work for the court, and a continuation or escalation of hostile, unreasonable, and stressful behavior.

An order shortening time may be necessary in some situations. If you or your opposing counsel forgets to confirm a hearing and needs to have the matter put back on the calendar, the court would likely grant the motion, and any objection would likely be viewed as petty and unprofessional. If opposing counsel files in such circumstances, it presents a good opportunity for you to act in a professional manner and agree to the motion. Opposing counsel would, one hopes, reciprocate in kind if later you needed a continuance on discovery or to reschedule a

deposition. They will certainly reciprocate in kind if you oppose a sensible request. In these circumstances, the maxim "you reap what you sow" applies with full force.

(e) Abusive discovery practices

Not surprisingly, discovery is one of the most frequently identified areas in which unprofessional conduct may occur. Examples include the use of "strategic noncompliance" with discovery, inappropriate threats of Rule 11 sanctions, embarrassing or burdensome requests, and depositions misused as forums for harassment. Another troublesome area is the refusal to agree on what are usually routine matters, such as continuances or scheduling. Practitioners have reported many instances of misrepresentation, noncooperation, lack of candor, harassment through volumes of discovery requests, and outright misrepresentation from opposing counsel. One rationale offered for this continuing behavior is that in many communities, attorneys or judges only rarely interact repeatedly with a specific attorney, and so the repercussions for uncivil or unprofessional behavior are minimal.

In family law, the personal nature of the action presents a minefield of potential discovery abuses. These abuses include burdensome or irrelevant requests for personal or financial documents, requests for a party's mental health records when there are no minor children, revealing sensitive information not relevant to parenting issues, unnecessary depositions of third parties, demands for privileged or protected information such as psychotherapy notes, and long lists of witnesses for trial with no good-faith intention to actually call those witnesses. An attorney may justify these actions as playing it safe by covering all the possibilities, but in reality the motivation may be the client's or the attorney's desire to harass, intimidate, or embarrass and to burden the other party with unnecessary and excessive litigation costs. These are inappropriate tactics and place the client, the attorney, and perhaps even the attorney's law firm in danger of sanctions. *See* RPC 3.4(d).

The leading case on CR 26(g) discovery sanctions is *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp*., 122 Wn.2d 299, 858 P.2d 1054 (1993). This case has the distinction of being used in civil procedure courses in law schools because it sets forth a comprehensive explanation of the proper intention and pursuit of discovery and provides an excellent discussion of the harmful consequences of discovery abuses.

The court in *Fisons* strongly rejected the argument that "good lawyering" requires abusive and misleading discovery responses. The court noted that "[t]he conflict here is between the attorney's duty to represent the client's interest and the attorney's duty as an officer of the court to use, but not abuse the judicial process." *Id.* at 354. Vigorous representation is required by an attorney, but *only* within the court rules. Otherwise the entire advocacy system would break down.

CR 26(g) was adopted to "provide a deterrent to discovery abuses as well as an impetus for candor and reason in the discovery phase of litigation." *Fisons*, 122 Wn.2d at 343. If the court

finds there has been a violation of CR 26(g), sanctions are mandatory. The court can impose these sanctions upon the attorney, the client, or both, upon motion or by its own initiative.

The *Fisons* court set forth the following guidelines:

(1) Fair and reasoned resistance to discovery is not sanctionable. However, misleading, evasive, or nonresponsive discovery answers are sanctionable. They are contrary to the intent of CR 26(g). *Fisons*, 122 Wn.2d at 346.

(2) Whether an attorney has made a "reasonable inquiry" under the certification requirements of CR 26(g) will be judged by an objective standard considering all the surrounding circumstances. *Fisons*, 122 Wn.2d at 343.

(3) It is not necessary to prove intent before sanctions are mandated. *Id.* at 344.

(4) Trial courts are encouraged to require monetary sanctions be paid to a court-related fund to discourage requests for sanctions being turned into a "cottage industry" for attorneys. *Id.* at 356.

Subsequently, the court in *Magaña v. Hyundai of America*, 167 Wn.2d 570, 587, 220 P. 3d 191 (2010), granted a default judgment to Mr. Magaña when Hyundai "willfully violated discovery rules" in responding to a request for production and in answering interrogatories. When a request for production or interrogatory is overbroad or asks for inadmissible evidence, counsel should object and respond, schedule a conference pursuant to CR 26 (f), and/or file a motion for a protective order to prevent the release of the requested information.

(f) Delaying disclosure of witnesses

Another area of discovery abuse is witness disclosure. Local rules may require disclosure according to specific deadlines. For instance, in King County a date for disclosure of primary and rebuttal witnesses is usually set forth in the case schedule. *See* King County LCR 26; King County LCR 4(e)(2). Absent a local rule, most standard interrogatories contain a request for this information.

Some attorneys follow a strategy of delaying the disclosure of witnesses as long as possible. They may disclose the names but not the addresses or phone numbers of their witnesses. They may not provide full information on the intended testimony or opinions. Other attorneys may take the opposite approach. They "bury" their intended witnesses among dozens of "throwaway witnesses" and refuse to narrow their list of potential witnesses. Opposing counsel has no choice but to contact each witness and try to determine what, if any, relevant knowledge or testimony that witness may have.

By engaging in these tactics, an attorney is incurring unnecessary costs, fostering excessive delay, antagonizing opposing counsel, and earning the displeasure of the court. As with all discovery, an attorney has a duty to fully disclose all requested information in a prompt manner. Violations of these requirements may be subject to sanctions under either CR 26(i) or CR 37. In most cases, CR 11 may not apply to discovery disclosures, but unreasonable or misleading disclosure of witnesses that unnecessarily increases the cost of litigation can be found

to be violations of CR 26. *Clipse v. State*, 61 Wn. App. 94, 808 P.2d 777 (1991).

Of course, not all delay in disclosing witnesses is necessarily deliberate. People move and change jobs, change their names, or have unlisted phone numbers. Sometimes an attorney has difficulty in obtaining current and complete information from the client. A client's intransigence, however, is not an acceptable excuse for lack of full disclosure. The standard is that the attorney must act diligently under the circumstances to provide the required information. RPC 1.3; RPC 3.4. It is not uncommon for additional witnesses to be revealed as discovery progresses. If circumstances truly require that a witness be added late in the case, most judges will permit it, if there has been no unnecessary delay or undue prejudice to the other side and if the opposing attorney has the opportunity to depose the new witness. At times such as this, an attorney's reputation for professionalism and ethical behavior can benefit both the attorney and the client.

As shown above, drafting and responding to discovery requests and disclosing witnesses are areas in which attorneys must carefully balance their duty to represent clients' interests with their duty as officers of the court and upholders of the judicial process.

(6) Communication skills and practical advice for enhancing civility

Attorney aspirations to be more civilized are essential, but aspirations must translate into behavior. So what are some specific things that will lead to being more civilized and helpful family law attorneys?

First, civility between counsel requires following the basic rules of society such as honesty, politeness, treating others with respect, and keeping one's commitments, whether written or verbal. In family law practice, some additional considerations are warranted. Good communication skills produce the confidence necessary to advocate respectfully and remain civilized in the process. The following communication skills and practice tips can help you avoid conflict and enhance effective communication.

Comment:	If you find yourself stuck and unable to work well with another attorney, come back to this chapter and read through these tips. It may also be helpful to offer one or more tips to your client. Using even one of these tips can improve your and your client's ability to communicate with others, remain civil in stressful circumstances, and avoid the destructive effects of conflict.

(a) Communication tips

The following communication tips can help with maintaining civility in family law.

Don't personalize your client's case—it's not about you. Letting your ego be drawn into your interactions with others will interfere in your ability to make sound judgments and objectively advise your client. What this means is that the outcome of the conversation, hearing, or case is not about you—it's about the facts. The other attorney's comments about the case are

not about you. Even if another attorney does make a comment about you, don't allow yourself to be drawn into the conflict. Your client is paying you to know the law, develop the facts, and communicate clearly to the judge, not to fight with the other attorney.

Think in terms of perspectives, not right and wrong. The attorneys and clients don't operate with the same facts, interpretations, assumptions, and agenda. Don't forget that each individual will bring a different perspective to every interaction, and there is no guarantee one particular view is "right." People often see events differently. Try to remember in conversations with other attorneys that getting locked into a struggle over who is "right" is not likely to lead to an effective resolution. Focus on solutions that meet everyone's needs and what can be done to remedy the problem going forward. If you have to go to a hearing or trial, either you can prove facts to support your client's perspective or you can't. Again, focus on the facts, not opinions about who is "right" or "wrong."

Acknowledge that the opposing party has a right to a different point of view. You won't get very far if you cannot acknowledge that other parties have the right to their own point of view. As an advocate, it is important to be able to see or acknowledge that the other spouse or partner has a right to see things differently from your client. When you acknowledge this to the other attorney it helps them see that you are a reasonable person and keeps things from becoming too positional and argumentative.

Diffuse the conflict by naming the case dynamic. State the obvious—the clients see things differently. They each have a story and a perspective. You can even say "Let's not get wrapped up in this ourselves. Our clients see this differently. Let's see if we can work toward a resolution." It can be very helpful to communicate from this "third party observer" stance, rather than being solely identified with your client's perspective.

Listen with the desire to understand. Try to discipline yourself to really listen to what the other attorney is saying. You might want to restate what you have heard to let them know you are really listening and to check accuracy. It helps build rapport and the ability to work well together if the other attorney knows you are listening and treating the person with respect.

Depersonalize the conversation. When speaking to other attorneys (as discussed above with the case in general), make sure you remember this is not about your life or the other attorney's life. Use "your client" rather than "you" when speaking to another attorney. When we identify ourselves or the other attorney with the client's position, it increases the chance someone will become defensive and argumentative.

Remember that you are a reporter, not a witness. It is extremely rare for attorneys to be present when the significant events in the client's case occur. Thus, the attorneys are merely reporting what their clients have told them. Don't oversell your client's report by presenting it as "the truth." If you weren't there, all you can convey is that your client reported the events occurred in a certain way. It can be very helpful to say this to the other attorney. When the

attorney says, for example, "Your client slammed the door on the children…," you can respond by saying that actually neither of you was there so you really don't know personally what happened. If you make explicit that you are each just communicating what your clients have told you, it can help align you and the other attorney as outsiders to the dispute, which will improve your chances of effective communication.

Acknowledge the contributions of others. Remember that other people need to be acknowledged. Try not to focus solely on your own agenda and instead acknowledge a good point or idea offered by the other attorney. You can even ask the attorney for ideas about how each client's needs can be addressed in a solution.

(b) Practice tips

The practice tips discussed below can help you reduce stress and conflict in family law cases.

Inform your client if you have a history of acrimonious dealings with opposing counsel. The client should be made aware because of the strong possibility of more conflict and potentially more expense. You should consider refusing to accept the case if you know your relationship with the other attorney will likely interfere with your ability to actually help the family resolve the legal issues. You might consider letting the client know that the legal fees may be higher due to the relationship you have with opposing counsel.

Continually manage your client's expectations. Discuss with your client the range of possible outcomes of the case. As the case progresses, potential outcomes will probably change and the client will need to understand the new range of appropriate outcomes. If the client has realistic expectations about the outcome, is it much less likely that the client will be unhappy with the end result and with the former spouse or partner. It is your job to let your client know in advance if the client has an unrealistic expectation about the outcome of the case and to help the client see that the other spouse or parent has a different point of view and that that individual will have facts in their favor as well. Becoming familiar with the research about post-divorce parenting arrangements and what residential schedules are in the best interest of children is very important. If you base your advice on research findings as applied to the facts of the family, it helps depersonalize the issues and may allow your client to see things more objectively.

Inform your client about conciliatory approaches to all decisions. You and the other attorney will move on to the next case, but the client must continue to live with the outcome of the litigation. Therefore, it is very important that at every point at which a tactical or strategic decision has to me made, the client be given both conciliatory and litigation options regarding the various ways the issue can be handled.

Be purposeful in your communications. Make sure you have a legitimate and productive purpose in each call and meeting with the other attorney. It is also helpful to ask what the other attorney hopes to accomplish during the call or meeting. If you can stay focused on

those purposes, it will help you avoid getting distracted into possibly contentious and irrelevant discussions. Remember that "venting" is not a legitimate purpose and it will not lead to a beneficial outcome.

Practice patience with other attorneys. If the other attorney is being positional, accusatory, or argumentative, listen rather than react. You are in charge of whether the conversation spins out of control through the manner in which you respond to an accusatory, argumentative attorney. You can always say "That is one way to look at this, but to be fair we need to acknowledge that there is more than one perspective." It may be helpful to try one of the communication tips discussed in subsection (a), above.

State directly your client's perspective and desired outcome. State the desired outcome as coming from your client, not you. Be direct about it without being argumentative and without assuming you and your client are "right." Self-righteousness is very irritating to others. If you are clear with the other attorney about what your client wants, it gives the attorney something tangible to assess and respond to.

Find common ground in your professional roles. Suggest to the other attorney that you work together to generate options that will address both clients' needs. Ask for the other attorney's ideas. This approach will help place you and the other attorney on the same side, as joint problem solvers who are outside the conflict.

(c) Dealing with "triggers"

The word "triggered" means that the attorney (or client) feels personally threatened, insulted, or attacked regardless of the other person's intent. Attorneys are most often triggered when they feel personally insulted, believe their competence is being questioned, or when others try to control them or tell them what to do.

Be aware of triggers. When you are "triggered," it puts you in an excited state in which it is difficult to make good decisions, so it is important to know how to identify this in yourself. The following are signs to watch for: (1) feeling "flooded," which occurs when adrenaline has been released due to a perceived threat, usually accompanied by a physical sensation of intensity; (2) feeling agitated, with a perception that you must act immediately; (3) rapid heartbeat and/or sweating; (4) feeling intimidated and/or unsafe asserting your client's position; (5) feeling angry and aggressive; (6) becoming argumentative and/or physically intimidating to others, including entering someone's physical space; (7) finding yourself unable to listen to what someone else is saying, or actually not hearing what they are saying because of your agitation; and/or (8) digging in and feeling "right" and unable to consider options.

Avoid being triggered by over-identification with your client. An attorney who over-identifies with the client can also be "triggered" when the client's position or perception of events is challenged. Attorneys who over-identify with their clients take the case personally, and when the client's version of events or the client is challenged, react as if the attorney were

personally challenged. An attorney whose feelings are triggered may respond personally, not professionally, and often acts with clouded judgment.

Recognize when you are triggered and take a break. We all feel triggered at times because we are dealing with the lives of human beings and issues that matter. But when we are triggered, our judgment may be clouded. Therefore, we must learn to recognize when we are in this state so that we can avoid acting in an inappropriate manner and adding to existing problems. If you do respond emotionally to something that has happened during a case, the first thing to do is to recognize the trigger and take a break before you respond or make important decisions. It is very difficult to recover immediately from the release of adrenaline cause by triggering, so taking a break gives you a chance to settle down and decide how to best serve your client. For example, when you realize it is happening, politely ask to talk/meet again after you have had time to cool down and think about things. You might say, for example, "I can't find an acceptable solution/make a good decision right now. I need some time to think about this further." This is the best way to avoid having a contentious conversation and possibly making further interactions more hostile and the lawsuit more costly for your client.

(d) Final considerations

One concrete thing you can do to promote civility is to recognize in communication with the other attorney that the clients have differing, but equally legitimate, perceptions. Notice that this language is not "equally true," but "equally legitimate." The difference lies in the fact that both parties believe they have a legitimate grievance, and they need to feel heard. When dealing with the other attorney and client, if the legitimacy of the other client's position is not recognized, then it is difficult to move forward. The facts as they are discovered and the application of the law to those facts may mean that the client does not get the desired result from the litigation. But for the attorney to attempt to preempt that result by belittling the other client's perspective in oral or written communication is not helpful. So, be mindful not to invalidate the other client's perspective by saying things such as "Your client's position is ridiculous" or "There is no way my client was abusive."

The volume can be lowered on a potential attorney argument by reminding the other attorney (and yourself) that all each knows is what the client reports. Because we are likely not present when events occur, we will have no personal knowledge of the facts, and each of the parties will present a different perspective on the events. As attorneys, you must work to develop your knowledge of the facts with whatever objective material you can find. Keeping the focus on facts will help you shape effective communication.

Understanding that clients perceive their experiences differently can also help you shape your clients' expectations and lead them to be more satisfied with the ultimate result. It can be helpful to begin your representation by telling your client that you cannot give the client an idea of what is likely to happen until you see the evidence on both sides to support each perspective.

Clients need to know from the outset that if there is no objective data to support their perspective, regardless of how strongly they believe it, an objective finder of fact may not see it their way.

§6.3 MAINTAINING YOUR CLIENT'S PRIVACY

Parties engaged in family law litigation are sometimes distressed to discover that sensitive personal information may be requested and disclosed in the course of the litigation. In addition to analyzing what information is relevant to seek and disclose, attorneys should consider a range of procedures that can be used to avoid unnecessary disclosure and protect their clients' privacy. The remainder of this chapter discusses specific procedures for and limitations on the disclosure of a client's personal information.

Practitioners today need to be particularly careful in their use of technological aids in their practice. The rise of the Internet, e-mail, and e-discovery has increased the occurrences of inadvertent disclosure of confidential client information. This is an area of increasing scrutiny by the WSBA and judiciary alike in an effort to maintain a proper balance between the right of public access to the courts and client confidentiality. The subject of privacy concerns related to use of technology is discussed in more detail in subsection (6), below.

(1) Discovery

A client may be asked in interrogatories or other discovery to reveal personal matters or to produce documents that contain sensitive or confidential information about the client's business, family, medical records, or financial matters. Clients will understandably be reluctant to disclose this information. An attorney must be able to explain to the client whether the documents are relevant and whether they must be produced. In addition, an attorney should be able to explain what procedures, if any, can be employed to protect the client's privacy.

Any analysis of whether discovery can be restricted must begin with a recognition of the attorney's basic responsibility to promptly provide complete and accurate responses to discovery requests. Failure to do so is a sanctionable offense. "[A] spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." *Wash. State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 342,858 P.2d 1054 (1993). It is within the discretion of the court to entertain a motion for sanctions, if the party seeking sanctions fails to strictly comply with CR 26(i). *See Amy v. Kmart of Wash. LLC*, 153 Wn. App. 846, 223 P.3d 1247 (2009).

The attorney seeking to limit discovery has several options, including the following:

(1) object to the request under CR 26(c) if it appears to be made purely to annoy, embarrass, harass, or intimidate, or to cause undue burden or expense;

(2) object to the request under CR 26(b)(1) if the request is unreasonably duplicative,

obtainable from some other source that is less burdensome or expensive, or unduly burdensome or expensive given the needs and resources of the parties;

(3) confer with opposing counsel on limiting the production; or

(4) seek a protective order under CR 26(c). This should begin with a request to opposing counsel on an agreed entry of a protective order under CR 26(c). If counsel will not agree, a motion must be brought and good cause shown. The court may enter an order that prevents the discovery entirely; imposes limits to a certain time or place, method of discovery, or issues; prevents disclosure of the information to others; or prevents disclosure of trade secrets or confidential business information.

The issue of releasing medical or therapy records is often a sensitive one. The Uniform Health Care Information Act, codified in Chapter 70.02 RCW, requires that at least 14 days' notice be provided of the intent to obtain discovery from a health care provider. It is prudent to include all medical, psychiatric, psychological, and drug/alcohol treatment providers in this category. If anyone objects to the request, that person must seek a protective order. Only after the 14-day notice period has expired may requests for discovery be served upon the medical provider. If the required notice has not been provided, the provider does not have to disclose the information. Remember that not all health care providers are aware of the Act and may need to be reminded if opposing counsel sends a request for information without benefit of the 14-day notice. See Chapter 23 (Access to Child Protective Services and Health Care Records) of this deskbook.

A court may order a CR 35 exam to take place if the mental or physical condition of a party is in controversy. However, under CR 35(b), if the person subject to the examination requests a copy of the report, then that person waives any privilege in the action regarding the testimony of every other person who examined or may examine that person for the same condition.

The issue of waiver of privilege also comes up when a client files a declaration from a counselor that contains disclosures made during therapy sessions. The filing of the declaration may be interpreted as a waiver of the therapist-patient privilege. If a declaration is filed, it should be carefully drafted to minimize this risk.

The issues involved in parenting evaluations can also be difficult. An evaluator may request that both parties provide medical, psychological, and alcohol/drug treatment records. However, RCW 26.09.220(3) provides that the investigator "shall make available to counsel and to any party not represented by counsel his or her file of underlying data and reports…." If the evaluator requests copies of privileged treatment records from a client, an attorney should proactively consider requesting a protective order limiting subsequent release of the records. Another possibility is to reach agreement with opposing counsel that the evaluator will obtain a release from the parties and all records will be sent directly to the evaluator and not to the parties or counsel for either party. The issue of whether a protective order would be entered may be reserved until later in the case. It is likely that if one party is not in agreement with the evaluator's recommendations, that party will request access to any and all information to which that party is entitled under RCW 26.09.220(3). This request will then necessitate a request for a

protective order from the opposing client if the records contain highly sensitive information.

(2) GR 15—sealing court records

Most clients would prefer not to have the details of their lives available for perusal by anyone who requests the court file. This desire for privacy is understandable. However, it conflicts with a basic premise of our jurisprudence system, that legal matters must be conducted in open forums where the possibility of favoritism, abuse, and prejudice is scrutinized and minimized. The common-law right of access to court documents is premised on the assumption that the main purpose of the inquiry "is to check the exercise of judicial authority, and not to provide information about the dispute being resolved." Anne-Therese Bechamps, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 121 (1990). This right to access could apply not only to pleadings and other case filings, but also to settlement agreements if they are submitted to the court for approval. *F.T.C. v. Standard Fin. Mgmt. Corp*., 830 F.2d 404 (1st Cir. 1987). The public has a constitutional right of access to the courts in Washington state. WASH. CONST. art. I, §10; *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993).

Chapter 25 (Family Law Court Records) of this deskbook addresses family court records in depth. For family law practitioners, GR 15 (amended July 1, 2006) is to be read with GR 22 (amended August 11, 2009). The sealing of civil case files is highly restricted. The court must make written findings of fact identifying "compelling privacy or safety concerns that outweigh the public interest in access to the court record." GR 15(c)(2). Agreement of the parties is not a sufficient basis for sealing or redacting court records. If redacting information will satisfy defined privacy or safety concerns, then the court may not seal the document.

Finding justification for restricting public access to court records is difficult under GR 15. *See In re Marriage of R.E*., 144 Wn. App. 393, 396, 183 P.3d 339 (2008). Records may be sealed following a showing of need using the five-part *Ishikawa* standard. This general civil law standard requires (1) a determination of the need for closure, (2) notice to the interested parties, (3) use of the least restrictive means available, (4) closure of no more records than necessary to serve the overriding interest, and (5) weighing the competing interests of the parties and the public. For more detail on the balancing requirements, see *Seattle Times. Co. v. Ishikawa*, 97 Wn.2d 30, 37, 640 P.2d. 716 (1982).

Most courts will not seal entire family law court files unless they contain highly sensitive information concerning child abuse or issues related to paternity or adoption that meet the privacy requirements defined in GR 15. Details of a person's assets and liabilities, a history of alcohol or drug abuse, and allegations of domestic violence or sexual misconduct will usually not be sufficient reason for a court to seal a file. Clients should know this before they choose to file inflammatory or personal materials. Certainly the possibility of having one's own "dirty laundry" aired in public for anyone to review might give them pause.

A motion to seal the file should be viewed as a "last resort" and attempted only after considering other means of dealing with the issue, such as a motion to strike under CR 12(f) or a protective order for specific documents.

If the court grants the motion to seal a file, the order must be specific enough to provide the necessary narrow protections but flexible enough to allow for some foreseeable changes. For example, the order should allow for a party to retain different counsel in the future without the burden of obtaining permission for the new attorney to access the court file and without requiring another court order. A sample Order to Seal File or Document can be found on the CD accompanying this deskbook.

In the event an order sealing the file or a protective order is entered, the parties must think about the need to distribute copies of some of the final documents to necessary parties. For example, when applying for a loan or transferring investment accounts, some banks or lenders require a certified copy of the decree and proof of allocation of assets and liabilities. Some schools or insurance providers may require a copy of the parenting plan. Law enforcement may require copies of any restraining orders.

The following guidelines should be considered when sealing noncriminal files:

(1) All motions to seal files should be noted for hearing, with notice given to all concerned parties and counsel, including guardians ad litem.

(2) Unsealing a file must also be done by hearing and entry of a separate order. There is no automatic opening of files based upon some future condition, such as the children turning 18.

(3) Keep in mind that if the file is sealed, future hearings may require special notice if they are on a restricted calendar.

(3) GR 22—access to family law court records

GR 22 governs access to defined health care records, financial information, and personal identifiers (such as the Social Security number) in family cases. Clients' prior concerns about making their tax returns, credit card statements, and bank account numbers public was alleviated by the adoption of GR 22 on October 1, 2001, governing access to family law court records. GR 22 was amended August 11, 2009.

For financial records (income tax returns, W-2s, credit card statements, bank accounts, wage stubs, loan applications, etc.), GR 22 restricts public access to these records and all "personal identifiers" such as driver's license number and Social Security number and seals these documents by requiring that they be filed under a "Sealed Financial Source Document" cover sheet.

GR 22 now requires that detailed personal health care records, which includes all past, present, and future physical and mental health records and payments, be sealed. This also includes parentage genetic test results. These records are all sealed by being filed under a "Sealed

Personal Health Care Record" cover sheet.

Also automatically sealed under GR 22 are detailed parenting evaluations, Family Court Service Risk Assessment Reports, CPS reports, sexual abuse evaluations, and reports of guardians ad litem, which are all to be filed behind a "Sealed Confidential Report" cover sheet. There is a "public document" filing concerning these sealed detailed reports. The public document includes a simple listing of materials and information reviewed, individuals contacted, tests conducted or reviewed, and the conclusions and recommendations in the sealed report. The detailed facts of the main report are sealed records.

With electronic access to court records, the balance between the public's right to access and the need and desire for personal privacy is becoming increasingly delicate. On October 26, 2004, the court adopted GR 31 (amended January 3, 2006), governing access to court records. GR 31 places the obligation and burden on parties and counsel to omit or redact from court records Social Security numbers, financial account numbers, and driver's license numbers. The directive to omit or redact the names of minor children has caused considerable confusion and concern in family law pleadings involving parenting and support of minor children. The rule concerning using children's names versus only their initials changes often. You should read each county's local rules and GR 31 to see what the current practice is regarding children's names.

(4) Pleadings

Any discussion about disclosure is always governed by two standards: full compliance with the rules of discovery and competently representing the client's interests. Information that is requested and that is not covered by any privilege must be disclosed. However, this same information may not have to be filed with the court unless it is necessary to support the client's position.

(a) What financial information to include in pleadings

Most hearings on temporary orders concern a number of issues, such as maintenance, child support, and parenting plans. The documents provided to the court should be sufficient to support the client's argument but not overwhelm the commissioner. In King County, for example, the two most recent years' personal and closely held corporate and partnership tax returns; six months of pay stubs, bank records, and investment account statements, and copies of check registers on request, are required for any motion involving financial issues. The local rules in each county should be consulted to verify what supporting documents are required. Another good source of information about what is required is practitioners from the county who may be familiar with the local standards of practice.

Practice Tip:	As a rule, family law commissioners are subjected to an enormous volume of paperwork and appreciate economy in paper as well as argument. Charts or tables that provide summaries of detailed information can be helpful, especially

	for handwritten documentation such as check registers.

Some courts have adopted rules that limit the information filed with the court. *See, e.g.*, Whatcom County SPR 94.08(c) (detailed list of all assets and liabilities is served on other party but not filed with court). CR 26(h) states that only that portion of discovery materials upon which a party is relying need be filed with the court. The federal courts have adopted similar rules. *See* E.D. WASH. R. 26.1. One obvious reason for these rules is that there simply is no room for the courts to file all the documents produced in discovery, many of which are not used in litigation.

Other courts have imposed page limits to control the paper overload for court commissioners. *E.g.*, King County LFLR 6(e)(5).

(b) Using agreed orders to protect sensitive information

Entering an agreed order should be the first goal for every family law attorney except in the most unusual of circumstances. This not only promotes civility but also protects clients from public disclosure of sensitive information. This approach avoids costly and divisive court hearings and also keeps control over the outcome in the hands of the clients and their counsel. What may not be as obvious is that if an attorney can, from the very beginning of the case, discuss an issue informally with opposing counsel, reach a mutually satisfactory agreement, and enter an order, the attorneys can reduce the "conflict" side of litigation. Ugly accusations and details of the parties' private lives are not disclosed to the public, and the level of emotion and hostility is minimized. The attorneys can, in effect, "model" a civilized relationship for their clients to emulate. This is particularly desirable when there are children involved and how the parents interact over the years to follow will greatly impact the children.

Of course, some clients will not be satisfied unless they can expose as much of the other person's private life as possible. An attorney should try to make clear that the courts react negatively to these tactics. Judges and commissioners do not wish to hear the tattling of an aggrieved party, regardless of whether it is true, *unless* it is directly relevant to the issues. This is especially true for parenting issues. Clients who insist on reciting a litany of wrongs they have suffered may be viewed as themselves creating unnecessary conflict as they point the finger at the other parent. A client may have some momentary pleasure in "exposing" the other party, but the long-term effect may be quite the opposite—a less sympathetic court and a less satisfactory outcome for the client and family. Lawyers have a duty to advise their clients about the possible repercussions of negative tactics.

(c) Protecting privacy in property settlement agreements

If the parties have agreed upon a settlement, the agreement should be prepared in as much detail as possible. Clarity and thoroughness on the part of the lawyer can avoid later disputes.

The settlement agreement should set forth all the property, assets, debts (particularly credit card balances), and details on maintenance, support, transfer of assets, and payment of professional fees in sufficient detail to be clear and enforceable. However, in doing this, a great deal of private information might be disclosed.

To help protect the client's privacy, consider the following:

(1) In the list of assets and liabilities, if there is only one account at a particular institution, do not include the account number. If there is more than one account, include the name on the account, the location of the account, and only enough of the account number to make it identifiable. Generally the last four digits of the account number are enough to allow later identification of the proper account.

(2) Do not list balances or values for the assets or liabilities in the final decree or findings of fact and conclusions of law. The parties should have this information disclosed and agreed upon in the settlement agreement, but the pleadings filed with the court can omit them.

(3) Do not file the settlement agreement with the court. The agreement should be incorporated by reference and a copy made available to the court for review when the final documents are entered. Two originals should be prepared, one for each attorney's file. Relevant sections of the agreement may be filed later if enforcement becomes an issue.

(5) Finalizing matters

The usual procedure for finalizing a dissolution is for at least one party to appear in court and make a presentation of formal proof. This presentation is usually made in the Ex Parte Department, with no provisions for privacy. It may be desirable for the formal proof to be presented in another manner if, for example, the clients are public figures or if there are health reasons. In some counties it is now permissible to finalize a dissolution electronically. Some counties allow "formal proof in lieu of personal appearance." One party must complete a declaration that attests to the reasons why neither party can appear and also sets forth the jurisdictional elements of a formal proof. A sample Formal Proof Declaration can be found on the CD accompanying this deskbook.

One possibility when a personal appearance is required is to enter the final papers before the trial judge. Most judges will accommodate an appointment for a presentation and are sensitive to the emotional nature of the proceeding. It would not be unreasonable to request that the formal proof be presented in chambers.

(6) Technology concerns

Every attorney with a computer should know how that computer may pose a security and confidentiality risk. A computer that is on a network or connected via modem can potentially be accessed by unauthorized persons. If you can access your computer from outside your office, then there is always the potential that someone else can as well. RPC 1.6 requires attorneys not

to reveal confidences or secrets relating to representation of a client. This would include taking reasonable precautions to keep client information and materials secure—not only traditional hard copies on paper, but computer files as well. If an attorney relies heavily upon a computer to store information, then proper back-up of the information is required. Attorneys may dream of the day when they can practice law without paper, but until computers are made infallible, it is recommended that a hard copy be kept of everything.

The usual method of computer-based communication is through electronic mail. "E-mail" is a wonderful convenience. E-mail can help attorneys avoid playing "telephone tag." Another advantage of using e-mail is that it allows as much time as needed to consider the message and the desired response, unlike in a telephone call. Using e-mail, an attorney can attach large documents and save the cost of faxing and retyping.

However, the type of problems that can arise with e-mail are as varied as the advantages. E-mail users enjoy the informality of e-mail, but that informality can be inappropriate if it goes too far. One of the most common problems with e-mail occurs when a message is sent to an unintended recipient. Amended in 2006, RPC 4.4(b) identifies the issue of inadvertently disclosing privileged information to opposing counsel: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The rule requires attorneys to inform opposing counsel if an e-mail is inadvertently received, as often happens now through the user error of hitting the "Reply All" button.

One way to help protect your client's privacy is to use a phrase, such as "Confidential—Protected by Attorney-Client Privilege," in the subject line of the message. This would arguably be notice to an unintended recipient that the message should not be opened. Of course, it might also make opening it more tempting.

Documents sent as attachments can be a source of inadvertent disclosure of confidential information through the metadata in the document. Metadata is information about a particular document that describes how, when, and by whom it was collected, created, accessed, edited, and modified. This includes information about how the document was formulated (including characteristics such as size, location, storage requirements, and media information). *See* Edward A. Morse, *Technological Entanglements: Evidentiary and Ethical Considerations of Metadata in Interjurisdictional Litigation*, J. OF INT'L COMM'L L. & TECH., 2007 no.2, at 94, 94 (citing Sedona Guidelines).

Ethics committees across the country are split on whether metadata may be extracted and used as an evidentiary tool. The Colorado State Bar Association finds the mining of metadata to be a violation of the Colorado Rules of Professional Conduct, Colorado Bar Ass'n Ethics Comm., Formal Op. 119 (2008); while the American Bar Association does not consider the use of metadata a per se violation of the Model Rules of Professional Conduct, ABA Comm. on Ethics and Prof'l Resp., Formal Op. 442 (2006).

Whatever the ethical opinion may be, the sender of a document has a duty to take reasonable steps to prevent the dissemination of confidential information. The WSBA's Access to Justice Board adopted a series of principles for openness and privacy. "The use of technologies in the Washington State justice system must protect and advance the fundamental right of equal access to justice." ACCESS TO JUSTICE TECHNOLOGY PRINCIPLES, Preamble, *http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=amatj02principles*.

There are a number of tools that can help a practitioner protect the client's information from release without the client's informed consent. The latest version of Microsoft Office (2010) offers built-in features that allow you to search for and delete personal information and metadata before sharing documents. For instructions, see Matthew Graven, *Tip: Remove Personal and Confidential Information from Office 2010 Files*, TECHNET MAGAZINE, *http://technet.microsoft.com/en-us/magazine/ff936144.aspx*. Microsoft also provides a free add-in program for Microsoft Office 2003/XP designed to remove hidden data from documents. See *Office 2003/XP Add-in: Remove Hidden Data*, MICROSOFT.COM, *http://www.microsoft.com/download/en/details.aspx?displaylang=en&id=8446* (last visited Mar. 29, 2012) or go to *http://office.microsoft.com* and search "remove hidden data add-in." The "Remove Hidden Data" tool should be available in the "File" drop-down menu of your Microsoft Office program after download. Follow the prompts and save the sanitized file as a new document. There are also several third-party programs available to "scrub" documents of metadata. These include iScrub by Esquire Innovations, Workshare Protect by Workshare, Doc Scrubber by Javacool Software, and BatchPurifier by Digital Confidence. Converting the document to PDF will reduce or eliminate metadata. It is also possible to assign a password to the attached file before the recipient can view its contents.

The WSBA Professionalism Committee proposed a rule that would require notice to opposing counsel that the other attorney was going to examine the metadata in a document as well as disclosure of the purpose for the examination. Ultimately the committee declined to adopt such a formal amendment to the Creed of Professionalism. The Creed of Professionalism continues to accept ABA Formal Op. 442, discussed above. For more information regarding metadata, see James T. Yand, *The Mining of Metadata*, WASH. ST. B. NEWS, Sept. 2008, at 12, http://www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/Bar-News/~/media/Files/News_Events/Publications/Bar%20News/2008%20Full%20Issues/200809SeptemberBarNews.ashx.

(7) Medical records

Medical records, including mental health records, are protected by state and federal statutes. The Washington State Legislature has articulated its concern that the privacy of its citizens be protected, especially related to medical and health treatment information:

> The legislature finds that:

(1) Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests.

(2) Patients need access to their own health care information as a matter of fairness to enable them to make informed decisions about their health care and correct inaccurate or incomplete information about themselves.

(3) In order to retain the full trust and confidence of patients, health care providers have an interest in assuring that health care information is not improperly disclosed and in having clear and certain rules for the disclosure of health care information.

(4) Persons other than health care providers obtain, use, and disclose health record information in many different contexts and for many different purposes. *It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.*

(5) The movement of patients and their health care information across state lines, access to and exchange of health care information from automated data banks, and the emergence of multistate health care providers creates a compelling need for uniform law, rules, and procedures governing the use and disclosure of health care information.

RCW 70.02.005 (emphasis added). Attorneys should be aware of the emphasized portion of subsection (4), quoted above.

Communications between a psychologist and a patient are also privileged communications RCW 18.83.110.

Medical records are also protected by federal statute. The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (Aug. 21, 1996), offers federal protection to individuals' privacy and confidentiality regarding personal health information. HIPAA protects against the unauthorized dissemination of personally identifiable health information. All records, including electronic mail, which include personally identifiable health information, are protected under HIPAA. HIPAA gives individuals the right to control use and dissemination of their health care information to third parties. 45 C.F.R. §164.501.

Family law practitioners should be mindful of the fact that children over the age of 13 have a protected confidentiality interest in their medical records. According to RCW 70.02.130(1), "[i]f the patient is a minor and is authorized to consent to health care without parental consent under federal and state law, only the minor may exercise the rights of a patient under this chapter as to information pertaining to health care to which the minor lawfully consented." This provision may be applicable under a number of Washington statutes. For example, under RCW 71.34.530, any minor 13 years or older may request and receive mental health treatment without the consent of the minor's parent. Although HIPAA generally provides a parent or guardian with the right to control third-party dissemination of medical records, *that is not the case when state law does not require parental consent for medical treatment.* When a minor is legally authorized to consent to

health treatment, the parent does not control the protected health information related to that care. 45 C.F.R. §164.502(g)(3)(i)(B). The minor has the sole authority to authorize disclosure of the minor's protected health information to third parties. *Id.*; *see also* Office for Civil Rights, U.S. Dep't of Health and Human Services, SUMMARY OF THE HIPAA PRIVACY RULE 16 (rev. May 2003), *http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf.*